LECTURES ON COMPARATIVE LAW OF CONTRACTS*

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This compendium is a collection of the lectures that I hold in the course on Comparative Private Law at the Oslo University, as well as in the course on International Business Transactions at the Centre for Energy, Petroleum and Mineral law and Policy, University of Dundee.

Comparative law, including also comparative contract law, which is the topic of these lectures, is a subject of legal study with its own, independent legitimacy and, in some European countries, with solid traditions. Therefore, there should be no need to justify, explain or subject to external purposes the analysis and comparison of the regulations that different countries provide for contracts.

My personal interest in comparative contract law, however, is mediated by my engagement in the field of international contracts. Having negotiated, drafted and analysed international contracts for 20 years, I was numerous times confronted with the implications of the differences (real or apparent) between the contract laws of different countries. I was also numerous times confronted with the uncertainty that arises out of these differences, and I repeatedly witnessed the attempt to remove the whole problem by (consciously or not) assuming that an international contract is not really subject to any state’s law, but exists in a trans-national system.

The question of what sources govern an international contract is the main topic of another course that I teach at the Oslo University, International Commercial Law; the relevant lectures are collected in a compendium published in the same series as this one, Lectures on International Commercial Law (2003). The conclusion of that compendium is that international contracts are, ultimately, subject to national laws. The natural development of that reasoning is, therefore, to analyse some of the most significant national contract laws, as well as international conventions and trans-national instruments that might be applicable to international contracts, in order to understand the main differences between them. This is what we are doing in the course on Comparative Private Law. The lectures will not focus on other aspects of the private law than contracts, and within contract law, we will focus only on the aspects that present the most significant differences. The course on comparative law, therefore, is meant as a continuation of the reasoning that began with the course on International Commercial Law. The compendia of both series of lectures will, duly
integrated with more systematic analyses of various international contract models, constitute the nucleus of a book on international contracts.

From the point of view of international contracts, an understanding of the main system’s contract laws is an important tool, and not only the satisfaction of a merely intellectual curiosity, for the reasons stated below.

A contract with foreign elements is potentially subject to the laws of a variety of countries, for example the laws of the countries where each of the parties has its place of business, the laws of the countries where the contract is to be performed, and the laws of any other countries that the transaction might be connected with.

Which of these laws will be governing the contract is a question that is answered by private international law, a branch of the law that provides rules for making from among the conflicting laws a choice of the governing law. Thanks to the choice of law rules, a contract will be governed primarily by one single law, thus avoiding the main conflicts that may arise if a plurality of legal systems is governing the same subject-matters. The main choice of law rule within contract law (but not the only one) is party autonomy, permitting the parties to choose the law that will govern their contract. For the sake of completeness, it is necessary to mention that there are situations in which the same contract is regulated by more than one law; this may happen by choice of the parties or by operation of law. The parties may decide that parts of their contract should be regulated by a certain law, whereas other parts should be regulated by another one: if the underlying transaction is complex and may easily be separated into several sub-transactions, the parties may find it advisable to subject certain parts of the transaction to a specific law with which it has a particular connection (so called “depecage” or “severability”). In other situations, specific rules of a law that is otherwise not governing the contract may be applied, if the judge deems these rules to have a character that requires their application even if they do not belong to the governing law (so called “overriding mandatory rules”), or if a particular area of a contract is subject to choice of law rules that differ from the rules applied in the rest of the contract. These described situations are relatively marginal, and the main effect of a choice of law rule is to select the law that governs a contract in its entirety.

An international contract, therefore, is primarily subject to one national law. Theoretically, therefore, it should be sufficient to get acquainted with the
particular law, in order to properly assess the rights and obligations arising out of that contract. In spite thereof, it might be very useful to spend some effort in obtaining knowledge of the regulation contained in the various potentially applicable laws. This is important, first of all, to be able to make an informed choice of the governing law. It is important also in order to be able to foresee and properly understand possible interferences by other laws, due to severability, overriding mandatory rules or other choice of law rules. It is important, moreover, to understand how the other party may interpret the contract, what it may have meant by a certain clause or formulation, etc. It is important, finally, because a large number of contracts is written in the English language and adopts English legal terms, in spite of the fact that the governing law may be of a different legal system. How to interpret exactly the English legal terms contained in the contract will depend on an adequate knowledge of English law and of the governing law.

Knowledge of foreign legal systems is obtained via the study of comparative law. This is why comparative law is relevant to international contracts.

Oslo, September 2004
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1. SOME OBSERVATIONS ON COMPARATIVE LAW

1.1 About Comparative Law

A certain aura of mystery has long surrounded, and probably still surrounds comparative law. Back in 1952 the following statement was contained in an article published in the American Journal of Comparative Law: “The greatest confusion continues to prevail about what is being compared, about the purposes of comparison, and about appropriate techniques”.¹ The substance of this statement was confirmed as still valid in 1999.² Yet in the years between 1952 and 1999 numerous and valid works appeared on comparative law, on both sides of the Atlantic Ocean: suffice it here to mention, among many others, authors such as René David, Gino Gorla, Rodolfo Sacco, Rudolf Schlesinger, Konrad Zweigert and Heinz Kötz. It is probably Rodolfo Sacco who has achieved most in terms of creating a systematic school of comparative law, which has significantly enhanced the interest for this discipline first in Italy, then, thanks to his own and his pupils’ numerous contacts abroad, both in Europe and in the USA.

Sacco’s teaching is at the basis of the so called Trento Manifesto, that was issued in 1987 in the occasion of the launching at the Italian university of Trento of the first faculty of law with a comparative perspective throughout all the taught subjects. The Trento Manifesto consists of five theses, meant to affirm the main aspects of the essence and the method of comparative law. Since that date the interest in comparative law has increased considerably, particularly in Europe, and especially in connection with the growing work on unification of contract law, which we will come back to infra. The Trento Manifesto was subject to a review by its authors and other comparatists nearly fifteen years after its publication, when the Trento University organised in 2001 a convention with the purpose of verifying the relevance of the five theses after a decade with intensive comparative activity, particularly, as mentioned, in the field of unification of the law of contract.³

¹ McDOUGAL, The Comparative Study of Law for Policy Purpose, in 1 Am.J.Comp.L. 24, pp. 28f.
In the presentation of comparative law, therefore, it is interesting to look at the Trento theses and at their review. The five theses are as follows:  

1. Comparative law, understood as a science, necessarily aims at the better understanding of legal data. Further tasks such as the improvement of the law or interpretation are worthy of the greatest consideration but nevertheless are only secondary ends of comparative research.

2. Comparative law studies various phenomena of legal life operating in the past or the present, considers legal propositions as historical facts including those formulated by legislators, judges and scholars, and so verifies what genuinely occurred. In this sense, comparative law is an historical science.

3. There is no comparative science without measurement of the differences and similarities found among different legal systems. Mere cultural excursions or parallel exposition of fields is not comparative science.

4. Comparative knowledge of legal systems has the specific merit of checking the coherence of the various elements present in each system after having identified and understood these elements. In particular, it checks whether the unrationalized rules present in each system are compatible with the theoretical propositions elaborated to make the operational rules intelligible.

5. Understanding a legal system is not a monopoly of the jurists who belong to that system. On the contrary, the jurist belonging to a given system, though, on the one hand, advantaged by an abundance of information, is, on the other hand, disadvantaged more than any other jurist by the assumption that the theoretical formulations present in his system are completely coherent with the operational rules of that system.”

What appears from the Trento Manifesto is, in respect of the essence of comparative law, the desire to affirm the legitimacy of this discipline irrespective of the practical applications that might accompany it. As a

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4 The Trento Manifesto is originally written in Italian. The English version that I am using here is taken from an extensive work on comparative law published by Sacco in English: SACCO, R., *Legal Formants: a Dynamic Approach to Comparative Law*, in *The American Journal of Comparative Law*, XXXIX, pp. 1–34, 343–402. These two articles contain also extensive comments on the theses and illustrations of the respective points.
matter of fact, most books on comparative law present their subject by listing the uses and applications that this discipline might have (it improves the basis for reforming domestic legislation, it contributes to a dynamic interpretation of domestic law, it is useful in the preparation of conventions and other instruments for the harmonisation of the law, it is useful in the process towards a common European law, etc.).

Even I have mentioned, in the introduction to these Lectures, that comparative law is useful in the drafting or interpretation of international contracts. The Trento Manifesto claims the legitimacy of comparative law as a science that studies differences and similarities between legal systems, even without a direct practical application of the knowledge that was achieved. In the review of the Manifesto that was held in 2001, it is made clear that the legitimacy of comparative law irrespective of its practical application still needs to be claimed and supported. Particularly the intensive concentration of the last years on the work towards a unification of European contract law, which is practically absorbing all comparative efforts within this field, has indirectly confirmed the point of view (contested by the Trento Manifesto) that comparative law is useful to the extent it serves a purpose. In the case of unification of the law, the study of the differences between legal systems would serve the purpose of eliminating these differences. This is, however, only one of the possible practical applications of the knowledge that is achieved through comparative studies. Another possible application is, as was mentioned in the Introduction above, the necessity to enhance the understanding of the field of international contracts. Other possible applications may be mentioned, particularly in connection with the process of legal reforms and of teaching of the law. The plurality of practical uses of the comparative knowledge confirms that comparative knowledge is useful as such, and it confirms that, as the Trento Manifesto affirms, comparative law has a legitimacy as a discipline, irrespective of the external purposes that the achieved knowledge may serve.

The parts of the Trento Manifesto on the method of comparative law, particularly the third and the fourth theses, seem to be generally recognised now as a proper description of the comparative method.

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6 See, for example, the introductory observations made by GAMBARO, A., *Riflessione*, at www.jus.unitn.it/dsg/convegni/tesi_tn/riflessione.htm
To illustrate the method of comparative law, it may be useful to look at one of the major applications of comparative law that has been carried out recently: the extensive use of foreign law that has been made by the Russian legislator in the legal reforms needed in the transition to a market economy.  

1.2 Comparative Law and the Example of Russian Legal Reforms

As opposed to the approach followed during the XIX century, where Russia adopted German law systematically, the Russian legislator during the 1990’s was not aiming at the reception of a foreign legal system as a whole; it was addressing specific areas or institutions, looking at several foreign legal systems and adopting foreign-inspired regulations on an ad hoc basis. The Russian legislator was thus borrowing regulation of specific legal institutions from different legal systems.

A closer understanding of the role of foreign legal models in the Russian system can be achieved by applying two doctrines introduced by some scholars of Comparative Law, relating to the concepts "Legal Formants" and "Legal Transplants".

As a preliminary observation on the method of Comparative Law, it can be mentioned that it is natural for a comparatist to consider all legal systems as "true", to the extent they are existing; a comparatist does not judge as "wrong" certain legal institutions that do not fit into a classification or that contradict the model by which they were inspired. The comparative approach to law is to analyse existing legal systems, and then compare them and classify them; not to evaluate in the light of pre-existing classifications or ideals of unitary systems. This is particularly true when making use of one of the most important tools of comparative law, namely the classification of all national systems of law into Legal Families. 

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8 The analyses of the Russian legal reforms made in paragraph 1.2 hereof are largely based on an article that I have written, *Russian legislation and foreign models. Some observations on Comparative Law*, in *Tidsskrift for Rettsvitenskap*, 1997, 766-791.

9 With respect to private law, the Russian picture is quite composite, as will be shown below: the legislator had on the one hand the ambition to create a unitary system of law, by issuing a reformed version of the Civil Code which was prepared having the recent Dutch Civil Code as a model. On the other hand, however, several specific laws have been issued outside of the Civil Code, both during and after the latter's preparation, and no system has been followed when looking at foreign legal models.

10 On the attitude of a comparatist see above, paragraph 1.1.

11 Several classifications have been proposed, according to different criteria; the classification that probably has influenced most legal literature in the last decades has been elaborated by DAVID, R. *(Les grands
into legal families is an instrument to simplify an otherwise very complex subject; most of the times the instrument proves to be very useful in identifying the basic elements of a certain legal system, but sometimes it results in an oversimplification, that does not represent all aspects of the described situation. Also, attaching too much importance to the classification into legal families might induce an observer to believe that a certain classification exists as an independent phenomenon, and that all legal systems must fit into the classification. The consequence might be that an institution or a system which does not fit might be considered "wrong", instead of leading to the conclusion that it is the classification that has to be re-evaluated.

The reforms taking place in Russia during the 1990’s exemplify the above: having abandoned the 70 years long experiment of socialism, it could have been expected that Russia would go back to the Romanistic-Germanic legal family, or that it would assume as a model another legal family, like Common Law. Instead, Russia has created an amazing mixture of different legal styles. This can be irritating to the observer who is particularly attached to the idea of legal families; but it cannot be rejected, simply because it does not fit into the classification. What is wrong is not the object that cannot be classified, but the classification itself.

However, some of the reforms introduced by the Russian legislator are quite puzzling, and indirectly confirm that classification into legal families does highlight the basic elements of different legal systems, and that consideration of such elements could contribute to the proper understanding of the foreign law which is used as a model.

systèmes de droit contemporains, Paris, 1964 – last edition, with C. Jauffret-Spinosi, 1992), and is based on the ideology that inspires the classified systems, as well as on the underlying legal techniques. This and other proposed classifications have been criticised both from a historical point of view (see for example REIMANN(ed.), The Reception of Continental Ideas in the Common Law World 1820–1920, Berlin, 1993) and because a substantial process of unification of law is taking place thanks to international conventions, uniform laws, model laws etc. (for further references to literature in this context, see GAMBARO, A., SACCO, R., Sistemi giuridici comparati, Torino 2002, p. 19, nn. 21–23).
1.2.1 Legal Formants: Russian Civil Law from the Revolution to Perestroika

A brief description of Russia's legal system since the Revolution\(^\text{12}\) will show that a legal system can be understood properly only if all the sources and elements peculiar to that particular system are taken into consideration, each source and element according to the weight that it has in the analysed system.

The first years after the revolution are characterised by an exceptional lack of organisation, understandable in view of the fact that Russia was not only participating in World War I, but also undergoing a civil war. In this picture the stability of revolutionary communism's power was uncertain, and Bolsheviks were more interested in issuing decrees which would affirm the revolutionary principles, for the sake of propaganda, than in issuing a legislation that could realistically be applicable. The purpose of legislation was educating the masses, not providing legal framework for the functioning of society. Courts of law and judges were abolished, and new tribunals were supposed to judge without procedural rules, on the basis of the revolutionary consciousness, of socialist sense of justice and of the workers' interest.

The first phase of revolutionary communism was replaced by the Novaya Economiceskaya Politika (N.E.P.) in 1921, which took distance from the above drastic ideals and set itself the goal of reconstructing Russia's economy. As the ambition to create a society based simply on a brotherly sense of justice was abandoned, the idea of law made its return, and several codes were issued (civil, criminal, civil procedure, family, agrarian). In particular the civil code, issued in 1922, was largely based on a draft prepared in 1913, which in turn had been heavily inspired by German law. Therefore, the 1922 code showed both in its structure and in its technical data, that it was based on German legal technique.\(^\text{13}\)

In 1928 the N.E.P. was abandoned, the economy was fully nationalised and the five-years plans were introduced; all private commerce was forbidden as speculation, and the concept of private property was renamed personal

\(^{12}\)A deeper survey of the historical and ideological development of Russia can be found in DAVID, R., Les grands systèmes, op. cit., pp. 127–183; see also BOGDAN, M, Comparative Law, Göteborg 1994, pp. 198–208.

\(^{13}\)See the comments of SACCO, The Romanist substratum, op. cit., p. 76.
property, to underline that it served only personal interests of the owner, and
could not be used to produce an income. In spite of the abandonment of the
more liberalistic ideas of the N.E.P., however, and in spite of the
collectivisation of all economy, the legal system created during the N.E.P.
was not abolished. All issued codes continued to exist for several decades,
and separate decrees issued during the years to take care of specific
situations did not modify the codes substantially. When it came to private
law, collectivisation of economy meant that all rules regarding enterprises,
their formation, operations and liquidation were abolished; introduction of a
planned economy meant further that state enterprises operated in fulfillment
of the five-years plans, i.e. on the basis of administrative orders, and not on
the basis of the freedom to contract. As a consequence, the law of
obligations and the theory of contract, which are pillars of the Romanistic-
Germanic legal system, decreased in importance in the socialist period, to
the benefit of the new socialist idea of nationalised enterprises, planned
economy and fulfillment of state orders. These differences between the
Romanistic-Germanic legal system and socialist law, together with the
fundamental difference in the ideology which inspired western societies and
socialist societies, was used by socialist legal scholars to affirm that socialist
law was something completely different from any other law. Soviet law,
according to such scholars, did not have the function of expressing a certain
conception of justice, based on legal tradition, but had the task to organise
economic forces within the nation, and to change behaviours and mentality
of its citizens. In particular when it comes to the area of private law, the
new function of law was stressed by stating that, as opposite to Western
countries, there was no such thing as interests of individuals, there was only
the fulfillment of the economic plan and the nation's development. The law,
therefore, in the eyes of socialist scholars was an instrument to ensure
society's development, and not to protect individuals' interests. On the basis
of this difference in the inspiring ideology, Soviet legal scholars constantly
denied the possibility of comparing Soviet law with other legal systems.
Comparative law, according to them, could be applied to systems that are
comparable; but Soviet law represented a completely different phenomenon,
and should therefore be kept out of any comparison.\footnote{See DAVID, Les grands systèmes, op. cit., pp. 131f., and BOGDAN, Comparative Law, op. cit., pp. 61f.}

Even if the inspiring ideology of Soviet law was undeniably peculiar to the
Soviet system, it seems that refusing any possibility of comparison was not a
justified attitude. In spite of the substantial differences, the civil code continued to be heavily based on a Romanistic-Germanic background; the structure of legal thought continued to be inspired by the Romanistic-Germanic categories and systematic methodology, and even terminology showed clearly that legal concepts had been taken from the Romanistic-Germanic legal doctrine. Text-books used at universities had the same subdivision into categories that could be found in text-books used at German universities; and while the ideology of socialism was felt in introductory or principle remarks of such works, it did not influence the subdivision of law into concepts or the set of definitions elaborated by two generations of German lawyers in the second half of the 19th century.

The clear imprint of Romanistic-Germanic legal thought persisted during the decades, and it could still be clearly seen in the next systematic codification of Civil Law after the 1922 Civil Code, Russia's Fundamental Principles of Civil Legislation of 1961. To show how deeply these Fundamental Principles were rooted in the Romanistic-Germanic system of Civil Law, it can be interesting to refer to some commentaries to the last edition of the Fundamental Principles, issued in 1992. As known, in 1992 Russia was already well into the reforms required to abandon socialist economy and go over to a market economy; and the Fundamental Principles of 1992 were meant to be a piece of legislation fully compatible with market economy (and therefore inspired by the same ideology as the Western legal systems). The 1992 Fundamental Principles were held to express the magnitude of the

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15. As an example, contracts are classified as "realnie" or "consensualnie", according to whether performance is necessary to conclude the agreement or whether the agreement between the parties is sufficient to conclude the contract; they are defined "causalnie" or "abstractnie" depending on whether the agreement is clearly connected with a typical purpose recognised by the legal system, or whether it is independent from any such connection. See Sukhanov, E.A., (red.), Grazhdanskoe Pravo, Moscow 1994, vol. 1, pp. 126–130. Obligations are divided into "alternativnie" and "facultativnie", liability can be "solidarnie", "subsiadiarnie", "regressnie", etc. (ibid., vol. 2, pp.12–20). Not only are these classifications the result of German Pandectists' elaboration of the Roman Corpus Juris Civilis, even for the definitions Latin words and not the corresponding Russian words have been used.

16. See for example Sverdlyk, G.A., Prinzipy Sovetskovo Grazhdanskovo Pravo, Moscow 1985. Sukhanov, Grazhdanskoe Pravo, op. cit., is the standard textbook of Civil Law and, even though written long after the beginning of Perestroika, is largely based on the tradition of Soviet Civil Law as a science and uses the Russian Civil Code of 1964 as one of the principal sources of law – see pp. 8–44. The book is so clearly based on the classical pandectist methodology, that its table of contents could easily be mistaken for a translation of an Italian or a German textbook on Civil Law.

17. See also, with references to further literature, Ajani, G., By Chance and Prestige: Legal Transplants in Russia and Eastern Europe, in The American Journal of Comparative Law, XLIII, pp. 93–117, p. 94 and n. 3.

18. The Fundamental Principles were actually issued first by The USSR on 31 may 1991, and, following the dissolution of the Soviet Union, were reinstated by the Supreme Soviet of the Russian Federation on 14 July 1992.
undertaken reforms, and it was said that a comparison of the 1992 Fundamental Principles with the Fundamental Principles issued in 1961 could clearly show how enormous changes had occurred.\(^{19}\)

The first comment was that "Often what is omitted from the 1992 version rather than the formulation itself betrays the change":\(^{20}\) meaning that in the new economic situation the state plan did not play the same determining role it played under socialism. This is, however, an aspect of economic organisation that was not dealt with within private law, and therefore enactments of private law (like the Fundamental Principles under examination) were not visibly affected by this change.

Other aspects of the 1992 Fundamental Principles that were mentioned to show how substantially legislation in private law had changed from 1961 were the following: (i) the 1992 version contemplated the concept of preliminary contract, according to which two parties agree that they shall enter into a determined contract when certain events occur; (ii) the regime of some contracts, like for example scientific research contracts, had been modified extending the scope of contractual freedom and limiting reference to mandatory legislation; (iii) the concept of unjust enrichment had been introduced again, after it had been abolished in the 1961 Fundamental Principles; (iv) compensation for moral damages has been introduced.\(^{21}\)

These were all the innovations the commentator mentioned as having extraordinary significance, and that should illustrate how deeply legislation in the field of private law had been transformed in 1992, in order to conform to the new situation of market economy.

To an observer who is not under the influence of ideology the above does not seem to represent a tremendously significant change: the mentioned changes are quite peripheral and the whole structure of the private law, its concepts and categories, had not been modified in 1992. This was because it was not necessary to modify them: Private law had always been clearly inspired by the Romanistic-Germanic model, and showed to be able to remain unchanged in spite of the modification of ideology. The concept of

\(^{20}\)Ibid., p. xxii.
ownership (with the exception, a very important one, of ownership of production means, which was reserved to the state), the disposition of ownership, the theory of contract, the laws of obligations, were all defined in the 1961 Fundamental Principles and regulated in the same way as in the system of Romanistic-Germanic law.\(^\text{22}\) Soviet law, furthermore, regulated the category of "juridical act", which is a well-known concept created last century by German doctrine ("Rechtsgeschäft"): the Russian civil code of 1964 contains a definition of the juridical act which is the direct translation of the classic German formula: "Juridical acts are acts of citizens or organisations having the aim of establishing, modifying or terminating civil-law rights or obligations. Juridical acts may be unilateral, bilateral or multilateral (contracts)".\(^\text{23}\)

Notwithstanding the appearances, the theory of contract was not affected by the regime of commando-economy and by the fact that state enterprises acted not out of contractual freedom, but in the fulfillment of state orders. What was affected was not the theory of contract itself, but the scope of its application, which was restricted to the extent free initiative was restricted by administrative orders. The scope of administrative orders contained in the economic plans, however, should not be over-rated: It is true that the plan decided the level of production to be met by each enterprise, as well as the procurement of raw materials. But plans usually did not go into detail, thus they left a certain room for each enterprise to exercise its contractual freedom. The law of obligations and the instrument of contract, therefore, were fully used under the Soviet regime, and state enterprises entered into contracts with each other or with foreign enterprises.

In conclusion, with the obvious exception of commercial law (company law, bankruptcy), which disappeared, it can be said that private law remained by and large Romanistic-Germanic; and this in spite of the difference in ideology and notwithstanding the affirmed fundamental difference of Soviet law, that purportedly could not be compared to other laws.

The above brief summary of how private law in the socialist period was perceived on one side, and how it appeared on paper on the other side exemplifies the importance, when observing a foreign legal system, of

\(^{22}\) For a thorough analysis of these legal concepts in Soviet law see DAVID, _I grandi sistemi_, op. cit., pp. 246–259.

\(^{23}\) The English translation quoted in the text is by SACCO, _Romanist Substratum_, op. cit., p. 80.
taking into consideration all elements that influence the application of law. Comparatists make use, in this context, of the concept of "legal formants".

The concept of "formant" does not have its origin in legal doctrine, but in linguistics. It is used to designate all elements that co-exist within a certain (phonetic) system, and which contribute, each in its peculiar measure, to the existence of that system.

The concept of "legal" formant has been introduced by the so called "dynamic" school of comparative law, and is used in connection with the plurality of elements that, within one single legal system, are capable of influencing the solution to a legal problem. All rules which present the same characteristics, like for example all judicial decisions, represent one legal formant of that particular legal system. Legal formants can be formally issued legal rules (the statutes, decrees etc.), rules elaborated by legal doctrine, rules that are expressed by a judge in a judicial decision, rules that are actually applied by a judge in a judicial decision (that do not necessarily coincide with the rule that has been expressed).

Understanding the role of each legal formant within each of the analysed legal systems, rather than analysing all legal systems through a certain, pre-determined scale, is the main task of comparative law.

A comparatist does not expect that, within one single legal system, all the formants are coherent with each other and contribute to the formation of a unitary system. A national lawyer (especially in countries with a strong Romanistic background, that have a rather formalistic understanding of the legal system and its sources) may have the idea that law has only one true interpretation; and if in reality there are several different interpretations he may react by choosing only one interpretation as true, and considering the others as wrong. A comparatist, on the contrary, cannot have the ambition of judging right or wrong in foreign legal systems, so he is a neutral observer of facts. A comparatist simply registers all existing formants within a

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24 The concept was introduced by Sacco, who, as already mentioned, founded a very active school of comparative law; the definition given to the method adopted by this school, "dynamic approach", appeared in a translation of one of Sacco's works for the American Journal of Comparative Law (see Sacco, Legal Formants, op. cit.), and it underlines that the methodology proposed by Sacco, by being devoted to the study of circulation of legal models among legal systems, differs from the better known formalistic school and realistic school. Sacco himself does not seem to appreciate this definition, see Sacco, R., Che cos'è il diritto comparato, Milano 1992, p. 11.
system, and all diverging elements among the formants as well as within one formant.

If we apply this approach to Russian law under the Soviet regime, we discover three layers.

The first layer is what legal doctrine stated: Soviet law is so different from all other laws, that it is impossible to compare. In this first layer we find legal doctrine and ideology as legal formants, and not rarely Western observers of Russian law have stopped at this layer, believing that these formants were determining elements that would override all other formants. This statement of uncomparability was repeated with such an emphasis and so consequently, that some Western scholars were intimidated and actually believed that Soviet law was something completely on its own.²⁵

If the observer does not stop at the first layer, however, but proceeds to examine the second layer, the formal legal rules, he discovers that formal legislation (within private law) is not only fully comparable with the other systems of law, but it is clearly based on the Romanistic-Germanic legal tradition. This second layer contains the formant of legislation, and an observer of the Russian legal system could be quite amazed by discovering how openly this formant contradicted the formant of the first layer: Firstly, Soviet private law was not this absolutely peculiar phenomenon that Soviet legal doctrine affirmed. And moreover, it had remarkable resemblances with Western legal systems.

If the observer had stopped at the first legal formant, he would have obtained a partial and misleading impression; but considering the formant legislation (second layer) would not have given a complete impression either. The third layer presents the formant of application of law, and it shows a picture that modifies considerably the similarity between Soviet law and the legal systems of Romanistic-Germanic tradition.

Judicial application of law had a very insignificant role in society's life: this was due to several factors, firstly to the fact that legal suits were not encouraged by the economic organisation of society. Since all enterprises were state owned, suing each other for obtaining compensation of some default would have meant little more than floating money from one part to

²⁵ See BOGDAN, Comparative Law, op. cit., p. 61, for further references.
another of the same entity. In particular, a single enterprise did not have any
interest in obtaining compensation, since enterprises were run in such a way
that all losses were covered by the state, and all profit would go to the state.
Also, enterprises did not have an accounting system that would enable them
to identify any losses or damages that could be claimed compensated in
court. Finally, enterprises would try to avoid law-suits, since the presence of
a law-suit would be a signal to the authorities that a particular enterprise was
not run in a proper way. In addition to all these reasons for avoiding law-
suits, it must be noted that the activity of judicial courts did not enjoy high
respect with the population. This was due to the lack of independency of the
judicial power, which was largely subdued to the party apparatus (like any
other sector of society was). Justice practised in judicial courts was usually
called "telephone-justice", by which is was meant that a judge would decide
not by independently applying the law to the particular facts, but in the way
that was suggested to him by a telephone-call made from the party. Another
aspect of the little role played by judicial courts was that people wishing to
have a claim enforced would often not go to court to obtain recognition of
their right, they would rather address the party apparatus, which could
provide quick and effective assistance.

The result of all this is that legal rules appearing on legal texts more often
than not were not applied; and that the organisation of society conformed
with administrative orders and party instructions rather than with formal
legislation.

Application of law in the socialist period was actually not one single formant
as it usually is in Western legal systems, but it could be considered as two
formants: judicial application (which was relatively insignificant) and actual
application through administrative bodies or party apparatus. This last
formant (fourth layer) turns out to be the determining element in the socialist
legal system.

The formant of actual application of law, therefore, gives a third picture of
Soviet law, which is different from the picture created by the formant
legislation, and also different from the picture created by the formants
ideology and legal doctrine. As a result of observation of all formants it can
be said that Soviet law was actually not comparable to other legal systems,
but this non-comparability was not due to the reasons mentioned by Soviet
legal doctrines; it was rather due to the particular organisation of a society
which was not based on the rule of law.
This example shows how important it is for a comparatist to take into consideration all legal formants of legal systems. If the observer of foreign legal systems limits his research to what legal doctrine of that state says on its own legal system, the obtained impression can be misleading. The example of Soviet-Russia shows that Soviet legal doctrine gave a misleading picture of its own system due to ideology; but there can also be other reasons for misleading judgements given by legal doctrine on its own system. The most common reason is that legal doctrine is used to look at its own legal system through the theoretical apparatus it has developed and applied for such long periods of time, that it feels no explanation or re-evaluation thereof is needed. Since such theoretical apparatus does not necessarily coincide with the actual application of that system's rules or with the theoretical apparatus the observer is used to, statements made by legal doctrine may be based on assumptions that are not fully understood by a foreign observer. It is then necessary to take into consideration all other legal formants of the system under observation; and it is important that the comparatist, when he identifies the legal formants, does so on the basis of what actually are the legal formants of the examined legal system, and not on the basis of what are the legal formants that the observer is used to from his own legal system. To make an example, an observer from a Common Law country would tend to give greatest importance to judicial precedents as legal formants; but we have seen that in Soviet-Russia this would not have been appropriate. An observer with a Romanistic background would tend to give greatest importance to the written law; also in this case the choice would not have been appropriate. The right attitude is to abandon the scale of values which the observer is used to from his own legal system, and try to understand how the system under examination is organised and how it operates.

1.2.2 Legal Transplants: Russian Civil Law Since the Perestroika

Russia's tormented transition to market economy after the failure of socialism has been and, although to a lesser degree, still is, accompanied by a very intense and unsystematic legislation activity. The legislator faced a situation where entire sectors of legislation did not exist (such as company law and bankruptcy), whereas the other areas of private law were regulated
by old rules, actually based on Romanistic-German models (and therefore fully compatible with a market economy, although certainly not very modern) but "spoiled" by the imprinting of socialist ideology received during the last decades. The legislator therefore started issuing a number of different enactments, in the belief that legislative introduction of legal institutions existing in developed market economies would be a necessary (and probably sufficient) condition to create a business environment in Russia. Such enactments were proposed and issued on an ad hoc basis, without caring too much for the context in which the new enactment would have to operate. To name just one example, legislation protecting competition and prohibiting monopolies was enacted before state industry was privatised, when most of Russian industry was still acting in full monopoly regime.26

This non-systematic attitude is strengthened by the fact that legislative initiative was spread over a number of different institutions: specially created commissions, universities or law institutes, representatives of certain industrial sectors, international institutions such as IMF, World Bank, EBRD, representatives of Western industries, private consultants, all acted as proponents of new legislation.

Circulation of legal models is a well known phenomenon, that traditionally has been identified with the reception by one country of the structure and principles of another legal system in its totality. During the last decades scholars started to concentrate on what was originally called "legal borrowing", and later acquired the name of "legal transplants".27 By these expressions is meant not the adoption of a foreign system of law as a whole, but the process by which a legal system looks to another legal system to adopt the latter's regulation of a specific area or institution. Legal transplanting occurs not only between two systems belonging to the same legal family, it can be carried out also irrespective of the boundaries of the classification into legal families. In such case the transplant is not impossible (it can be reminded that the classification into legal families is not a pre-

27A. WATSON presented the theory of legal transplants first in the seventies, and dedicated much of his work to the development of such theory; see his recent From Legal Transplants to Legal Formants, in The American Journal of Comparative Law, XLIII, pp. 469–476. For a clear overview of legal literature on the matter see MATTEI, U., Why the Wind Changed: Intellectual leadership in Western Law, in The American Journal of Comparative Law, XLII, pp. 195–218, especially pp. 196–198. See also AJANI, By Chance and Prestige, op. cit., p. 93, n.1.
existing phenomenon, but just a tool to help understanding different legal models), but it requires a deep understanding of all aspects of the regulation to be transplanted, that might have assumptions and implications in areas in which the original legal system differs substantially from the corresponding areas of the borrowing legal system. An example of an inaccurate legal transplant effected across the boundaries of different legal families is the introduction of trust in Russian law, as discussed below.

Scholars of comparative law have proposed several explanations for the occurrence of legal transplants: the most authoritative school has identified two reasons for the adoption of foreign legal models: imposition, on one side, and prestige, on the other side. These two factors are not only relevant in the classical context of reception of legal systems as a whole (colonialism as an example of imposition, the French Civil Code and the German legal doctrine of the 19th century as an example of prestige), but also in the case of more restricted legal transplants: in Russia, for example, imposition (by way of international financial institutions exerting their economic leverage) is probably the factor determining adoption of particular legal concepts (for example with respect to the abolition of state-regulated prices, and in the field of privatization). As an example of legal transplants occurring on the basis of prestige can be mentioned English law, which is widely referred to e.g. in connection with financial transactions.

Recently a new circulating factor has been proposed, as a better alternative to the factor of prestige: it has been suggested that the search of "efficiency" could be a reason for circulation of legal models. Efficiency is a criterion used by Law and Economics scholars to explain or justify the reasons of changes in legal institutions: legal changes occur, according to this discipline, because the system is continuously looking for a more efficient way of organising social life and administrating justice. By efficiency is meant economic efficiency, which is assessed by the evaluation models typical for economics, based on the comparison of costs and benefits. This Law and Economics approach has recently been proposed as appropriate not only with respect to changes within one single legal system, but also in the case of legal transplants. The world's legal picture has been seen as a global market, where different legal rules are on offer to regulate a certain situation; and national legislators, to regulate specific areas, would pick the legal rule

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which is more efficient and decide to adopt it. Legal transplants would then be originated by a balancing of costs and benefits of the different possible rules, and efficiency would be the circulating factor.

This factor has been proposed as an alternative to the earlier mentioned criterion of "prestige", which has been criticised as being a much too vague concept, lacking a proper definition. Even if it may be true that efficiency plays an important role in certain instances, however, it does not seem appropriate to exclude prestige as one of the factors that determine circulation of legal models. The fact that the economy of one system might be better developed than others, that its legal literature might have been used as an inspiration or as a model because of its clarity or completeness, that its legal tradition might have shown in practice that it is appropriate to tackle certain situations, all these and other elements contribute to the creation of "prestige" of a certain legal system, and may be at the origin of legal transplants.

In my opinion, therefore, efficiency should not replace prestige, but be added as a third circulating factor.

Russia's hectic legislating activity during the 1990’s is, as mentioned, characterised by a large plurality of entities and individuals that take the initiative to new bills, and by lack of coordination among the actually issued pieces of legislation. The picture is even more complicated by the varying legal background which inspires any such initiatives. Since the reform activity is largely based on legal transplants, it can be useful to try to identify the reasons that inspire such transplanting activity.

