The European Review of Private Law aims to provide a forum which facilitates the development of European Private Law. It publishes work of interest to academics and practitioners across European boundaries. Comparative work in any field of private law is welcomed. The journal deals especially with comparative case law. Work focusing on one jurisdiction alone is accepted, provided it has a strong cross-border interest.

The Review requires the submission of manuscripts by e-mail attachment, preferably in Word. Please do not forget to add your complete mailing address, telephone number, fax number and/or e-mail address when you submit your manuscript. Manuscripts should be written in standard English, French or German.

Directives pour les Auteurs
La Revue européenne de droit privé a pour objectif de faciliter, par la constitution d’un forum, la mise au point d’un Droit Privé Européen. Elle publie des articles susceptibles d’intéresser aussi bien l’universitaire que le praticien, sur un plan européen. Nous serons heureux d’ouvrir nos pages aux travaux comparatifs dans tout domaine du droit privé. La Revue est consacrée en particulier à l’étude comparée de la jurisprudence. Les travaux concentrés sur une seule juridiction sont admissibles, à condition de présenter un intérêt dépassant les frontières.

Nous souhaitons recevoir les textes par courrier électronique, de préférence en Word. Ajoutez l’adresse postale complète et le numéro de téléphone de l’auteur, un numéro de télécopie et l’adresse électronique.

Les textes doivent être rédigés en langue anglaise, française ou allemande standard.

Leitfaden für Autoren


Style guide
A style guide for contributors can be found in online at http://www.kluwerlawonline.com/europeanreviewofprivatelaw.

Index
An annual index will be published in issue No. 6 of each volume.
Interpretation of Contracts in International Commercial Arbitration: Diversity on More than One Level

GIUDITTA CORDERO-MOSS

Abstract: There is a diffuse sentiment that international arbitration is more apt in understanding the interests of the parties than national courts are. Does this mean that arbitrators are more disposed than national courts to relying on the language of the contract and to disregarding possible interference from national law - including also principles such as the principle of good faith? Alternatively, do they more readily rely on considerations of good faith, on the economic interests that are at stake, on trade usages and the like than national courts do?

Considering the impact of different legal traditions on the interpretation of contracts, the limited harmonizing effect of transnational sources in this context, the peculiar drafting style adopted in international contract practice and the rationale therefor, as well as the legal framework for international commercial arbitration, this article highlights the interpretation dilemma faced by arbitrators. It concludes that within arbitration there is no unitary approach to interpretation of contracts.

Resumé: Il existe un sentiment diffus selon lequel l’arbitrage international est plus apte à comprendre les intérêts des parties que les cours et tribunaux nationaux. Cela signifie-t-il que les arbitres sont plus disposés que les cours et tribunaux nationaux à se baser sur le langage du contrat et à ne pas tenir compte des interférences possibles du droit national – y compris également des principes tels que celui de la bonne foi? Ou bien s’apportent-ils plus facilement sur des considérations de bonne foi, sur les intérêts économiques en jeu, sur les usages du commerce et autres usages similaires, que les cours et tribunaux nationaux?

Prenant en considération l’impact des différentes traditions juridiques sur l’interprétation des contrats, l’effet limité d’harmonisation des sources transnationales dans ce contexte, le style particulier de rédaction adopté dans la pratique des contrats internationaux et sa justification, ainsi que le cadre légal de l’arbitrage commercial international, le présent article souligne le dilemme de l’interprétation auquel les arbitres doivent faire face. Il conclut qu’au sein de l’arbitrage, il n’y a pas d’approche unitaire pour interpréter les contrats.


* University of Oslo.

1. Introduction

There is a diffuse sentiment that international arbitration is more apt in understanding the interests of the parties than national courts are. Does this mean that arbitrators are more disposed than national courts to relying on the language of the contract and to disregarding possible interference from national law - including also principles such as the principle of good faith? Alternatively, do they more readily rely on considerations of good faith, on the economic interests that are at stake, on trade usages and the like than national courts do? I will argue here that there is no unitary approach within arbitration.

1.1. Interpretation of Contracts by Courts

We know about the classic divide between the literal and purposive interpretation of contracts, traditionally believed to characterize courts belonging to, respectively, the common law and the civil law traditions. Modern comparative law research is inclined to consider this divide as overrated and largely overcome by a common core of European contract law. Elsewhere I argue that the common core reveals a certain synchrony between the systems on an abstract level, but that it does not necessarily lead to harmonized solutions on a specific level. Awareness about a common core may show that a certain principle may be recognized and a certain result may be achieved in a plurality of legal systems, albeit by employing different legal techniques. In a specific case, however, it is the particular legal technique employed in the contract that counts, and not the abstract possibility of achieving the desired result, if only the right legal technique had been adopted.