Legal transplants encouraged by international financial institutions (especially by the IMF) could be seen as the result of the first of the mentioned circulation criteria, namely "imposition": granting of substantial loans was made subject to modification of legislation according to specific criteria (for example, transplant of the legal-economic principle of free international trade, by demanding abrogation of export-tariffs on oil), and such economic leverage can very well be strong enough to induce the legislator to accept legal principles that otherwise would not have been

30 Ibid., p. 8.
31 Ibid., pp. 3, 16.
adopted (it is interesting to notice that many of the imposed rules have been reversed, directly or indirectly, after the loans have been granted).

For other legal transplants "prestige" certainly plays an important role, but, due to the earlier mentioned plurality of persons and organisations proposing new laws, as well as the different legal models these belong to or refer to, it is tempting to consider some legal transplants as the result of chance rather than of a systematic, carefully considered inspiration by one or more prestigious legal models.

The legal system which advisors and consultants refer to is sometimes dictated by economic reasons: in the case of the legislation process in the very important sector of oil, for example, the associations of foreign oil-industries which were interested in investing in Russia played a major role. Since the majority of members of these associations were American oil companies, legislation proposed by these associations was based on legal models familiar to American lawyers. As an example, the proposed legislation was structured on the idea that there was no distinction between private law and public law, because the American legal system does not accept such a distinction. Therefore it was proposed that oil investments should be regulated by agreements between the investor and the Russian state, whereby it was expected that principles of normal contractual law would apply and that both the state and the investor would be treated as equal parties, bound to their respective contractual obligations. However, the Russian legal system has a deep distinction between administrative and private law; and the oil sector falls within the scope of administrative law, whereby the state and the investor cannot be considered equal parties, and the investor is subject to the state's authority, that can exercise its administrative powers with a certain discretion. Political reasons have prevented oil legislation from being approved in the proposed form; had it been approved without major corrections, however, it would have been a legal transplant of an American principle (the lack of distinction between

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32 The process of preparation of the Law on Production Sharing Agreements can be followed nearly step by step in Russian Petroleum Investor, coming out monthly, see especially the years 1995 and 1996; See also my Draft Russian Law on Production Sharing Agreements to Give Needed Legal Framework to Petroleum Investments?, in Survey of East European Law, 1995, pp. 5–11, and Petroleum Legislation in Russia – Draft PSA Law Approved in the First Reading, in Survey of East European Law, 1995, pp. 11–13. For an extensive comment on the text of the legislation that was adopted and the method that led to that text, as well as further references to literature, see my Contract or Licence? Regulation of Petroleum Investment in Russia and Foreign Legal Advice, in Journal of Energy & Natural Resources Law, 1998, 186-199.
private and public law) dictated by the fact that the majority of the members in the proposing industrial association were Americans.

In other cases personal acquaintances play a determining role: If the members of a law commission have good contacts with a US professor, then the Act on which they are working will be modelled on American law. If a member of another law commission obtains a scholarship to study in Scotland, he will propose a bill on the subject-matter of his commission based on the Scottish model. The legal transplants deriving out of such contacts are surely based on the prestige of the models, but acquaintance with those particular models seems sometimes to be dictated by chance rather than by a systematic approach.

Based on the above, I think it is appropriate to consider a fourth circulation factor, that has been proposed, quite provocatively, in connection with the transplanting activity carried out by the former socialist countries in their transition to a market economy: legal transplants can take place by "chance".33

Considering the results of such an intense transplanting activity, it cannot be overlooked that the traditional classification into legal families is being challenged rather heavily, and not only because one traditionally acknowledged family, the "socialist family", has disappeared.

The area of private law in Russia is now primarily regulated by a new civil code. The socialist civil code was, as we have seen, largely based on the Romanistic-Germanic model, and therefore compatible with the new situation arisen after the abandonment of socialism and the transition to a market economy, but it was not modern and above all too much associated with socialism and its ideology from a psychological point of view. A special commission was set up to prepare a new civil code;34 the work of the commission proceeded in a systematic way, and the code now being issued is based on the Romanistic background of Russia's legal tradition. The new code is largely inspired by the new Dutch civil code, which in turn is a codification based on Romanistic legal tradition, (but it is a modern codification, which has enriched its Romanistic-French tradition with legal

33AJANI, By Chance and Prestige, op. cit., pp. 106, 109, 112.
transplants from other legal systems). The new Russian civil code is therefore a development of the Russian legal system that, even if largely based on legal transplants, follows the line of legal tradition already existing in Russia. It does not create particular problems of classification from a legal families-point of view and it cannot be accused of being a transplant which is based on chance.

On the other side, many of the pieces of legislation issued outside the civil code, on an ad hoc basis, do not seem to be particularly inspired by the desire of developing the existing legal tradition, but represent legal transplants from many different legal systems. To clarify this statement with an example one can mention the situation of company law.

1.2.3 Plurality of Models: The Example of Russian Company Law

In modern societies the legal system usually provide for the possibility to engage into entrepreneurial activity at least two kinds of legal entities: on one side, legal entities that are supposed to have a large scale activity, and therefore should raise large capitals. The ownership of such entities is usually spread among a plurality of shareholders; such legal entities can be also listed on the stock exchange, in which case shareholding becomes even more spread among the public. A characteristic of such companies is that they are subject to relatively strict accounting and reporting rules, and their managing bodies might be subject to special rules as to their areas of responsibility and their components (for example, it may be mandatory to have the participation of representatives of the employees).

The other kind of legal entity which legal systems usually present is reserved to more limited activities, which do not require a very high level of capitalisation. Such entities are usually owned by a relatively small number of investors, and restrictions may be imposed on the possibility to transfer ownership of the entity to third parties.

These two types of legal entities are known in most Western legal systems, but the details of their regulation are different in each system.

The Russian legal system adopted this distinction into larger corporations and smaller companies, and it did so by effecting a double legal transplant: firstly, it transplanted American law on joint stock companies, and it
introduced into the legal system what was called joint stock company of the open type (the larger corporation) and the joint stock company of the closed type (the smaller company).\textsuperscript{35} Secondly, the Russian legal system effected a transplant from the German legal system, and introduced what was called company with limited liability (the smaller company).\textsuperscript{36}

The Russian legal system, thus, presented an overlapping of legal transplants: the company of the smaller type could be found in two editions, one regulated by rules inspired by the U.S. joint stock company, and one regulated by rules inspired by the German GmbH. This situation has now been simplified by a new law on companies, which has a more coordinated regulation,\textsuperscript{37} but the mentioned co-existence of two different regulations for the same phenomenon persisted for several years.

This double legal transplant could be condemned by an observer who has in mind the classification into legal families mentioned supra: Such an observer might be tempted to consider one of the two concurring legal transplants as "wrong". For example it could be claimed that the transplant of American law is wrong, firstly, because the Russian legal system is based on Romanistic-Germanic legal tradition, and secondly because the Russian legal system had a regulation of (at least part) of that particular subject matter, which regulation happened to be a legal transplant from German law, therefore from the "right" legal family.

A comparatist, however, should not think along such lines. It is understandable that overlappings of legal transplants from different systems can be a little irritating to an observer who thinks in terms of classification into legal families; however, there is no evidence that mixing legal models from different systems leads to difficulties in interpretation or in application of the law.

In the mentioned example, Russian company law cannot be said to have been particularly efficient. On the contrary, its application (or lack of application) has created huge problems, \textit{e.g.} in cases where companies have increased their capital without informing their shareholders.

\textsuperscript{35}Governmental Decree No 601 of 25 december 1990.
\textsuperscript{36}Law on Enterprises and Enterpreneurial Activity, 25 December 1990.
\textsuperscript{37}Law on Joint Stock Companies, 26 December 1995.
These problems, however, cannot be considered a result of company law in Russia being based on rules inspired by both American and German law. Firstly, legislation was still rather fragmentary and did not cover all connected areas, so that certain fundamental parts were left out of legislation (for example, lacking regulation on registration of shareholders and on communication with the shareholders). Secondly, these problems were due to the already mentioned attitude of the Russian citizen, who did not feel that legal rules should necessarily be applied at all times, and that in any case they should not prevent anyone from acting in a way that satisfied the interests of the concerned bodies, in this case the companies' management (this attitude, although it is being modified as the role of courts of justice increases its significance, is still so spread that, as mentioned above, it should be considered as a legal formant of the Russian system, or at least as a correction to the other legal formants of that system).

Therefore, problems raised by application of company law were not caused by the fact that the Russian legislator had operated with a mixture of legal families: the only notable consequence of this double legal transplant is that practising lawyers with a strong German legal background tended to advise their clients to choose the regulations inspired by the GmbH; whereas practising lawyers with a strong Common Law background preferred to apply the regulations inspired by the joint stock company. This can hardly be seen as "wrong", it seems rather to be a richness of the system.

The example of Russian company law should thus confirm that a comparatist must have a neutral attitude towards legal models, and that classification into legal families is just a fiction used for the purpose of explanation, and should not be used as a criterion to evaluate whether a legal model is right or wrong.

1.2.4 Misunderstood Models: The Example of Trust

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38Ever since the start of Perestroika legal advice on foreign investment in Russia has been given primarily by foreign law firms or by Russian branches of foreign law firms. Initially local branches of foreign law firms were attempting to practice Russian law by sending to Russia American, German or Italian lawyers, who had to learn the language, learn to understand the legal mentality etc.; the results were not always of excellent quality, and confirm that a lawyer very easily falls in the trap of judging a foreign legal system on the basis of his own legal mentality. Gradually a new generation of Russian lawyers is becoming more active, even if primarily as employees of Russian branches of foreign law firms.
It must, however, be confessed that sometimes situations arise where even the most humble comparatist has to wonder whether the proposed legal transplant makes any sense from a legal point of view.

One example is a legal transplant effected by decree of the Russian president in 1993 introducing the institution of trust.\(^{39}\)

It should be kept in mind that trust is a creation of English law, based on the concept that property can be divided into a formal ownership and a beneficial interest. Formal ownership is historically an institute of Common Law (as opposed to equity); in the case of assignment of property effected with the instruction to manage the property in a certain way, Common Law recognised simply the assignment of formal ownership, and it lacked the flexibility necessary to recognize legal effects to the underlying management obligation. Rules of equity were developed and adopted by courts of equity with the very aim of avoiding the difficulties created by the rigidity of the Common Law system. The concept of formal property was then complemented with the concept of beneficial interest: in the case of trust, the beneficial owner can compel the trustee, by way of an injunction, to use the property in trust in the best interests of the beneficiary; he can trace the object of trust with third parties in case of breach of trust; he can protect the object of trust from the creditors of the trustee.\(^{40}\)

Such concept of dual property is unknown in the Romanistic legal tradition: here ownership is unitary and not divisible, but very well elaborated theory of contract and laws of obligations take care (under the category of "fiduciary obligations") of the situations that in England would be treated as a trust.

Nevertheless, the institution of trust was transplanted into several legal systems, which do not have a Common Law tradition, and this is primarily\(^ {41}\) because, when it comes to enforcement of the beneficiary's rights in case of litigation, English law gives a more efficient protection of the beneficiary (injunction, tracing with third persons) than Romanistic legal systems do (if property is transferred to a "trustee", the latter becomes full owner and the

\(^{39}\)Decree No 2296 on Fiduciary Ownership (Trust) of 24 December 1993.

\(^{40}\)For a thorough presentation of the institute of trust, also from a comparative point of view, see FRATCHER, W.F., Trust, in International Encyclopedia of Comparative Law, VI, II, pp. 3–115.

\(^{41}\)MATTEI, Efficiency in Legal Transplants, cit., pp. 8–10, uses trust as one example of legal transplants based on efficiency.
beneficiary's interests can be protected only within the frame of general contractual liability).

It is, therefore, not surprising that also Russia, after Louisiana, Quebec, Scotland, most countries in South America, Japan and Liechtenstein, has transplanted the institution of trust.

However, the presidential decree which effected this transplant into Russian law betrayed a quite restrictive view of what the institution of trust really means, so that the result of the transplant does not seem to be complete.

It must first of all be noticed that the presidential decree has a quite limited scope as it is supposed to apply only to assignment of shares in enterprises that are undergoing privatisation. The idea of the decree is that shares of such enterprises can be assigned to a certain party (the trustee); that the trustee shall acquire full ownership of these shares, though with the obligation to administer such shares in the best interest of the party who created the trust, and that at a determined date the trust shall expire, and ownership of the shares shall return to the original owner who created the trust, or go to a third party.

This mechanism of temporary assignment of shares was elaborated in a period where Russian industry was in relatively bad shape, and the state was not willing to sell at too low prices: To increase the value of industry and consequently obtain satisfactory compensation for its privatisation, the state was willing to slow down the process of sale of enterprises and improve the operations and financial situations of the enterprises before starting privatisation. However, the Russian state did not have the funds to improve the state of its industry; one of the proposed solutions was that the state should obtain a substantial loan by a consortium of Russian banks, and in exchange assign as security the shares of some nationalised enterprises; the banks would then administrate the companies of which they held the shares in security; after a certain period, it could be decided whether the loan was to be repaid or whether the banks could acquire full ownership of the shares held as security.

The decree introducing the institution of trust must primarily be seen in this context, as a proposal to solve the temporary financial problems of the

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42 Art. 21.
Russian state. Even in such a restricted perspective one may wonder whether the institution of trust was the appropriate instrument; it cannot be seen how transferring the shares in trust would be an advantage for any party with respect to simply creating a pledge on such shares, since it does not seem that transferring the shares in trust would give either of the parties a better protection than each party would have had if the transfer had been a pledge.

Moreover, the presidential decree on trust betrays the wish to be something more than an instrument limited to privatisation: The first article reads that "the institution of trust is transplanted into the Civil Law of the Russian Federation", and the last article, which is the one containing restriction of the use of trust to the shares of enterprises under privatisation, states that this restriction is valid only until entrance into force of the new civil code (implying that in the new Civil Law the institution of trust would expand its scope of application).

It is therefore worthwhile to examine in more detail how this legal transplant has been effected. The transplanting decree, beside regulating the structure of assignment with the obligation of administering in the best interest of the beneficiary and re-assignment at expiry date (as mentioned above), does not contain any rules that introduce into Russian law the concept of dual property. In particular, no special remedies are created to protect the interest of the beneficiary. On the contrary, on this point the transplanting decree repeats the principle which is to be found elsewhere in Russian law: the trustee responds of the proper fulfilment of his obligations with all his assets.

This is the usual rule of liability that is to be found in the law of obligation of most systems with Romanistic legal tradition: in case of non-fulfilment of an obligation, the defaulting party's liability extends to all his assets.

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43Art. 209.4 of the new Civil Code (issued on 21 October 1994) now regulates the area of assignment of property with an accompanying, fiduciary obligation to manage it or to dispose of it in a certain way in the interest of the assignor or in the interest of a third person. The Civil Code has not adopted the idea of dual property, which underlies the institute of trust; it confirms that the concept of property is unitary, and that an assignment of property must be absolute and cannot be limited by fiduciary obligations: thus art. 209.4 excludes that, in case of instructions to administer the property for the benefit of the beneficiary, ownership is transferred to the "trustee"; the matter is thus regulated as a simple contractual obligation.

It is not clear whether entrance into force of the Civil Code has automatically abrogated the decree on trust, or rather the decree continues to be in force, in the limited scope described by its own art. 21.

44Art. 13.
There is no mention of the more effective legal remedies, like injunctions or tracing, that are actually the substance of the institution of trust.

By reading the transplanting decree the impression is that the transplant has been fulfilled only halfway: the word "trust" has been introduced, as article 1 reads; but the step of introducing also the legal consequences of creating a trust and the legal remedies for breach of trust has not been effected. The transplanting decree has simply inserted the definition of trust on the existing concept of unitary ownership and laws of obligations.

The resulting institution does therefore not resemble the "original" institution of trust: what has been created is simply the possibility to assign property under the obligation of administering it in a certain way, and for a limited period of time. One may wonder what the point of such legal institution is, since the mentioned construction can be achieved by using the general principle of freedom to contract within the context of what was already existing in the Russian legal system.

1.2.5 Conclusion

The example of Russia's legislative reforms shows that considering foreign legal models is a process that requires full understanding of the foreign legal system in its totality, as well as acknowledgement of the differences between such a system and the system which desires to adopt the foreign regulation as a model.

At the same time, an understanding approach to foreign law, as can be acquired by applying the methods of comparative law, is becoming more and more important in the process of legislative reforms. Maintaining or enhancing local peculiarities of each legal system represent an obstacle to international business and trade, and it should be the ambition of every system to extend the process of globalisation of the economy also to the legal regulation thereof.

Russian legal reforms are only one of many legal transplants that occur continuously in practically all legal systems. In the field of commercial contracts a massive transplant is being indirectly and partially unconsciously forwarded by contractual practice. It has become more and more common to write commercial contracts on the basis of models prepared by renowned law
firms, multinational companies and financial institutions, or branch organisations. These institutions are mainly based in the USA or the UK, or avail themselves of the assistance of acknowledged international law firms, in turn mainly USA or UK based. The models prepared by or for these institutions are shaped on the structure and requirements characteristic of their respective legal systems, that is the US or the English legal system. These models are mainly adopted also for use in other legal systems, even if the underlying transactions are meant to be governed by the law these other systems; and this occurs mainly without going through the step of adapting the models to the requirements of the governing law, or at least verifying whether there is a need of adapting them. When these contract models are introduced in another legal system, they operate as a transplant of the US or English legal institutes into the legal system where the contract is intended to operate. This kind of transplant occurs at a different level from the transplants operated by the legislator, but enriches the system of the host country by introducing a contractual practice that responds to criteria that were unknown in the traditional system or were tackled in a different way. This might also create considerable difficulties of interpretation and need to coordinate the text of the contract with the governing law.

1.3 The Distinction between Common Law and Civil Law

The categories, or families, of law have been developed as a tool to classify legal systems. Various classifications may be proposed; a classical distinction is between systems of Common Law, systems of Civil Law, systems of Islamic law, and socialist systems.\(^4^5\) The classification into families is useful as long as it permits us to treat under one category different legal systems that have various features in common, and to distinguish them from other systems that have other characteristics. The relevance of a division into families will, therefore, depend on the features that the observer is focusing on from time to time. If the focus is, for example, on the state organization, the criteria for building families might be whether the states are organized as federations or as unitary systems, or whether the systems are secular or religious. In this case, the grouping into families might probably be different than if the focus is on commercial contracts. In the context of commercial contracts, the classic division

\(^{4^5}\) The distinction was elaborated by DAVID, see above, footnote 4. The family of socialist systems has lost considerably in significance as a result of the transition to market economy of the former Soviet Union and the Eastern European countries during the 1990’s.
between Common Law and Civil Law might be very useful, even if it does not cover all the major legal systems of the world (it leaves out, for example, the Islamic system).

The division between Common Law systems and Civil Law systems is traditionally based on the different sources of law, respectively the judicial precedent and the statutes. In the context of contracts, however, I deem it more relevant to focus primarily on the different way of interpreting a contract and on the different role that the legal system plays in integrating the contract; this, in turn, influences the way contracts are drafted in the respective legal traditions. Further classifications are possible: for example, within what is usually considered to be Civil Law, it is possible to distinguish between systems based on the French Code Napoleon, systems based on the German Pandects and Scandinavian (or, more correctly,

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46 Common Law systems are England and Great Britain (apart from Scotland), the United States (apart from Louisiana), Canada (apart from Quebec) and the countries that have been under the British Empire, including some African countries, India, Pakistan and some other South-Asian countries, Australia and New Zealand.

47 Civil Law systems are the continental European countries, Scandinavia and to a certain extent Scotland, Quebec, Louisiana, the Latin American countries, most African countries, Eastern Europe, Russia and most Asian countries (including Japan and, to a certain extent, China).

48 Recent studies aim at verifying whether the difference between Common Law and Civil Law is really so significant as it is traditionally believed to be. The traditional distinction based on the sources of law is largely imprecise, see GAMBARO, SACCO, Sistemi giuridici comparati, cit., pp. 51ff. Within the law of obligations the common historic origins are being highlighted and modern convergences are being identified, see, among other authors, GORDLEY, The philosophical origins of modern contract doctrine, Oxford 1991, pp. 134ff., KÖTZ, Abschied von der Rechtskreislehre, in Zeitschrift für europäisches Privatrecht, 1998, pp. 493ff. and ZIMMERMANN, R., The Law of Obligations, Oxford 1996, pp. 554ff., 569ff. See also GAMBARO, SACCO, Sistemi giuridici comparati, cit., pp. 19ff., with further bibliographic references in footnotes 23 and 24. However, the differences between these two families remain considerable in the context of contracts, as these lectures will show.

49 The first codification of private law was made in 1804 by the Code Civil. The Code Civil contained the principles of freedom of contract, recognition of property, and other principles affirmed by the French revolution, but was at the same time largely a codification of the Roman law that had been applied in France for centuries. The Code Civil has considerably influenced the codification process that took place outside France during the XIX and the early XX centuries, either as a consequence of the authority conquered military by Napoleon, or as a consequence of the authority achieved among lawyers on the basis of the quality of the codification (prestige). Among the countries that are deemed to be Romanistic are, on the European continent, among others Belgium, Spain and Italy; in America are Quebec, Louisiana and most of the South-American countries, and in Africa, in the Middle East and in South-Asia are the countries that were under the French influence during 1800.

50 German law was not codified before 1900. During the whole XIX century legal doctrine was very active and elaborated a series of legal concepts and categories that were eventually codified in the Bürgerliches Gesetzbuch of 1900 (BGB). The German legal doctrine has influenced considerably Switzerland, Austria and the Nordic countries, and the BGB was used as model among others in Hellas, Brazil, Peru, Eastern Europe, Russia and Japan.
All these sub-categories of Civil Law systems may present their own specific features that distinguish them from each other, such as, for example, the emphasis on the principle of reasonableness to interpret the contract rather than on the systematic construction of the provisions. These differences, however, are marginal, if compared to the differences between the Civil Law systems and the Common Law systems. From the point of view of international contracts, therefore, the most interesting classification is that between Common Law and Civil Law: this is particularly true in view of the widespread use of English contract models even for transactions that are governed by a Civil Law system. When a contract is drafted on the basis of a model developed under the Common Law system, but it is regulated by the law of a Civil Law system, it becomes important to understand the main features that distinguish the Common Law from the Civil Law. In this way, it is easier to understand why certain contractual provisions have been inserted or written in that certain way in the original model that was meant to operate under a Common Law system. It is also easier to understand how those provisions should be interpreted or rewritten to obtain the same results under the governing Civil Law system.\footnote{Norway, Sweden and Finland are Scandinavic countries, and are referred to, together with Denmark and Iceland, as Nordic countries. The private law of these countries is significantly influenced by German law, although there is no general codification that can be seen as a direct reception of the BGB.}

\section*{1.4 The Method}

In paragraph 1.1 above we have seen the comparative method according to the Trento Manifesto, and in paragraph 1.2 we have illustrated the relevance of this method by applying some categories of comparative law to analyse the process of legal reforms in Russia. The method that we will follow in these lectures does not differ substantially from what we have just explained. \footnote{It has become customary to write commercial contracts on the basis of Common Law models, even if the legal relationship is not meant to be governed by a Common Law system. As shown above, this leads to a style of drafting contracts that is not necessarily appropriate for contracts subject to Civil Law systems. In the majority of cases, this will only result in redundant provisions, that do not create real problems of interpretation; in other cases, however, this may result in contractual provisions that contradict principles of the governing law or that can be only with difficulty co-ordinated with the governing law. The University of Oslo has in 2004 launched a project (http://www.jus.uio.no/ifp/anglo_project/index.html) for assessing the legal effects of applying Common Law contract models in legal relationships that are governed by Norwegian law. This assessment will be expanded in due course to governing laws from other Civil Law systems, first of all German, French, Russian and Italian law.}
1.4.1 The Terms of Comparison: Certain Common Law and Civil Law State Laws and Certain International Instruments

In order to understand the main differences between the law of contracts of the Common Law- and of the Civil Law families, we will compare the following laws, that we will shortly present below: English law (as the main representative of a Common Law system), Norwegian law (as a representative of the Scandinavian systems, a group within the Civil Law systems), German law (as the main representative of the Germanic systems, a group within the Civil Law systems) and Italian law (as a representative of the Romanist (Civil Law) systems based on the Code Napoleon, though with some influences from the Germanic (Civil Law) system).

International contracts are often subject also to international sources such as conventions, or to non-national sources (often also called, traditionally, *lex mercatoria*, or trans-national law or, borrowing a terminology from the public international law, soft law). We will, therefore, extend our comparison to the UNIDROIT Principles of International Commercial Contracts, the Principles of European Contract Law (PECL) and the United Nations Vienna Convention on Contracts for the International Sale of Goods (CISG). The former two mentioned sources are non authoritative compilations that do not have any binding effect unless they have been referred to by the parties in the contract, or unless they are deemed to be the expression of international usages and practices. The latter mentioned source, on the contrary, is an international convention, drafted by the United Nations and ratified by 63 states and therefore having binding effect within their respective legal systems. The effect of these sources, therefore, is considerably heterogeneous. As explained below, however, all these three instruments have the ambition of representing a uniform law on international contracts (to what extent these uniform laws replace the national governing laws, or rather integrate them, is a question that is discussed in the course on International Commercial Law). It is, therefore, legitimate to include them in the comparison of legal systems that may be relevant to international contracts. A short presentation of these systems is made below.

a) Norwegian Law
Norwegian law of contracts is strongly influenced by German legal doctrine, especially of the XIX century.\textsuperscript{53} 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{54} 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. This became clear in 1983 with the introduction in the Act on Formation of Contracts of § 36, giving the judge 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, as we will see in the course of these lectures.

\begin{itemize}
\item[b)] German Law
\end{itemize}

German contract law is codified in the Civil Code, the Bürgerliches Gesetzbuch (BGB). The BGB was issued in 1900, and extensively reformed in 2001.

The object of the codification in 1900 was the elaboration of the law that had been carried out very actively by German legal doctrine during the preceding

\textsuperscript{53} On the relationship between German legal doctrine and the Nordic law of contracts see, \textit{i.a.}, GAMBARO, SACCO, \textit{Sistemi giuridici comparati}, cit., pp. 400ff, and ZWEIGERT, KÖTZ, \textit{Einführung in die Rechtsvergleichung}, cit., pp. 270ff.

two centuries; legal scholars had devoted considerable energy to classifying and systemising primarily Roman law.\textsuperscript{55} The BGB thus codified the result of the scientific ideals of the XVIII and XX centuries: rules were expressed on the highest possible level of abstraction, and the internal consistency of the system was the ultimate aim to reach. In addition to the ideal of scientific abstraction and consistency, the BGB was inspired by the ideal of liberalism, according to which each individual should be permitted to regulate its own interests as he deems fit and should be expected to take the responsibility therefor.

However, 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. Because of the historic development, especially the hyperinflation after the First World War and the situation after the Second World War, German judicial practice showed keen to apply actively these general clauses, 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 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.\textsuperscript{56}

\textsuperscript{55} On the characteristic features of the German law of contracts see, \textit{i.a.}, GAMBARO, SACCO, \textit{Sistemi giuridici comparati}, cit., pp. 339ff. and ZWEIGERT, KÖTZ, \textit{Einführung in die Rechtsvergleichung}, cit., pp. 130ff.

c) 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.\(^{57}\)

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 ideal 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, \(i.e.\) the codified text of the law, and this has to be applied without making any recourse to natural reason or equity.\(^{58}\) 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

\(^{57}\) On the influence of French and German law on Italian law see, \(i.a.\), GAMBARO, SACCO, Sistemi giuridici comparati, \textit{cit.}, pp. 377ff.

\(^{58}\) For an historic analysis and further references see GORDLEY, \textit{The philosophical origins}, \textit{cit.}, pp. 220ff.
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).

d) English Law

English law consists of two parts: on the one hand are the the common law and statutory law, on the other hand are the rules of equity. The common law is based on the judicial decisions rendered by judges which become sources of law on the basis of the rule of precedent. Statutory law is becoming more and more important particularly as a consequence of the implementation in statutes of the many European rules, but remains in any case residual and sectorial. The rules of equity are a system of remedies that were developed as from the Middle Ages by the Court of Chancery in order to mitigate the rigidity of the common law. Both common law and equity are today part of English law; in particular, the name of equity should not be interpreted as if it represented an opening for the judge to evaluate the circumstances of a specific case on the basis of non strictly legal criteria: the equity consists of legal rules that are applied very strictly.

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

59 For a vivid explanation of the conflict between these two influences and further references see GAMBARO, SACCO, Sistemi giuridici comparati, cit., p. 385. See also MONATERI, P.G., The Weak Law: Contaminations and Legal Cultures, in Transnational Law & Contemporary Problems, vol. 13, pp. 584ff.
60 GAMBARO, SACCO, Sistemi giuridici comparati, cit., pp. 389ff.
61 On the special features of English law see, i.a., GAMBARO, SACCO, Sistemi giuridici comparati, cit., pp. 69ff. and ZWEIGERT, KÖTZ, Einführung in die Rechtsvergleichung, cit., pp. 177ff.
the consequences thereof are respected by the legal system even if this should be to the detriment of justice or reasonableness. 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. This attitude is based on the central position that England has had 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 them and patronise them, they expect the legal system to give them tools in order to enforce what they have agreed.⁶²

e) The UNIDROIT Principles of International Commercial Contracts

The UNIDROIT Principles of International Commercial Contracts⁶³ were published in 1994 by the UNIDROIT, an international organisation established in 1926 with the purpose of unifying the private law. The work on the Principles started in 1981, in a working group under the direction of the Italian professor Bonell. Recently, the scope of the principles was extended from the original seven chapters (regulating formation, validity, interpretation, content, performance and non performance) to cover also set-off, assignment of rights, agents and third party rights, limitation.

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 rules 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.

⁶² See below, particularly section 3.4.4.
⁶³ The full text can be found at 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/
The ambitions of the UNIDROIT Principles are multiple, as it appears from their preamble, and they can be summarised as follows. Because the Principles are the result of an extensive comparative study and offer modern and functional solutions, they may be used by legislators as a source of inspiration when legislating in the field of general contract law. Because of the persuasive authority that derives from the high quality of the working group that prepared them, the Principles could be used by courts or arbitrators to interpret existing international instruments. Moreover, they may be used by contractual parties during the preparation of their contract, as a guide to the drafting. The parties to an international contract might decide to subject their contract to the regulation of the UNIDROIT Principles, as an expression of a balanced, international set of rules, rather than choosing a national governing law. The Principles might be useful for arbitrators, especially if they are deciding a dispute on the basis of the transnational law: rather than having to search for what could constitute international usages of trade, or similar undefined concepts, they could rely on a ready available set of rules. The last ambition of the Principles is to be used by courts or arbitrators instead of the governing law, should the content of the law be impossible or extremely difficult to establish.

f) The Principles of European Contract Law (“PECL”)

The Principles of European Contract Law are drafted by the Commission on European Contract Law, a group of academics established in 1982 under the leadership of the Danish professor Ole Lando. 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

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64 For more details on the Commission on European Contract Law, see [http://web.cbs.dk/departments/law/staff/ol/commission_on_ecl/members.htm](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/](http://web.cbs.dk/departments/law/staff/ol/commission_on_ecl/)
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.

A first step on this path was made in 2000, when the European Parliament called on the Commission of the European Communities to draw up a study on the question of unification of contract law within Europe. As a follow up thereof, the Commission issued the Communication from the Commission to the Council and the European Parliament on European Contract Law. In this Communication, seeking information from all interested parties, including also businesses, legal practitioners, academics and consumer groups, the Commission wished to have a response as to what extent the development of a common European private law is desirable or even necessary to enhance the internal market. Furthermore, the Commission wished to have a response as to what approach would be preferable in the harmonisation of the European private law (if the result of the former mentioned inquiry confirms that such a harmonisation is desirable). The Communication presented a non-exclusive list of four alternative approaches: (i) to leave the solution of any identified problems (due to the diversity in the various state laws) to the market; (ii) to promote the development of non-binding common contract principles; (iii) to review and improve existing EC legislation in the area of contract law, and (iv) to adopt a new instrument at EC level. The Communication made extensive reference to the academic engagement in this area: in addition to the already mentioned PECL, an enlargement of the scope of the PECL is being worked upon by the “Study Group on a European Civil Code”, and a draft of a European contract code (“European Contract Code – Preliminary Draft”) has been published by the Academy of European Private Lawyers, also known as the “Pavia Group”.

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65 Resolution of 16.03.00, OJ C 377, 29.12.00, p. 323. The documents that are referred to in the text, including also the Commission Communication, the Responses to the Communication, the Action Plan, as well as responses to the Action Plan, 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/contlaw/index_en.htm

More than 180 answers arrived to the Communication. The Commission on European Contract Law (which is the author of the PECL), and its successor, the Study Group on a European Civil Code (which is preparing a restatement of the law on specific contract types and other areas of private law not already covered by the PECL) presented a joint response, that is interesting to look at in order to understand the ambitions of the PECL in respect of their function.

The joint response to the Communication argues extensively in favour of harmonisation, showing with a series of illustrations that the state laws of the member states differ from one another, and stating that this difference is a barrier to the completion of the internal market primarily because it hinders businesses from adopting standard conditions of contracts throughout the European Union, and it increases the costs of the transactions and disputes by forcing the operators to assess the law in every single state they operate in. The preferred approach for achieving the desired harmonisation is, according to the Commission and the Study Group, the adoption of a restatement of the law. The Commission and the Study Group seem to propose a semi-legislative status for such restatement, that would put it, in the hierarchy of the sources of law, somewhere between the traditional sources of trans-national law (such as, for example, the Uniform Commercial Code and the UNIDROIT Principles) and binding sources of law. For the achievement of such a semi-legislative status, the Commission and the Group envisage an amendment of the European private international law (which is embodied, in respect of contractual obligations, in the Rome Convention on the Law Applicable to Contractual Obligations of 1980,\(^{67}\) in respect of the other areas of private law, the conflict rules are to be found in the national private international law of the various member states); the long term aim is to render the restatement an “optional legal system”, that the parties can voluntarily choose to govern their relationship, and for doing that they need a conflict rule that permits the parties to make such a choice of law. The choice of such an optional legal system, in the vision of the Commission and the Study Group, would mean the exclusion of any applicability of state laws; the restatement, in other words, would not be an addition to the applicable state law, but a replacement thereof.

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\(^{67}\) It may be mentioned here that the Rome Convention is undergoing a review in connection with its forthcoming transformation into a Regulation. The question of admitting the choice of non-national laws is one of the items that are on the Commission’s agenda, see, for full details on the ongoing process, http://europa.eu.int/comm/justice_home/fsj/civil/applicable_law/fsj_civil_applicable_law_en.htm
On 12.2.2003 the Commission issued an Action Plan on A More Coherent European Contract Law.\textsuperscript{68} The Action Plan assumes that the present sector-based approach of the European regulatory activity shall not be abandoned; therefore, it does not directly endorse the idea of creating a binding European contract law that shall replace the national contract laws \textit{en bloc}. However, the Commission is concerned with the necessity of improving the consistency of the European rules (so called \textit{acquis communitaire}).\textsuperscript{69} The Action Plan mentions a series of measures to be taken in order to enhance such consistency, among others also to examine whether problems in European contract law may require a non sector-specific approach, such as an optional instrument as the one envisaged for the first phase of the PECL. The Action Plan, therefore, has neither endorsed nor rejected the idea of an optional instrument: Should the idea of an optional instrument be actually adopted by the European authorities, it will not necessarily correspond to the PECL, or to their version as we know it today. The developments of this very interesting process may be followed on the European Commission’s homepage on Contract Law Review.\textsuperscript{70}

g) The Vienna Convention on Contracts for the International Sale of Goods (\textquotedblleft CISG	extquotedblright)

The Convention on Contracts for the International Sale of Goods was drafted by the United Nations Commission on International Trade Law (\textquotedblleft UNCITRAL\textquotedblright) and adopted in Vienna in 1980.\textsuperscript{71} 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 (\textquotedblleft ULF\textquotedblright) and to the Uniform Law on the International Sale of Goods (\textquotedblleft ULIS\textquotedblright), 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 legal traditions and economic situation of Western Europe. Western Europe was also the region that had

\textsuperscript{68} COM (2003) 68 final, 12.02.2003
\textsuperscript{69} A working group of law professors from a large number of European universities, that goes under the name of Acquis Group (the full name being European Research Group on Existing EC Private Law) has the purpose of systemising and coordinating the existing European rules. Its homepage is: http://www.acquis-group.org/
\textsuperscript{70} See above, footnote 65.
\textsuperscript{71} 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.
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.\textsuperscript{72}

The Vienna Convention has been signed by 63 parties, and it is looked upon with extreme interest especially in academic circles,\textsuperscript{73} 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 practice\textsuperscript{74} and becomes itself an autonomous body of international regulation that adapts to the changing circumstances independently from the legal systems of the ratifying states.\textsuperscript{75}

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


\textsuperscript{74} Because of the convention’s many references to trade usages.

\textsuperscript{75} 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.
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 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.

h) Transnational and International Instruments as an Expression of Trans-national Law

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 comparison of contract laws 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.

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76 For a full list of the reservations and of the states that have made them see http://www.uncitral.org
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 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

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77 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
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 include both the collections of principles and the CISG as a term of comparison in our forthcoming assessment of the main characteristics of the law of contracts in Common Law-, Civil Law- and trans-national law systems.

The question whether these instruments are actually capable of exhaustively governing an international contract, thus excluding the applicability of national laws, or whether they should be seen as complement rather than a substitution of national laws, is not the subject of this course.⁷⁸

1.4.2 The Object of the Comparison

As we have seen, we will base our comparison on the principles laid down in the Trento manifesto.

a) How the Rules Work

As the third Trento thesis affirms, studying comparative law is not the same as studying one or more foreign laws. Every legal system has its own structure, its own tradition and its own concepts; studying a national law

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⁷⁸ This question is dealt with in the course on International Commercial Law, see my *Lectures on International Commercial Law*, 2003, pp. 54 ff.
with the help of the structure, tradition and concepts of that particular law will help being acquainted with the rules and principles of that law, but will not help understanding the differences and similarities that that law has with other national laws. Systems might have developed different theories and remedies for obtaining similar results; as long as the observer is confined to the explanation of theories and remedies that are made by the relevant system, it will be difficult to acknowledge that the different legal instruments that are being described in so incompatible terms are in reality only different definitions of the same remedy, or different ways of obtaining the same result. Vice versa, systems might adopt the same terminology for legal instruments that have different assumptions or create different results; as long as the observer relies on the terminology that each system is using for describing its own regulation, actual differences may remain concealed. A well-known illustration of the misleading effect that lies in absolute belief in the interpreter’s own legal system is the question of the definition of a contract. In most Civil Law systems a contract is described as the meeting of the parties’ declarations of will to be bound, usually referred to as the exchange of the offer and the acceptance. However, practice has shown that in many situations a contract is entered into even if there has been no exchange of offer and acceptance (for example, because the parties have started to perform without a formalisation of their agreement). Legal doctrine has acknowledged this practice and its contradiction with the doctrinal or codified requirement of the exchange of offer and acceptance. Instead of taking the logical consequence of admitting that this requirement is not absolute, however, doctrinal categories have been elaborated to fit these deviating practices into the requirement of offer and acceptance, still believed to be absolute and correct (so called fictio juris). Therefore, the category of the tacit acceptance, or of the implied expression of will, was elaborated, so that the traditional requirement of exchange of offer and acceptance can still be deemed absolute and valid, in spite of the fact that the law applied in practice does not correspond thereto any more.79

In order to properly compare laws, it is necessary to look beyond the self-description that is made in the compared systems, and to look at how the

79 See SACCO, R., Formation of Contracts, in HARTKAMP. A., et al. (ed.), Towards a European Civil Code, Kluwer Law International, 1998, 99, 194f. In Norway legal doctrine, strongly influenced by German legal doctrine, initially resorted to the same fictio juris described in the text. However, the Norwegian legal system being more interested in practical solutions and specific questions than the German one, it was soon recognised that the operation of stretching the logic to fit reality into an abstract category was not necessary, and the requirement of exchange of offer and acceptance is not considered as absolute any more. See WOXHOLTH, op.cit., p. 94.
respective rules actually work. Being able to appreciate the results of the application of the various legal systems is a situation that gives comparable information.

b) Where the Differences Are

Given our aim of assessing the main differences between the systems named above, it does not seem appropriate to proceed to a comparison by serving parallel descriptions of the law of contracts within each of the analysed systems. These parallel descriptions would, first of all, often repeat for each legal system aspects that are common with the other systems; therefore, it would be necessary afterwards to single out what is peculiar for each of them; otherwise no real comparison would have been carried out. Secondly, parallel descriptions of each legal system would be made using the legal structure and the terminology of the respective systems, thus concealing real differences or similarities behind the use of different expressions or legal concepts or, vice versa, the different use of apparently similar concepts. Therefore, it would be necessary afterwards to single out the real effects of legal expressions or concepts; otherwise no real comparison would have been carried out.

As an alternative to parallel descriptions of the contract law in the various legal systems, we will focus on the specific areas of contract law that present the main differences. The specific areas of the law of contract that present the most significant differences from the point of view of international contracts are the following: formation of contracts, interpretation, reasonableness of the content, good faith in the negotiations and in the performance, liability for non-performance, remedies for non-performance. We will not focus on the validity of contracts as a consequence of pathologic situations such as fraud or duress, because they are relatively marginal in the field of international contracts.

c) The Importance of Technicalities

The last decades’ intensive academic work related to a Code or a Restatement of European private law has brought many authors to neglect
the differences in the regulations presented by the various legal systems, as long as the result of the application of these regulations is equivalent.\textsuperscript{80}

This attitude is justified if the purpose of the comparison is to identify the functional equivalencies that may be the basis of a common European regulation.

If, however, the purpose of the comparison is to get acquainted with the various regulations for the purpose of writing international contracts that may be effective and enforceable in the respective legal systems, then the attitude must be another one. It is not sufficient to know that all legal systems would, in some way or another, have arrived at the same or a similar result. It is indispensable to know in what way that result can be achieved, so that the contract may take into consideration and adapt to the technicalities of the different regulations.

As an illustration we can look at the question of irrevocable offers. As a general rule, an offer is deemed to be revocable under English law, whereas it is irrevocable in the Germanic systems. A deeper knowledge of English law shows that an offer may become irrevocable, if, for example, the parties have provided for a payment (even a nominal payment) by the offeree to the offeror in exchange of the offeror’s commitment not to revoke its offer (so called consideration). If the comparison is meant to supply the basis for a new regulation of offers that shall be common to England and the Germanic systems, it is justified to focus on the functional equivalency of the systems: in all systems an offer may be considered irrevocable. If, however, the comparison is meant to give knowledge of the requirements that have to be met in order to render the irrevocability enforceable in all systems, than it will be necessary to focus on the technical aspects of the regulations.

1.4.3 The Method of the Comparison

We will work on cases that are chosen in order to show the different results at which different regulations can lead. If the case is the same and the solution is different from system to system, this unequivocally means that the law is different. We will then attempt to explain why and in what way the law is different in that particular area. In this way, we will have a

comparison of the different features that the various systems present in specific areas of the law of contracts. A further elaboration of the material will permit an understanding of the different approaches on a higher level of abstraction, highlighting the legal questions that the cases illustrated.

This method has first been applied systematically in the Cornell Studies on the Formation of Contracts, a large scale comparative study lead by Rudolf Schlesinger that started in 1957 and resulted in 1968 in the monumental volume on the Formation of Contracts. The nucleus of these studies was a questionnaire that was elaborated in the course of the project’s first three years. The questionnaire contained questions on factual situations that were formulated in such a way that they could be understood equally by lawyers of different jurisdictions: therefore, the use of legal concepts or technical terms was avoided, to prevent that each lawyer interpreted the concepts or the terms in the light of his own legal tradition. On the basis of the answers to the questionnaire, national reports and, eventually, a general report were produced, meant to compare and elaborate on the data that had been collected.

The factual approach assumed that each contributor communicated the results that would be obtained in his legal system in the various particular cases, not that he explained a doctrinal system. This was criticised by some authors, who accused Schlesinger of applying the method of case law, typical of the Common Law countries, also to legal systems of Civil Law, that do not recognise the same effect to cases and precedents as Common Law systems do. This criticism seems to ignore that each lawyer in answering the questionnaire was meant to apply the sources that are applicable in his own legal system (whether they are judicial cases, statutory rules, doctrinal theories or other sources). Asking the contributors to give solution to cases was a way of highlighting the results of application of each system’s law in accordance with its own principles and traditions, at the same time avoiding the misunderstandings due to different interpretations of concepts and categories.

82 See SACCO, Legal Formants, cit., p.29
The method based on cases is now applied in many systematic comparative projects, such as, among others,\textsuperscript{83} the studies on the Common Core of European Private Law,\textsuperscript{84} that have been ongoing for nearly 10 years and resulted so far into several books on various aspects of private law.\textsuperscript{85}

\textsuperscript{83} For an application of a similar method in the field of maritime law, see the extensive work by SELVIG, E., \textit{The Freight Risk}, in \textit{Arkiv for sjørett}, vol. 7, Oslo, 1978, with a closer description of the method on pp. 26f.

\textsuperscript{84} The Common Core project was launched in 1995; for extensive information on the project and its status, see the homepage at \url{http://www.jus.unitn.it/dsg/common-core/home.html}

2 FORMATION OF CONTRACTS

A contract is a legal instrument that creates, modifies or terminates for the parties thereto rights and obligations towards each other. The legal effects of a contract are determined by the law that governs it, and so is also the question whether there is a contract at all. There are considerable differences in the approach to formation of contracts in the systems that we are comparing, and to appreciate the differences it is necessary to split the question of formation into several sub-questions.

The first aspect to be analysed is the question how can a contract be concluded. An agreement may be contained in a written document regulating in detail the relationship between the parties, with signature of both parties. In this case, the appearance is that a contract has been concluded between the parties. The contract could, however, be invalid, because of incapacity of one of the parties, because the contract was concluded under duress or undue influence, because one of the parties was under an essential mistake, or because the object of the contract is illegal. We will not examine these factors that defeat contractual liability, because they have only a marginal significance in respect of international contracts. We will, however, examine other factors that might affect the existence of a contract even if the agreement between the parties is contained in a written and signed instrument, since they are peculiar only to some of the analysed systems: the consideration (in English law) and the causa (in Italian law).

Contracts are, however, not always contained in written and signed instruments. The traditional way to conclude a contract is by the parties exchanging an offer and an acceptance, and this method is recognised and regulated in all analysed systems. However, there may be different approaches to the legal effects of an offer, as well as to the legal effects of an acceptance that does not completely conform to the offer.

The exchange of offer and acceptance is not the only alternative to the written instrument signed by the parties. The parties may by their conduct create the impression that they consider a contract as concluded. This is particularly interesting in the eventuality that the parties have been carrying out detailed negotiations on a certain relationship: are the negotiations a sufficient basis for a contract to be deemed concluded, or is it necessary to
formalise the contract with the written instrument and the signatures? If the negotiations have been very detailed, a party may have started to rely on the prospect that a contract would be concluded and might have, for example, disclosed sensitive information to the other party or might have declined to initiate competing negotiations with other parties. The extent to which negotiations may be basis for obligations between the parties is treated in different ways in the analysed systems. In the context of formation of contracts, we will look at the extent to which negotiations between the parties may be a basis for deeming the contract concluded. Other obligations that may arise between the parties during the negotiations, such as the obligation to disclose information that may affect the other party’s evaluation of the transaction, will be examined under the heading of good faith, in chapter 5 below.

2.1 Cases

The questions mentioned above may be illustrated by some cases that will help specifying the implications of the relevant aspects. We will first present the cases, we will then see how the cases would be solved in the respective systems that we are comparing, and finally we will see how the various solutions were reached, by presenting an outline of the regulation of formation of contracts in each of the analysed systems. A comparison of the examined aspects will be made in the conclusion.

2.1.1 Written Amendment to an Existing Contract

We can assume that a constructor and a sub-contractor have entered into a contract for the installation by the sub-contractor of a certain infrastructure on the site where the constructor is carrying out its building activity. The installation contract contains all details of the infrastructure that has to be installed, and specifies the price to be paid by the constructor.

After a certain time, the sub-contractor realises that its estimate of the work necessary for the installation had not been accurate, and that the agreed price would correspond to the costs and expenses that the sub-contractor would incur in the course of the installation, without leaving any margin of profit for the sub-contractor. The sub-contractor explains the situation to the constructor and requires that the installation contract is amended by
increasing the price. The constructor is interested in avoiding any delays in the installation of the infrastructure and agrees to increase the price. The parties enter into a written contract for the amendment of the installation contract; the only amendment that is made is that the price is increased.

Shortly thereafter the constructor finds another party who would be able to install a similar infrastructure in a shorter time and for a price not much higher than the price that was originally agreed with the sub-contractor. The constructor wishes to revoke the amendment that increased the price.

The question that arises here is whether the contract that was entered into for increasing the price is binding, or whether the constructor has some possibility to avoid its enforcement.

2.1.2 Irrevocable Offer

We can assume that a constructor desires to participate in a tender for the construction of an energy production plant. For the purpose of developing its bid, the constructor requires a sub-contractor to specify in an irrevocable offer the terms and conditions at which the sub-contractor would be able to supply certain material to the constructor. The sub-contractor sends an offer to the constructor, specifying the quality, quantity, delivery time, delivery place, price for the delivery, details for payment, etc.; the offer contains also a clause saying that the offer is binding on the sub-contractor and cannot be revoked before a specific date after the tender procedure is concluded.

The constructor presents its bid, which is also based on the sub-contractor’s offer, and is awarded the construction contract. Having been awarded the contract, the constructor is about to accept the sub-contractor’s offer, but finds out that the offer has been revoked by the sub-contractor. In spite of the circumstance that the term that had been fixed in the offer had not yet elapsed, the sub-contractor revoked the offer, after having calculated more accurately and having found that the conditions contained in the offer were not sufficiently profitable.

The question that arises here is whether the sub-contractor (the offeror) has the possibility to revoke its offer, even if it had stated that the offer could not be revoked before a certain date.
2.1.3 Modified Acceptance

We can assume that a seller desires to sell, and a buyer desires to purchase, certain goods. The parties agree on the phone on quality, volume, price, delivery time and delivery place, and they agree also to exchange written confirmation of the details. The seller sends a confirmation of the terms that had been agreed on the phone, specifying that the goods are to be shipped on a ship chosen at the seller’s discretion. The buyer sends an acceptance of such confirmation, but requests that the ship is of a certain nationality.

The seller does not reply to the buyer’s acceptance. When the time arrives for the shipment, the seller has shortage of those goods and decides to consider the contract as not concluded, due to the circumstance that the acceptance was not in conformity with the offer.

The question that arises here is whether the contract has come into existence, in spite of the non-conforming acceptance.

2.1.4 Battle of the Forms

We can assume that a seller desires to sell, and the buyer desires to purchase, a certain volume of goods. The parties agree on the phone on the quality, volume and price, but say nothing on the delivery place and other modalities of the delivery. The seller transmits shortly thereafter a confirmation of the deal on its pre-printed general conditions of sale which provide, among other things, that the seller is not liable for delays due to peaks in the market. The buyer answers by confirming the deal on its own pre-printed general conditions of purchase which provide, among other things, that the only circumstance that may limit the seller’s liability for delays is force majeure. The delivery time is equal in both confirmations.

When the delivery time arrives, the seller does not have the whole volume of goods available. The demand for those goods had increased considerably in that period, and the production capacity of the seller was not sufficient to meet all requests. The seller takes contact with the buyer and advises it that a delivery could be possible after a two weeks period. The buyer invokes the
liability limitation contained in the general conditions of purchase, and claims that the seller shall reimburse the damages that are caused by the delay. The seller states that there was no binding contract between the parties; however, should a contract be deemed to exist, the seller invokes the liability limitation contained in the general conditions of sale.

The question that arises here is whether the contract between the parties has been concluded, and in what terms.

2.1.5 Break-off of Negotiations

We can assume that a car producer and a component producer start negotiations for the joint production a new car-structure. The parties identify the plant where the production may take place, and start discussing the conditions upon which the plant could be jointly purchased; they discuss how the technical design of the production may be organised, and start discussing how the existing personnel of both parties could contribute according to their skills, they discuss how the funding of the production may be organised, and how the profits may be split between the parties. These detailed negotiations are carried out through a period of several months, each matter being negotiated by two teams of experts in the relevant areas, representing each of the parties; the results to which the teams arrive in the respective discussions are meant to be noted down in so called memoranda of understanding. The intention of the parties is to gather as many memoranda of understanding as possible and to present them to the respective legal departments so that they can be transformed into a contract, to be signed by the management of the companies.

Shortly before the work towards the first memorandum of understanding is started, the car producer is approached by another component producer, which proposes a similar co-operation but at terms that the car producer considers more favourable than the terms that are discussed with the first component producer. Without informing the first component producer, and without affecting the negotiations with it, the car producer starts parallel negotiations with the second component producer. These negotiations proceed smoothly, and before the last memorandum of understanding with the first component producer is finalised, the car producer and the second component producer decide to enter into an agreement that provides for
exclusive negotiations between the two parties for a period of three months. The parties intend to finalise the co-operation contract within this term. As a consequence thereof, the car producer breaks off the negotiations with the first component producer.

The question that arises here is whether the car producer is entitled to break off the negotiations with the first component producer, since no final contract had been concluded between the two parties, or whether the circumstance that the parties were engaged in so detailed negotiations has created some obligations in this respect.

2.2 Partially Common Goals

The systems of law that we are comparing here have some fundamental principles in common, when it comes to formation of contracts: they all presuppose that a contract reflects the meeting of the will of (at least) two parties to regulate their respective and mutual interests at certain conditions. They also recognise that a contract may be deemed existing even if there has been no expressed meeting of the intentions, as acceptance may be implied by conduct.

Beyond these common features, however, the various systems that we are analysing have different goals in their regulation of formation of contracts. Some systems may wish to protect the interests of a party that may have had a legitimate reliance on the conduct of the other party, even in the absence of a formal contract. Other systems may wish to enhance the freedom that the parties enjoy to arrange their interests as they deem fit. In the former approach, the systems will provide for rules that ensure that good faith and fair dealing are followed by the parties; in the latter approach, they will set clear and formal requirements that must be met in order for a contract to be considered established. The different approaches will become evident when we look at the solutions that the described cases would have in the various systems.

2.3 Different Solutions
The cases described in paragraph 2.1 above would be decided differently in some of the compared systems, as we will see below.

2.3.1 Written Amendment to an Existing Contract

If the case of the amendment to an existing contract was decided under English law, the amendment would not be considered as a valid contract.

In all other analysed systems, the amendment would be considered as a binding contract.

2.3.2 Irrevocable Offer

If the case of the revoked offer was decided under English law, the revocation of the offer would be considered effective.

In all other analysed systems, the offer would have been considered binding until the fixed term has expired.

2.3.3 Modified Acceptance

In the case of acceptance that is not in conformity with the offer, Norwegian (with some reservations), Italian and English law would have deemed that no contract has come into existence.

German law, the CISG, the UNIDROIT Principles and the PECL would have considered the contract as concluded.

2.3.4 Battle of the Forms

In the case of non-conforming general conditions, Norwegian law (with some reservations), Italian and English law, as well as the CISG, would have deemed that the contract has not come into existence. However, had the seller started carrying out the delivery, the contract would be considered as concluded, and the buyer would be able to invoke the liability clause in its general conditions of purchase.
German law, the UNIDROIT Principles and the PECL would have deemed the contract as concluded, and neither the seller nor the buyer would be able to invoke the liability clauses contained in their respective general conditions.

2.3.5 Break-off of Negotiations

In the case of break-off of negotiations, the party that has relied on negotiations would be entitled to claim damages if the case was decided under Norwegian, German and Italian law, or under the UNIDROIT Principles and the PECL.

If the case was decided under English law or the CISG, the party that has relied on negotiations would not have any legal remedy to exercise against the party breaking off the negotiations.

2.4 How the Respective Solutions are Reached

As we have seen above, the cases would be decided differently in the various systems. To explain how the various solutions are reached, we will go through a short outline of the main features peculiar to each of the compared systems.

2.4.1 Norway

Under Norwegian law formation of contracts is regulated partially in the Act on Formation of Contracts, and partially by judicial practice. The Act on Formation of Contracts provides for the classical conclusion of contracts, i.e. the exchange of an offer and an acceptance (§§ 1 to 9). A contract is deemed concluded when the offer is accepted; the only requirement is that the acceptance must conform to the offer. There are no form requirements: therefore, as a general rule, a contract does not need to be concluded in writing in order to come to existence. On the basis of this approach, we can understand why the case contemplating an amendment agreement increasing the price of an existing contract described in paragraph 2.1.1 above would be decided in favour of the existence of the amendment agreement: as long as the parties have agreed on a certain regulation of their interests, and as long
as there are no invalidity grounds such as fraud or duress (but we have defined these invalidity grounds as outside of the scope of our analysis), the contract must be considered as binding on the parties.

In the eventuality that the offer and the acceptance are not exchanged simultaneously, the offer is binding on the offeror from the moment in which the offeree has obtained knowledge thereof (§§ 5 and 7 Act on the Formation of Contracts). An offer is deemed to be binding even if that is not specified directly or indirectly: it is, therefore, not necessary that the offer contains a term within which it must be accepted, in order for the offer to be binding. This explains why the case regarding the revocation of the offer (paragraph 2.1.2) above would be decided in favour of the offeree.

As we have seen, the general rule on the exchange of offer and acceptance as a basis for the conclusion of a contract assumes that the acceptance must conform to the offer (so called “mirror image rule”). However, § 6 Act on the Formation of Contracts contains a restriction to this rule, which assumes a complicated psychological test in respect of each of the parties. Provided that the offeree believed, in sending a differing acceptance, that the acceptance was conforming, and provided that the offeror understood this circumstance, the contract is deemed concluded on the basis of the terms contained in the differing acceptance. If the offeror desires to avoid this result, it must promptly notify the offeree that the acceptance is not in conformity with the offer, in which case the acceptance will be considered as a counter-offer, according to the general rule of the first paragraph in § 6. On the basis of this approach, it is possible to understand how the case regarding the modified acceptance (paragraph 2.1.3 above) would probably be decided against the conclusion of the contract: this decision is in line with the general rule that an acceptance must conform to the offer, and there seems to be little ground to deem the requirements of the awareness as met in this particular situation.

The same mirror image rule seems to apply also to the eventuality that each of the offer and acceptance made reference to the general conditions of the respective party (the so called “battle of the forms”), since Norwegian law does not contain a specific rule in this respect. Therefore, the case

86 WOXHOLTH, op.cit., pp. 207 ff., considers it as not completely clear that the rule of § 6 Act on Formation of Contracts would be applicable in this respect, in view of the large variety of solutions that other systems of law have given to the question of battle of the forms. He does not propose a specific
regarding the battle of the form (paragraph 2.1.4) above would probably be decided against the existence of the contract. However, if the seller had started to perform its obligations, its conduct would have been considered as an implied acceptance of the buyer’s counter-offer. Therefore, the liability clause contained in the buyer’s general conditions of purchase would be applicable (so called “last shot” theory, according to which the battle of the forms is won by the party who sent its conditions latest).

Norwegian law recognises other ways to conclude contracts, beyond the statutory regulated exchange of offer and acceptance, and the conclusive conduct as regulated in judicial practice. Particularly in the eventuality of negotiations between the parties, the legal system provides for a general duty of loyalty and good faith that can result in liability if it is breached, and it can even result in the parties being bound by the contract that they were negotiating. One expression of the duty of loyalty that arises between negotiating parties is that negotiations have to be carried out seriously and with the aim of reaching a mutually agreeable result. This does not mean that a party is bound to conclude a contract whenever it starts negotiations, but it means that a party may not start or continue negotiations with another party if it does not contemplate that the negotiations may result in a contract (for example, a party that negotiates with the only purpose of obtaining confidential information from the other party). Similarly, a party may not break off negotiations for reasons that are not connected with the progress of the negotiations, without incurring in liability towards the other party. The case regarding the break-off of negotiations (paragraph 2.1.5 above) would be a situation that falls within the duty of loyalty as described herein.

Under some circumstances Norwegian judicial practice has even gone so far that it has considered the contract between the negotiating parties as concluded, if the parties had agreed in principle on the main terms of the contract and were still negotiating on other, less material terms. As a general rule, the execution of a final contract is not deemed to be a condition for the coming into existence of the contract. The Norwegian Supreme Court has

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87 There are several Supreme Court decisions that consider a contract as concluded on the basis of the circumstance that the parties have started performance thereof: see Rt. 1978 s.702, Rt. 1981 s. 595, Rt. 1987 s. 1205.


89 Rt. 1998 s. 946.
deemed a contract as concluded in spite of the absence of a formal contract; these decisions are, mainly, taken on the basis of a thorough evaluation of all the circumstances of the case, so that it is difficult to induce from the court’s reasoning firm criteria that can have general application.\footnote{For an extensive analysis of the matter and reference to judicial practice see WOXHOLTH, op.cit., pp. 150 ff. and HOV, op.cit., pp. 118ff.}

2.4.2 Germany

Also under German statutory law the formation of contract is primarily regulated in respect of the exchange of offer and acceptance (§§145 ff. of the German Civil Law Book, Bürgerliches Gesetzbuch, “BGB”). As a general rule, and similar to Norwegian law, there are no further requirements for the coming into existence of a contract, which explains why the case regarding the amendment of a contract (paragraph 2.1.1) would be decided in favour of the existence of the contract.

Also under German law the offer is binding on the offeror, as long as it is sufficiently detailed to be a basis for a binding contract if accepted (§ 145 BGB); the offer becomes binding when it has reached the knowledge of the offeree (§130 BGB). However, the offeror may exclude this effect, by expressly excluding the irrevocability of the offer (§ 145 BGB, second paragraph). Based on this regime, the case regarding the revocation of the offer (paragraph 2.1.2 above) would be decided in favour of the offeree.

Also under German law, as under Norwegian law, an acceptance has to conform to the offer, otherwise it would be considered as a rejection of the offer and a counter-offer (§ 150 BGB). However, German law contains a rule according to which a contract may be deemed concluded to the extent the acceptance was in conformity with the offer, while the part of the acceptance which differs from the offer may be deemed to be a counter-offer. This assumes, however, that the parties may be expected to have had interest in concluding the contract even without the provision upon which no agreement was reached (§ 155 BGB). In the case regarding the modified acceptance (paragraph 2.1.3 above), therefore, the contract would be considered as concluded, as long as the identity of the ship is not an essential term of the contract (if it was essential, the contract could not come into existence without an agreement thereon), and as long as the identity of the ship does not affect the interest of the parties in the transaction. The buyer’s
counter-offer on the identity of the ship would not be automatically considered as accepted if the seller has not replied to the counter-offer; judicial practice has stated that the seller’s silence is to be deemed an acceptance of the counter-offer if the buyer’s acceptance was delayed (and therefore to be considered as a counter-offer according to § 150(1) BGB), as long as the buyer’s acceptance was in conformity with the seller’s offer. If the acceptance is not in conformity, however, there is no automatic legal effect in the seller’s silence, which may be considered as an acceptance of the counter-offer if other circumstances of the case so indicate (for example, conclusive conduct if the seller starts performing the contract).  

If the offer and the acceptance make reference to the parties’ respective general conditions, German law would qualify the situation as an “open lack of agreement” (“offener Einigungsmangel”) which, in case of doubts on the existence of the agreement, excludes that a contract has been concluded (§ 154 BGB). However, if the conclusive conduct of the parties or other circumstances excludes doubt on the existence of the agreement, judicial practice has developed the so called “knock out theory”, according to which a contract is deemed concluded on the agreed points and at the conditions that are compatible with each other. The general conditions that differ from each other knock each other out, so that none of them will be applicable. In the case regarding the battle of the forms (paragraph 2.1.4 above), the question is whether the silence of the seller and its notice that the delivery would be delayed may be deemed to be a conclusive conduct that implies agreement on the main aspects of the transaction. If they may, then the contract is deemed concluded, however, without any of the liability clauses contained in the parties’ respective general conditions. The liability of the seller would have to be evaluated on the basis of the governing law.

German law does not consider a contract as concluded, as long as the parties have not reached an agreement on all the points that were the object of negotiations; in the eventuality of doubt on the conclusion of a contract in such a situation, the contract shall be deemed not to have come into existence (§ 154 (1)). A contract shall also not be deemed as concluded, if the parties had contemplated that the final agreement should be contained in a formal document (§ 154 (2)). Under German law, therefore, it seems to be more difficult than under Norwegian law to deem a contract as concluded on

91 BGH NJW 1995, 1671
92 BGH NJW 1985, 1838, BGH NJW 1991 1606
the basis of negotiations that have been carried on between the parties. However, also German law, like Norwegian law, provides that the simple fact that parties are negotiating creates certain obligations to each other. The theory of the *culpa in contrahendo*, or precontractual liability, largely developed by judicial practice, is, after the recent reform, codified in § 311(2) BGB, providing that the simple fact that the parties initiate negotiations creates duties of loyalty as described in § 241(2) BGB. Of particular interest here is the duty to conduct negotiations in good faith, which also covers the duty not to break off negotiations for reasons not related to the progress of the negotiations, as long as the other party was under the legitimate expectations that the negotiations would be continued with the purpose of concluding a contract. This explains why the case regarding the break-off of negotiations, described above in paragraph 2.1.5, would be decided in favour of the party that had relied on the negotiations.

2.4.3 Italy

Italian law sets forth in article 1325 Civil Law Book (Codice Civile, or “CC”) a list of four requirements that have to be met in order for a contract to be considered as binding: the agreement between the parties, the *causa*, the object and, to the extent it is requested for specific contracts, the form.

The requirement of the written form regards mainly contracts relating to real estate (articles 1350 ff. Codice Civile).

The object of a contract must be, according to article 1346 Codice Civile, possible, legal, determined or determinable.

The requirement of the *causa* has been the object of complicated doctrinal analysis but can be said, for practical purposes, to correspond to the social-economic function of the contract. Article 1343 Codice Civile states that the *causa* of a contract has to be legal, i.e. it must not violate mandatory rules of law or the public policy. That a contract must not be illegal or against public policy in order to enjoy the protection and enforcement by the legal system, however, is not a peculiarity of Italian law. Even if the other analysed systems do not list the *causa* as an essential element of the contract, therefore, the result of the regulations does not differ substantially

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in this respect, and the additional criterion listed in Italian law does in reality not add a new prerequisite to the list of factors that must be in place for a contract to come in existence.\footnote{On the decline of causa, also defined as a "conceptual hippogriff", see ZIMMERMANN, The Law of Obligations, cit., p. 553.}

The agreement of the parties is regulated extensively in articles 1326 to 1342 Codice Civile. Also Italian law, like Norwegian and German law, contemplates the agreement as an exchange of offer and acceptance.

On the basis of the above mentioned four factors that are essential to the formation of a contract, it results that the amendment contract described in paragraph 2.1.1 above would be considered as binding under Italian law.

As opposed to Norwegian and German law, the general rule for an offer is that it can be revoked until the contract is concluded (article 1328 Codice Civile); however, article 1329 states that, if an offer specifies that it is meant to be irrevocable for a determined period, it will be binding on the offeror. On the basis of this last rule, therefore, the case described in paragraph 2.1.2 above regarding the revocation of the offer would be decided in the same way as under Norwegian or German law.

Also Italian law, like Norwegian and German law, contains the rule according to which the acceptance must conform to the offer; a differing acceptance would be seen as a counter-offer (article 1326 Codice Civile). The so called mirror image rule is applied strictly by Italian courts, and it applies even if the modifications contained in the acceptance are of minor importance.\footnote{C. 93/77} As long as the modified acceptance (counter-offer) is not accepted, therefore, the contract will not be deemed come into existence, not even for the elements upon which the parties have agreed. The acceptance of the counter-offer may be made also tacitly, by conclusive conduct;\footnote{C. 85/1738} but silence cannot be interpreted as acceptance (not even if the acceptance conforms to the offer, but is deemed to be a counter-offer because it is made after the term that was fixed for acceptance: article 1326(2)). On the basis of the strict application of the mirror image rule, therefore, we understand that in the cases described in paragraphs 2.1.3 (modified acceptance) and 2.1.4 (battle of the forms) above Italian law considers the contract as not concluded. Had the seller started performance, it would have been...
considered as an acceptance of the buyer’s counter-offer, therefore the buyer’s general conditions of purchase would be applicable (last shot rule).

Also Italian law, like Norwegian and German laws, contains a rule that obliges the parties to act in good faith during the negotiations of a contract (article 1337 Codice Civile). One of the duties that arise in this connection is not to create unjustified expectations in the other party. Breach of this duty would be to break off negotiations without justification after having created in the other party a reasonable expectation that the contract will be concluded, but also to continue negotiations without advising the other party that the prospects of concluding a contract are not high. This explains why, in the case described in paragraph 2.1.5 above (break-off of negotiations), Italian law would deem the car producer liable for reimbursement of damages.

2.4.4 England

English law considers a contract as concluded when there has been an exchange of offer and acceptance, as do the statutory rules in the systems that we have already analysed. However, English law has a further requirement for the coming into existence of a contract, which is not known in the other analysed systems: the requirement of the consideration.

The consideration is an essential requirement of contracts in English law, and can be shortly described as the necessity that the contract obliges both parties creating reciprocal benefits and detriments. In the absence of the mutual benefit and detriment, the contract would be seen as a unilateral promise that gives benefit only to the promisee and detriment only to the promisor, and this would render the contract unenforceable. In most typical contracts the consideration is identified with the price: in a sale agreement, for example, the seller promises to sell the thing (thereby creating for itself the detriment of depriving itself of the thing, and the benefit for the buyer of conveying it the thing), and the buyer promises to pay the price (thereby

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97 C. 97/11394. For an extensive analysis of this matter’s development in legal doctrine and judicial practice, with further references, see SACCO, R., DE NOVA, G., Il contratto, Torino 2004, pp. 236ff.
98 The consideration has a common origin with the causa that we met in Italian law, as they both descend from the doctrinal elaboration of Roman law: see ZIMMERAMNN, The Law of Obligations, cit., pp. 554ff. While the criterion has lost most of its substantial significance in Italian law, it survives and is still central in the English law of contracts.
creating for itself the detriment of paying the price, and for the seller the benefit of transferring it the money).  

In the case of renegotiation of a contract and subsequent amendment of the price, the amendment agreement would result in a promise by one party to pay an increased price, and in the promise by the other party to perform its contractual duty. This latter promise, however, is not deemed to be a sufficient consideration under English law, since the fulfilment of the existing contract is something that the other party already was entitled to according to the original contract. Therefore, and amendment agreement like the one described in paragraph 2.1.1 above would be considered as lacking consideration, and English law would not enforce it.

The requirement of consideration has consequences that may seem unjustified, as in the case just mentioned, and legal doctrine criticises it for that.  

A step towards mitigation of the doctrine has been done in connection with the recognition that a benefit or a detriment may be merely practical: for example, promise by one party to perform its contractual obligations might be of practical benefit to the other party because it would save the time and trouble connected with replacing the performance, etc. However, the impact of this step is deemed to be quite uncertain in English legal doctrine.

Another significant mitigation of the rule of consideration is the remedy of the promissory estoppel. The promissory estoppel is a so called equitable remedy, i.e. a legal instrument that has been developed in the system of justice peculiar to English law which is called Equity and was originally administrated by the Court of Chancery. The purpose of developing equitable remedies was to mitigate the consequences of the strict application of the law that was made by the Courts. The result is today that English law consist of two bodies: the body of law, which gives the parties formal rights on the basis of statutory law or of Common Law, and the body of equity, which gives remedies that, under precise, definite and limited circumstances, prevent one party from exercising the formal rights that it has at law. The

99 The doctrine of consideration is very extensive and has various rules, such as that the consideration needs not being adequate, but it must be real. For an extensive analysis of the various aspects of the doctrine, as well as reference to judicial practice, see ANSON, BEATSON, J., Anson’s Law of Contract, Oxford 2002, pp. 88ff. and TREITEL, G.H., The Law of Contract, 11th ed., London 2003, pp. 67ff.