1 G. CORDERO-MOSS (ed.), Boilerplate Clauses, International Commercial Contracts and the Applicable Law, Cambridge University Press, Cambridge, 2011. This book is based on a research project that I run at the University of Oslo from 2004 to 2009 and shows that the same contract wording may lead to diametrically different legal effects, depending on the governing law. See particularly part 3 in the book, as well as the Conclusion. See also G. CORDERO-MOSS, International Commercial Contracts, Cambridge University Press, forthcoming 2014, Chapter 3.
1.1.1. Different Approaches to Interpretation: The Example of Liquidated Damages Clauses

If a contract subject to English law stipulates that a party shall pay the other party a certain amount as penalty in case of breach of contract, that clause will not be enforceable because contractual penalties are forbidden in English law. If the parties had structured the payment as a reimbursement of liquidated damages, a result similar to the contractual penalty could have been achieved even under English law.\(^2\) English law, by interpreting the contract in a formalistic way, permits the parties to circumvent the prohibition of contractual penalties: this is defined as the possibility of the parties of manipulating the interpretation in order to avoid the intervention of the courts.\(^3\) The converse, however, is not necessarily true: In civil law, no matter how clear and detailed the drafting is, there are some principles that may not be excluded by the contract. Thus, a clause of liquidated damages might lead to results quite different from those contemplated in the wording of the contract if it is subject to a civilian law: the agreed amount of liquidated damages will be disregarded if it can be proven that the loss actually suffered by the innocent party is much lower\(^4\) or much higher.\(^5\) Contractual penalties may, under certain circumstances, be cumulated with other remedies, also including reimbursement of damages.\(^6\) The civilian tradition, by interpreting the contract in a purposive way (to varying degrees depending on the specific

---

3 Ibid., sec. 2.7.
applicable law), will supplement and sometimes even correct the wording of the contract, no matter how clear and detailed it was drafted.

The governing law and the legal tradition of the judge, therefore, may lead to inconsistent legal effects for the same contractual wording.

1.2. Contracts’ Ambitions of Self-Sufficiency

To minimize the risk of external interferences with the agreed terms, international contracts are drafted in a style that aims at creating an exhaustive and as precise as possible regulation of the underlying contractual relationship.

To a large extent, this degree of detail may achieve the goal of rendering the contract a self-sufficient system, thus enhancing the impression that, if only they are sufficiently detailed and clear, contracts will be interpreted on the basis of their own terms and without them being influenced by any governing law. This impression, as was seen in section 1.1.1 above, has been proven to be illusionary, and not only because governing laws may contain mandatory rules that may not be derogated from by the contract. As a matter of fact, not many mandatory rules affect international commercial contracts, although there are important mandatory rules, for example, in the field of limitation of liability, that are also relevant in the commercial context. In the context of the interpretation of contracts, the focus should mainly be on the spirit underlying general contract law. This will vary from legal system to legal system and will inspire, consciously or not, the way in which the contract is interpreted and applied. Notwithstanding any efforts by the parties to include as many details as possible in the contract in order to minimize the need for interpretation, the governing law will necessarily project its own principles regarding the function of a contract, the advisability of ensuring a fair balance between the parties’ interests, the role of the interpreter in respect of obligations that are not explicitly regulated in the contract, the existence of a duty of the parties to act loyally toward each other, and the existence and extent of a general principle of good faith - in short, the balance between certainty and justice.

---


7 To what extent these rules have an impact in the context of international commercial arbitration is analysed in G. CORDERO-MOSS, ‘International Arbitration and the Quest for the Applicable Law’, 8(3). *Global Jurist (Advances)* 2008, part II, sec. 2. See also the research project running at the University of Oslo, on Arbitration and Party Autonomy (APA): http://www.jus.uio.no/ifp/english/research/projects/choice-of-law/.
1.2.1. Boilerplate Clauses

To avoid such interference, contracts often contain a series of clauses in which the parties try to take into their own hands those aspects where the balance between certainty and justice may be challenged - the so-called boilerplate clauses. These clauses relate to the interpretation and general operation of contracts and are to be found in most contracts irrespective of the subject matter of the contract. They are relatively standardized, and their wording is seldom given attention to during the negotiations.