100 ANSON, op.cit., p.110, and, to a lesser extent, TREITEL, op.cit., pp. 160f.

101 Williams v. Roffey Bros. & Nicholls (Contractors) Ltd. [1991] 1 Q.B. 1

102 ANSON, op.cit., pp. 107 f.
promissory estoppel can, under certain circumstances, prevent a promisor from going back on its promise, even if the promise was given without consideration and is therefore not enforceable at Common Law. The criteria that would have to be met are: that the promise is clear and unequivocal, that it must be inequitable for the promisor to go back on the promise, and that the promisee must have altered its position in reliance on the promise made.\textsuperscript{103} The effects of the estoppel would, however, only be suspensive, and the promisor would be able, by giving notice, to go back on the original terms of the contract.\textsuperscript{104}

The description of the requirements for a promissory estoppel shows that this remedy would not be available in the case regarding the amendment of the contract described in paragraph 2.1.1 above: the first requirement of clarity is met, but the remaining two are not.

Where the offer and the acceptance are not exchanged simultaneously, English law regulates, like Italian law, that the offer may be revoked until it is accepted.\textsuperscript{105} Unlike Italian law, however, the simple specification in the offer that it is irrevocable for a certain period is not sufficient to render the offer irrevocable: it is necessary to have a consideration, otherwise the promise to keep the offer firm is not enforceable.\textsuperscript{106} This explains why English law would decide the case regarding the revocation of the offer described in paragraph 2.1.2 above in favour of the revocability of the offer. The above mentioned equitable remedy of the promissory estoppel would not be available in this case, because English law admits it only for the eventuality that contractual rights have arisen between the parties. In the case of an offer, however, no contract has been entered into, therefore no contractual rights have arisen, and the promissory estoppel is not admitted as a remedy.\textsuperscript{107}

English law, like the other systems that we have examined, assumes that the acceptance must conform to the offer, in order for a contract to come into existence. An acceptance that introduces new terms is considered as a rejection of the offer and as a counter-offer.\textsuperscript{108} This explains why the case

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\textsuperscript{103} Ivi, pp. 114 ff.
\textsuperscript{104} Ivi, pp. 117f.
\textsuperscript{105} Great Northern railway Co v. Witham (1873)L.R.9C.P.16
\textsuperscript{106} Offord v. Davies (1862) 12 C.B.N.S. 748
\textsuperscript{107} ANSON, op.cit., pp. 118f.
\textsuperscript{108} Jones v. Daniel [1894] 2 Ch. 332
\end{flushright}
regarding the modified acceptance described in paragraph 2.1.3 above would be decided against the existence of a contract.

The mirror image rule is applicable also in the eventuality of battle of the forms. In spite of the suggestion to abandon the strict application of the mirror rule and the consequent last shot rule in case of conclusive conduct by the parties, it seems that judicial practice is rather reluctant to assume an innovative approach. This explains why the case regarding the battle of the forms described in paragraph 2.1.4 above would be decided against the existence of the contract.

English law does not recognise any duty of good faith or of loyalty as a consequence of negotiations between the parties. Until a contract is concluded, the parties are free to act as they deem fit, and they are not requested to take into consideration the interest of the other party in any way, as long as they do not make fraudulent misrepresentations. Therefore, the case regarding the break-off of negotiations described in paragraph 2.1.5 above would be decided in favour of the party breaking off the negotiations.

2.4.5 CISG

Formation of contracts is regulated in part II of the CISG; the applicability of part II of the convention may be excluded by a ratifying state according to article 92 of the convention, and it might be of interest here to notice that all the Scandinavian countries (and only those countries) resolved to make use of this possibility and opted out of part II of the CISG.

The CISG is an attempt to create a uniform law that is not adhering totally to the Civil Law or the Common Law tradition; therefore, often it will be possible to see that the regulation contained in the convention attempts to

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109 In Butler Machine Tool Co. Ltd. v. Ex-Cell-O Corporation (England) Ltd [1979] 1 W.L.R. 401 Lord Denning pleaded for an approach that was more based on the evaluation of all the terms that the parties actually had agreed upon, not substantially different from the knock out theory adopted by German courts. The majority of the Court of Appeal, however, applied the mirror image and the last shot rules.

110 ANSON, op.cit., 236ff.

111 The status of the convention, with reference to all reservations made by the various contracting states, may be seen at the homepage of UNCITRAL: http://www.uncitral.org/en-index.htm. The Scandinavian countries’ reservation against part II has been criticised as poorly founded and as having narrower effects than it could be expected: see LOOKOFSKY, J., Alive and well in Scandinavia: CISG Part II, in 18 Journal of Law and Commerce 1999, 289 ff.
bridge gaps between the two traditions, or proposes completely new solutions.

In respect of formation of contracts, the CISG adopts the classical model of the exchange of offer and acceptance and does not require further elements such as form, consideration or *causa* (article 23). An article addresses even the matter of amendment of contracts (directly solving the case described above in paragraph 2.1.1), and specifies that a contract may be amended by the mere agreement of the parties (article 29(1)). This specification is necessary to avoid that the requirement of consideration (even if it is not listed in the CISG as a requisite of formation) is applied in Common Law countries to consider a contract governed by the CISG as invalid. In the absence of article 29(1), article 4(a) would permit this indirect use of the consideration, since it leaves questions of validity of contracts to the domestic law.

In the eventuality that the offer and acceptance are not exchanged simultaneously, article 16(1) adopts the Common Law approach, and states that an offer may be revoked until it has been accepted. However, the next paragraph of article 16 restricts this rule, reaching results that are similar to those of the Civil Law systems: an offer is irrevocable, notwithstanding the general rule in the first paragraph, if it indicates that it is irrevocable or if the other party has reasonably acted on reliance that the offer was irrevocable. The case described above in paragraph 2.1.2, therefore, would be decided on the basis of article 16(2), in favour of the irrevocability of the offer.

Also the CISG contains the mirror image rule, according to which an acceptance that modifies the offer is seen as a rejection of the offer and a counter-offer (article 19(1). The CISG contains an innovative rule in this respect in article 19(2) which is, however, restricted in its scope by article 19(3). The second paragraph of article 19 says that an offer is deemed accepted in spite of additional or different terms (unless the offeror objects to the discrepancies), if the additional or different terms do not materially alter the terms of the offer. In the case of acceptance that contains immaterial modifications to the offer, the contract is deemed concluded on the basis of the terms contained in the acceptance. The rule of article 19(2), therefore, puts on the offeror the burden of objecting to the modified terms; according to the mirror image rule in its strict sense, the offeror would have had the burden of accepting the modified acceptance.
If the offeror proceeds to performing the contract without reacting to the modifying acceptance, the result is the same under the rule of article 19(2) and under the strict mirror image rule: the contract is deemed concluded (article 18(1)) on the basis of the terms contained in the acceptance.

The requirement for the applicability of article 19(2) is that the modified terms must not materially alter the terms of the offer. Paragraph 3 illustrates, with a non-exhaustive list, what terms would be considered to alter materially the offer, and refers to terms relating to the price, payment, quality and quantity of the goods, place and time of delivery, extent of one party’s liability to the other or the settlement of disputes. There are, therefore, few terms that may be deemed as immaterial under this rule; the identity of the ship, as in the case described in paragraph 2.1.3 above, would be a term that does not material alter the terms of the offer, which would lead to a decision in favour of the existence of the contract.

The CISG does not contain specific rules for contracts entered into by reference to general conditions. Therefore, article 19 applies also to the scenario of the battle of the forms. As seen, article 19(2) would result in a decision in favour of the conclusion of the contract, and the contract would be based on the terms contained in the acceptance (so-called last shot rule). Application of article 19(2), however, assumes that the modified terms are not material. In the case of battle of the forms where one of the modified terms is material, as in the case of liability clause as described in paragraph 2.1.4 above, the acceptance would have to be considered as a counter-offer. If the seller has not started to perform the contract, therefore, the contract may not be deemed as concluded. If the seller had started performing the contract, the counter-offer would be deemed accepted (article 18(1)), and the terms of the contract would be those contained therein (last shot rule).

The CISG does not contemplate other ways of concluding contracts than the exchange of offer and acceptance, and it does not regulate the question of pre-contractual liability. The legal effects of the behaviour of the parties under negotiations (if any), therefore, are left to the domestic law that might govern the contract in addition to the CISG.112 However, as we have already pointed out, the CISG, in its quality as the first and major uniform law on

112 For 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
international contracts, is looked upon as a source of inspiration for what can be deemed as international acknowledged principles in the field of commercial law, and is often referred to as a source of the *lex mercatoria*. Therefore, it may be of significance to enquire the approach that CISG has to such an important question as the legal effects of negotiations between the parties. It might, therefore, be of interest to mention that the matter of pre-contractual liability is not absent from the CISG because it has been overlooked; during the legislative works, specific proposals on pre-contractual liability were presented, 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.\(^{113}\) 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 exclusion of good faith as a source of legal obligations from the CISG seems to indicate, therefore, that the case regarding the break-off of negotiations described in paragraph 2.1.5 above would be decided against the liability of the party breaking off the negotiations if it was decided under the *lex mercatoria* as expressed in the CISG.

### 2.4.6 UNIDROIT Principles

The UNIDROIT Principles regulate the matter of formation of contracts in a way similar to the CISG in many respects, therefore there is no need to describe these aspects in detail, and reference can be made to the comments made on the corresponding rules of the CISG. The rules that are common to the UNIDROIT Principles and the CISG are as follows:

A contract may be concluded, modified or terminated by the mere agreement of the parties (article 3.2), without any requirement of form, consideration or *causa*; the offer may be revoked until the contract is concluded (article 2.4(1)), unless it indicates that it is firm or the offeree has relied on it as

\(^{113}\) *Ivi*, 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.
irrevocable (article 2.4(2)); an acceptance that differs from the offer is deemed to be a counter-offer, unless the additions or modifications do not materially alter the terms of the offer (article 2.11). It must be noted, in this context, that the UNIDROIT Principles do not contain a rule corresponding to article 19(3) CISG, setting forth a list of terms that are considered as material.

The Principles contain, unlike the CISG, a specific rule for the battle of the forms, that is based on the knock out theory (as opposed to the general rule of articles 18 and 19 CISG, that would lead to application of the last shot rule). Article 2.22 states that, in case of offer and acceptance each making reference to a different set of general conditions, the contract is deemed concluded on the basis of the agreed terms and of any general conditions that might be common in substance (unless one party promptly rejects that the contract has been concluded). The rule contained in the Principles, therefore, corresponds to the rule developed in German judicial practice.

The Principles contain, unlike the CISG, a rule on the conduct of the parties prior to the conclusion of the contract: according to article 2.15, a party that negotiates in bad faith is liable towards the other party for any losses caused to the other party. This rule corresponds to the rules that we have seen in the Civil Law systems. The first paragraph of article 2.15 confirms that the parties are free to negotiate and that there is no obligation to enter into a final contract if negotiations are started; the second paragraph states the liability in case of bad faith conduct, and the third paragraph exemplifies that entering into or continuing negotiations without having the intention to reach an agreement is deemed to be in bad faith.

2.4.7 PECL

The PECL contain a regulation substantially corresponding to the rules set forth in the UNIDROIT Principles: a contract is concluded on the basis of the agreement of the parties (article 2:101(1)); an offer is revocable until accepted unless it is to be deemed firm (article 2:202); the acceptance that does not conform to the offer is deemed to be a counter-offer unless the modifications were not material (article 2:208); in the case of battle of the forms the contract is deemed concluded for the terms that are substantially common to both general conditions (article 2:209); negotiations have to be entered into and continued in good faith (article 2:301).
The PECL specify also that their rules on formation of contracts, though expressly meant to regulate the eventuality of exchange of offer and acceptance, shall be deemed applicable even if the contract is entered into in a different way, thus indirectly recognising that contracts may be concluded also in other ways.

2.5 Conclusion

The outline made above shows that there are several nuances among the compared legal systems, but that the main difference seems to be between English law and the analysed Civil Law systems as well as the trans-national systems.

2.5.1 Criteria for Formation of Contract

As we have seen from the above described cases, under English law the requirement of consideration as an essential element of a contract has significant impact on the validity of agreements that would be considered as binding in the other systems. The same impact cannot be seen in the requirement of the *causa*, which, among the systems analysed here, is peculiar to Italian law but has a limited practical relevance.

The criteria of consideration and of *causa* have a common origin in Roman law, or, more precisely, in the elaboration of the Roman texts that was made by the natural lawyers until the XVIII century. The natural lawyers were elaborating a reason to explain why a promise should be enforceable, and they found it in the references that the Roman texts made to the *causa*. Two kinds of *causa* were identified, *i.e.* of grounds for rendering a promise enforceable at law: the fact of giving and the fact of exchanging. The former was based on an act of liberality, the latter on the ideal of commutative justice. Both notions were based on the then prevailing philosophy of Aristotelis: since both the liberality and the commutative justice were considered as virtues in this philosophy, they were used as theoretical justifications of the enforceability of promises.\(^\text{114}\) French legal doctrine

preserved this approach, and inserted the *causa* in the Code Civil of 1804 as a fundamental criterion of the contract. The Italian Codice Civile, even if it was issued nearly 150 years after the Code Civil, maintained the categories of the French model, and listed the *causa* as one of the elements of the contracts. Since the issuance of the Codice Civile considerable effort has been made by the Italian legal doctrine to explain and justify the criterion of the *causa*, but it cannot be overseen that the criterion does not have a practical significance and is given consideration more from a theoretical and traditional perspective than in practice. In the XIX century, because of the development of society and of the legal systems and due to the increased attention to the needs of the industrial and commercial exchange rather than to the categories of a philosophy that was not considered any more as the basis of the legal system, the philosophical notions of liberality and commutative justice could not be invoked any more to justify the enforceability of promises. The French legislator decided nevertheless to preserve the traditional approach, as we have seen, and the Italian legislator received this attitude. The German legislator of 1900, on the contrary, took the consequences of the social developments, and did not insert the *causa* as an element of the contract. Norwegian law, inspired, as we have seen, by German law, did the same.

While the requirement of the *causa* ceased to have practical relevance or even ceased to exist in the Civil Law systems examined herein, the development of English law is different. At the end of the XVIII century English law has, surprisingly, received and maintained the Roman criterion of the *causa*, and has inserted it on the existing dual system of Common Law and of Equity. Contract law was in the system of Common Law organised by writs, *i.e.* by formulas that were to be presented to the court in order to enforce a certain claim. The already mentioned structure of the Common Law, based on the courts’ precedents, assumed that a right existed to the extent that it could be enforced in court by adopting an existing writ or by drawing (often far fetched) analogies to an existing writ. In the courts of the other system of English law, the courts of Equity, the basis was not a formula to enforce a claim, but a ground for seeking a relief against the counterparty’s enforcement of a claim. The enforcement of a ground for relief was soon structured much in the same way as the enforcement of a writ, with the necessity to adopt an existing ground or to draw an analogy to an existing one.\(^{115}\) In this system of writs and of grounds for relief there was

\(^{115}\text{See, more extensively and for references, GORDLEY, *The phylosophical origins*, cit., pp.}
no need to require a *causa*; however, when, at the end of the XVIII century the English contract law was systemised, Roman law exercised its influence. The first treatises of contract law borrowed heavily from the natural lawyers, who had elaborated the Roman texts, as well as from the French texts, who had been influenced by the natural lawyers. The borrowing was, however, selective: of the two kinds of *causa*, the fact of giving and the exchange (based respectively on the philosophical notions of liberality and commutative justice, as seen above), English contract lawyers focused on the criterion of the exchange. Also the use of the criterion is different: while French lawyers used the notion of *causa* to explain from a philosophical point of view why a promise should be enforceable, English lawyers did not indulge in theoretical elaborations, but used the criterion of exchange to determine what promises are enforceable. As long as there has been an exchange, the promise is enforceable because the claim based thereon may be deemed based on a writ. The criterion of exchange, called consideration, became therefore a fundamental element for rendering a promise enforceable. Due to the special structure of English law, based on the use of precedents and on drawing analogies to precedents, the criterion of the consideration plays still a fundamental role in the English law of contract. The creative ability to draw analogies and to distinguish the cases from the precedents on the basis of slight factual differences, however, has to a great extent (but not completely, as the cases mentioned above have shown) managed to stretch the notion of exchange in order to satisfy the requirement of modern society.

The trans-national sources that we are examining here do not recognise the criteria of consideration or of *causa*, and this is hardly surprising in light of the origin of these criteria as seen above. Modern compilations do not need to invoke loose philosophical formulations to justify the enforceability of a promise. Also, neither the CISG nor the compilations of principles are structured so as to require the use of a certain writ or to draw an analogy to a writ that in turn requires the existence of an exchange. Therefore, there is no need to complicate the question of enforceability of promises with criteria that are founded on a philosophical or a traditional basis.

2.5.2 Irrevocability of the Offer

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116 The first treatise of contract law being written by Powell in 1790.
The requirement of the *causa* or of the consideration has implications in respect of the revocability of an offer. An offer is not an act of liberality nor a complete exchange. In the French (and, in theory, also in the Italian) or the English system, the logic consequence to be drawn in this context is that an offer is not binding because in an offer there is no *causa* or consideration and therefore there is no basis for enforceability. However, this may have negative consequences for the offeree, who receives an offer but remains in the uncertainty about the legal status of the offer if this can be revoked until a contract has been entered into. Given that all systems examined here are interested in protecting the offeree, it is interesting to see the different paths that are followed in order to conform with the requirements of the respective legal systems.

The simplest solution is adopted in German law, and received in Norwegian law: since there is no requirement of a *causa* or a consideration for a promise to be enforceable, an offer can be an enforceable promise and is therefore deemed to be irrevocable.

A compromise between the formal requirement of a *causa* or a consideration and the desire to protect the offeree is made in the Italian system, in the CISG and the trans-national compilation of principles, where, probably thanks to the modernity of these systems, the formality of the tradition has given way to the needs of commercial exchange. In these systems, the lack of a *causa* or consideration will not affect the enforceability of an offer if the offer specified that it was irrevocable.

A similar result is achieved under French law, although the requirement of the *causa* there is not waived: an offer remains by its nature unenforceable, but the offeree is protected by the general law of tort, according to which a person causing harm to another person is to reimburse the connected damages. In the case of revocation of an irrevocable offer, therefore, the French judge will recognise the offeree the reimbursement of his reliance interest that was violated.  

Yet another approach is followed in English law, where, as we have seen, the criterion of consideration cannot be derogated from. Under English law, therefore, an offer remains revocable until it has been accepted and a contract is entered into.

117 See, for references, ZWEIGERT, KÖTZ, *op.cit.*, pp. 353ff.
In order to grant a certain protection to the offeree, English courts have elaborated the so-called mailbox theory, according to which the acceptance is deemed arrived (and therefore the contract is deemed to be entered into) when the offeree has dispatched it. The general rule is that a notice is deemed made when it arrives to the other party; by anticipating the moment in which the acceptance is deemed arrived, English law tries to reduce the lapse of time during which the offer may be revoked and the offeree is uncertain about the legal situation.\(^{118}\)

2.5.3 Correspondence of Offer and Acceptance

Also the question of correspondence between the offer and the acceptance is regulated differently in the various systems, both in individually negotiated contracts and in the eventuality of exchange of general conditions. While the national laws seem to apply the mirror image and the last shot rules quite strictly, the trans-national systems (and German law, in respect of the battle of the forms) have developed a more flexible approach.

The mirror image rule corresponds to the requirements of the traditional doctrinal definition of a contract as the meeting of the parties’ wills. The wide-spread use of general conditions of contract as well as new contractual practices due to the new means of telecommunication create situations for the formation of contracts that were not contemplated at the time when the theory on the meeting of the parties’ wills was elaborated. Different legal systems react differently to the new situation, as seen above. This discrepancy may be explained in light of the degree of modernity of the legal systems and of the extent to which the judge may be creative in the respective system.

English law is bound by its categories and depends on the elaboration of analogies or of distinguishing from precedents in order to adapt to new situations. In the context that we are examining here, this has shown to be an obstacle that has prevented adapting to the new situations. Italian law is codified and has a largely positivistic approach to the written text of the law, which also prevents adapting to the new situations. Also German law is codified, but we have seen that the German judge has traditionally assumed

\(^{118}\) See, for references, ANSON, \textit{op. cit.}, pp. 43 ff. and TREITEL, \textit{op. cit.}, pp. 24 ff.
a creative role that permits to develop the written rules and to adapt to new needs, or even to create new rules. Also the Norwegian judge plays a creative role and is central in the modernising the law; the lack of a modern rule on formation of contracts in Norwegian law seems therefore to be more due to the scarcity of judicial practice on this field than on the lack of creative will by the judge. When the courts will be confronted with a question that requires adapting the mirror image and the last shot rules, Norwegian courts will probably follow the modern examples of German law and of the trans-national sources. The Trans-national sources have adapted to the modern requirements to a varying degree. The restrictions that affect the modern approach contained in the CISG are probably due to the necessity to find a compromise that could satisfy all countries who were participating in the drafting of the convention. The need to compromise was less present in the drafting of the compilation of principles, probably because the defense of the more traditionalist values is less compelling if the instrument that is being drafted is not going to be binding, like it is the case for the restatements of principles.

2.5.4 Pre-contractual Liability

In addition to the formal requirements that have to be met for considering a contract come into existence, there is a significant difference in the role that the principle of good faith plays under formation of a contract. While English law and the CISG do not recognise any role for it, the other systems require that the parties take into consideration also each other’s interests, and provide for liability in case of breach of this duty.

The tension between, on the one hand, recognising the individual will and, on the other hand, ensuring loyalty and fair play in business transaction has been solved in opposite ways in England and on the continent. This is traditionally explained, as we have seen, with the central role that maritime and financial transactions have had for centuries in England. In these transactions the operators are assumed to be able to properly take care of their own interests and they are believed not to need a “paternalistic” legal system to support them. These kind of transactions thrive better in an objectively predictable system, and the English legal system tends therefore more towards giving clear rule for the enforceability of rights than creating the conditions for obtaining an equitable, but unpredictable justice. The
Common Law skepticism towards the category of good faith is reflected also in the CISG, where the drafting parties did not reach an agreement on introducing a general clause on good faith.
3 INTERPRETATION OF CONTRACTS

The interpretation of a contract is more complicated than just reading the provisions written therein and assessing the meaning of the words. A contract regulates the rights and obligations of the parties towards each other, and during the term of the contract situations may arise, where the expressed wording of the contractual provisions is not sufficient to indicate a solution. The questions that may remain unanswered are disparate: which one of the parties is to bear the risk for damages to the goods while they are being transported to the delivery place, is a party entitled to interest rate on overdue payments and at what rate, and so on. If the provisions of the contract do not expressly address these questions or are unclear, the contract will have to be interpreted. The contract must be interpreted also to assess its relationship to the governing law, that might have rules regulating the subject-matter of the contract and integrating the contractual regulation, where necessary. The purpose of the interpretation is to find out what the parties have meant for situations like the one that has arisen. There is a variety of methods of interpretation, ranging from the literal interpretation (according to which the parties have not meant to regulate the situation if the contract is silent on that matter) to the subjective interpretation (that attempts to establish what the parties have really meant and involves therefore the examination of the conduct of the parties during the negotiations as well as after the signature of the contract) and the objective interpretation (that aims at establishing what would be a reasonable regulation of the situation irrespective of the real intention of the parties).

According to which one of these interpretative methods prevails in a certain legal system, the contracts governed by that legal system will be drafted so as to accommodate the consequences of the interpretation. If the interpretation is literal, the parties will draft long and detailed contracts and will attempt to regulate any possible situation that might arise. If the interpretation is objective, the parties will focus in their drafting on the specific aspects that require express regulations, leaving the remaining aspects to the interpreter, who will fill the gaps of the contract in accordance with a reasonable standard (more often than not coinciding with the declaratory rules of law on that particular matter).
3.1 Cases

We will look at the differences between the analysed systems of law on the basis of the following two cases:

3.1.1 Renewal of Lease

We can assume that a landlord and a mining company enter into a lease agreement of an area to be exploited as a mine. The lease has the duration of 25 years. The price to be paid by the mining company is a fixed amount per ton of the extracted product, and such price is subject to an index regulated in the contract. The lease agreement contains a clause regulating the possibility to renew the contract that reads as follows:

“This agreement expires on the 25th anniversary of the date hereof, provided, however, that the mining company is entitled to a renewal of this lease – at the same conditions – if it notifies the other party one year prior to the expiry date hereof of its decision to renew within.”

The mining company notifies within the contractual term the other party of its decision to renew the lease for 25 years; the landlord objects to the renewal, and requires that the financial conditions of the lease are renegotiated.

The question that arises here is whether the wording of the contract ("at the same conditions") can be considered sufficiently clear to make a decision, or whether the clear language of the contract must be interpreted also in the light of other considerations.

The former approach is generally defined with the Latin formula in claris non fit interpretation, i.e. that it is not possible to contradict clear language by way of interpretation. The latter approach involves also considerations of fair dealing in the interpretation of clear language, or evidence of the parties’ conduct in order to clarify what the parties really have meant.

3.1.2 Transfer of Activity

We can assume that two medical doctors, each with his own practice in a different city, decide to exchange cities and transfer to each other the
respective practices. The doctors enter into an agreement that regulates rights and obligations arising out of the mutual transfer of their firms. After some months, one doctor decides to return to his original city and starts there a new practice in competition with his own former firm that had been transferred to the other doctor. The other doctor wishes to prevent this competition, because most of his new clients might be tempted to go to their former doctor rather than continuing visiting the old practice with a new doctor. The contract does not contain any clause limiting the competition between the two firms or the possibility for one doctor to return to the original city and start competition with the other party.

The question that arises here is whether a gap in the contract can be filled inserting a reasonable regulation or a regulation that the parties may prove was meant to apply. Alternatively, the fact that the contract is silent may be considered not as a gap to be filled, but as an intention by the parties not to regulate that matter.

The former two approach involve a gap filling on the basis of fair dealing or on the basis of the subjective intention of the parties; the latter approach is generally defined with the Latin formula *expressio unius est exclusio alterius*, i.e. that something that has been left out of a contract has to be considered as excluded from the scope of the contract.

### 3.2 Common Goals

Interpretation of contracts is, according to all the legal systems that we are comparing, meant to establish the common intention of the parties: this is expressly postulated in the regulation of some of the compared systems, or is recognized by legal theory and judicial practice in others. That the main goal of interpretation is to establish the common intention of the parties is spelled out in § 133 of the German BGB, article 1362 of the Italian Codice Civile, article 4.1 of the UNIDROIT Principles, article 5:101(1) of the PECL and article 8 of the CISG. That the goal is the same also in the remaining systems analysed here, Norway and England, is confirmed by the respective legal doctrines.119

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In addition to the goal, the compared systems have certain rules of interpretation in common. All of them provide that, to the extent a real common intent of the parties cannot be established, the interpretation of the contract should lead to establishing an objective intent that a reasonable person comparable to the parties might have under similar circumstances. This common understanding of the relevance that the subjective or the objective intentions respectively have in the interpretation of contracts is the conclusion of an intense doctrinal debate started in the XIX century, which saw the subjective interpretation (aiming at establishing the real will of the parties) fiercely opposed to the objective interpretation (aiming at establishing the meaning of the declaration made by the parties as such).

All the compared systems contain a rule according to which the contract has to be interpreted systematically, so that each provision is read in light of the other provisions and to avoid contradictions.

All the compared systems contain a rule according to which a provision that can be interpreted in various ways shall be interpreted in the way that ensures efficacy of the contract (so called favor validitatis rule).

All the compared systems provide rules of interpretation according to which, in case of unclear language, the provisions shall be interpreted in the way that is most favourable to the party that has not drafted them (so called contra proferentem rule).

Other rules of interpretation, however, are peculiar to some of the systems and cannot be found in others. In view of the common goal that the various

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120 See for Norway WOXHOLTH, op.cit., pp. 436f., for Germany BGB § 157 (for a clear analysis of the relationship between § 157 and § 133, which latter provision favours the search for the actual will of the parties, see MEDICUS, D., Allgemeiner Teil des BGB, Heidelberg 2002, pp. 123 ff.), for Italy Codice Civile art. 1366, for England ANSON, op.cit., p. 161, for the CISG art. 8(2), for the UNIDROIT Principles art. 4.1(2), for the PECL art. 5:101(3).
121 See for Norway WOXHOLTH, op.cit., pp. 440f., for Germany MEDICUS, op.cit., p. 121, for Italy Codice Civile art. 1363, for England ANSON, op.cit., p. 162, for the UNIDROIT Principles art. 4.4, for the PECL art. 5:105. The CISG does not contain a specific rule on this aspect, but the generally acknowledged rule is not incompatible with the system of the CISG.
122 See for Norway WOXHOLTH, op.cit., p. 446, for Germany MEDICUS, op.cit., p. 122, for Italy Codice Civile art. 1367, for England ANSON, op.cit., p. 161, for the UNIDROIT Principles art. 4.5, for the PECL art. 5:106. The CISG does not contain a specific rule on this aspect, but the generally acknowledged rule is not incompatible with the system of the CISG.
123 See for Norway WOXHOLTH, op.cit., pp. 456f., for Germany BGB § 305c(2)122, for Italy Codice Civile art. 1367, for England ANSON, op.cit., p. 161, for the UNIDROIT Principles art. 4.5, for the PECL art. 5:106. The CISG does not contain a specific rule on this aspect, but the generally acknowledged rule is not incompatible with the system of the CISG.
systems’ regulations have, it could be expected that the two cases described above would be solved in the same way in the different systems. However, this is not the case, as we will see below.

3.3 Different Solutions

The two cases described above would be decided in different ways, according to the legal system that is applied.

3.3.1 Renewal of Lease

The case of the renewal of lease was decided by the Norwegian Supreme Court in 1990. The Court interpreted the renewal clause of the contract as if it regulated not an independent right to renew the contract, but a preemptive right in case third parties would be interested in the lease. In case of interested third parties, so the Court, the mining company would have a preemptive right according to the contract, at the same conditions as the third parties were willing to offer. The Court reasoned that it would have been natural to seek an offer by a third party in order to establish the market value of the area at the moment of renewal. In the specific case, however, there were no offers by third parties; the Court deemed it possible to interpret the renewal clause as if it contained an independent right of the landlord to require a direct renegotiation of the price even in the lack of third parties offers, affirming that the clause was written in such a loose way that there was room for that interpretation. The Court supported its interpretation with considerations of fair dealing, pointing out that a contract with such a long term as 25 years must give access to renegotiation of the price at the moment of renewal, irrespective of the fact that the contract already contained an index clause.

The case could possibly have been decided in the same way if it was decided under the PECL, since the Principles list good faith and fair dealing as one of the criteria for establishing the meaning of the contract.

124 Rt 1990 s. 626. The case was slightly more complicated than the description made here in the text. The parts that have been omitted or simplified, however, do not affect the arguments made by the Supreme Court in respect of the interpretation of the contractual provision.
If the case was decided under any other of the compared systems, it would most probably not have been decided in the same way. The decision would likely have been to renew the lease by extending the existing agreement at the same conditions. Under German law, as well as under the UNIDROIT Principles, the decision would have been based on the principle that, even if reasons of good faith or fair dealing required opening for renegotiation of the price, these reasons could not contradict clear terms that have been agreed between the parties. Under Italian law, a similar principle prevents to interpret contractual provisions in a way that contradicts their clear language. Under English law, contracts have to be interpreted literally and there is no room for corrections based on fair dealing. The case could not be solved under the CISG, since it falls outside of its scope of application. However, if the case was decided under the lex mercatoria as it is deemed to be expressed in the CISG, it would be solved similarly as in Italy and England.

3.3.2 Swap of Activity

The case of the swap of activity was decided by the German Supreme Court in 1971. The Court affirmed that the goal of interpretation, in case of gaps in the contract, is to establish what regulation the parties would have inserted in their contract, if they had been aware of the necessity to regulate the situation that was not covered by the contract. In this process, the interpreter has to take into consideration the principles of good faith and of fair dealing. The Court, therefore, interpreted the contract extensively and filled the gap with a provision that prevented both parties from establishing a practice in competition with the transferred practice for a period of 2-3 years.

The case would probably be decided in a similar way if it was under Norwegian law, as well under the UNIDROIT Principles or the PECL. These systems emphasise the importance of interpreting contracts in accordance with good faith and fair dealing. Norwegian law, however, would probably follow a different path to obtain the same 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

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125 ZWEIGERT, KÖTZ, op.cit., pp. 401f.
126 C78/5939.
128 BGHZ 16, 71.
the transaction, and that the contract therefore is not binding because an essential condition has ceased to exist.\textsuperscript{129}

The case, however, would probably be decided differently under Italian and English law. Reading an implied limitation of competition in the contract would be an interpretation of the contract that responds to the criteria of good faith and fair dealing, and this is something that the Italian legal system is not preventing. However, it would also extend the scope of the obligations that are based on the contract; and this is something that is not allowed under Italian law.\textsuperscript{130} A court inspired by the positivistic approach that prevails in the traditional Italian judicial practice would, therefore, not read an implied limitation of competition into the contract. A more progressive court might, however, take a position similar to the German one.\textsuperscript{131} Under English law, the principle of literal interpretation prevents reading implied terms into a contract, unless such terms are necessary for the business efficacy of the contract or obvious, and in any case not if there are conflicting interests between the parties.\textsuperscript{132}

The case could not be solved under the CISG, since it falls outside of its scope of application. However, if the case was decided under the \textit{lex mercatoria} as it is deemed to be expressed in the CISG, it would be solved similarly as in England.

3.4 \textit{How the Respective Solutions are Reached}

From the foregoing we can see that there are various approaches to the interpretation of contracts, and that these can lead to significantly different results in spite of the common goal that the compared systems all have to establish the common will of the parties. Below we will outline the main features of interpretation of contracts in the compared systems, as an explanation of how it has been possible to reach the different solutions. We

\textsuperscript{129} For a more extensive reasoning as well as references to judicial practice see the contribution of HAGSTROM to ZIMMERMANN, WHITTKER, \textit{Good Faith in European Contract Law}, cit., pp. 490f.

\textsuperscript{130} See above, footnote 126.

\textsuperscript{131} See the contribution of GRAZIADEI to ZIMMERMANN, WHITTKER, \textit{Good Faith in European Contract Law}, cit., pp. 486f., who, however, supports his view more on an analogy with the rule of article 2557 Codice Civile, limiting competition in case of transfer of commercial activity (not directly applicable in the case of transfer of a practice as described in our case).

will focus on the features that are peculiar to each of the systems, so that this overview can be useful to the comparison.

3.4.1 Norway

In Norway the interpreter enjoys a considerable flexibility in the interpretation process. In the establishment of the (objective) intention of the parties, it will be possible to consider all circumstances of the case, including the parties’ conduct prior to or subsequent to the entry into the agreement. Moreover, 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. In addition, the interpretation will be affected by considerations of fair dealing and good faith. The wording of the contract, therefore, will be read in a way that permits to implement the principles of fair dealing and good faith.

The Norwegian interpreter has, in other words, to construe the contract in a way that is consistent with the intention of the parties, the purpose of the contract and fair dealing. In order to proceed to such construction of the contract, the interpreter may imply terms, fill gaps and even in extreme cases correct the wording used by the parties.

3.4.2 Germany

In Germany the interpreter is requested by § 157 of the BGB to establish the intention of the parties according to good faith and fair dealing. In the interest of predictability, the interpretation has to be as objective as possible, on the basis of the understanding that a reasonable person would have under similar circumstances (so called bonus pater familias). However, should the interpreter find that an objective interpretation is not consistent with the

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136 The Act on Formation of Contracts contains a wide-ranging rule in § 36, that gives the judge the possibility to modify the terms of a contract or to set the contract in full or in part aside if its enforcement would be unfair or against fair dealing. This rule is applied more restrictively for commercial contracts than for other contracts (such as, for example, consumer contracts). This rule will be examined infra, chapters 4 and 5.
137 This statement seems to contradict § 133 of the BGB, that requires to establish the real intention of the party that has made a declaration. However, this latter requirement is applicable primarily to unilateral declarations, and not bilateral as a contract. More extensively, on this distinction, see MEDICUS, op.cit., pp. 123ff.
understanding of both parties, the subjective interpretation will be applied (so called falsa demonstration non nocet rule).\textsuperscript{138}

The German interpreter has, in other words, to construe the contract in an objective and predictable way, consistent with good faith and fair dealing. In order to proceed to such construction of the contract, the interpreter may imply terms and fill gaps, and good faith is deemed to be a criterion for filling gaps in accordance with § 242 BGB.\textsuperscript{139} However, a judge is not allowed to make an interpretation that runs against the clear terms of the contract or that extends the objects of the contract.\textsuperscript{140} The gaps will be filled in a way that tends to establish a balance between the opposed interests of the parties.

3.4.3 Italy

In Italy the interpreter is guided in the interpretation of contracts by a series of articles of the Codice Civile, particularly 1362 to 1371. The interpreter is expected to establish the intention of the parties first of all on the basis of the text of the contract,\textsuperscript{141} though integrated with the parties’ conduct.\textsuperscript{142} 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.\textsuperscript{143} Such other interpretation criteria are subordinated to the literal interpretation (\textit{in claris non fit interpretatio}).\textsuperscript{144}

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.\textsuperscript{145} Considerations of balance of the parties’ interests are even more subordinated, and can, according to article 1371, be made only to the extent

\textsuperscript{138} RGZ 99, 147.
\textsuperscript{139} § 242 BGB regards the phase of performance of the contract, but it is deemed to apply also in the phase of interpretation, as a basis for gap filling: see KROPFOLLER, J., \textit{BGB, Studienkommentar}, Munchen 2002, § 242, rn 1.
\textsuperscript{140} BGHZ 77, 304.
\textsuperscript{141} C. 95/4563
\textsuperscript{142} Article 1362 CC.
\textsuperscript{143} C.95/6050
\textsuperscript{144} On the scope of this rule see SACCO, DE NOVA, \textit{Il Contratto, cit.}, vol. II, pp. 394ff.
\textsuperscript{145} C.88/303
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.

3.4.4 England

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. This is considered as substituting for the bargain actually made by the parties one which the interpreter deems would be more reasonable or commercially sensible; and 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 written therein. The purpose of this rule is to enhance predictability in the course of commerce; in the balancing

146 Investors Compensation Scheme Ltd. v. West Bromwich B.S. [1998]1 W.L.R. 898 (H.L.)
148 Charter Reinsurance, cit.
149 Hare v. Horton (1883) 5 B. & Ad. 715
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 other systems analysed here), at least in respect of facts that were known to both parties.\[^{152}\] 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.\[^{153}\]

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.\[^{154}\] The courts do not fill gaps in the contract when it would be reasonable to do so, but 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).\[^{155}\]

### 3.4.5 CISG

The CISG, considered to be a significant step towards unification of the law of contracts, applies to international sale of goods. As already mentioned in paragraph 1.4.2 above, the CISG is sometimes considered to be an expression of trans-national principles that are generally recognised and apply to international contracts in force of their acknowledgement (\textit{lex mercatoria}), and is therefore also looked upon as a source of regulation of contracts that are not directly falling within the scope of its application.

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\[^{154}\] Phillips Electronique, cit., 472  
\[^{155}\] See ANSON, \textit{op.cit.}, pp. 145 ff.
Interpretation of contracts, however, is not regulated in the CISG; what the convention regulates is, in article 8, the interpretation of a party’s statement or conduct. According to this article, and similar to the other systems that we are analysing, the interpreter has to establish the real intention of the party that made this statement only to the extent such intent was known or could not have been unknown to the other party. In the other situations, the interpreter has to establish an objective meaning of the statement, by reference to the understanding that a reasonable person of the same kind as the other party would have had in the same circumstances. Such reasonable intent shall be established in light of all relevant circumstances of the case, that are exemplified as negotiations, any practices established between the parties, as well as the subsequent conduct of the parties.

In respect of gap filling, the CISG itself represents a set of rules that is to be applied to fill gaps in the contracts; it must be noted, however, that article 6 permits the parties to exclude applicability of the convention. The CISG recognises, in other words, that the parties may prevent gap-filling through the convention by excluding its applicability. To what extent the interpreter can fill gaps beyond the implication of the convention’s rule is not clarified in the CISG.

3.4.6 UNIDROIT Principles

The UNIDROIT Principles contain a series of articles regulating the interpretation of contracts, particularly articles 4.1 to 4.8. Under the Principles the interpreter has to establish the common intention of the parties (or the objective understanding of reasonable persons, art. 4.1(2)) having regard to all the relevant circumstances of the case. Article 4.3 sets forth a non-exhaustive list of the relevant circumstances that may be used in the interpretation of a contract: preliminary negotiations between the parties, practices established between the parties, the conduct of the parties subsequent to the conclusion of the contract, the nature and the purpose of the contract, the meaning Commonly given to words and expressions in the relevant branch of trade, usages. The Principles do not mention good faith as a criterion for finding the meaning of the contract. The Principles recognise, in article 2.17, the validity of so called merger clauses, provisions in which the parties affirm that their entire agreement is contained in the contract and that no other documents or evidence shall be admitted to add to or modify the content of the contract. This clause is interpreted literally in the English
system, as 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.

3.4.7 PECL

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.

3.5 Conclusion

The main differences in the method of interpretation seem to be between the English system, that attaches most importance to the wording of the contract, and the Civil Law and Trans-national systems, which aim at establishing the will of the parties (or an objective will of comparable, reasonable parties).
This difference finds its historical explanation in the already mentioned 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.¹⁵⁶ 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 the doctrines concerned with each particular kind of contract, and we will now see how this influenced the interpretation of contracts.

During the XIX century the doctrine of natural law was abandoned on the continent, in favour of a more positivistic-exegetic approach in France, and in favour of an hystorical-teleological approach in Germany. The contract was now deemed to be based on the parties’ will, not on some virtues, duties or imperatives naturally stemming from human relations. 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.¹⁵⁷ 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.

England, as seen, failed to adopt the doctrines concerned with the particular types of contracts, and it did therefore not have a systematic set of rules that could integrate or guide the interpretation of contracts. The respect of the parties’ will was not mediated by the consideration of a (once natural) type of transactions with its own (once natural, then positive) requirements. Consent by the parties was conceived as a consent not to a type of contract

¹⁵⁶ See, for more extensive references, GORDLEY, The philosophical origins, cit., pp. 146ff., 159.
¹⁵⁷ GORDLEY, The philosophical origins, cit., p. 201.
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.

The above explained difference between the Common Law and the Civil Law is not the only difference that we saw in this chapter. There are differences also among the Civil Law systems and between these systems and the trans-national systems. They regard primarily the means that can be employed by the interpreter to establish the intent of the parties. All systems permit the interpreter to fill gaps in the contracts, but some allow even to interpret clear contractual language so as to adapt its literal scope to a reasonable result (first of all Norwegian law). Some systems can in the process 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), while all these systems require to take into consideration the surrounding circumstances, such as the conduct of the parties during negotiations or after the signature of the contract.

These differences in attitude may also be explained in light of the respective traditions. We have already pointed out that French and German lawyers have different traditions of interpretations of the law, that have respectively influenced Italian and Norwegian doctrines. These traditions in turn influence the role that the interpreter has even in respect of contracts. While the interpreter in the French and Italian systems has a greater respect for the written text and the expressed words that have been set forth in a document (be it a statute or a contract), the interpreter in the German and Norwegian system pays more attention to the purpose that the instrument pursues, the balance between the involved interests, the necessity to ensure an equitable justice.

The trans-national restatements follow the Civil Law tradition in this context (and so does the CISG, but only to a limited extent). 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.

The overview made in this chapter may explain the reason why contracts based on English law or other Common Law systems are written so extensively and present so many detailed regulations, whereas contracts based on Civil Law systems traditionally are much shorter and simply regulate the aspects that are specific for that particular deal. The parties expect that a contract subject to a Civil Law system is interpreted in the light of the rules and principles that prevail in the law of contract of that system; they do not need to repeat that regulation in their own contract. Should the governing law not contain specific rules that can be applied to a certain gap, the parties may count on the interpreter filling contractual gaps on the basis of the purpose of the contract, of surrounding circumstances, to a certain extent of the principles of good faith and fair dealing. A contract subject to English law is more likely to be interpreted literally, on the basis of the provisions that have actually been expressly formulated by the parties. Hence, a contract subject to a Common Law system has to spell out the regulation that a contract subject to a Civil Law System may leave implied.
4 REASONABLENESS

After the question of interpretation of a contract, which is devoted to assessing the meaning of the formulations contained in the contract, we will turn to the question of the possibility that the interpreter has, if any, to control and correct the content of the contract on the basis of the criterion of reasonableness.

We have already seen that in some of the compared systems, namely Norwegian law and the PECL, good faith and fair dealing are criteria that are applied already in the first phase on interpretation, i.e. during the assessment of the meaning of a formulation used by the parties. In the remaining systems good faith and fair dealing do not play an active role in the hermeneutic phase of interpretation and cannot, in particular, be applied to change the meaning of words or expressions used in the contract. Good faith and fair dealing are, however, used as a criterion for the filling of gaps under the UNIDROIT Principles and, although with a different definition, German law.

Some of these systems do recognise that the content of a contract may be measured up to criteria such as good faith and fair dealing, or reasonableness. We are now in the next phase of construction of a contract: having assessed the meaning (and filled the gaps), we evaluate the content of the contract that underlies the meaning. It is often difficult in practice to distinguish between the first phase of interpretation and the subsequent phase of control on the contract’s content, particularly if the first phase involves a gap-filling by the interpreter and therefore implies the interpreter’s influence on the contract’s content. This means that sometimes the interpreter’s construction of a contract may be defined either as a restrictive or extensive interpretation or as a control on the contract’s content. The former definition will be preferred if the legal system of the interpreter does not allow an active control; the interpreter will, therefore, exercise a disguised control of the contract’s reasonableness.

Such a control of contractual terms may have relevance in different respects: one scenario is that one party has provided to the other its standard general conditions, and that the other party has no real possibility to negotiate. Another scenario is that the contractual terms have been individually
negotiated between the parties. Particularly in the situation of general conditions that are provided by one party, it is possible to envisage two different situations: where the other party is a consumer, or where it is a person dealing in the course of its trade. The interests of the consumer are usually protected by mandatory legislation, the consumer being considered as the weaker contractual party that deserves statutory protection. Since the consumer legislation is specific and largely influenced by European standards, we will not treat it in our comparison of the general law of contracts of the various state systems.

4.1 Cases

We will look at one case showing an example of general conditions submitted to one party for acceptance, and two cases showing examples of individually negotiated terms of contract.

4.1.1 Limitation of Contractual Remedies

We can assume that a software company licences an accounting programme to a law firm. The programme turns out to be inadequate, as it can handle the accounting only for a limited number of clients. The general conditions of licensing, which were accepted by the licensee, contain a provision that limits the remedies that are available to the licensee in case of inadequate performance of the programme. The provision reads as follows:

“In case of non satisfactory performance of the programme, the licensee may, by written notice to be served not later than 14 days from the date hereof, request the licensor to replace the programme with a new version of the programme, which is currently under development and shall become available 6 months after the date hereof. Any other remedies are excluded.”

The licensee considers the programme as non satisfactory, but is not satisfied with the contractual remedy either. Having to wait 6 months for receiving the new version of the programme would mean that the accounting of the law firm would come to a complete stop, with detrimental consequences for the operation and the cash flow of the firm. Therefore, the licensee seeks to make use of the contractual remedies that it would be
entitled to under the governing law (for example, reimbursement of damages or resolution of the contract).

The question that arises here is whether the contractual clause that limits the remedies available to the licensee is fully enforceable or whether it can be modified or declared unenforceable because it is unreasonable.

The former approach assumes that the contract is enforceable in accordance with its terms, as long as the terms have been agreed. The latter approach involves discretion of the interpreter to correct the agreed terms in accordance with an objective standard of good faith or reasonableness.

4.1.2 Termination for Immaterial Breach

We can assume that a company borrows from a bank a considerable amount of money, to be repaid over a 10 years period. The loan agreement contains several obligations and covenants that the borrower has to comply with. The most important obligation is to pay interest on the outstanding amounts and to repay the principal of the loan in accordance with the agreed repayment schedule; other important covenants regard the duty to obtain the prior consent of the lender for any major investment, divestment or reorganisation of the company. Further covenants have a less material significance for the deal, but are nevertheless listed in the same provision (section [xx]) as the most important obligations of the borrower. Among others, the borrower commits to submit to the lender copies of its quarterly accounts not later than 7 days after they have been certified. The money is disbursed by the lender, and the borrower complies with all its obligations for one year. One year after the disbursement, the borrower fails to submit a quarterly account to the lender. The borrower is, therefore, in breach of one of the obligations that are not very material; the material obligations, on the contrary, are still complied with. The loan agreement contains a provision that permits the lender to early terminate the contract and to require immediate payment of all outstanding amounts in case of breach of contract by the borrower. The clause reads as follows:

“Upon any breach whatsoever of any of the Borrower’s obligations listed in section [xx] hereof, the Lender shall be entitled to terminate this agreement with immediate effect and to require the immediate repayment of all outstanding amounts. If the breach is capable of
being remedied, and the Borrower offers to remedy such breach, the lender shall be entitled, in its absolute discretion, to refuse such offer of remedy and to proceed to termination of this agreement with immediate effect.”

The failure to submit the accounts is a breach of contract and it entitles the lender to early terminate the loan in accordance with the clause that we have just seen. The borrower offers to remedy the breach by submitting the accounts after the contractual deadline, but the lender elects to exercise the absolute discretion to terminate the agreement in spite of the offer of remedy, as the mentioned provision entitles it to do.

The question that arises here is whether the contractual clause that entitles the lender to early terminate is fully enforceable or whether it can be modified or declared unenforceable because it is unreasonable, or because its exercise in the particular situation would be unreasonable. The former approach assumes that the contract is enforceable in accordance with its terms, as long as the terms have been agreed. The latter approach involves discretion of the interpreter to correct the agreed terms in accordance with an objective standard of good faith or reasonableness.

4.1.3 Determination of Price

We can assume that an enterprise having its own energy producing unit enters into an agreement for the supply of energy to another enterprise. The agreement contains a provision that determines the price to be paid on the basis of the square area of each enterprise. Such price determination was the result of long and detailed negotiations between the parties on the most reliable method for calculating the price; the objective of the parties was to find a calculation method that would ensure that neither of the parties would gain or loose as a consequence of the contract.

After some years the energy producer installs a meter for the measurement of each enterprise’s actual consumption. The meter shows that the actual consumption of the buyer is higher than what that enterprise is paying for. The energy producer requires therefore a renegotiation of the contract, so that the price can be calculated in accordance with the actual consumption rather than in accordance with the surface.
The contract does not contain a renegotiation clause, and the clause on calculation of the price is very clear in determining that the criterion for calculation is the square area.

The question that arises here is whether the contractual clause that determines the price calculation is fully enforceable or whether it can be modified because it is unfair to one party.

The former approach assumes that the contract is enforceable in accordance with its terms, as long as the terms have been agreed. The latter approach involves discretion of the interpreter to correct the agreed terms in accordance with an objective standard of good faith or fair dealing.

This present case differs from the previous case described in paragraph 4.1.2 above in the degree of its possible conflict with an objective standard of reasonableness. The case of early termination for immaterial breach assumes serious consequences for the borrower (the repayment of a large amount of money on a short notice) following a breach that is not material for the lender: enforcement of the contract may, therefore, in this case, seem to be a very strict measure, which might seem unfair. The case of the recalculation of the price, on the contrary, assumes that the price calculation agreed by the parties is not fully accurate: enforcement of the contract may, therefore, in this case, seem to be not fully appropriate to achieve the goal that the parties had to make a reliable calculation of the costs, but it is not very unfair.

4.2 Mainly Different Goals of the Regulations

All the legal systems that we are comparing contain rules that permit to set aside or override unfair contractual terms when one party to the contract is a consumer: the consumer enjoys statutory rights that permit him to choose among a series of possible remedies, or that prevent the parties from limiting the statutory remedies.

The trans-national instruments contain rules that specify that mandatory statutory rules are applicable when they have a character that renders them applicable in spite of the international character of the contract, and consumer protection is usually considered as falling within this category. As mentioned in paragraph 4 above, however, we are not going to focus on the protection of the consumer in our comparison.
Apart from the common regulation in favour of the weaker party, the legal systems compared herein do not present many common features in the context of control of the contract’s content based on reasonableness.

In respect of general conditions of contract, there is a certain resemblance in the majority (but not the totality) of the systems’ aim to ensure that the general conditions are used in a fair way. The common way of pursuing this goal is by providing for measures to assess whether their terms are actually to be deemed as agreed. General conditions are prepared by one party and submitted to the other party for acceptance, and are therefore not negotiated between the parties. Even if the conditions have been signed by the party who has not drafted them, it is conceivable that that party has not read them, or that, even if it has read them, it has not bothered to negotiate specific terms that it found unacceptable, on the assumption that the drafting party would not be prepared to change its general conditions. Most of the analysed systems have some regulation of this matter, providing different degrees of protection to the party that has not drafted the conditions.

Moreover, all the systems examined herein have some common rules of interpretation, which may be relevant to the goal of ensuring a fair use of general conditions. Of the rules of interpretation mentioned in paragraph 3.2 above, one may be particular relevant: the rule according to which a provision, in case of uncertainty, shall be interpreted in the way that is most favourable to the party that has not drafted it.\(^\text{158}\) Another common rule is that individually agreed terms prevail over general conditions, in case of conflict between them.\(^\text{159}\)

In respect of individually agreed terms, on the contrary, there does not seem to be any goal that is common to all examined systems. Some systems aim, in different degrees, at ensuring that the bargain is reasonable in spite of what the individually agreed terms might say, whereas in other systems it is the wording of the contract that prevails.

\(^\text{158}\) See paragraph 3.2 above.
\(^\text{159}\) See for Norway WOXHOLTH, *op.cit.*, p. 458, for Germany § 305 b BGB, for Italy Codice Civile art. 1342.1, for England ANSON, *op.cit.*, p. 183, for the UNIDROIT Principles art. 2.21, for the PECL art. 5:104. The CISG does not contain a specific provision in this respect, but the generally acknowledged rule does not run counter the convention’s system.
4.3 Different Solutions

The three cases described above would be decided in different ways, according to the legal system that is applied.

4.3.1 Limitation of Contractual Remedies

The case of the general conditions limiting the contractual remedies is a school example used in Norwegian universities to illustrate the judge’s powers to evaluate the contract’s content.\(^{160}\) There are two alternative approaches to the solution of this case: the interpreter may either question whether the clause limiting the contractual remedies actually was agreed upon by the licensee, or he may assume that the clause has been agreed upon and set it aside or modify if it finds that its content is not reasonable. This latter control on the contract’s content may either be made openly, or in a disguised way, in the course of a restrictive or extensive interpretation.

The first approach is what has traditionally been used to avoid giving effect to provisions that do not seem fair: particularly in the case of general conditions, where there has been no negotiation of each of the conditions, it has been tempting to argue that the party accepting the conditions has not really read and approved them, and that therefore those particular terms where not really agreed upon. If the disputed terms are such that the position of the party having to accept them is negatively affected, it is possible to exclude their applicability on the ground that they have never really been agreed upon and that therefore they are not binding.\(^{161}\) In the present case, it could have been difficult to affirm that a law firm was not aware of the consequences of its signing and accepting the general conditions; nevertheless, provisions of general conditions have traditionally been applied in a rather restrictive way.

More recently the Norwegian interpreter has moved towards a more direct evaluation of the contract’s content. Since the modification in 1983 of the Act on Formation of Contracts, that introduced the regulation of §36, a judge has the authority to set aside or to modify a contractual provision, if enforcement thereof would be unfair or against fair dealing. The provision in

\(^{160}\) The case study is more complicated than the one described here, but the simplification that I have made does not affect the arguments relevant to the question of control of the contracts’ reasonableness.

\(^{161}\) HOV, *op. cit.*, pp. 121ff. and WOXHOLTH, *op. cit.*, pp. 31f.
the present case might, therefore, be set aside on the basis of § 36 Act on Formation of Contracts.

The case might be decided in the same way under German law. Since the 2001 reform, the BGB contains a regulation devoted to general conditions of business (§§ 305 ff.); some of these rules are not relevant here because they apply to contracts with consumers, but other rules apply also to contracts entered into in the course of each party’s business. In particular, § 305 c contains a regulation similar to the first of the Norwegian approaches described above, i.e. the possibility to exclude applicability of a condition which has such an unusual character, that the party accepting it could not have expected it. Moreover, § 307 contains a rule similar to the second Norwegian approach described above, the open control on the contract’s content: a condition is unenforceable if it unduly negatively affects the other party against the principle of good faith. The provision in the present case might, therefore, be set aside also on the basis of § 307 BGB.

The case might be decided in the same way if it was decided under the UNIDROIT Principles, although the UNIDROIT Principles permit only the first of the alternative approaches available under Norwegian and German law, i.e. the possibility to avoid application of a clause that the party accepting the general conditions could not reasonably have expected (so called surprising terms, art. 2.20).

If the case was decided under Italian law or under the PECL, the possibility to avoid applicability of the clause limiting the contractual remedies would depend upon the actual possibility that the other party had to become aware of it: if the licensor took reasonable steps to bring it to the other party’s attention (art. 2:104 PECL) or if the other party has signed a specific reference to it (art. 1341 Codice Civile), the provision is applicable. The PECL contain a rule in article 4:110 that might resemble the second approach available under Norwegian and German law, i.e. the possibility to avoid a term that, against good faith and fair dealing, causes a significant imbalance in the parties’ rights and obligations. Due to its requirement of “significance” and the reference to the balance of both parties’ situations, the wording of this rule seems to set a stricter standard than that of fairness or of prejudice of a party’s position that are respectively required under Norwegian and German law. Therefore, it is uncertain whether this rule may be used to set aside the disputed provision in the present case.
If the case was decided under English law, the clause would probably be given full enforcement. Unfair terms of contracts contained in general conditions of business are limited by a series of statues, of which the most important is the Unfair Contract Terms Act 1977; however, this act applies mostly to consumers and, for the situations where it applies also to contracts where a consumer is not involved (a contract where general conditions were used is one of the situations where the act applies also to commercial contracts), it makes a series of important exceptions that considerably restrict the act’s scope of application. Thus the Unfair Contract Terms Act does not apply to commercial contracts concluded on the basis of general conditions, as long as the contracts are within the areas of insurance, commercial charter parties, carriage of goods by sea, intellectual property, international supply, securities. For the few remaining situations where a commercial contract is entered into on the basis of general conditions, the Act’s test of reasonableness of the conditions will apply. Our case relating to the area of intellectual property, it being based on the licence of software, the Unfair Terms of Contracts Act will not apply.

The case could not be decided under the CISG, since it falls outside of the scope of its application. However, if the case was decided under the *lex mercatoria* as it is deemed to be expressed in the CISG, it would be solved similarly as under English law.

### 4.3.2 Termination for Immaterial Breach

If the case of termination of the loan because of immaterial breach by the borrower was decided under Norwegian law, depending on the totality of the circumstances of the case, the lender would probably not be allowed to exercise its contractual right to terminate the contract. On the basis of the already mentioned § 36 Act on Formation of Contracts, the Norwegian judge would proceed to evaluate the significance of the breach of contract for the lender and the consequences of the early termination for the borrower, and the conclusion would probably be (on the basis of the information that we have available on the factual circumstances) that the sanction of early termination would be out of proportion and therefore unreasonable. Therefore, the contractual right of the lender to terminate the contract would be set aside as unreasonable.
If the case was decided under the PECL, the conclusion would probably have been the same. As we saw in paragraph 3.4.7 above, good faith is a criterion that shall be used in the interpretation of the meaning of the contract according to article 5:102. Therefore, and to the extent that the lender’s early termination can be deemed as an undue reaction to an immaterial breach by the borrower, the text of the termination clause can be accommodated so as to prevent the unwanted result.

If the case was decided under German law, the conclusion would probably be the same, but on the basis of a different reasoning. German law does not contain a general access to control the content of a contract (if the terms of the contract have been individually negotiated, as opposed to the general conditions that were examined in paragraph 4.3.1 above); however, § 242 BGB requires that a contract is performed in accordance with good faith. One of the functions that this rule is deemed to have is to prevent that a party abuses a right that it has under the contract. To the extent that the lender’s conduct does not have a reasonable explanation, therefore, it may be prevented as being a performance against good faith.

If the case was decided under Italian law or the UNIDROIT Principles, it would be probably decided in a different way. Neither Italian law nor the UNIDROIT Principles give ground for modifying or accommodating the clear language agreed upon by the parties; even if there are several references to good faith in the Codice Civile and in the UNIDROIT Principles, these may not be invoked to correct a contractual regulation that the parties have willingly agreed upon. The lender, therefore, would be permitted to early terminate the loan because of the immaterial breach of contract by the borrower.

English law would lead to the same conclusion as Italian law and the UNIDROIT Principles, even more so, since it contains very little reference to good faith and attaches great weight to the language of the contract.

The case could not be decided under the CISG, since it falls outside of the scope of its application. However, if the case was decided under the lex mercatoria as it is deemed to be expressed in the CISG, it would be solved similarly as under Italian and English law and the UNIDROIT Principles.
4.3.3 Determination of Price

The case of renegotiation of the contractual clause on calculation of the price was decided by the Norwegian Supreme Court in 1991.\textsuperscript{162} The Court’s reasoning is based on the purpose of the contract, which the court identified in the wish that none of the parties should have a gain or a loss out of the energy transaction, i.e. that the transaction should be on a self-cost basis. The Court observed so that the price determination in the contract was agreed upon because it was meant to be the most reliable way of calculating the price. The facts showed that there was a more reliable way to calculate the price, and the Court considered that this more reliable way would be more appropriate to reach the purpose of the contract. The Court considered this a reasonable ground for the energy producer to request a modification of the clause on price calculation.

If the case was decided under any of the other systems compared herein, the contractual clause would most probably had been enforced according to its terms; the task of a judge is not considered to be that of ensuring that the deals between the parties are equitable and correct, but to ensure that the deal upon which the parties have agreed is correctly performed (unless significant imbalances require, under exceptional situations and not in all the systems, to set aside or modify the contract).

The case could not be decided under the CISG, since it falls outside of the scope of its application (delivery of electricity is expressly excluded from the scope of the convention). However, if the case was decided under the \textit{lex mercatoria} as it is deemed to be expressed in the CISG, it would not be solved like under Norwegian law.

4.4 How the Respective Solutions are Reached

From the foregoing it appears that there are several approaches to the question of how far a judge may go in evaluating the reasonableness of the contract’s content. An outline of the main features peculiar to each system follows below, so that we can understand how the different solutions are obtained.

\textsuperscript{162} Rt 1991 s. 220. The description of the case has been simplified in the text, but in a way that does not affect the arguments relevant to our subject-matter.
4.4.1 Norway

In respect of contractual terms contained in general conditions, as well as in respect of individually negotiated terms, we have seen that Norwegian law has evolved from an approach that aimed at interpreting the general conditions restrictively on the ground that the parties accepting the conditions might not have been aware of the strictest provisions contained therein. This approach was used as an indirect control of the content of the provisions that mostly departed from the usual standard for similar contracts, and therefore as an indirect control of the provisions’ reasonableness. This approach was partially superseded when, in 1983, the Act on Formation of Contracts was amended to contain § 36, which openly permits the judge to directly set aside or modify terms of the contract that are not reasonable. This rule applies not only to general conditions, but also to individually agreed terms.

In determining the reasonableness of a provision, the judge may take into consideration, among other things, the remaining content of the contract, the position of the parties, the circumstances at the moment of entering into the contract, subsequent circumstances.

§ 36 gives the judge, in other words, a very flexible possibility to evaluate all the relevant aspects of the specific case, and to change the contract between the parties so as to obtain a result that conforms more to what is reasonable and fair. In addition to the above mentioned criteria set forth in § 36 itself, the judge will look for guidance in statutory rules regulating similar situations, commercial practice or common sense in order to establish what is a reasonable regulation for the specific case.

The discretion of the judge is, according to this rule, rather broad; to restrict somewhat the scope of applicability is the reference to “the position of the parties” as a criterion for determining the reasonableness of the contract. If the parties are on an equal footing and there is no imbalance between their bargaining powers, the judge will be more reluctant to intervene on the contract, than if one of the parties was a consumer or in an evidently weaker contractual position than the other party.  

163 Rt. 1999 s. 922, RT. 2000 s. 806, Rt. 2003 s. 1132.
Another limitation to the applicability of § 36 is to be made in respect of the so called “Agreed Documents”. In certain branches of business, standard contracts have been developed as a result of negotiations between associations that represent each of the contractual parties: for example, in respect of construction or of freight, standard contracts have been negotiated between organisations representing each party of those types of relationship (both the principal and the constructor, both the carrier and the cargo owner). The result is contracts that represent the state of the art in respect of the contractual and commercial practice within that particular branch, as well as that they represent the most balanced compromise between the opposed interests of each of the parties. In view of the special quality of these contracts, the Supreme Court has been willing to enforce clauses that might otherwise have been deemed as unreasonable, as long as their were part of an Agreed Document.  

4.4.2 Germany

In respect of general conditions of business, German law has a double approach similar to the Norwegian one. The first measure to ensure a fair use of general conditions is to restrict the scope of what is considered to be agreed between the parties: § 305 c BGB provides that provisions contained in general conditions are not to be deemed a part of the agreement between the parties, if, according to the circumstances, they are so unusual, that the party accepting the conditions cannot be expected to have taken them into account. The second paragraph of § 305 c specifies that, in case of uncertainty, the interpretation shall be in favour of the party that has not drafted the conditions. This rule serves, as we have already pointed out, as an indirect control of the conditions’ content: if it departs significantly from the usual regulation of similar situations, it will not be given effect, on the ground that it was not agreed.

§ 307 BGB provides a direct control of the conditions’ content: a condition is to be deemed as unenforceable, if it unduly and against the principle of good faith negatively affects the party that has not drafted it. It is specified that a condition may fall within the scope of this rule if it is not sufficiently clear and understandable. According to § 307 (2), moreover, an undue prejudice against good faith is (in case of uncertainty) to be presumed, if the

164 Rt 1994 s. 626, where the Supreme Court enforced a clause containing a limitation of liability in favour of the carrier, even if the damage to the cargo was due to the gross negligence of the carrier.
condition is not conform to the principles underlying the rules of law that the condition is derogating from. The rule does not sanction derogation from the law as such, because it is not referring to mandatory rules of law; it is the principles that inspire declaratory rules of law that are made reference to as a term of comparison and therefore as a guideline for what may be considered as an undue regulation against good faith. Moreover, § 307(2) specifies that an undue prejudice against good faith is (in case of uncertainty) to be presumed, if the condition limits the rights and obligations arising out of the agreement in such a way that it prejudices the possibility to reach the purpose of the agreement.

Unlike Norwegian law, however, German law does not extend the rule on control of the contract’s content also to cover individually agreed terms. However, the rule that requires a party to perform its contractual obligations according to good faith and fair dealing, contained in § 242 BGB, is interpreted as having also a barrier function that prevents a party from abusing a right that it has according to the contract. In particular, this rule may be invoked to avoid enforcement of a contractual clause if the consequences of its enforcement are in a considerable imbalance compared to the situation (for example, termination of a contract as a consequence of an immaterial breach).  

The rule of § 242 BGB, however, may not be invoked to correct the regulation of the parties’ interests as it is contained in the contract. In case of dramatically changed circumstances, the rule of § 313 BGB may be invoked to correct the regulation of the contract, but this is allowed only under exceptional circumstances and may not be looked upon as an ordinary means to correct a not very appropriate contractual regulation.

4.4.3 Italy

Italian law is less inclined than Norwegian and German law to control the content of a contract, whether directly or indirectly.

In respect of general conditions, the Codice Civile provides some measures to ensure that the party that has not drafted them is aware of them; however,

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165 KROPHOLLER, op.cit., § 242, nn 2 ff.
these measures are less invasive than the corresponding Norwegian and German rules. Article 1341 provides that general conditions are binding on the parties if they were known or could have been known by the party that did not draft them. By specifying that they are binding if they could have been known, article 1341 is putting on the party that has not drafted them the burden of acting diligently for obtaining knowledge of the conditions. For conditions that contain a particular prejudice of that party’s position, article 1341 requires, as a prerequisite for their enforceability, that the conditions are specifically signed. The requirement of the double signature should, in the intention of the rule, ensure that the conditions have been specifically approved. As long as the party that has not drafted the conditions has signed twice (once for the whole document and the second time for the conditions specifically referred to), the conditions become binding and enforceable, even if they contain a regulation that might be considered as unfair to that party.

In respect of individually agreed terms, Italian law does not provide measures to ensure that the content is reasonable. As we have seen above in paragraph 3.4.3, the criterion of good faith is not a criterion that may be used to correct the clear language of the contract or the balance of interests as regulated in the contract, and this is confirmed by both legal doctrine and judicial practice.166

In some situations, specific statutory rules require the judge to substitute unreasonable contractual clauses; for example, art. 1384 requires the judge to reduce the size of a contractual penalty, if it is manifestly too onerous, and art. 1526 requires reducing the size of the indemnity for rescission of a sale contract with reservation of title. However, without a specific statutory rule expressly justifying the replacement of a certain kind of unfair clause, the judge will not be allowed to modify the regulation agreed upon between the parties, even if it is unfair.167

The criterion of good faith is used to ensure that the contract is performed properly (art. 1375), but this is more directed to ensure the accurate implementation of the rights and obligations as regulated in the contract, rather than to correct these rights and obligations to ensure a reasonable contractual regulation.168

166 Art. 1366 Codice Civile; see SACCO, DE NOVA, Il contratto, cit., pp. 115ff., with further references.
167 GAZZONI, op.cit., 772ff.
168 See below, paragraph 5.3.3
4.4.4 England

English law is even less inclined than Italian law to regulate a direct or indirect control of the contract’s content.

Case law affirms also in England the rule that general conditions have to be brought to the attention of the party who has not drafted them, even more so, when their content is prejudicing this party’s position in an unusual way.169

Beyond this, however, there seems to be little possibility to control the content of the general conditions. The Unfair Contract Terms Act of 1977, which applies principally to consumer contracts, extends to commercial contracts when these are entered into on the basis of general conditions. However, as we have seen in section 4.3.1 above, the act contains a long series with exceptions that significantly reduce its scope of applicability to commercial contracts.

Case law had developed the theory of the fundamental breach of contract, according to which a condition limiting the liability of the party who drafted the general conditions could not be enforceable, if the violation of contract for which that party would otherwise be liable amounts to a fundamental breach of that contract. The reasoning of this rule was that a fundamental breach of contract leads to a termination of that contract, and in case of termination of the contract also the condition limiting the liability would cease to have any effect. This rule, however, has been set to rest by the House of Lords in 1980:170 the House of Lords made reference to the Unfair Contract Terms Act that had been recently enacted, regulating the efficacy of limitation of liability clauses. The House of Lords pointed out that there is no need of a judicial rule on fundamental breach of contract to integrate the statutory rules, and it underlined that in the context of contracts between parties with equal bargaining power (which are the contracts that interest us here) the parties should be free to allocate the risk as they please and their regulation should be respected.

The attitude above described is even more valid in respect of individually agreed terms: the parties are free to regulate their interests as they deem fit

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169 Interfoto Library Ltd. v. Stiletto Ltd. [1989] 1 Q.B. 433
170 Photo Production Ltd. v. Securicor Transport Ltd. [1980] 2 W.L.R. 283
in their contract, and the interpreter has no possibility to correct the balance of interests agreed upon by the parties, not even if that is advisable for the sake of good faith or fair dealing.