The eagerness in drafting may reach excesses that have been defined as 'nonsensical' by a prominent English expert. For example, the ubiquitous clause of Representations and Warranties may list, among the matters that the parties represent to each other, that their respective obligations under the contract are valid, binding, and enforceable. This Representation is itself a term of the contract and is itself subject to any ground for invalidity or unenforceability that might affect the contract, so what value does it add? It is particularly interesting that this representation is deemed redundant by an English lawyer, because it shows that the attempt to detach the contract from the governing law may go too far, even for English law, and this is notwithstanding that the drafting style

---


9 A Representation clause on the validity and enforceability of the contract is a typical part of boilerplate clauses. See, for example, sec. 5.2, Art. V, Form 8.4.01 (Form Asset Purchase Agreement), M.D. Fern, Warren's Forms of Agreements, Vol. 2 (LexisNexis, 2004). This is also the first representation recommended in Contract Standards, a site that analyses both public and private document collections with the purpose of creating standard forms and providing contract benchmarking (http://www.contractstandards.com/contract-structure/representations-and-warranties, last visited on 14 Feb. 2013). On the basis of its survey, the site comments on this clause as follows: 'States that the execution of the agreement will not violate any law or conflict with any contractual obligation agreement. The language is typically consistent across a range of transaction types' (http://www.contractstandards.com/contract-structure/representations-and-warranties/no-conflicts, last visited on 14 Feb. 2013). See also Sample Representations and Warranties, sec. 3.2, Documents for Small Businesses and Professionals, http://www.doctoc.com/docs/9515308/Sample-Representations-and-Warranties (last visited on 14 Feb. 2013). Numerous examples of actual use of this Representation clause may be found in the contracts filed with the US Securities and Exchange Commission; for example, sec. 25.1.3 of the contract dated 21 Nov. 2004, between Rainbow DBS and Lockheed Martin Commercial Space Systems for the construction of up to five television satellites (http://www.wikinvest.com/stock/Cablevision-Systems_(CVC)/Filing/8-K/2005/F2355074, last visited on 14 Feb. 2013) and sec. 5.02 of the merger agreement dated 14 May 2007, between eCollege.com and Pearson Education, Inc. and Epsilon Acquisition Corp. (http://www.wikinvest.com/stock/ECollege.com_(ECLG)/Filing/DEF-A14A/2007/F4972482, last visited on 14 Feb. 2013).
adopted for international contracts is no doubt based on the English and American drafting traditions.\textsuperscript{10}

Be that as it may, contract practice seems to be based on the illusion that it is possible, by writing sufficiently clear and precise wording, to draft around problems and circumvent any criteria of fairness that may inspire the interpreter. This seems to speak for the appropriateness of a strictly formalistic interpretation of contracts, at least if the expectations of the parties have to be met. As was mentioned above, however, the legal effects of a contract do not flow simply from the words of the contract but are the result of an interaction between the text of the contract and the governing law. Ambitions of absolute self-sufficiency, therefore, are doomed to fail. Furthermore, a strict formalistic interpretation of the contract, or at least of some clauses of the contract, is not necessarily in accordance with the expectation of the parties, as section 3.1 below will show.

2. Contracts and Arbitration

That contract wording may be overridden by the governing law seems to contradict quite significantly the will of the parties. It is legitimate to enquire whether contracts enjoy a larger degree of self-sufficiency, if disputes arising out of the contracts are decided not by national courts, but by international arbitration.

2.1. The Relative Detachment of Arbitration from National Laws

International arbitration is a system based on the will of the parties, and arbitrators are expected to abide by the will of the parties and not apply undesired sources that bring unexpected results. Moreover, arbitral awards enjoy broad enforceability and the possibility of courts interfering with them is extremely limited, so that the court’s opinion on the legal effects of the contracts becomes irrelevant.\textsuperscript{11} While all these observations are correct, they do not necessarily affect the question of how contracts are interpreted in arbitration.

It is true that an arbitral award will be valid and enforceable even when it does not correctly apply the governing law. Not even the wrong application of mandatory rules of law is a sufficient ground to consider an award invalid or

\textsuperscript{10} For a more extensive discussion of the common law models for international contracts, see CORDERO-MOSS, \textit{International Commercial Contracts}, Chapter 1.