If the parties had not included a clause on termination in the terms described above, the immaterial breach could not have been invoked as a basis for termination.\footnote{BEALE, Termination, cit., pp.352ff.} This result, however, would not be achieved by applying the criteria of reasonableness or good faith, that, as we have seen, are not present in English law. The result would be achieved applying the distinction between condition of contract and warranty. The former is used to describe those terms that go to the root of the contract; they are so fundamental, that a breach entitles the other party to terminate. Breach of a warranty, on the other hand, entitles only to request reimbursement of damages. For the terms that are difficult to classify, English law has developed the category of intermediate terms, the breach of which may be basis for termination if they represented a substantial performance. By these categories, English law achieves in part the same objective of the Civil Law doctrines of good faith and reasnableness, i.e. it prevents the abuse of one party’s right. However, as already mentioned, this is not applicable if the parties have inserted in their contract a clause that entitles one party to terminate upon any breach, irrespective how immaterial the breach is.

### 4.4.5 CISG

The CISG does not contain reference to good faith or fair dealing as a corrective of the contract’s content (the only reference to good faith, in article 7, is not directed at regulating the parties’ conduct, but the judge’s interpretation of the convention).\footnote{Article 7 was intentionally drafted so as to exclude reference to good faith in the interpretation of the contract; nevertheless, sometimes article 7 is interpreted extensively, as if the criterion of good faith referred also to the construction of the contract. See infra, paragraph 5.4.5 and references in the footnotes.} The convention presents, as already pointed out, a series of rules that are meant to integrate the contract’s content. However, applicability of the convention’s rules may be in full or in part excluded by agreement of the parties, according to art. 6 CISG; therefore, it does not seem that there is any basis for assuming that the CISG contains rules or principles that may supersede the terms of the contract.
4.4.6 UNIDROIT Principles

In respect of general conditions, referred to by the Principles as standard terms, the UNIDROIT Principles regulate only the possibility to indirectly control the content: article 2.20 provides that no term contained in standard terms which is of such a character that the other party could not reasonably have expected it, is effective unless it has been expressly accepted by that party. The Principles’ approach is similar to Italian law’s approach: as long as the non drafting party has accepted the surprising terms, these become binding and enforceable, and may not be modified in order to reinstate a fairer balance between the parties.

In respect of individually agreed terms, the UNIDROIT Principles do not count good faith or fair dealing as a criterion for the interpretation or the correction of the contract’s wording. They are criteria for the filling of gaps in the contract, but this does not justify the active overriding of the contract’s conditions in their name.

4.4.7 PECL

The PECL have a double approach to the question of control of the content of general conditions (referred to therein as “terms not individually negotiated”); however, the degree of control ensured by the PECL is rather modest. Article 2:104 provides that general conditions may be enforced only if they were known to the party who has not drafted them, or if the party who drafted them has taken reasonable steps to bring them to the other party’s attention. It may be noted that this regulation resembles the Italian regulation, though the burden of diligence is in the PECL on the party drafting the general conditions, rather than on the other party. The PECL specify also that a mere reference to the general conditions made in a contract, even if the contract containing the reference is signed, is not considered as a sufficient measure to bring the conditions to the other party’s attention.

In addition to the measures to make the other party aware of the conditions, the PECL provide a rule for exercising control on the content of general conditions: article 4:110 states that a condition is unenforceable if, against the principles of good faith and fair dealing, it causes a significant imbalance in the parties’ rights and obligations to the detriment of the non-drafting
party. The significant imbalance shall be determined on the basis of the nature of the performance, the other terms of the contract and the circumstances at the time of conclusion of the contract. In addition to having a scope of application that is limited by the requirement of a “significant” imbalance, the rule of article 4:110 shall not apply to a term representing the main subject-matter of the contract, or to the adequacy in value of the respective obligations.

In respect of individually agreed terms, the PECL contain a reference to good faith and fair dealing as a criterion for interpreting the contract (art. 5:102(g)). To what extent this is sufficient to justify an interpretation that openly contradicts or corrects the clear language of the contract, is not specified.

4.5 Conclusion

As we did in the case of interpretation contracts, we see that Common Law and Civil Law take two opposite positions in respect of the possibility to control, directly or indirectly, the content of a contract in accordance with principles of good faith or fair dealing. However, there is a significant difference of degrees within the Civil Law and Trans-national law systems that brings some of these systems closer to the Common Law than to the most extreme Civil Law Systems.

This may be noticed particularly in respect of contractual terms that were individually agreed: on one extreme we have the Norwegian system, that grants the judge discretion to modify the contract’s terms so as to correct a (not significant) imbalance between the parties, on the other extreme we have Italian law and the UNIDROIT Principles, that take a position similar to the English one and do not permit to override clear terms of the contract. In between are the positions of German law and the PECL, while the CISG does not regulate the matter.

The differences between Common Law and Civil Law can be explained in light of the different role that the will of the parties plays in the respective systems. We have already seen that all examined systems gave a central role to the individual autonomy starting with the beginning of the XIX century, since this reflected the developments that were taking place in the European
society from an industrial, commercial and social point of view. However, we saw that the systems of Civil Law had inherited a mitigation of this attitude through the adoption of the declaratory rules on the various types of contracts, which in turn stemmed out of the doctrine of natural law and were therefore based on the ideal of equitable justice. Moreover, the Civil Law systems evolved, particularly during the XX century, granting more and more protection to the weaker contractual party.

Also the English legal system could have evolved in the same direction, since it contained the feature of the consideration, that originated from the natural law’s elaboration of the Roman *causa*; as we have seen in the second chapter, English law maintains to this date the element of the consideration, whereas the systems based on German law have abandoned it and the Italian system attaches little practical importance to it. 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 reasonable or not, is considered to be paternalistic, and is not in compliance with the expectations that English lawyers have in respect of their legal system.\(^{173}\) Even the equitable relief for a so-called unconscionable bargain, which could at first sight be deemed to be equivalent to an assessment of the transaction’s reasonableness, is not meant to reinstate the balance between the contractual parties, but is based on its value as evidence that a fraud has taken place. A significant inadequacy of the consideration, in other words, might be considered 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 reasonableness 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 reasonable 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.\(^{174}\) We have already pointed out that this is usually justified by

\(^{173}\) See, for further references, GORDLEY, *The philosophical origins*, cit., pp. 146ff.

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.

Within the Civil Law systems the different degrees of importance given to the criterion of reasonableness can be explained in light of the different role that the judge has towards the law. We have already seen that the German system, influenced by the historical school, has always granted the judge a wide scope of evaluation of the legal rule’s purpose and application. The social situation following the First World War, with the dramatic hyperinflation, was the background for the Supreme Court’s active application of the general clause on good faith contained in § 242 of the BGB. This was used to revert 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. 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.

The same attitude is to be found in Norwegian law, that not only is influenced by German law, but has traditionally a pragmatic approach to the law, aimed at creating substantive justice in the specific case rather than obeying by a blind respect of formalities.

Italian law, on the contrary, has an already mentioned positivistic approach that is difficult to combine with such a creative role for the judge. The legislator, however, has recognised the necessity to protect the interests of the weaker contractual party, and has issued a series of rules to correct excessive unjust consequences of unreasonable bargains, including also some general clauses that do not contain specific rules but reference to a general standard and would therefore give the judge a certain room for evaluation. These rules, however, are applied with the known positivistic approach.

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175 RGZ 107, 18ff. See also, for further references, among others ZIMMERMANN, WHITTAKER, Good Faith in European Contract Law, cit., pp. 20ff.
The evolution that the legal system’s focus has undergone during the past two centuries is clear. During the whole XIX century the focus was on the protection of the freedom of contract; this means the protection of the bargain that the parties have agreed to, and this again means an advantage for the stronger contractual party, that can impose unreasonable conditions to the other party and may rely on the legal system to enforce them. During the XX century and even more in this early XXI century the focus is on the protection of the weaker party, particularly, but not only, of the consumer. The different roles of the judge highlighted above have permitted to obtain this evolution by judicial practice in Germany and in Norway, whereas England and Italy have requested the formal intervention of the legislator.

The trans-national compilations of principles take a middle-position, reflecting the modern necessity to protect the interests of the weaker party, but not adopting the most progressive solutions, probably for the sake of not alienating the consensus of the countries that have more formal traditions. The latter reason is probably also the background for the CISG’s silence on the matter.

177 These countries have nevertheless extensive legislation for the protection of the consumer.
5 GOOD FAITH

After having examined how the principle of good faith or other similar standards such as fair dealing and reasonableness may affect the interpretation of the contract (chapter 3 above) and how it may be used as a standard for controlling the content of the contract (chapter 4 above), we can now look at how and to what extent this principle sets a standard for the conduct of the parties.

The conduct of the parties relating to a contract may be split into two phases: the pre-contractual phase, which basically regards the behaviour of the parties during the negotiations of the contract, and the phase of performance of the contract after it has been entered into, which regards the way in which the contract is implemented.

In respect of the pre-contractual phase, we have already seen under chapter 2 above that some systems provide for a duty of good faith during negotiations that may result in liability if one party unjustifiably breaks off negotiations. In these systems the duty of good faith may have further consequences that we will look at below. Other systems take the opposed position and do not recognise a duty of good faith; in these systems each party is expected, prior to the conclusion of the contract, to take care of its own interests. The same dichotomy between the systems can be found also in respect of the phase of performance, as we will see below.

5.1 Cases

We will look at the differences between the analysed systems of law on the basis of two cases, one for the phase of negotiations and one for the phase of performance.

5.1.1 Withheld Information

We can assume that a food producer starts negotiations for the sale of one of the buildings where it was in the past operating a bakery. The bakery has not been operative for some years; the food producer knows that the building
does not satisfy the criteria of certain new health regulations, so that it cannot be used any more to host the facilities of a bakery. The prospective buyer intends to initiate a bakery in the building, and the seller knows about these intentions; however, no express mention of the buyer’s intention is made during the negotiations. The seller does not disclose to the buyer that the building is not fit for hosting a bakery. The parties enter eventually into an agreement for the sale of the building, and no mention is made in the contract of the intention of the buyer to use the building for starting a bakery or of the circumstance that the building is unfit for that purpose.

The question that arises here is whether the seller has breached a duty of disclosure that it might have towards the buyer, or whether it is the buyer that has a duty of diligence in enquiring about the quality of the contract’s object.

The former approach assumes that the conduct of the parties is governed by a principle of good faith that requires them to take into due consideration also the interests of the other party. The latter approach assumes that each party must take the full responsibility for its conduct and be prepared to accept the consequences thereof.

5.1.2 Undue Influence on Calculation of Royalty

We can assume that two parties have entered into a licence agreement that allows the licensee to use the licensor’s technology for manufacturing certain products. The price to be paid by the licensee to the licensor for the right to use the technology (so called royalty) is expressed as a percentage of the price that the licensee charges to the company with which the licensee will have entered into a contract for the distribution of the products. The license agreement does not contain any rule regarding the distribution agreement, so the licensee is free to choose any distributor that it deems fit and to agree to any distribution conditions that it deems fit.

The licensee establishes a wholly owned company and enters into a distribution agreement with this subsidiary. The distribution agreement provides for a very low price to be paid by the distributor to the licensee; this low price is the basis for calculating the royalty that the licensee owes to the licensor in accordance with the licence agreement. The price that the distributor obtains from the end consumers of the products is much higher.
than the price that it pays to the licensee; therefore, the distributor makes a large profit. The distributor is a wholly owned subsidiary of the licensee, and, therefore, the distributor’s profit benefits also the licensee. The licensor, on the contrary, does not benefit of the high prices of the products.

The question that arises here is whether the conduct of the licensee may be considered in conflict with the purpose of the license agreement, or whether the licensee is free to arrange the distribution as it deems fit, as long as this does not contradict the express provisions of the distribution agreement.

The former approach assumes that the parties have a duty of acting in good faith and to be loyal to each other in the performance of their contract. The latter approach assumes that the parties have complied with their duties as long as they have respect the literal meaning of the contract, and that no more duties arise from the contract.

5.2 Different Goals of the Regulations

While all examined systems have rules that sanction fraudulent acts by one party, there is no goal that is common to all examined systems in respect of good faith as a standard for the conduct of the parties. Some systems do not admit the notion of good faith at all in this context, or they admit it but only to ensure that the performance of the contract takes place exactly in the way in which the parties have envisaged it. Other systems admit the notion of good faith and use it to ensure that the relationship between the parties is fair and balanced even beyond the express scope of the contractual provisions.

5.3 Different Solutions

The different approaches listed in paragraph 5.2 above lead to different solutions of the cases.

5.3.1 Withheld Information

The case of withheld information has been drafted on the basis of Italian legal doctrine.\(^\text{178}\) An Italian court would apply article 1337 Codice Civile,

which provides that the parties have to act in good faith during the phase of negotiations. It would be against this rule when one party is aware of the other party’s motives for entering into the contract and of circumstances that make the prospective contract unfit for the other party’s purpose, and yet it does not disclose to the other party such circumstances.

The case would be decided in the same way if it was decided under Norwegian or German law, which both contain rules on the parties’ duty to act in good faith also during the negotiations, as well as rules on duty to disclose significant circumstances.

The case might be decided in the same way if it was decided under the UNIDROIT Principles or the PECL, which both contain rules on good faith conduct of the parties. However, it is rather unclear what the standard of good faith contains in these codifications.

The case would be decided in the opposite way if it was decided under English law: the standard of good faith is not generally recognised in English law, and particularly not in the phase of negotiations. Each party is basically expected to take care of its own interests during this phase, and, as long as there is no fraudulent behaviour (so-called misrepresentation), a party is not required to assist the other party in the formation of the bargain.

The case could not be decided under the CISG, since it falls outside of its scope of application. However, if the case was decided under the *lex mercatoria* as it is deemed to be expressed in the CISG, it would be solved similarly as in England.

### 5.3.2 Undue Influence on Calculation of Royalty

The case of the undue influence on the calculation of royalty was decided by the Italian Supreme Court.\(^{179}\) The Court applied article 1375 Codice Civile, requiring the parties to perform the contract in good faith. The wording of the contract did not exclude the possibility to enter into a distribution agreement with a captive company; however, a good faith performance would have required that the price to be charged to the distributor be on the

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\(^{179}\) C. 99/3775
same level as it would have been if the distributor had been a third party (so called at arm’s length).

The case would be decided in the same way if it was decided under Norwegian and German law, which both set forth duties of good faith and of loyalty.

Also for this case, as for the previous one, it is uncertain whether the standard of good faith contained in the UNIDROIT Principles and in the PECL would be applied to decide in the same way as under Norwegian, German and Italian law, or whether a different standard should be applied.

If the case was decided under English law, it would be decided in the opposite way. English law has no specific duty to act in good faith in the performance of a contract and, having in mind the literal interpretation of the contracts described in chapter 3 above, there does not seem to be any basis for sanctioning a conduct that does not violate the wording of the contract.

The case could not be decided under the CISG, since it falls outside of its scope. However, if the case was decided under the *lex mercatoria* as it is deemed to be expressed in the CISG, it would be solved similarly as in England.

### 5.4 How the Respective Solutions are Reached

From the foregoing it appears that there are two main approaches to the question of good faith as a standard to evaluate the conduct of the parties. An outline of the main features peculiar to each system follows below.

#### 5.4.1 Norway

Norwegian law has good faith or fair dealing as a recurring principle throughout the law of contracts. We have already seen that good faith is used in the interpretation of contracts (chapter 3 above) and that reasonableness is used as a standard for controlling the content of contracts (chapter 4 above). Good faith and loyalty are principles that govern also the conduct of the parties, both in the phase of negotiations and in the phase of performance.
In the phase of negotiations, the principle of good faith results, among other things, in a duty to take into consideration the other party’s reliance on contractual negotiations (chapter 2 above), 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. 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. The duty to disclose goes so far that it is even codified in respect of a sale “as is”, i.e. a sale where both parties expressly agree that the seller does not make and the buyer does not require warranties on the quality of the sold thing (and where therefore there should be no duty of disclosure): § 19(1)(b) of the Sale of Goods Act provides that, even if a thing has been sold “as is”, the seller is liable if it failed to disclose material information that the buyer could reasonably have expected and this has influenced the purchase.

In the phase of performance, the courts have often applied a general duty of good faith, that can be adapted to the circumstances of the specific case to ensure that the parties’ conduct is loyal to the purpose of the contract and takes duly into consideration the interests of the other party.

5.4.2 Germany

Also German law has a general rule on good faith, that applies both in the phase of negotiations and in the phase of performance. In particular, § 241(2) BGB provides for a duty of care towards the rights, things and interests of the other party. § 241 regulates expressly the performance of the contract, but is 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 understanding or performance of the contract.

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180 On the duty of information see, extensively, HAGSTRØM, V., AARBAKKE, M., Obligasjonsrett, Oslo 2003, pp. 131ff.
181 Rt. 1988 s. 1078. See, more generally, HAGSTRØM, AARBAKKE, op.cit., pp. 72ff.
182 BGHZ 132, 175, BGH NJW 1973, 542
In addition to the duty of care that arises by operation of law according to § 241, the BGB contains also in § 242 an obligation to perform the contract in accordance with the principle of good faith and fair dealing. Also this obligation is extended by § 311 to cover the phase of negotiations. The obligation to act in good faith brings to a duty of loyalty towards the other party and a duty to respect also the other party’s interests, and it is the basis for implied duties to ensure an accurate performance of the contract in accordance with the purpose of the contract, as well as to limit abuses of rights formally based on the contract.\textsuperscript{183}

5.4.3 Italy

Italian law contains a general clause on good faith in article 1175 Codice Civile, and specific clauses on good faith in the phase of negotiations (art. 1337) and in the phase of performance (art. 1375).

This results, among others, in duties of disclosure, of cooperation, of protection of the other party’s rights and things.

These duties are deemed to be implied, and stem from the general principle of good faith. This is not in contradiction with the reluctance that Italian law has in using good faith as a criterion to interpret contracts: as we have seen above in chapter 3, Italian law does not permit to extend the scope of contractual obligations on the basis of the principle of good faith, and even less does it permit to correct or modify the language of the contract in order to ensure an interpretation that is more in compliance with the principle of good faith. While the good faith principle is not deemed in Italy a criterion for assessing the meaning or the content of the contract, however, it is deemed to be an appropriate means of ensuring proper performance of the contract.

Therefore, the implied duties mentioned above, that are based on the principle of good faith, are not to be seen as the result of the evaluation of the contract’s content, nor the expression of a general duty to take care of the other party’s interests. These implied duties are the assumption for

\textsuperscript{183} MEDICUS, \textit{op. cit.}, pp. \ldots See also HESSELINK, \textit{m.}, \textit{Good Faith}, in HARTKAMP, \textit{Towards a European CivilCode, cit.}, 290ff.
performing correctly and properly the contract in total accordance with its terms.  

5.4.4 England

The approach of English law is primarily based on the assumption that each party is to take care of its own interests, to acquire the information that it deems necessary, and to provide for a contractual regulation that is adequate for the purpose that that party has. This is often summarised in the already mentioned formula *caveat emptor*, i.e. the buyer is to pay attention to its own interests (and may not expect or require that the seller discloses information or provides for a contract regulation that takes care of the buyer’s interests).

Accordingly, the parties are under no obligation to disclose information to the other party under the negotiations, and the only obligation that they have in the phase of performance is to perform the contract precisely and exactly in accordance with its terms. This goal is apparently the same goal expressed in Italian law: also the Italian system is concerned with ensuring that the contract is applied in full. However, this goal is reached in a different way in the respective systems: while Italian law assumes implied duties, as long as these are deemed necessary to ensure a proper performance of the regulation that was agreed between the parties, English law looks simply at the expressed regulation of the contract. Any duty that is not expressed is deemed to be not wanted by the parties, who otherwise would have expressed it.

Apart from sanctioning fraudulent conduct such as misrepresentation, there are some exceptions to these rules for certain types of contracts, such as implied terms as set forth in specific statutory law (mainly for the protection of the consumer) or such as insurance contracts, where the insured party is supposed to disclose information to the insurance company. As a general rule, however, good faith is not a criterion that is applied in the negotiation or performance of contracts. The reason for such rigorous approach is said to lie in the awareness that English law is the law of the world’s leading

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185 ANSON’S, *op.cit.*., p. 323
186 *Ivi*, p. 236
187 *Ivi*, p. 499
financial centre, and that in such a circumstance predictability of the legal outcome of a case is more important than creating the possibility to reach an absolute justice.\textsuperscript{188} Even if the law may be hard, it has the advantage of letting business know exactly where they stand; the prospects of a vague concept of fairness would make decisions unpredictable and would drive business away.\textsuperscript{189}

5.4.5 CISG

The CISG does not contain a general duty of good faith. Article 30, that regulates the seller’s principal obligations, makes reference to the duty to perform in accordance with the terms of the contract and the rules of the convention (which may be excluded by contract), but makes no reference to good faith.

Failure to mention good faith as a standard for the conduct of the parties is significant in light of the quality that the CISG has as a uniform law that may be considered as expression of the \textit{lex mercatoria}. Failure to mention good faith is even more significant, considering that it is not the result of a forgetful commission; proposals to insert good faith had been presented under the drafting of the convention, but they have not been accepted.\textsuperscript{190} In spite of the clear refusal to insert good faith as a guideline for the parties’ conduct, part of legal doctrine and of judicial practice seems keen to read such a guideline into the convention by interpreting extensively article 7 CISG, according to which the convention is to be interpreted according to good faith.\textsuperscript{191}

5.4.6 UNIDROIT Principles

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\textsuperscript{188} GOODE. R., \textit{The Concept of Good Faith in English Law}, Centro Studi e ricerche di diritto comparato e straniero, 1992 p.5
\textsuperscript{189} Ibid.
\textsuperscript{190} See on the history BIANCA, BONELL, \textit{Commentary on the International Sales Law}, Milan 1987, art. 7, 1.3ff. For a clear overview of the debate on this matter with a critical view, see DISA SIM, \textit{The Scope and Application of Good Faith in the Vienna Convention on Contracts for the International Sale of Goods}, 2001, at \url{http://www.cisg.law.pace.edu/cisg/biblio/sim1.html#*} . See also SCHLECHTRIEM, P., \textit{Good faith in German law and in international uniform laws}, Centro di studi e ricerche di diritto comparato e straniero, Saggi, conferenze e seminari, No 24, 1997, p.2. On the strong minority opinion expressed by BONELL, who affirms that an extensive interpretation of the CISG permits to consider the criterion of good faith relevant also in respect of the parties to the sale contract, see supra, footnote 113.
\textsuperscript{191} SCHLECHTRIEM, \textit{Good faith in German law and in international uniform laws}, cit., pp. 3 and 5f.
\end{flushright}
The UNIDROIT Principles contain 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.

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.

In the comment to this article, 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 any national law. 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 create clarity in respect of the content of good faith as a standard. There is certainly no uniform notion of good faith 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. As we have seen from the outline above, there are few principles that may be considered common to Civil Law and Common Law systems, and, even among Civil Law systems, there are considerable differences. The instrument that is generally considered as a high expression

192 http://unidroit.org/english/principles/paragraph-1.htm, comment No 2 to art. 1.7.
of the *lex mercatoria*, the CISG, willingly has not included good faith as one of the criteria, which renders dubious the very existence of this criterion in the trans-national context. Contractual practice is generally adopting contract models prepared on the basis of English law or at least of Common Law systems, which, as seen above, do not contemplate good faith as a standard. As a consequence of this contractual practice, the regulations between the parties move more and more away from the assumption of a good faith standard even in countries where the legal system does recognise and important role to good faith.

The foregoing shows that, even if the UNIDROIT Principles emphasise the principle of good faith, it might be difficult to concretise its content, and reference to an internationally recognised standard seems to restrict the applicability of the good faith rather than clarifying it.\(^{193}\)

### 5.4.7 PECL

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 a duty of disclosure is uncertain; moreover, 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, lacking an acknowledged international standard.

### 5.5 Conclusion

\(^{193}\) On the impossibility to adopt the concepts developed in a domestic law for applying the formula of good faith in the UNIDROIT Principles, irrespective of the rule contained in the Principles, see SCHLECHTRIEM, P., *Good faith in German law and in international uniform laws*, cit., p. 3ff.
Also in the context of good faith as a standard for the parties’ conduct we see a clear opposition between the Common Law and the Civil Law approach, where the former is concerned with preserving the parties’ freedom to contract and to ensure that their contracts are performed accurately according to their precise wording, whereas the latter is concerned with providing means for ensuring the fairness in the 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 consequetely 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 flourish. 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. 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.\footnote{See, among others, ERP, S. van, The Pre-contractual Stage, in HARTKAMP, A., Towards a European Civil Code, cit., pp. 215ff.}

There is, however, a wide range of degrees regarding the relevance of good faith even within the Civil Law systems. While the Civil Law systems contain rules that are largely equivalent to each other from a morphological point of view, they apply these similar rules in different ways. In Italy the rule on good faith is mainly an interpretative tool, whereas in Germany (and in Norway) it is considered as an operative guideline.\footnote{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 – ein supranationaler Grundsatz?, in Festschrift für Walter Odersky, Berlin 1996, pp. 703ff., 705ff.} 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.

Surprisingly, the status of the law is rather uncertain within the transnational sources that we have examined, but the tendency must be, in spite of the opposite appearance, towards a restrictive application of the good faith. 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. The trans-national compilations of principles give good faith a central role; however, they do not define the scope and meaning of good faith, but they emphasise that the principle of good faith must be understood on the basis of the practice of international trade, 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. Not many sources are available to establish the meaning of good faith 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. International contractual practice is mainly based on Common Law contract models, the very structure of which rejects the interference of good faith. 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.
6 LIABILITY FOR NON-PERFORMANCE

Another area where Civil Law and Common Law systems present significant differences is that of the liability for non-performance. A contract is binding by its nature, and this means that both parties are required to perform their respective obligations in accordance with the agreed terms (with or without any correction by implied terms, good faith or reasonableness, as seen above): in a contract of sale, for example, the seller will be obliged to deliver the goods, in the volume and with the quality as specified in the contract, at the agreed place of delivery and on the agreed delivery date. The buyer will be obliged to pay the agreed price according to the agreed modalities, as well as to take delivery at the agreed place and on the agreed time.

Situations may arise, however, where one of the parties does not comply with its obligations under the contract. For example, the seller delays its delivery, or the delivered volume is smaller than agreed, or the quality is not in accordance with the agreed specifications. In these situations, a breach of contract occurs. Whether the party that did not comply with its obligations is to be deemed liable for this breach of contract and has to bear the legal consequences thereof, is something that is regulated differently in the various legal systems. Also the consequences of such liability are different, but those will be dealt with in chapter 7 below.

There are, broadly speaking, two main ways of looking at the question of liability for non performance: one approach assumes that the non-performing party is in any case legally liable for its breach of contract, the other one assumes that a legal liability arises for the non-performing party only if that party is actually responsible for that breach. The former approach regards the contractual obligations as absolute obligations that are guaranteed by the parties, and operates therefore with a concept of strict liability (a party is automatically liable for having failed to comply with an obligation that it has guaranteed, irrespective of the reasons for that failure to comply). The latter approach looks at the conduct of the non-performing party and assumes a liability only if that party has willingly or negligently violated its obligations; if the non-performing party cannot be blamed for the failure to perform, it will not be considered liable.
These opposing approaches are mitigated by exceptions and corrections on both sides; however, the difference in attitude remains.

The question of liability for non-performance of a contractual obligation may be spilt at least into two main groups: liability for a default that is imputable to the non-performing party because of wilful misconduct or negligence of that party, and liability for a default that is not due to the wilful misconduct or the negligence of the non-performing party.

The former category does not interest here, since there are no significant differences in the examined system’s answers: a party is to be deemed liable for breach of contract if the default is due to that party’s improper performance of its obligations.

The latter category, on the contrary, is treated differently in the various systems. The question of whether a defaulting party may be excused from its non-performance is particularly relevant when the performance has been prevented by an unforeseeable event, that was outside of the control of that party, and that occurred after the prevented obligation was entered into. Supervening impediments of this kind are traditionally defined as events of *force majeure* in contractual practice, and they are often regulated in detail in the contracts. Should the contract not provide for a specific regulation of a supervening impediment, the governing legal system will intervene with its own regulation. This regulation will be analysed below.

6.1 Cases

We will look at a series of cases that are meant to show the main features of the question of excuse from liability because of *force majeure*, so that the main requirements typical of *force majeure* clauses are highlighted: what is an external event, what is an unforeseeable event, when is the performance to be deemed prevented.

6.1.1 Destruction of the Contract’s Object (1)

We can assume that a producer of car components enters into a contract for the delivery of certain aluminium components made to the specifications of the buyer, which is a car producer. When most of the components are
produced, an earthquake destroys the facility of the seller, including also the warehouse where the already produced components were stored. As a consequence, the seller cannot comply with its obligation of delivery.

The question that arises here is whether the seller may be excused from its non-performance. The assumptions of this case are, in addition to the earthquake being an external event, that the facilities of the seller were constructed in a solid way, that the area in which the facility was constructed is not especially exposed to strong earthquakes, that the seller had taken all reasonable measures necessary for the safe storage of the products.

6.1.2 Destruction of the Contract’s Object (2)

In a contract similar to the one described above (sale of car components produced to the specifications of the buyer), we can assume that the obligation of the delivery cannot be performed because the facility was destroyed by a fire.

Also in this case the question that arises is whether the seller may be excused from its non-performance; however, we assume here that the fire-alarm of the facility was not duly installed, and that the defaulting installation was due to a sudden illness of the person that was in charge of security in the organisation of the seller.

6.1.3 Act of God (Factum Principis) (1)

In a contract of sale of car components, as the one that we have assumed above, we can envisage a situation where new governmental regulations in the country of the seller introduce the requirement of an export licence for technical equipment, including also the components. The new regulations are issued following a new security policy of that country, intending to prevent sale of material that could be used for military purposes. The process for obtaining the export licence is lengthy, and because of that the seller cannot comply with its obligation in respect of the delivery date.

Also here the question is whether the seller may be excused from the delay in delivery.
6.1.4 Act of God (Factum Principis) (2)

In the same contract for the sale of car components as described above, we can assume that the export of the components has long been subject to licensing by the authorities in the country of the seller. We assume also that the seller was in the possession of a multiple licence that permitted it to export the components without having to apply for a specific licence in connection with every contract. We assume that the multiple license is withdrawn as a consequence of the seller’s non-compliance with certain requirements set by the government. Because the seller now has to apply for a specific export licence, it is not in a position to deliver the goods in accordance with agreed delivery date.

The question is whether the seller is excused from its failure to perform.

6.1.5 Supplier’s Failure

In the same contract for the supply of aluminium car components, we can assume that the seller/producer of components has to procure the aluminium for the production of the components from third parties. After having carried out an extensive process comparing the quality, reliability and conditions offered by the major aluminium suppliers on an international level, the seller enters into a contract for the procurement of aluminium with a recognised supplier, which was offering the best conditions. The aluminium supplier fails to deliver the proper quality of aluminium according to the time schedule agreed with the producer of components. As a consequence of the lacking delivery of aluminium, the seller/producer has to delay its production, including also the production of the car components for the buyer. Therefore, the seller/producer can not comply with its obligations towards the buyer.

The question is whether the seller/producer is excused from its non-performance. We can assume that the failure to deliver aluminium to the producer/seller (which resulted in the seller/producer’s failure to comply with its obligations towards the buyer) is due to extraordinary weather conditions that prevent shipments from the harbour from which the supplier can ship the aluminium of the requested quality.
6.1.6 Sub-contractor’s Failure

In a contract for the sale of car components similar to the one described above, we can assume that the seller has delegated part of the production process to a third party, on the basis of a sub-contract. We can assume that the sub-contractor fails to perform its obligations properly, because of inefficiencies due to an internal reorganisation process that it started after having entered into the sub-contract with the seller. As a consequence of the sub-contractor’s default, the seller is not capable of complying with its obligations towards the buyer.

The question is whether the seller may be excused from its non-performance; the difference between this case and the previous one is that in the present case the sub-contractor’s failure is due to an impediment beyond the sub-contractor’s own sphere of control, and that the third party that caused the default had been chosen by the seller to perform parts of the contract, whereas in the previous case the third party that caused the default had not been engaged to perform that particular contract, but simply to provide the factual assumptions for the production of the seller.

6.1.7 Choice between Contracts

We can assume that the producer of car components has entered into two contracts for the delivery of customised car components to two different car producers. When the seller has nearly completed production for both buyers, an earthquake partially destroys the seller’s storage facilities. As a consequence thereof, the seller is capable of delivering the total agreed volume on the agreed delivery date only to one buyer, not to both; alternatively, the seller could deliver on the agreed delivery date only part of the agreed volume to both buyers.

The question is whether the seller is excused from its partial non-performance, and in what way; we can assume that the circumstances around the destruction of the storage facility are corresponding to those described in paragraph 6.1.1 above, i.e. that the seller was not to blame for the destruction.
6.1.8 Unaffordability (1)

We can assume that the car components that are to be delivered under a sale contract similar to those described above have to be transported by ship to the buyer, and that the responsibility for the freight is upon the seller. Due to unexpectedly severe weather conditions the ship cannot enter the harbour and cannot be loaded. As a consequence, the delivery cannot take place on the agreed time, unless the buyer orders an ice-breaker, which will cost a significant amount of money.

The question is whether the seller is excused from the non-performance; in this case the performance is not physically impossible, since an ice-breaker would permit the ship to approach and leave the harbour. However, the use of an ice-breaker would be so costly that it would be very burdensome on the seller.

6.1.9 Unaffordability (2)

We can assume that the parties have entered into the contract for the sale of aluminium car components as described above. In the contracts the parties have agreed on a certain price, which the seller has calculated (among other things) on the basis of the price for the aluminium that is to be used as a raw material in the production of the components. The seller has also calculated a certain margin beyond the current aluminium price, since it is aware of the fact that the price of aluminium is very volatile and fluctuates considerably.

We can assume that the price of aluminium increases significantly beyond the increase that the seller had calculated in the price, and that sale of components at the price agreed with the buyer would bring to considerable losses for the seller, that might even be facing insolvency as a consequence thereof.

The question here is, assuming that the seller fails to perform the contracts to avoid these losses, whether the seller may be excused under the circumstances from its non-performance.

6.2 Different Goals of the Regulations
The goals of a regulation on exemption from liability for non-performance may be several. The regulation may aim at allocating the risk for supervening unexpected events between the parties according to the system’s evaluation of which one of the two parties is closer to bear that particular risk. This approach assumes a strict liability, triggered irrespective of the conduct of the party that was prevented from performing its obligations.

Alternatively, the regulation may aim at rewarding a party who has acted with the due diligence, so that a party is not supposed to bear the risk for unexpected events if that party has acted diligently, even if it would be closer to bear such risk in an objective allocation of risk. Finally, the regulation may be founded on the aim of avoiding unfair situations in the relationship between the parties.

The legal systems compared herein present all three above mentioned approaches, although not in their respective pure forms and are mitigated by some exceptions. Despite the different declared aims, however, all systems would decide similarly some of the cases that we are analysing. Also, despite similar formulations in their regulations, some systems would decide some of the mentioned cases differently; the solution would be, for some systems, equal to the solution that would be reached in the systems adopting the opposite formulation in their regulation.

6.3  Different Solutions

We will look now at how the mentioned cases would be decided in the compared systems.

6.3.1  Destruction of the Contract’s Object (1)

The first case would be decided equally in all compared systems. If the performance is objectively prevented by the destruction of the object of the contract, and if this hindrance is due to a fact beyond the control of the prevented party, which was not foreseeable, and the consequences of which could not be overcome, then the prevented party is excused from its non-performance.
6.3.2 Destruction of the Contract’s Object (2)

This case would also be decided equally in all the analysed systems: if the event that prevents the performance is within the control of the prevented party, and that party cannot prove that it has taken all necessary measures to overcome the event or its consequences, then that party cannot be excused and will be liable for its non-performance.