\textsuperscript{11} On the enforceability of international awards and the scope within which national courts may exercise a certain control, see CORDERO-MOSS, \textit{International Commercial Contracts}, Chapter 5. See also G. CORDERO-MOSS, ‘International Arbitration and the Quest for the Applicable Law’, \textit{Global Jurist (Advances)} 2008, part II, sec. 2. See also the research project running at the University of Oslo, on APA: http://www.jus.uio.no/ifp/english/research/projects/choice-of-law/.
Therefore, arbitral tribunals are quite free to interpret contracts and to decide how, if at all, these contracts shall interact with the governing law. This, however, will not supply the arbitral tribunal with a sufficient answer to the question of how to interpret the contract. This is not a mere question of verifying whether mandatory rules have been complied with. It is a deeper and subtler question, and it regards the values upon which interpretation should be based, as will be seen below.

2.2. The Interpretation Dilemma

Whether a contract is interpreted strictly on the basis of its wording or whether the wording is integrated with considerations of good faith, economic interest, and the like depends on the interpreter’s understanding of the relationship between certainty and justice. This was described above as relating to the function of a contract, the advisability of ensuring a fair balance between the parties’ interests, the role of the interpreter in respect of obligations that are not explicitly regulated in the contract, the existence of a duty of the parties to act loyally toward each other, and the existence and extent of a general principle of good faith. The interpreter’s position in these respects may lead to an interpretation of the contract that is more literal or more purposive. Some interpreters may be unaware of the influence that their legal system exercises on them: they may have internalized the legal system’s principles in such a way that interpretation based on them feels like the only possible interpretation. Others and particularly experienced international arbitrators may have been exposed to a variety of legal systems and, thus, may have acquired a higher degree of awareness that the terms of a contract do not have one natural meaning, but that their legal effects depend on the interaction with the governing law. These aware interpreters face a dilemma when confronted with a contract drafted with a style extraneous to the governing law: on the one hand, they do not want to superimpose on the contract the principles of a law that the parties may not have considered during the negotiations. On the other hand, they have no uniform set of principles permitting them to interpret a contract independently from the governing law: elsewhere I argued that there are no real alternatives to a state governing law

---

12 The grounds for refusing enforcement of an award are listed exhaustively in Art. V of the 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards, which has been ratified by over 145 countries.

13 CORDERO-MOSS, ‘Does the Use of Common Law Contract Models Give Rise to a Tacit Choice of Law or to a Harmonised, Transnational Interpretation?’, in Cordero-Moss (ed.), Boilerplate Clauses, pp. 52 ff. See also CORDERO-MOSS, International Commercial Contracts, sec. 2.4.
when it comes to principles of general contract law upon which the interpretation and application of the agreed wording is based.\(^\text{14}\)

### 2.3. Transnational Sources: The Example of the Merger Clause

Often instruments of transnational law, such as the UNIDROIT Principles of International Commercial Contracts (UPICC) or the European Principles of European Contract Law (PECL), upon which the European work on a common contract law largely relies, grant the interpreter much room for interference regarding the wording of the contract - based on the central role given to the principle of good faith. However, good faith is a legal standard that needs specification, and there does not seem to be any generally acknowledged legal standard of good faith that is sufficiently precise to be applied uniformly, irrespective of the governing law.\(^\text{15}\)

Particularly if one of the parties invokes the governing law to prevent a literal application of the contract (notwithstanding that that party might not have taken the governing law into particular consideration during the negotiations), the dilemma is not easy to solve, not even for an arbitrator.

As an illustration of the dilemma faced by the arbitrators, we can look at the challenges that arise in interpreting a clause that very often recurs in international contracts, the so-called Merger Clause, also known as the 'Integration clause' or 'Entire Agreement clause'.\(^\text{16}\) This is one of the already mentioned boilerplate clauses.

The purpose of the Merger Clause is to isolate the contract from any source or element that may be external to the document. This is also often emphasized by referring to the four corners of the document as the borderline for the interpretation or construction of the contract. The parties’ aim is thus to

---

\(^{14}\) Restatements of soft law, compilations of trade usages, digests of transnational principles, and other international instruments, sometimes invoked as appropriate sources for international contracts, may be invaluable in determining the content of specific contract regulations, such as the INCOTERMS used for the definition of the place of delivery in international sales. However, these sources do not, for the moment, provide a sufficiently precise basis for addressing questions such as the function of a contract, the advisability of ensuring a fair balance between the parties’ interests, the role of the interpreter in respect of obligations that are not explicitly regulated in the contract, the existence of a duty of the parties to act loyally toward each other, and the existence and extent of a general principle of good faith. For an analysis of the material available on the Merger Clause, which proves this point, see CORDERO-MOSS, ‘Does the Use of Common Law Contract Models Give Rise to a Tacit Choice of Law or to a Harmonised, Transnational Interpretation?’, in Cordero-Moss (ed.), Boilerplate Clauses, sec. 2.4 and CORDERO-MOSS, International Commercial Contracts, sec. 2.4.2.1.