Illness of an employee in the seller’s organisation cannot be considered as a liberating event: a party has the duty to organise its activity in such a way that it is at all time carried out in a correct manner, and it is within the ordinary course of business to provide for solutions that ensure the proper functioning of the company even if some key employees should become ill.

6.3.3 Act of God (Factum Principis) (1)

Also this case would be decided equally in the analysed systems: as in the case described in 6.3.1, we are in a situation where the performance is objectively prevented by a supervening event outside of the prevented party’s control. In this case the cause of the hindrance is not a natural event, as in the case of the earthquake, but the act of an authority. In both cases, however, the prevented party has no influence on the cause of the impediment, and cannot overcome its consequences. Therefore, the prevented party is excused.

6.3.4 Act of God (Factum Principis) (2)

Also in this case the compared systems would come to equal decisions: even if performance is prevented by the act of an authority, as in the previous case, here the authority has acted to sanction a negligent conduct of the prevented party. Therefore, the impediment cannot be considered to be outside of the control of that party, and there will be no excuse from liability.

6.3.5 Supplier’s Failure

This case would be decided differently according to the approach adopted by the legal system. The legal systems that follow the criteria of the strict
liability and the allocation of risk between the parties according to the respective spheres of control, would consider the choice of supplier to be an event which falls within the sphere of control of the seller. Certainly this impediment would not fall within the sphere of the buyer and, since all risks have to be allocated between the parties, it follows that it must fall within the sphere of the seller. This is quite understandable from the point of view of the absolute obligations of the parties: the seller has guaranteed that it would sell aluminium components, and the seller has the obligation to obtain the raw material in order to produce the components and deliver them to the buyer in accordance with the agreed terms. Therefore, the impediment could not be considered external to the seller, and the seller would not be excused from liability for non-performance. The English system, the CISG, and most probably the UNIDROIT Principles and the PECL would decide in this sense.

The other systems would, on the contrary, decide in the opposite way, although with different motivations.

Norwegian law operates since some recent law reforms with the concept of impediments beyond the control of the prevented party or within its control. On the basis of this concept, we saw that English law, the CISG and probably the trans-national principles would come to the conclusion that the present impediment is within the sphere of control of the seller. Norwegian law, on the contrary, would consider the impediment to be outside of the actual sphere of control of the seller. The choice of supplier is within the sphere of control, and that choice was carried out diligently, as we saw in the case description. After having made the choice, however, the seller loses, from a practical point of view, any possibility to control the sphere of the supplier. The seller has no actual possibility to influence the performance of the supplier, and the impediment is preventing the performance of the supplier. Therefore, Norwegian law would consider the impediment outside of the sphere of control of the seller, and the seller would be excused.

German and Italian law would come to a result similar to the result reached under Norwegian law, out of a different reasoning. Both laws do not adopt the approach of the strict liability and allocation of risk according to the

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196 Sale of Goods Act of 13 May 1988 (no 27), §27; this act constitutes the implementation into Norwegian law of the CISG.
sphere of control. German and Italian law move from the notion of responsibility. If the prevented party is to be blamed for the impediment or its consequences, it cannot be excused from liability. If, however, the prevented party can prove that it has not acted negligently, it will be excused from liability. In the present case, as we have seen, the seller has operated with diligence in the choice of supplier; therefore, it would not be considered liable for non-performance due to failure by the supplier.

6.3.6 Sub-contractor’s Failure

In the case of use of a sub-contractor for performing part of the seller’s obligations, all systems would come to a similar conclusion. The seller would not be excused from non-performance, primarily on the grounds of the observation that the seller has delegated part of the performance to a third party, and that therefore the seller is responsible for the conduct of that party as if it was its own. If the third party is prevented from fulfilling its obligations by an impediment that would qualify as an exemption from liability, and if also the seller is under the same impediment, then the non-performance may be excused (so-called requirement of the double impediment). However, if either the main contractual party or the sub-contractor is not under such an impediment, the main contractual party will be considered liable for non-performance. In the present case, the internal reorganisation was not external to the sub-contractor, therefore the sub-contractor cannot be considered under a qualifying impediment; the requirement of the double impediment is not met, and the seller is not excused.

6.3.7 Choice between Contracts

In the case of choice between a plurality of contracts whereby only one can fully be performed because of a partial impediment, the various legal systems would come to different results. First of all, not all systems would recognise the situation as a ground for partial excuse of the seller and, secondly, the systems that would assume a partial exemption provide for different consequences of the excuse.

Norwegian law has no clear rule for this eventuality, but an obiter dictum in a Supreme Court decision, which has been supported by legal doctrine,
seems to indicate that in the present situation the seller would be obliged to perform in full its obligations arising out of the eldest contract, whereas it would be excused from non-performance of the newest contract.\(^{197}\)

Italian law and German law would most probably decide the case excusing the seller from the part of delivery that has become impossible, and requesting that the impediment is allocated \textit{pro rata} among the various buyers, i.e. that each delivery is reduced proportionally with the reduction in the seller’s capacity due to the partial impediment.\(^{198}\)

English law would not excuse the seller at all, in accordance with a judicial rule that is being heavily criticised in English legal doctrine.\(^{199}\) The impediment would not be considered external, because the real impediment would not be seen as being the earthquake, but the circumstance that the seller had entered into several contracts with numerous buyers. If the seller had only entered into one contract with one buyer, it would have been in a position to comply with its delivery obligations even after the earthquake. Hence, the real impediment is not the earthquake, but the plurality of contracts; therefore, the impediment is not external, but self-induced, and the seller may not be excused.

The UNIDROIT Principles, the PECL and the CISG do not provide any specific rules for this eventuality. Since all three instruments regulate the eventuality of a temporary impediment, we can assume that it would not run against their underlying principles to provide also for a partial impediment (which is not expressly regulated). Therefore, it seems reasonable to assume that a party could be excused also for a partial non-performance. Whether these instruments would look at the partial non-performance as self-induced (as in English law) or as external to the prevented party, however, is not easy to say. Also, should one come to the conclusion that this situation would qualify for a partial excuse, it is not easy to determine, on the basis of the autonomous interpretation of these instruments or on the basis of international practice, what the consequences of such partial excuse would be (preference of the eldest obligation, pro rata reduction of all obligations, or a third solution).

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\(^{197}\) Rt. 1970 s. 1059, p. 1064; see HAGSTRØM, AARBAKKE, \textit{op.cit.}, pp. 268ff.

\(^{198}\) The eventuality of a partial impossibility and of a corresponding partial excuse is regulated expressly by the Codice Civile in art. 1258, and it can be inferred from the wording of § 275(1) BGB.

6.3.8 Unaffordability (1)

If the case on unaffordability of the performance was decided under English law or under the CISG, the seller would not be excused. Neither English law nor the CISG admit that a party is exempted from its obligations if the performance becomes more onerous than expected. The only situations in which a party may be excused are those in which the fulfilment of an obligation has objectively become impossible, and also in this case, as we have seen above, the excuse shall be admitted only on the basis of the criterion of the strict liability. A mere inconvenience or even a material loss that the party would face if it was requested to perform its obligation are not considered as an objective impediment, therefore are not sufficient to exempt the non-performing party from liability.

Under the UNIDROIT Principles and the PECL the situation described in the present case is defined as hardship, and it entitles the party that is affected by it to require renegotiations with the other party, in order to modify the terms of the contract and reinstate the balance between the parties. If the negotiations fail, the affected party has to go to court to obtain a modification or a termination of the contract.

Under German law the economic burden would not qualify as an impediment (regulated by § 275 BGB), but as a change in circumstances (regulated by § 313 BGB), and the affected party would be entitled to renegotiations or, in case of unsuccessful negotiations, to terminating the contract, as long as the change in circumstances was not foreseeable at the moment of concluding the contract and as long as the new circumstances render the performance unaffordable for the affected party (so called economic impossibility).

Under Norwegian law, a party is excused from non-performance even if the fulfilment of its obligations is not physically impossible, as long as the performance would be of a burden on that party that would go beyond what reasonably could be assumed in that type of contracts.

Under Italian law a party is not excused from non-performance if the fulfilment has become too onerous; however, Italian law obtains the same result as if unaffordability was an exemption. This is because Italian law...
considers it to be against the principle of good faith if the other party insists on enforcement of its contractual rights, as long as the performance requires from the affected party an excessive burden.\textsuperscript{200}

6.3.9 Unaffordability (2)

The present case would be decided equally in all examined systems: the price of aluminium being volatile, it cannot be considered as an unforeseeable event that strong fluctuations have taken place. The seller was aware of this circumstance, and could have negotiated a different price mechanism to avoid the situation that arose. Hence, the event that has caused the unaffordability cannot be considered as unforeseeable, and the seller cannot be excused.

6.4 How the Respective Solutions are Reached

From the foregoing it appears that there are several approaches to the question of excuse from liability for non-performance, as well as that similar solutions may be achieved even if the wording adopted in the regulation would point at different solutions.

6.4.1 Norway

Traditionally exemption from liability for non-performance was considered to be in Norwegian law based on the concept of strict liability, with the limitation of \textit{force-majeure} situations.\textsuperscript{201} In 1988, however, a new Sale of Goods Act was enacted, that implemented in Norway the CISG. This Act introduced, in § 27, a new concept in respect of exemption for non-performance, that of event “beyond the control” of the affected party, on the model of article 79 CISG. Subsequently, the same concept has been introduced in a series of Acts that regulate different types of contracts, it has been adopted in standard contracts and has received significant attention in legal doctrine. Hence, the original approach of strict liability with the

\textsuperscript{200} GAZZONI, \textit{op.cit.}, p. 623

\textsuperscript{201} HAGSTRØM, AARBKKE, \textit{op.cit.}, pp. 480ff.
exception of *force majeure* may be considered mainly superseded by the criterion of the sphere of control.\(^\text{202}\)

The scope of this criterion, however, is not completely clear. In the CISG, the criterion of sphere of control seems to serve to determine the allocation of risk between the parties, and therefore to represent a border between what falls abstractly within the sphere of the seller and what falls within the sphere of the buyer, irrespective of the factual circumstances of the specific case, the diligence of the parties, etc. Interpreting the criterion in the same way would have led to a very strict regulation under Norwegian law; however, the intention of the legislator was, introducing the new criterion of the sphere of control, to mitigate the regulation that existed earlier.\(^\text{203}\)

Therefore, the criterion of the sphere of control is interpreted by legal doctrine\(^\text{204}\) not, as in the CISG, as having an *abstract* understanding of each party’s sphere of control, since this would have probably rendered even stricter the Norwegian regulation prior to the enactment of the Sales of Goods Act. The criterion is interpreted on the basis of the *actual* sphere of control of each party. If one party actually has the possibility to influence a certain process, then events caused by that process are to be deemed within the sphere of control of that party. Norwegian doctrine also emphasises that, even if a party has started a process, this in itself does not mean that any events occurring in the course of that process are in the sphere of control of that party.\(^\text{205}\) The test must be if that party actually had the possibility to influence the part of the process in connection with which those events occurred. Hence the decision of the case described in paragraph 6.1.5: the seller chose the supplier, and this choice is certainly within the seller’s sphere of control (the seller could have chosen another supplier, and then the default would not have happened). However, the seller has no actual possibility to influence the performance of the supplier, therefore any impediment in connection therewith is to be deemed outside of the seller’s sphere of control.

The criterion of the sphere of control, in other words, is applied in a significantly different way from the criterion contained in the CISG: not as a

\(^{202}\) *Ivi*, pp. 481, 502ff.

\(^{203}\) Ot.prp. nr.80 (1986-87) p. 38 ff. and, extensively on the preparatory works in this context, HAGSTROM, AARBAKKE, *cit.*, pp. 490ff.

\(^{204}\) *Ivi*, pp. 489ff.

\(^{205}\) *Ivi*, p. 495
way of allocating the risk between the two parties, but as a way of determining whether the affected party had a possibility to control the impediment. The interpretation of this criterion resembles, therefore, the regime that prevails in Germany and in Italy, where the criterion for exemption from liability is not the sphere of control, but the responsibility of the affected party.\textsuperscript{206}

The second paragraph of § 27 Sales of Goods Act regulates the situation in which a party has sub-contracted the performance in whole or in part to a third party. In this case, the criterion of the actual control does not apply, and that party is liable for the sub-contractor’s non-performance as if it was its own non-performance. Hence, there will be exemption from liability only if both the main contractual party and the sub-contractor have been prevented by an event outside the respective sphere of control. This is because a party that decided to delegate to third parties the performance that it should have carried out itself must respond for the conduct of such third parties as if it was its own, irrespective of the actual possibility to influence it.

The impediment that excuses from liability for non-performance does not necessarily have to make the fulfilment of the obligation physically impossible: it is sufficient that the performance is rendered significantly more burdensome than could have been expected in a contract of that kind.\textsuperscript{207}

In the case of fulfilment that is not objectively impossible, but the performance of which would be very cumbersome, also other legal means are available to the affected party. In addition to the corrective interpretation available to the judge as mentioned in chapter 3 above, the already mentioned § 36 Act on Formation of Contracts represents a barrier against enforcement of contractual obligations that would have an unreasonable effect.\textsuperscript{208}

6.4.2 Germany

\textsuperscript{206} It must be mentioned here that a recent Supreme Court decision (21 April 2004, HR-2004-00755-A) has affirmed that, in the context of defects of generic goods, the liability is strict, and the test will be whether the defects objectively are within the sphere of control of the seller. In this context, therefore, the Supreme Court has rejected the test of actual control and is more in line with the regulation contained in the CISG.

\textsuperscript{207} Ot.prp. nr. 80 (1986-87), p. 72. See also HAGSTROM, AARBKKE, \textit{op.cit.}, pp. 482f.

\textsuperscript{208} See HAGSTROM, AARBKKE, \textit{op.cit.}, 242 ff., for extensive references to case law.
German law has an approach that differs in the form from the Norwegian one, but is similar in the results. Under German law the criterion of sphere of control is not applied, and the risk is not allocated in advance between the two contractual parties. The determining criterion under German law is that of the negligence of the non-performing party.

According to § 276 BGB, a liability for non-performance arises only, in the case of impediment as described in § 275, if the affected party has acted negligently or with wilful misconduct. According to § 280 ff. BGB, the negligence of the affected party is presumed, and therefore the burden of proof is on the affected party, that has to prove the lack of negligence in its conduct. As long as evidence of lack of negligence is produced, therefore, the affected party is not liable for its non-performance, even if the impediment occurred within the sphere of control of that party.

According to § 275 BGB, an obligation does not need to be fulfilled if its performance has become impossible, either objectively or subjectively (paragraph (1)), or if it has become so onerous and out of proportion in relation to the creditor’s interest in the performance, that it would be against the principle of good faith to insist on the performance (paragraph (2)), or, if the performance has to be made personally by the affected party, a fulfilment cannot be expected in light of the character of subjective impediments and in light of the other party’s interest in the performance (paragraph (3)). The second and the third paragraph of § 275 refer to a performance that has become so cumbersome, that the efforts that have to be made to fulfil it are out of proportion with the other party’s interest in the performance. These rules, therefore, do not regard the interest of the affected party, but the interest of the other party, and they simply weigh the amount of effort required for the performance against the other party’s interest therein.

The interest of the affected party is considered in § 313 BGB: this rule regards change in circumstances that supervenes after the conclusion of the contract and was not foreseeable at that moment. If the change in circumstances is so dramatic, that the fulfilment of the contractual obligations in their original terms becomes unbearable for one party, the contract shall be renegotiated. Should the renegotiation not be successful, the contract may be terminated.

Also in German law the main contractual party is responsible for the conduct of the third parties that it may choose to perform the contract in whole or in
part (§ 278 BGB). From this it may be inferred, that the main contractual party may be excused for non-performance due to the sub-contractor only if both parties were under an impediment that qualifies as an exemption from liability.

The eventuality of a temporary impediment is regulated indirectly in § 281 BGB, regulating a liability for partial performance only if the affected party is not able to prove that it had not acted negligently.

6.4.3 Italy

Also Italian law, like German law, applies the criterion of the responsibility for determining whether a non-performance may be excused. The formulation of Italian law may, prima facie, seem to be stricter than the standard set by German law; however, the application of Italian rules is not significantly different from the standard set by German law.

Article 1218 Codice Civile states that a party that does not fulfil its obligations correctly is liable, unless it proves that the non-performance is due to impossibility caused by events that that party is not responsible for. The letter of the rule, therefore, requires that the affected party proves that there has been an external event that has made the performance impossible, and this is a stricter criterion than the proof of lack of negligence provided for by German law. However, Italian courts read this article together with article 1176 Codice Civile, requiring that the debtor must exercise the due diligence of a reasonable person (bonus pater familias) in performing its obligations, and affirm that, as long as the affected party has presented evidence that it has acted with the due diligence, the exemption provided for in article 1218 may be applied.209

The exemption of article 1218 covers only objective impossibility of the performance; for the eventuality of performance that has become significantly more cumbersome, the principle of good faith intervenes, stating that it would be against good faith if the other party insisted on performance of an obligation that has become excessively onerous on the affected party (articles 1175, 1375).

209 C. 86/6404, C. 91/12346.
Also in Italian law the excuse may be temporary, if the impediment ceases and the parties still have interest in the performance (article 1256), and impediments caused by sub-contractors excuse the main contractor only if there is a double impediment (article 1228).

6.4.4 England

The approach under English law is different from that under the systems analysed above. English law is concerned with allocating the risk of supervening events between the parties: the question that the English lawyer answers to is: who must take risk, rather than: was the affected party to be blamed?

Under English law the parties have an absolute obligation to perform the contract accurately. The only situation that may discharge a party from this duty is if a supervening event, without default of that party, makes the performance illegal or impossible. This eventuality is called frustration of the contract, and is applied restrictively.

The mere fact that the performance becomes more difficult or onerous does not make the performance impossible: apart from the obvious situations of destruction of the object of the contract, frustration is defined as a supervening event “(without default of either party and for which the contract does not make sufficient provision) which so significantly changes the nature (not merely the expense or onerousness) of the outstanding contractual rights and/or obligations from what the parties could reasonably have contemplated at the time of its execution that it would be unjust to hold them to the literal sense of its stipulations in the new circumstances”.

The test is very strict, and a contract may be deemed frustrated only if the supervening event radically changes the nature of the obligations that are to be performed. It is said that “it is not hardship or inconvenience or material loss which calls the principle of frustration into play. There must be as well such a change in the significance of the obligation that the thing undertaken would, if performed, be a different thing than that contracted for.”

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In addition to having a very strict criterion for what is deemed to have become impossible, English law is also very strict in respect of the characteristic of the supervening events. As in the other examined legal systems, the impediment must be supervening, unforeseeable and external to the parties. This latter criterion is applied restrictively, and (as we have seen in the case described in paragraph 6.3.7 above) has induced the Court of Appeal to deny, in a much criticised decision,\textsuperscript{213} that a contract had been frustrated, on the ground that impediment was not external to the affected party but self-induced, because the affected party had allocated for the performance of that particular contract a ship that had afterwards sunk. The real cause of the non-performance was said to be the affected party’s election to use that particular ship for that contract, rather than the sinking of the ship. The result of this reasoning is that, if a carrier has two ships and enters into two transportation contracts with two different parties, it will certainly be in default of one of these contracts if one of the ships sinks. In order to avoid the default, the carrier should always keep one ship idle and on stand-by, for the eventuality that the other ships sinks. Alternatively, it should regulate an exemption from liability for this eventuality in the contract.\textsuperscript{214}

Because frustration of a contract assumes such a dramatic change in the nature of the obligation, or even the destruction of the contract’s object, it is not possible to envisage a temporary frustration. The effect of frustration is said to be that “killing the contract”,\textsuperscript{215} and it is not possible to invoke a temporary event for a suspension of the effects of the contract, as it is possible in the other examined systems.

6.4.5 CISG

According to article 79 CISG a party is not liable for failure to perform its obligations, if it proves that the failure was due to an impediment beyond its control, that was unforeseeable and that could not reasonably have been overcome.

\textsuperscript{213} The Super Servant Two, cit.. For the criticism, see above, footnote 199.
\textsuperscript{214} This is the suggestion that is made in the judgement, The Super Servant Two, cit., at p. 158, which is also repeated by legal doctrine quoted in footnote 199 above.
\textsuperscript{215} ANSON, cit., p. 531.
The CISG does not contain any reference to the diligence of the affected party as a criterion for exempting it from liability; in another context, the convention confirms that diligence is not a criterion for excuse, and articles 45(1)b and (61(1)(b) regulate that each party may exercise contractual remedies for non-performance against the other party without having to prove any fault or negligence or lack of good faith on that party, nor do they mention that any evidence of diligence would relieve the other party from its liability. Also, the CISG does not contain any requirement that the parties act in good faith. The lack of any reference to good faith or diligence also in article 79 makes it difficult to imply in its rule that the affected party may be exempted on the basis of criterion of responsibility, as it prevails in Norwegian, German or Italian law.

The Secretariat Commentary\(^{216}\) (the closest counterpart to an Official Commentary on the CISG) does not address the question of how the criterion of the sphere of control shall be interpreted, whether literally, or as a reference to the actual control and the criterion of responsibility, as it is done in Norwegian law. Bearing in mind that the CISG requires to be interpreted autonomously, without reference to domestic legal systems, it seems appropriate to apply the literal interpretation and to see article 79 as a reference to an objective division of the landscape into two spheres, that of the seller and that of the buyer, without reference to specific actual possibilities to exercise control. This is confirmed by case law and doctrine, which affirm that, to refer to our case described in paragraph 6.1.5, procurement risk falls within the sphere of risk of the seller, and that therefore failure by the seller’s supplier is not deemed to fall outside of the seller’s sphere of responsibility (unless the relevant good has disappeared completely from the international market).\(^{217}\)

In respect of hardship, or performance that has become significantly more cumbersome than expected, the CISG is silent. However, the wording of


article 79 does not seem to allow a wide interpretation of its scope, since it uses the term “impediment”. During the phase of drafting of the convention, the proposal had been made to use the term “circumstances” rather than “impediment”, so that also situations as hardship could fall within the scope.\footnote{218 The Uniform Law on the International Sales of Goods, which is the predecessor of the CISG, contained in article 74 reference to “circumstances”.} The proposal has not been accepted, and the use of the term “impediment” seems to justify a restrictive interpretation of the scope of article 79, i.e. only to situations where the performance is impossible.\footnote{219 HONNOLD, Uniform Law for International sales under the 1980 United Nations Convention, 1991, 432.} This can also indirectly be inferred by comparison with the UNIDROIT Principles and the PECL, both having the same wording as the CISG in connection with excuse from liability for non-performance. The two collections of principles, that had the aim of regulating also hardship, contain a separate article regulating this eventuality, thus confirming that the regulation of the impediment was not meant to cover also change in circumstances that make more burdensome but do not prevent the fulfilment of an obligation.

The effects of the impediment may also be temporary, according to article 79(3); the CISG recognises, in article 79(2), the exemption from liability if a third party was engaged to perform the contract, as long as the requirement of the double impediment is met.

6.4.6 UNIDROIT Principles

The UNIDROIT Principles contain in article 7.1.7 a wording very similar to that of the CISG in order to excuse from liability a party that proves that the non-performance was due to an impediment beyond its control, unforeseeable and that could not reasonably have been overcome. The Principles define this situation as \textit{force majeure}, considering this the most acknowledged term within international practice.\footnote{220 Official Comment to article 7.1.7, 1.}

The question of interpretation of the requirement “beyond the control” is not clarified in the official commentary to the Principles. Unlike the CISG, the Principles contain numerous references to the standard of good faith; whether this is sufficient to depart from the literal interpretation, which would point at an objective allocation of risk between the parties irrespective
of the responsibility that the affected party might really have, is rather uncertain.

The impediment referred to in article 7.1.7 is an event that objectively prevents the performance; the eventuality of hardship is regulated in article 6.2.2, contemplating the occurrence of events fundamentally altering the equilibrium of the contract. As long as these events are supervening, were unforeseeable, were beyond the control of the affected party and the affected party had not accepted their risk, the affected party is entitled to require renegotiation of the contract (art. 6.2.3). If renegotiations are not successful, the affected party may seek the assistance of a court to terminate or adapt the contract.

Also the UNIDROIT Principles contemplate a temporary impediment (article 7.1.7(2)), whereas they are silent on the question of failure to perform due to a sub-contractor.

6.4.7 PECL

The PECL contain a regulation substantially similar to that of the UNIDROIT Principles, with some minor differences that will be seen below. Hence, the question of how to interpret the requirement of “beyond the control” remains unclear.

Like the UNIDROIT Principles, also the PECL distinguish between impediment (regulated in article 8:108) and change in circumstances (regulated in article 6:111). The latter is defined as a situation where the contract becomes excessively onerous for one party; the criteria that justify a request of renegotiations correspond to the criteria contained in the UNIDROIT Principles, with the difference that the PECL do not require that the change is caused by an event beyond the control of the affected party.

6.5 Conclusion

The picture of the regulation of exemption from liability for non-performance is quite complicated. As a general distinction, we have seen that English law differs from the Civil Law systems primarily because it assumes that the contractual obligations are absolute and that a party may be
discharged only in exceptional events. English law is concerned with allocating the risk of changing circumstances between the parties in an objective way, whereas the analysed Civil Law systems are concerned with excusing a party who is not to blame for its non-performance.

The difference in attitude, however, is reduced in respect of what is called in the Germanic tradition generic obligations, *i.e.* the obligation to supply certain goods that are not individually specified and can therefore, in the case of destruction or other impediments in the delivery, easily be substituted with equivalent goods readily available on the market. The substance of this distinction, unknown in the Common Law systems and in the CISG, is that the performance is not deemed to be prevented, even if the goods that were meant to be delivered are destroyed or otherwise cannot be delivered, as long as the goods that were promised are available on the market and the seller is capable to procure them from another source. As a result, in the Germanic systems the liability in case of non-performance of generic obligation is closer to the strict liability of the Common Law. A strict liability in the case of generic goods has been affirmed also in Norwegian law.\(^{221}\) The distinction between generic obligations and specific obligations, however, does not seem to add anything new to a careful interpretation of the concept of impediment: as long as similar goods are available, there is no impediment that prevents delivery. A seller that fails to procure the available goods, cannot be deemed to have acted with the due diligence, and cannot, therefore, be excused. Also in the Germanic systems, therefore, it would be possible to apply a strict standard of liability without making use of the notion of generic obligations. The category is, therefore, strictly speaking redundant, and is not present in the new version of the BGB after the 2001 reform, that was inspired by the CISG. It must be noted that the seller of generic goods is expected under Italian law to proceed to the specification of the goods that are to be sold under the contract, and that after such specification the obligation cannot be considered generic any more. It can be interpreted *a contrario* that, until the specification has taken place, the seller is due to procure equivalent goods in case of destruction of the goods that were intended to be sold, but this follows from the generic standard of diligence and not from a specific regulation regarding generic obligations.

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\(^{221}\) See the Supreme Court decision mentioned in footnote 206 *supra.*
We have seen that Norwegian law adopts a language that seems to point at an objective allocation of risk (following the criterion of the CISG, which in turn seems to be based on the Common Law approach), but that it applies the criterion of responsibility in its interpretation thereof (following its Germanic tradition).

We have seen that also the trans-national sources adopt a language that seems to point at an objective allocation of risk, and that there is little ground for interpreting that in a way that departs from the strict liability that the language seems to indicate.

Also in the case of hardship, we have seen that English law has a different regulation, which does not recognise any effect to change in circumstances that make an obligation significantly more burdensome for one party, whereas all the other systems consider this situation.

The distinction between Common Law and Civil Law in the context of liability for non-performance can be explained with the already mentioned inclination of the English system to privilege predictability, for the sake of ensuring that business is carried out smoothly, rather than ensuring that an equitable justice is made in the specific case. Common Law (and the CISG) allocate the risk of non-performance between the parties according to where it is most closely to expect that the risk should be borne. This objective rule is not to be defeated by subjective criteria such as lack of negligence, because it would render the system less predictable. Civil Law systems, as already pointed out, privilege (in different degrees) the subjective elements of the specific case, in order to ensure that an equitable solution is reached.
7 REMEDIES FOR NON-PERFORMANCE

After having seen that there are different approaches to the question of when a party is excused from liability for non-performance, we will look at how the consequences of such liability are regulated in the respective systems.

We will see that there is a variety of remedies against non-performance, and that most of them can be applied in all analysed systems, although in varying degrees, whereas some of them are not applicable in all the compared systems.

The main differences regard, first of all, the possibility for the other party to request specific performance, i.e. to request the judge to order the non-performing party to fulfil its contractual obligations. This remedy is in some systems considered as the main remedy available in case of non-performance, whereas it may in other systems be available only to a restricted extent.

Different approaches may be seen also in respect of the remedy of reimbursement of damages; particularly, the assumption for requesting a reimbursement of damage may be that the non-performing party has acted negligently, or reimbursement may be due irrespectively of the fault of that party, i.e. based on strict liability.

Furthermore, different approaches may be taken in respect of the calculation of the damages that are to be reimbursed: focus may be on the damages that were foreseeable, or on the damages that have been caused by the non-performance, irrespective of whether they were to be expected in the ordinary course of events or not.

The effects of an excusing impediment may be different: they may suspend the performance of the contract as long as the impediment lasts, or the contract may cease to have any effect. As a consequence of the mentioned different effects, the affected party may be freed from liability to pay damages but still be liable in respect of other remedies, or it may be completely freed from any liability.
The effects of a change in circumstances that renders the performance significantly more onerous vary also, since we have seen in paragraph 6.4 above that not all systems recognise that hardship may be excusing. Hence, these systems will consider the situation as a breach of contract, whereas the other systems will apply their respective rules on hardship.

7.1 Cases

We will look at the same cases that were presented in paragraph 6.1 above, so that we can complete the observations on liability made in chapter 6 above with the examination of the consequences of the liability. Because the cases have already been described, there is no need to present them in detail again.

We can specify now what consequences the non-performance by the seller has had for the buyer, so that we can use this as an assumption for the reasoning about the legal consequences of the non-performance.

We will assume that the car producer has discussed with the component producer the design of a new component that was supposed to be presented at an international car event. The component producer was aware of the importance of delivering the new components in time to permit presentation of the new car model at the international event.

As a consequence of the lacking delivery, the car producer has to stop production for a certain time, and cannot present the new model at the event.

As a consequence thereof, the car producer is not able to profit from an increase in sales that it was counting on due to the attention that the new model would receive in connection with the international event.

Moreover, the car producer loses a very profitable contract for the sale of special customised cars to a high profiled entity within the show-business, because the delay in production makes it impossible to respect the delivery date, and the show-business entity decides to purchase another type of car from another producer.
In addition, the car producer loses the income that would have come from additional sales due to the publicity if the show-business contract had been performed.

In addition to these various losses of profit, the car producer has had some expenses in connection with the chartering of the ship that was supposed to transport the car components, and had to pay a penalty to the carrier for cancelling the contract.

We will see to what extent the remedies provided for by the various legal systems permit the buyer to recover all the above losses and expenses.

7.2 Different Goals of the Regulations

Contracts are legal instruments producing legal effects for the parties entering into them. Being committed to the rights and obligations set forth in the contract, the parties are primarily expected to perform their obligations voluntarily in accordance with the contractual regulation. Should, however, the performance not be effected, or should it be not in compliance with the contractual regulation, the parties are faced with the consequences of being bound from a legal point of view. The party that is contractually entitled to the defaulted performance enjoys the protection of the legal system, that will provide remedies for sanctioning the default. The party that has not performed according to the contract has to accept the other party’s exercise of legal remedies and, if it does not, it is subject to enforcement by the competent authorities. The system of legal remedies has the double function of ensuring that a party fulfils its contractual obligations or pays the consequences of not doing it, thus enhancing certainty in commercial and economic exchanges, and of preventing that the aggrieved party makes recourse to self-justice, thus ensuring fairness and predictability in commercial and economic exchanges.

While the main goals of preventing and sanctioning non-performance and of preventing self-justice are common to all systems, there may be different goals for the regulation of the specific remedies for non-performance that are made available in each system. Some systems may aim at reinstating the situation between the parties as originally envisaged in the contract, providing for, for example, delivery of the undelivered thing, repair of defective thing, or reduction of price for the defective thing. Alternatively,
systems could aim at sanctioning the contract breach by ordering the defaulting party to compensate the loss and damage that its breach caused to the other party.

In the former approach, the question of reimbursing damages would become relevant as an addition to the reinstatement of the situation envisaged in the contract, and it would assume that the non-performing party has acted negligently or with wilful misconduct. In the latter approach, the reimbursement of damages would be triggered by the non-performance as such, irrespective of any fault by the defaulting party.

Also the calculation of the damages that are to be reimbursed will be influenced by the chosen approach.

Finally, the question of applicability of a remedy will depend on the circumstance that there has been a breach of contract; if the non-performance is excused, on the contrary, the aim will be not to sanction the breach, but to bring the contract to termination (with consequent restitution of what was disbursed under the contract), or try to adapt it to the new circumstances.

7.3 Different Solutions

Some of the cases mentioned under paragraph 6.1 above would be solved differently in the various analysed systems.

7.3.1 Destruction of the Contract’s Object (1)

In the case of impossibility for the seller to deliver the goods to the buyer as a consequence of an earthquake, we saw in paragraph 6.3.1 above that all analysed systems would deem the seller excused. The consequences of this exemption from liability would be similar in all systems, and the buyer would not have any possibility to request reimbursement of damages. The buyer would, however, be freed from its obligation to pay the price for the components, and the contract would either cease automatically to have any effect (in England and in Italy), or it could be terminated by initiative of the buyer (in the other systems).
7.3.2 Destruction of the Contract’s Object (2)

In the case of impossibility for the seller to deliver the goods to the buyer because of a fire, we saw in paragraph 6.3.2 that all compared systems would deem the seller liable for the non-performance, because the impediment could have been overcome by the proper installation of a fire alarm, and such installation could have taken place if the seller had had a more efficient plan for the internal organisation. The consequences of this liability would be similar in all the compared systems, but not completely.

In all systems the buyer would be freed from its obligation to pay the price, and in all systems the contract would cease to have effect, either automatically (England, Italy), or as a consequence of a termination by the buyer. In all systems the buyer would be entitled to reimbursement of damages, but the calculation of damages might differ.

Under English law, as well as under the CISG, the buyer would be entitled to reimbursement of the incurred expenses and of the loss of increased profit due to the impossibility to participate in the international event, since this loss was foreseeable (we have assumed that the seller and the buyer had co-operated in the design of components that were meant to be used for a new car model to be presented at the international event). However, under these systems the buyer would not be entitled to reimbursement of the loss of profit connected with the show-business contract, since that would be considered as an extraordinary loss that was not foreseeable.

Under Norwegian, German and Italian law, as well as under the UNIDROIT Principles and the PECL, the test of foreseeability is related to what is objectively foreseeable by a reasonable person as a likely consequence of the breach, as opposed to English law and the CISG, that make reference also to the circumstances that were actually known to the parties.

Under Norwegian law, unless the seller has acted with gross negligence or wilful misconduct, the loss of profit would not be reimbursable. However, if gross negligence or wilful misconduct on part of the seller is established, the damages to be reimbursed may include not only loss of increased profit but even the loss of extraordinary profit (in addition to the remaining damage).

The loss of profit is reimbursable under Italian law and the PECL, as long as it is foreseeable as a reasonable consequence of the breach. However, the
loss of extraordinary profit may be reimbursable, if wilful misconduct on part of the seller is established.

7.3.3 Act of God (Factum Principis) (1)

In the case of impossibility for the seller to deliver on time the goods to the buyer as a consequence of new governmental rules on export, we saw in paragraph 6.3.3 above that all analysed systems would deem the seller excused.

Some of the consequences of this exemption from liability would be similar in all systems, and the buyer would not have any possibility to request reimbursement of damages.

The buyer would, however, be freed from its obligation to pay the price for the components, and the contract would either cease automatically to have any effect (in England), or it could be terminated by initiative of the buyer if the buyer has no interest in a delayed performance (in the other systems).