\(^{15}\) For a more extensive analysis, see the references made in the previous footnote.

\(^{16}\) A typical wording is: ‘This Agreement constitutes the entire agreement between the parties and supersedes any and all prior oral or written agreements or discussions’.
exclude that the contract is integrated by terms or obligations that do not appear in the document.

The parties are obviously entitled to regulate their interests and to specify the sources of their regulation. However, many legal systems provide for ancillary obligations deriving from the contract type,\textsuperscript{17} from a general principle of good faith,\textsuperscript{18} or from a principle preventing an abuse of rights.\textsuperscript{19} This means that a contract would always have to be understood not only on the basis of the obligations that are spelled out in it but also in combination with the elements that, according to the applicable law, integrate it. A standard contract, therefore, risks having different content depending on the governing law: the Merger Clause is meant to avoid this uncertainty by barring the possibility of invoking extrinsic elements. The Merger Clause creates an illusion of exhaustiveness of the written obligations.

This is, however, only an illusion: first of all, ancillary obligations created by the operation of law may not be excluded by the contract.\textsuperscript{20}

Moreover, some legal systems permit bringing evidence that the parties’ agreement creates obligations different from those contained in the contract.\textsuperscript{21}

Furthermore, many civilian legal systems openly permit the use of pre-contractual material to interpret the terms written in the contract.\textsuperscript{22}


\textsuperscript{18} See the general principle on good faith in the performance of contracts in §242 of the German BGB. See DANNEMANN, ‘Common Law Based Contracts under German Law’, in Cordero-Moss (ed.), \textit{Boilerplate Clauses}, secs 3.2 and 3.3 for examples of its application by the Courts.


\textsuperscript{21} See, for Germany, §309 No. 12, of the BGB, prohibiting clauses which change the burden of proof to the disadvantage of the other party; see MAGNUS, ‘The Germanic Tradition: Application of Boilerplate Clauses under German Law’, in Cordero-Moss (ed.), \textit{Boilerplate Clauses}, sec. 5.1.1.a. Italy, on the contrary, does not allow oral evidence that contradicts a written agreement, see DE NOVA, ‘The Romanistic Tradition: Application of Boilerplate Clauses under Italian Law’, in Cordero-Moss (ed.), \textit{Boilerplate Clauses}, sec. 1.

\textsuperscript{22} In addition to Germany (see previous footnote), see for France, LAGARDE, MÉHEUT & REVERSAC, ‘The Romanistic Tradition: Application of Boilerplate Clauses under French Law’, in Cordero-Moss (ed.), \textit{Boilerplate Clauses}, sec. 2; for Italy, DE NOVA, ‘The Romanistic Tradition: Application of Boilerplate Clauses under Italian Law’, in Cordero-Moss (ed.),
Finally, a strict adherence to the clause’s wording may, under some circumstances, be looked upon as unsatisfactory even under English law, in spite of the formalistic interpretation style that English law may employ in respect of other clauses, as was seen in section 1.1.1.  

Neither does transnational law give a uniform framework to interpret the Merger Clause independently of the governing law: the UPICC and the PECL contain, respectively in Articles 2.1.17 and 2:105, a rule regulating Merger Clauses, thus giving the impression that there is a harmonized regime for these clauses and that therefore the inconsistency due to the diversity in the national laws may be overcome on a transnational level. It is, however, questionable that an arbitral tribunal might find a solution to the interpretation dilemma in the UPICC or the PECL. The UPICC and the PECL are based on a strong general principle of good faith, which is specified by an express rule limiting the application of the Merger Clause. These instruments do not allow a literal interpretation of the Merger Clause; this, in turn, seems to contradict the expectations of the parties when they write a Merger Clause in the contract. As was seen immediately above, the extent to which the principle of good faith shall override the wording of the contract depends on the governing law. To achieve a uniform interpretation of the Merger Clause, it is necessary to identify a uniform standard of good faith. In 1992 the UNIDROIT created a database, the Unilex, for the purpose of enabling the development of a coherent jurisprudence on the UPICC. A coherent and sufficiently detailed case law could, indeed, contribute significantly to the establishment of a transnational standard of good faith, at least to the extent necessary to interpret the Merger Clause. As of July 2013, the Unilex listed five decisions on the UPICC’s provision on Merger Clauses. Elsewhere I have analysed these decisions, showing that they do not have a

---


24 See CORDERO-MOSS, ‘Does the Use of Common Law Contract Models Give Rise to a Tacit Choice of Law or to a Harmonised, Transnational Interpretation?’, in Cordero-Moss (ed.), *Boilerplate Clauses,* sec. 2.4.

uniform approach. The UPICC, therefore, do not succeed in giving a uniform understanding of how the Merger Clause should be interpreted.