If the buyer has interest in a delayed performance, however, the solutions would not be equal any more: in England, the contract would be considered as frustrated, and therefore the buyer would not have any basis for requesting a delayed performance. In all other systems, on the contrary, the impediment would have suspended the effects of the contract, and the buyer would be entitled to insist on delivery after the effects of the impediment have ceased to exist.

7.3.4 Act of God (Factum Principis) (2)

In the case of delay of the delivery due to self-induced revocation of the seller’s export licence, we saw in paragraph 6.3.4 above that all the systems would deem the seller to be in breach of contract. The consequences of such breach, however, would not be equal in all systems.

Under English law, the buyer would simply be entitled to reimbursement of damages. If the delay amounts to a fundamental breach of contract, the buyer may also terminate the contract. Under special circumstances, and at
the discretion of the court, the seller may be ordered to perform its obligations under the contract.

Under Norwegian, German and Italian law, the buyer would be entitled first of all to request performance, and, in addition, to reimbursement of damages. If the delay amounts to a fundamental breach, and if various other requirements are met in the different legal systems, the buyer may also terminate the contract.

Also under the CISG, the UNIDROIT Principles and the PECL the buyer would be entitled to request performance, although the right to specific performance is more limited under these systems than under the other Civil Law systems that we saw above. In addition, the buyer would be entitled to damages or to terminate the contract (in the present case it would not be necessary that the delay amounts to a fundamental breach of contract to permit termination, it would be sufficient that the buyer has given the seller notice of termination if the delivery does not occur within a certain term).

7.3.5 Supplier’s Failure

We saw in paragraph 6.3.5 above that the case of impossibility to deliver because the seller’s supplier of raw material failed to supply the aluminium would be considered differently in the various systems.

Norwegian, German and Italian law would deem the seller excused for its non-performance, and therefore the consequences would be the same as seen above in paragraphs 7.3.1 and 7.3.3: the buyer would not be entitled to any reimbursement of damages, but would be entitled to terminate the contract, if the buyer had no interest in a delayed performance or by presenting a notice.

Under the UNIDROIT Principles, the PECL and the CISG the seller would not be freed from liability, and the buyer would be entitled to request specific performance (although with some restrictions) or to terminate the contract, in addition to damages.

Under English law, the seller would not be freed from liability, and the buyer would be entitled to damages and to terminate the contract, if the default amounted to a fundamental breach of contract.
7.3.6 Sub-contractor's Failure

As we saw in paragraph 6.3.6 above, the seller would not be freed from its obligations in any of the compared systems, in the case of default by a sub-contractor. Therefore, the consequences would be similar to the consequences that we have seen in paragraphs 7.3.2 and 7.3.4 above: in all systems the buyer would be entitled to damages and to terminate the contract in case of fundamental breach. In all systems but the English, the buyer would also be entitled to specific performance, although the UNIDROIT Principles, the PECL and the CISG have a more restrictive regulation of the access to this remedy than the other systems.

7.3.7 Choice between Contracts

In the case where the seller was faced with the impossibility to fully comply with two contracts with two different buyers, we saw in paragraph 6.3.7 above that there would be a variety of solutions, ranging from the full liability for default under English law, to the excuse pro rata under German and Italian law, the excuse from non-performance of the latest obligation under Norwegian law, and an unclear treatment under the UNIDROIT Principles, the PECL and the CISG (most probably a strict treatment similar to the English regulation).

The consequences of this situation towards the buyer that has not obtained (full) performance will under Norwegian, German and Italian law be similar to those described in connection with the cases where the seller was deemed excused: the buyer will not be entitled to damages, but to terminate the contract, if the non-performance is fundamental.

Under English law (and probably under the UNIDROIT Principles, the PECL and the CISG) the buyer that has not obtained performance is entitled to the remedies for breach of contract, primarily reimbursement of damages and termination (specific performance being excluded because the performance has become impossible).

7.3.8 Unaffordability (1)
In the case of performance having become excessively onerous as a consequence of unexpected weather conditions, we saw in paragraph 6.3.8 that English law and the CISG would not excuse the seller, whereas the other systems would permit the seller to renegotiate or terminate the contract.

The latter systems, therefore, possibly with the exception of the UNIDROIT Principles, would not permit the buyer to exercise any contractual remedies, whereas each English law and the CISG would have different remedies.

Both systems would recognise that the seller has to reimburse damages, and both systems would give the buyer the possibility to terminate. However, the CISG would, primarily, give the buyer the possibility to request specific performance (although with restrictions).

7.3.9 Unaffordability (2)

The case of the performance which became excessively onerous because of high fluctuations of the raw material’s price would be decided against the exemption from liability in all analysed systems, as we saw in paragraph 6.3.9 above. Therefore, the consequences would be those of a breach of contract. Reimbursement of damages and termination are remedies available in all systems, whereas specific performance is available under Norwegian, German and Italian law, and to a certain extent under the CISG. The restrictive regulation of access to specific performance in the UNIDROIT Principles and the PECL would not allow specific performance under these instruments in this case, thus giving a result similar to that reached under English law.

7.4 How the Respective Solutions are Reached

From the foregoing it appears that there are several approaches to the question of remedies for non-performance, the main differences being in the purpose of granting a remedy to the non-defaulting party (reinstatement of the contractual situation as envisaged according to the original contractual terms, as opposed to reimbursement of the damages that arose as a consequence of the breach of contract). As a consequence of the different approaches to the purpose of contractual remedies, the question of whether
the negligence of the defaulting party is relevant will be answered differently. Also the calculation of reimbursable damages is regulated differently. Below follows a short outline of the main rules within this area in the compared systems.

7.4.1 Norway

Under Norwegian law there is a series of remedies available to the non-defaulting party. The main aim of the Norwegian regulation is to try to recreate the situation between the parties as was envisaged in the contract, or to reinstate between the parties a balance that has been affected by the default. Therefore, the main remedy is to be considered the specific performance, where the non-defaulting party is entitled to request that the defaulting party fulfils the obligations that it has breached (where this is still possible).\(^{222}\) Besides the specific performance, other remedies that tend at reinstating the balance between the parties are the request of repair of the defective thing,\(^ {223}\) the request to substitute the defective thing,\(^ {224}\) the reduction of price.\(^ {225}\) The non-defaulting party will also be entitled to withhold fulfilment of its own obligation,\(^ {226}\) and it will be entitled to terminate the contract, if the default is to be considered so essential in the economy of the contract that the non-defaulting party has no interest in the proper fulfilment if the contract longer.\(^ {227}\)

Reimbursement of damages comes as an addition to the above mentioned remedies, and it assumes that the defaulting party is deemed to be responsible for the breach (however, it is not necessary to prove negligence, unless special damages are claimed, as will be seen below)\(^ {228}\) If the defaulting party is not liable, no reimbursement of damages will be due; however, the other remedies will still be available to the non-defaulting party (assuming that there is the physical possibility to exercise them; for

\(^{222}\) On specific performance as a general rule in Norwegian law, as well as on the exceptions to this rule, see HAGSTÅR, AARBKKE, op.cit., 364 ff.. For sale contracts see the Sale of Goods Act, § 23, that has inspired subsequent legislation on other contract types.

\(^{223}\) HAGSTÅR, AARBKKE, op.cit., pp. 374 ff. For sale contracts see the Sale of Goods Act, § 34.

\(^{224}\) HAGSTÅR, AARBKKE, op.cit., pp. 395 f. For sale contracts see the Sale of Goods Act, § 34(2).

\(^{225}\) HAGSTÅR, AARBKKE, op.cit., pp. 397 ff. For sale contracts see the Sale of Goods Act, § 38.

\(^{226}\) HAGSTÅR, AARBKKE, op.cit., pp. 352 ff. For sale contracts see the Sale of Goods Act, § 49(2).


\(^{228}\) HAGSTÅR, AARBKKE, op.cit., pp. 451 ff. For sale contracts see the Sale of Goods Act, §§ 27, 40, 57.
example, the remedy of specific performance may not be exercised if the thing that should have been delivered is destroyed).

In respect of the calculation of the reimbursable damages, the defaulting party is as a rule liable to reimburse only the so called direct damages, i.e. the damages that are in a reasonable relationship of causation with the breach of contract and could be reasonably foreseen as a likely consequence of the breach (so called adequate causation).\(^{229}\) According to the Norwegian interpretation of this rule, this excludes reimbursability of indirect damages, such as loss of opportunities.\(^{230}\) Therefore, the seller in the cases described above should be liable to reimburse the incurred expenses, but not the loss of profit. However, in the case of wilful misconduct or gross negligence of the non-performing party, also indirect damages may become reimbursable, as for example loss of profit for stop of production or loss of profit because a contract with third parties was prevented by the default (so called \textit{casus mixtus}).\(^{231}\) Therefore, in the cases described above, the seller would be liable (to the extent its conduct may be deemed to represent gross negligence) to reimburse not only the loss of profit deriving from the missed international event, but also the loss of profit deriving from the missed show-business contract.

Traditionally Norwegian law distinguishes between damages that arise for the non-defaulting party as a consequence of the non-fulfilment of the contract (damages relating to the violation of the non-defaulting party’s expectations, so called positive contractual interest or expectation interest), and damages that arise for the non-defaulting party as a consequence of its having entered into a contract that was non fulfilled (damages related to the violation of the non-defaulting party’s reliance on the contract, so called negative contractual interest or reliance interest). The positive contractual interest is traditionally said to be reimbursable in case of breach of a valid

\(^{229}\) HAGSTRØM, AARBAKKE, \textit{op.cit.}, pp. 526 ff. For sale contracts see the Sale of Goods Act, § 27(4).

The limitation of the reimbursable damages to the direct damage is contained in the new legislation, first of all the Sales of Goods Act. The applicability of this limitation also beyond the scope of the legislation is confirmed also by SELVIG in respect of performance of generic obligations, whereas in respect of performance of specific obligations the author sees this limitation as applicable only where the obligations require a high degree of diligence. This is due to SELVIG’s interpretation of the criterion of liability (“beyond the control of the prevented party”) as a standard of strict liability (SELVIG, E., HAGSTRØM, V., \textit{Kontraktsrett til studiebruk}, Oslo 1997-98, vol. 3, pp. 24f.). This interpretation is in line with what seems to be the prevailing and most correct interpretation of the CISG, but it is stricter than what seems to be the prevailing interpretation in Norwegian, see \textit{supra}, section 6.4.1.

\(^{230}\) HAGSTRØM, AARBAKKE, \textit{op.cit.}, pp. 529f. For sale contracts see the Sale of Goods Act, § 67(2).

\(^{231}\) HAGSTRØM, AARBAKKE, \textit{op.cit.}, pp. 532 f. For a description of indirect damages for sale contracts see the Sale of Goods Act, § 67(2).
contract, whereas the negative contractual interest is reimbursable in case of invalid contracts. According to this approach, the non-defaulting party is not free to choose which reimbursement to pursue, as this depends on the cause of non-performance that is being acted upon. Nowadays the distinction between these two interests is not applied absolutely.\footnote{See HAGSTRØM, AARBAKKE, \textit{op.cit.}, pp. 520 ff, for a sharp analysis and extensive references to judicial practice.}

In the case of impediment that prevents a performance exempting the non-performing party from liability, the other party will not be entitled to damages, but the other remedies will continue to be available (as long as they can be reconciled with the existence of an impediment).\footnote{HAGSTRØM, AARBAKKE, \textit{op.cit.}, pp. 272 ff. For sale contracts see the Sale of Goods Act, §§ 23, 27, 34-40.} In particular, the other party will be entitled to terminate the contract. The excusing effects of an impediment, however, last only as long as the impediment persists, and performance will be due as soon as the impediment ceases to exist, if the other party has not terminated the contract in the meantime.\footnote{HAGSTRØM, AARBAKKE, \textit{op.cit.}, pp. 272 ff.}

In case of change in circumstances that renders the performance excessively onerous, we have seen already that Norwegian law would permit an adjustment of the contractual terms, so that the balance between the parties is reinstated and meets the criteria of reasonableness.\footnote{See supra, section 4.4.1.}

\subsection*{7.4.2 Germany}

Under German law the non-defaulting party may choose between requesting specific performance (if it is still possible, and after having notified the defaulting party according to § 286 BGB) and terminating the contract according to §§ 323 and 324 BGB. Termination as a remedy is available to the non-defaulting party irrespective of the quality of the breach of contract, the only assumption being that the non-defaulting party must have given to the defaulting party, prior to terminating, a notice granting it a grace period for fulfilling its obligations properly.\footnote{This unitary conception of breach of contract is the result of the 2001 reform. On the basis of the regulation of breach of contract contained in the CISG, that in turn was in this particular context inspired by Common Law, the reform has simplified a system of remedies that was rigid and unsatisfactory, and that had required the creation of new categories by judicial practice and legal doctrine for a proper application. See ZIMMERMANN, \textit{The Law of Obligations, cit.}, pp. 810ff. and 824ff., and SCHLECHTRIEM, P., \textit{The Law of Obligations, cit.}, pp. 810ff. and 824ff., and SCHLECHTRIEM, P., \textit{The Law of Obligations, cit.}, pp. 810ff. and 824ff.}
In addition to the above mentioned remedies, and under the condition that the defaulting party is liable for the default because of negligence or wilful misconduct (which liability is presumed), the other party may request reimbursement of damages according to § 280 BGB.

Under the condition that the non-performing party is deemed liable for the default, the other party may, instead of insisting on specific performance, request reimbursement of damages in lieu of the specific performance, i.e. quantify the value of the performance and liquidate it. The non-defaulting party may request to liquidate only that part of the performance that was not properly fulfilled, or that the totality of the performance is substituted for its money equivalent. This latter alternative (so called grosser Schadenersatz, as opposed to the kleiner Schadenersatz described first) is viable only if the non-defaulting party has no interest in the partial performance, or if the breach of contract is material; and in case of total liquidation the part of performance that has been fulfilled (if any) will be subject to restitution. The liquidation of the money equivalent of the performance may be cumulated with the reimbursement of damages to which the non-defaulting party is entitled under § 280 BGB in case of negligence of the defaulting party.

In respect of calculation of reimbursable damages, the general rule is that the total damage that has been caused is to be reimbursed; the liability of the defaulting party is, as seen, an assumption for liability for damages, but under German law the degree of negligence of the non-performing party does not have a bearing on the kind of damages that are deemed to be reimbursable. These include also the so-called indirect damages, such as loss of opportunities; however, the scope of this broad rule is restricted by the requirement that the indirect damages must be reasonably expected as consequences of that breach (in respect of loss of profit, the reasonability requirement is contained in § 252 BGB).

There are two alternative ways of assessing the damages. If the non-defaulting party elects to withhold its own performance, the assessment will be made on the basis of the so-called difference theory. According to this theory, the damages correspond to the difference between the value of the performance and the money equivalent of the performance.
performance that should have been received under the contract and the value of the performance that was withheld by the non-defaulting party (and saved by the non-defaulting party). If the non-defaulting party elects to fulfil its own obligations under the contract, damages will be assessed according to the so called subrogation theory. In this case, the damages correspond to the full value of the defaulted performance.

The damages referred to in §§ 280-283 BGB, that we have looked at so far, reflect the positive interest of the non-defaulting party in seeing the contract fulfilled. § 284 BGB gives the non-defaulting party the possibility to request, in alternative, damages corresponding to the negative interest. Rather than seeking the financial equivalent of the proper performance of the contract, § 284 is the basis for requesting to be put in the same situation as if the contract had not been entered into, by reimbursing the expenses reasonably incurred in reliance on the fulfilment of the contract.

The effects of an impediment that excuses the non-performing party from liability are to exclude the reimbursement of damages as long as the impediment lasts, and to entitle the other party to termination.239

The effects of change in circumstances that renders the performance more cumbersome are to entitle the affected party to renegotiations, and, if the renegotiation is unsuccessful, to termination.240

7.4.3 Italy

The remedies available under Italian law are, primarily, specific performance241 or termination. Termination, however, is available only if the breach of contract is fundamental,242 and if the defaulting party has acted with negligence.243

In addition to these remedies, the non-defaulting party will be entitled to reimbursement of damages according to article 1218 Codice Civile. This

239 § 275 BGB
241 Codice Civile art. 2930 to 2933, as well as article 1219 on the notice that the non-defaulting party has to serve on the defaulting party as an assumption of its request of specific performance.
242 Codice Civile art. 1455
243 Codice Civile art. 1453
provision does not request any negligence by the defaulting party, and sets therefore a strict criterion for liability for damages. However, The Codice Civile contains another provision, in article 1176, that makes reference to diligence, and requests a party to fulfil its obligations with the diligence that can be expected by a reasonable person (bonus pater familias). Judicial practice combines these two provisions in the eventuality of non-performance and therefore mitigates the strict effects of article 1218. As a consequence, if the defaulting party is able to prove that it acted diligently, it will not be considered liable to reimburse damages.\textsuperscript{244}

In respect of the calculation of reimbursable damages, the general rule is that the defaulting party has to reimburse the damages that were foreseeable as a consequence of that breach.\textsuperscript{245} However, the defaulting party is, in case of wilful misconduct, liable to reimburse not only the damages that were foreseeable, but all the damages that have actually been caused by the breach of contract. In the absence of wilful misconduct, the damages to be reimbursed are those caused by the breach of contract in the ordinary course of events; extraordinary consequences of the breach are not eligible.\textsuperscript{246} However, indirect or consequential damages are reimbursable, as long as they are reasonably foreseeable, and this includes both incurred losses and lost profit or lost opportunities.\textsuperscript{247} Under article 1460 the non-defaulting party may withhold its performance if the other party is in breach of its obligations. If the non-defaulting party elects not to carry out its performance, the calculation of the reimbursable damages will have to take into consideration also the savings or the opportunities that are connected with the withholding of the performance (compensatio lucris cum damno).

Under Italian law it is only the positive contractual interest that is reimbursable, i.e. the violation of the non-defaulting party’s expectations that the contract will be properly fulfilled.

In respect of an impediment that excuses non-performance, Italian law provides that the contract shall cease automatically to have any effect (as opposed to Norwegian and German law that leave it to the other party to request termination).\textsuperscript{248} However, if the effects of the impediment are only

\begin{footnotesize}
\begin{enumerate}
\item\textsuperscript{244} C. 94/1500, and see also GAZZONI, \textit{op.cit.}, pp. 621 ff.
\item\textsuperscript{245} Codice Civile art. 1225.
\item\textsuperscript{246} C. 99/11629
\item\textsuperscript{247} C. 99/4852 and see GAZZONI, \textit{op.cit.}, pp. 629f., 692.
\item\textsuperscript{248} Codice Civile art. 1256(1) and 1463f.
\end{enumerate}
\end{footnotesize}
temporary, the obligations arising out of the contract will be simply suspended and will start having effect again when the impediment has been overcome.\footnote{249}{Codice Civile art. 1256(2)}

The effect of change of circumstances that renders the performance more onerous is that the contract is terminated; however, the non-affected party may avoid termination by offering the affected party to adjust the contractual terms to the changed circumstances.\footnote{250}{Codice Civile art. 1467.}

7.4.4 England

As a general rule, English law recognises only reimbursement of damages as a remedy in case of breach of contract, as well as termination in case of fundamental breach.\footnote{251}{Historically, this limitation of the range of remedies can be explained because English law of contract evolved from the delictual remedies that were available to a person in case of an unjust wrong that he had suffered. The plaintiff was, in the case of such trespass, entitled to a compensation in money. See ZIMMERMANN, \textit{The Law of Obligations, cit.,} pp. 776 ff.}

Specific performance is granted only as a subordinated remedy, and only if the reimbursement of damages is deemed by the judge to be less adequate than the specific performance. The courts are said to be quite restrictive in the application of their discretion, so that the remedy of specific performance is confined to special circumstances.\footnote{252}{ANSON, \textit{op. cit.}, p. 633, and TREITEL, \textit{op.cit.}, pp. 1019ff.}

Reimbursement of damages, therefore, is the main remedy under English law, and it does not assume that the non-performing party is responsible for the breach: contractual obligations are deemed to be absolute in English law, and any breach will entitle the other party to reimbursement of damages irrespective of whether the non-performing party is to be blamed for the breach or not. The notable exception to this general rule is the theory of frustration, that we have seen above in paragraph 6.4.4, according to which a contract that is frustrated ceases to have any legal effect, including also, therefore, to be the basis for a claim of reimbursement of damages.

In respect of the calculation of the reimbursable damages, English law requires that there is a causation between the breach of contract and the
damages, i.e. that the breach of contract is the effective cause of the loss, without any breach in the chain of causation. To restrict the scope of reimbursable damages, however, the remoteness of the damage will have to be evaluated, and the general rule is that damages are reimbursable if they were foreseeable as reasonable consequence of the breach according to the usual course of events or, alternatively, if they could have been reasonably contemplated as a consequences by the parties on the basis of their knowledge at the time they made the contract.\textsuperscript{253} The test of the usual course of events would exclude reimbursability of extraordinary losses, such as loss of profit in connection with a particularly profitable contract with third parties that could not be concluded as a consequence of the breach. However, the test of the contemplation by the parties makes those losses eligible for reimbursement, if the defaulting party knew about the prospects of that profitable contract.

In respect of the assessment of the reimbursable damages, English law presents two alternatives: either the non-defaulting party may claim reimbursement of the losses suffered in connection with the preparation or partial performance of the contract (so called negative contractual interest or reliance interest), or it may claim reimbursement of the loss of gain that it would had had if the contract had been properly fulfilled (so called positive contractual interest or expectation interest).\textsuperscript{254}

In respect of the consequences of an impediment, we have seen in paragraph 6.4.4 above that the only situation where the non-performing party may be excused, is when the impediment qualifies as a cause of frustration of the contract. As a consequence of frustration, the contract ceases to have legal effects; there is no possibility to suspend the contract’s obligations or to extend the contract’s duration is the impediment has only a temporary character.

In respect of change in circumstances that renders the performance more onerous, we have seen that English law does not provide special rules; a non-performance will be deemed to be a breach of contract, and the consequences will be as described above.

\textsuperscript{253} Hadley \textit{v.} Baxendale, (1854) 9 Exch. 341
\textsuperscript{254} ANSON, \textit{op.cit.}, pp. 596ff., and TREITEL, \textit{op.cit.}, pp. 936ff.
7.4.5 CISG

The CISG contains a series of remedies available to the non-defaulting party, and all these are cumulative with reimbursement of damages. The latter does not assume that the defaulting party is to be blamed for the default,\(^{255}\) as opposed to the regulation contained in the examined Civil Law systems.

The specific performance is contemplated as a remedy in the CISG;\(^{256}\) however, article 28 specifies that a court is not bound to grant specific performance if it was not bound to do so under its own domestic law. This reference to domestic law means that specific performance as a remedy under the CISG is available only and to the extent in which it is available under the national law of the judge.

The other contemplated remedies are: (i) the substitution of the defective thing,\(^{257}\) however only if the defect constitutes a fundamental breach and if the substitution is requested within reasonable time, (ii) the request of repair of the defective thing,\(^{258}\) however only if the request is reasonable and is made within reasonable time, (iii) the termination of the contract (which the CISG calls “avoidance”),\(^{259}\) however only in case of fundamental breach or, in case of delay, after the grace period contained in a notice by the buyer has elapsed, and (iv) the request to reduce the price.\(^{260}\)

In addition to the above mentioned remedies, and irrespective of any negligence by the defaulting party, reimbursement of damages may be claimed by the non-defaulting party (unless the performance was prevented by an event that constitutes an exemption from liability according to article 79). These damages shall correspond to the losses that have been incurred as a consequence of the breach, including also loss of profit.\(^ {261}\) The reimbursement of damages is meant to place the non-defaulting party in the same economic position as if the contract had been properly performed;\(^{262}\)

\(^{255}\) Article 45  
\(^{256}\) Article 46(1).  
\(^{257}\) Article 46(2).  
\(^{258}\) Article 46(3).  
\(^{259}\) Article 49.  
\(^{260}\) Article 50.  
\(^{261}\) Article 74.  
\(^{262}\) Secretariat Commentary to article 74, n. 3
the CISG, therefore, does not contemplate reimbursement of the negative contractual interest.

In respect of the remoteness of the reimbursable damages, the CISG provides the test of foreseeability as a possible consequence of the breach; however, the foreseeability is not based on an objective standard of what could reasonably be expected for breaches of similar kinds of contract according to the ordinary course of events, it is based on the actual knowledge of the parties of the special circumstances of the case.263

In respect of impediment beyond the control of the affected party, we have seen in paragraph 6.4.6 above that the CISG provides for an exemption from liability for non-performance. The consequence of such exemption is that damages may not be claimed; all other remedies, however, are still available.

In respect of change in circumstances that renders the performance more onerous, we have seen in paragraph 6.4.6 that the CISG does not contain a specific provision. Non-performance will, therefore, be deemed to be a breach of contract, with the consequences described above.

7.4.6 UNIDROIT Principles

The UNIDROIT Principles contain mainly two alternative remedies: the so-called right to performance264 and the termination.265 Both remedies may be cumulated with reimbursement of damages,266 and, like in the CISG and in English law, it is not assumed that the non-performing party is to be blamed in order to claim damages, with the exception of force majeure situations.

The right to performance is divided into two: the specific performance,267 and the repair or replacement of the defective performance.268 Both remedies are available subject to the restrictions that are listed in article 7.2.2: specific performance, repair or replacement will therefore not be admissible if the performance is impossible or illegal, if the performance would be unreasonably burdensome, if the performance may reasonably be obtained

263 Article 74.
264 Articles 7.2.2 and 7.2.3.
265 Article 7.3.1.
266 Article 7.4.1.
267 Article 7.2.2.
268 Article 7.2.3.
from other sources, if the performance is of a personal character, or if it has not been requested within reasonable time.

The right to termination is subject to the breach of contract being fundamental, or to the non-defaulting party having given notice to the non-performing party with a grace period to perform. Article 7.3.1(2) contains a series of criteria to assess whether the breach is fundamental.

The calculation of the reimbursable damages is meant to ensure that the non-defaulting party receives full compensation, and it covers both incurred expenses and lost profit.\textsuperscript{269} The losses that may be reimbursed are those that were foreseeable as likely to result from the breach of contract.\textsuperscript{270} As opposed to the CISG, the Principles set an objective standard of what would reasonably be foreseeable by a diligent person,\textsuperscript{271} rather than referring to the knowledge of the parties of any special circumstances. Also, the UNIDROIT Principles use the concept of likelihood, to explain the requirement of foreseeability of a consequence; the CISG uses the concept of possibility, which is wider.

In the case of \textit{force majeure} the Principles provide for an exemption from reimbursement of damages,\textsuperscript{272} as long as the impediment lasts.

In the case of hardship the UNIDROIT Principles recognise the affected party the right to renegotiate the terms of the contract, see above paragraph 6.4.7. However, article 6.2.3. specifies that this does not give the affected party the right to withhold its performance; a logical consequence of this provision seems to be that, in case of non-performance due to hardship, and even if renegotiations are pending, the right of the other party to claim reimbursement of damages should be available (particularly in view of the circumstance that article 7.4.1 provides for a strict liability for damages and does not require the proof of negligence). Nevertheless the official comment on the UNIDROIT Principles affirms that “hardship does not in principle give rise to a right to damages”, without motivating this statement.\textsuperscript{273}

\begin{itemize}
\item\textsuperscript{269} Article 7.4.2.
\item\textsuperscript{270} Article 7.4.4
\item\textsuperscript{271} See the official comment to article 7.4.4
\item\textsuperscript{272} Articles 7.4.1 and 7.1.7(2).
\item\textsuperscript{273} Comment on article 7.4.1, n. 1
\end{itemize}
7.4.7 PECL

The PECL contain a series of remedies for breach of contract. The remedy of specific performance is, like in the UNIDROIT Principles, restricted by some provisions.\textsuperscript{274} The PECL, however, contain fewer restrictions than the UNIDROIT Principles: specific performance is not admitted where the performance would be unlawful or impossible, it would be unreasonably burdensome or performance could be reasonably obtained from other sources. Like the UNIDROIT Principles, the PECL extend these restrictions also to the remedying of a defective performance.\textsuperscript{275}

The PECL provide also for the right to reduce the price.\textsuperscript{276}

The right to termination is subject to the breach of contract being fundamental, or to the non-defaulting party having given notice to the non-performing party with a grace period to perform.\textsuperscript{277}

In addition to all these remedies, reimbursement of damages is also available.\textsuperscript{278} The PECL, like the UNIDROIT Principles and the CISG, as well as English and Norwegian law, assume that damages are payable on the basis of strict liability, and do not therefore require proof of the negligence of the non-performing party; also the PECL, however, make an exception for the eventuality that the performance is prevented by an event beyond the control of the non-performing party.\textsuperscript{279}

In respect of the calculation of the reimbursable damages, the PECL specify that the sum should be such as to place the non-defaulting party in the position as if the contract has been properly performed, and it shall contain both incurred expenses and loss of profit.\textsuperscript{280}

In respect of the remoteness of the loss, the PECL apply the same standard as the UNIDROIT Principles:\textsuperscript{281} foreseeability of the losses as a likely result of the breach. The PECL, therefore, operate with the concept of likelihood,

\textsuperscript{
274 Article 9:102. \\
275 Article 9:102(1). \\
276 Article 9:401. \\
277 Article 9:301. \\
278 Articles 8:101 and 8:102. \\
279 Article 8:108. \\
280 Article 9:502. \\
281 Article 9:503.}
like the UNIDROIT Principles. However, it should be noted that in connection with the remoteness of the losses the PECL introduce the criterion of gross negligence or wilful misconduct. If the defaulting party’s conduct has been grossly negligent or intentional, the losses to be compensated will not be limited to the foreseeable losses. This rule, therefore, reminds of the regulation that we found in Norwegian and Italian law.

In respect of excuse due to an impediment beyond the control of the non-performing party, the remedies of reimbursement of damages and of specific performance are not admitted; this excuse lasts as long as the effects of the impediment persist.

The effects of hardship are to entitle the affected party to renegotiations or to request that the court terminates the contract.

7.5 Conclusion

As we have seen from the outline made above, there are few aspects that are common to all the analysed legal systems, the main one being that no reimbursement of damages is due if the non-performing party is excused from liability.

7.5.1 Remedies

As a major difference between the Common Law systems and the Civil Law systems, is the different purpose of the remedy of specific performance. Specific performance is considered as the main remedy in the Civil Law systems, aiming at recreating between the parties the situation as described in the contractual terms. Specific performance is, on the contrary, only a subsidiary remedy under English law that is applied at the discretion of the judge and only if the main remedy is not adequate; the main remedy being under Common Law the reimbursement of damages.

282 Article 8:101(2).
283 Article 8:108(2).
284 Article 6:111.
This can be explained in light of the historic development of the Common Law: the breach of contract has always been considered in England as a “civil injury”, i.e. a wrong that has been committed by one subject to another subject. The instruments by which the affected party could obtain a remedy are the so-called actions, or writs, meaning fixed forms of suits that aim each at obtaining a certain kind of remedy. This was yet another borrowing from Roman law, that had introduced fixed formulae for the enforcement of claims. While the Civil Law systems developed to consider rights and obligations as entities with their own existence irrespective of the suits that must be presented to enforce them in court, English law maintained the close relation between a right and the fixed formula (or writ) needed to implement it. As was vividly expressed in a commentary on the fundamental Blackstone’s Laws of England: “With us in England, accordingly, the several actions have been from time immemorial conceived in fixed forms of complaint, each exclusively appropriate to the particular kind of injury for which redress is demanded.”

An injury caused by a breach of contract was related to a personal action, and the forms of personal actions available were limited in number. Accordingly, breach of contract could be acted upon by the so-called actions of debt or of assumpsit (a special kind of action for trespass, i.e. for the violation of the plaintiff’s property). In both actions the only judgement that a court could make was a money judgement: in the action of debt, the object of the recovery is the amount of money that is allegedly owed to the plaintiff, and, in the action of assumpsit, the object of the recovery was a private monetary satisfaction to the injured party. The specific performance was developed as an equitable remedy, and as such subject to more restrictions in its application.

The trans-national compilations of principles take a position somewhere between the two opposing positions of Common Law and Civil Law, admitting specifying performance as a remedy, but restricting its applicability. This seems to be due to the desire to find a compromise that could be acceptable to both the Common Law and the Civil Law traditions.

286 STEPHEN, op.cit., p. 452, mentions debt, covenant, detinue, trespass, trespass on the case, and replevin.
287 STEPHEN, op.cit., p.524. If the contract was under seal, the action of covenant was also available.
288 STEPHEN, op.cit., pp. 542f.
7.5.2 Negligence

In respect of reimbursement of damages, we have seen that German and Italian law assume negligence by the defaulting party to admit this remedy, whereas the other systems operate with the concept of strict liability. This may be explained because in these two systems reimbursement of damages is seen as an additional remedy, and therefore a stricter standard is required for its application. However, the degree of negligence may be relevant to the assessment of the amount of damages under Norwegian law and the PECL.

7.5.3 Reimbursable Damages

We have seen that there are different rules in respect of what damages are to be reimbursed: as a general rule (unless the defaulting party has acted negligently), Norwegian law does not contemplate indirect damages such as loss of profit, whereas the other systems do.

Also the definition of foreseeability of damage is treated differently: English law and the CISG deem reimbursable the damages that were foreseeable objectively or on the basis of the parties’ knowledge of the circumstances, whereas the other systems have an objective standard for foreseeability (the adequate causation) that does not contemplate the parties’ knowledge. Apart from the difference between the subjective and the objective foreseeability, however, the result of applying the foreseeability test or the causality rule should not be significant.

7.5.3 Force Majeure and Hardship

The effects of an impediment preventing performance differ: under English and Italian law (but only if the impediment is permanent), the affected contract ceases to have any effect automatically, whereas in the other systems it is up to the other party to exercise the remedy of termination. Also, English law does not recognise that a temporary impediment may suspend the effects of a contract, whereas the other systems do.

Finally, the effects of hardship are different: under English law and the CISG, non-performance as a consequence of change in circumstances that
render the performance excessively onerous is deemed to be a breach of contract, under the other systems the affected party may request renegotiation of the contract’s terms.

Once again, the position of English law (and of the CISG) may be explained in view of the repeatedly mentioned desire to enhance predictability and prevent subjective evaluations in the enforcement of contracts.
8. FINAL CONSIDERATIONS

The overview that we have seen gives rise to certain considerations.

Firstly, we have seen that some of the differences between the legal systems are due more to a question of the degree of modernity of the relevant legislation, than to a substantive difference between the aims that the relevant legislations want to achieve. These differences require a specific knowledge of the technicalities of each legal system, but do not seem to be an unovercomable obstacle to understanding the respective rules or even to bridging the differences and creating a uniform law.

However, we have also seen that there are some 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.

In the field of commercial contracts, we have seen that the conception of contracts proper of the Common Law (whereby the contract is to be interpreted literally, notions of reasonableness 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 reasonableness 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. However, generally recognised definitions of these standards do not exist (particularly in light of the rejection of these notions by the Common Law tradition); nor are there any binding international conventions that may assist in this particular context. 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 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 in these lectures. 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 whether international commercial contracts will continue to 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, since arbitrators may enjoy a more flexible scope of action than national judges, but they are still bound to apply the law accurately, as the analysis made in my lectures on International Commercial Law shows.

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SOME USEFUL RESOURCES

Comparative law:

http://www.dvr.euv-frankfurt-o.de/

http://www.iecl.ox.ac.uk/

http://www.jus.unitn.it/dsg/common-core/home.html

http://www.iuscomp.org

http://www.mpipriv-hh.mpg.de/index.shtml

http://www.ucl.ac.uk/laws/global_law/

Convention on Contracts for the International Sale of Goods:

http://www.cisg.law.pace.edu/

http://www.uncitral.org

http://www.unilex.info/

Databases on national legislation:

http://www.bib.uni-mannheim.de/bereiche/jura/db-verz.html

http://www.law.nyu.edu/library/foreign_intl/country.html

European Contract Law:

Principles of European Contract Law:

http://web.cbs.dk/departments/law/staff/ol/commission_on_ecl/

Unidroit Principles of International Commercial Contracts:

http://www.unidroit.org/english/principles/contracts/main.htm