The question, therefore, remains open: should the wording of the clause prevail over the principles underlying the (national or transnational) governing law? Should the clause be interpreted in light of the governing law? Should the terms of the contract be integrated with transnational principles?

Pointing out that an arbitral tribunal wishes to be more faithful to the will of the parties than a court does gives only an ostensible answer to these questions. Is the arbitrator more faithful to the parties’ intentions when he interprets the clause literally or when he integrates the clause with considerations of good faith, loyalty, or commercial sense – which may be based on the governing law, on transnational principles or on a more equity-inspired understanding of the dispute?

3. Understanding the Dynamics of Contract Drafting

There seems to be no absolute answer to the question of what interpretation better meets the expectations of the parties: a strictly literal interpretation of the terms of the contract or an integration of the contract with principles of good faith and commercial sense based on law, trade usages, transnational principles, or other sources. The former would better reflect the parties’ expectations if it is assumed that the parties have consciously intended to achieve specific legal effects with each and every of the words that they have written in the contract. This, however, does not reflect the reality of how contracts are drafted and negotiated.

3.1. Contract Drafting Without Regard to the Governing Law

Often, some of the clauses in a contract are inserted without the parties having given any particular consideration to their content. This applies particularly to the already mentioned boilerplate clauses, which are inserted more out of habit than out of a specific need or intention to regulate those matters in that particular way. In addition, parties may often negotiate details of their deal and draft the corresponding regulation before even considering the question of which law will govern the contract.

A seminar organized at the University of Oslo in 2011 discussed the parties’ expectations when drafting contracts and confirmed that parties do not

---

26 See CORDERO-MOSS, *ibid.*, and, more updated, CORDERO-MOSS, *International Commercial Contracts*, sec. 2.4.2.1.

27 A more extensive analysis of the practice of contract drafting is made in CORDERO-MOSS, *International Commercial Contracts*, Chapter 1.

28 APA: http://www.jus.uio.no/ifp/english/research/projects/choice-of-law/ The programme for the seminar, the list of panel participants, and the transcript from the panel discussions are available
always expect that each and every of the contract’s clauses will be enforced literally. Often, the parties do not even know whether these clauses are enforceable, and they consider their non-application as a legal risk that they are willing to take.\textsuperscript{29}

Sometimes the parties believe that a properly drafted contract, which describes the deal in detail, will make recourse to a governing law or external principles redundant.\textsuperscript{30} Sometimes the parties do not bother describing the deal in excessive detail, and they rely on trade usages to integrate the contract.\textsuperscript{31} Sometimes a clause with a very technical legal meaning is inserted, without having given consideration to the legal definition and effects that that particular wording assumes.\textsuperscript{32}

This practice may be surprising, considering the importance that the governing law has for the application and even the effectiveness of contract terms, as was seen above. However, the practice of negotiating detailed wording without regard to the governing law is not necessarily always unreasonable. From a merely legal point of view, it makes little sense, but from the overall economic perspective, it is more understandable. The gap between the parties’ reliance on the self-sufficiency of the contract and the actual legal effects of the contract under the governing law does not necessarily derive from the parties’ lack of awareness regarding the legal framework surrounding the contract. More precisely: the parties may often be aware of the fact that they are unaware of the legal framework for the contract. The possibility that the wording of the contract is interpreted and applied differently from what a literal application would seem to suggest may be accepted by some parties as a calculated risk.

3.1.1. \textit{Calculated Risk}

A contract is the result of a process, in which both parties participate from opposite starting points. This means that the final result is necessarily a

\begin{quote}

\textsuperscript{29} See the interventions of D. ECHENBERG, http://www.jus.uio.no/ifp/english/research/projects/choice-of-law/events/apa-transcript.pdf, at pp. 24–26, as well as the interventions of A. BRAUTASET, at pp. 22–24; P. TAIKALKOVSKI, at p. 32; and F. NORBURG, at p. 28.

\textsuperscript{30} See the intervention of BRAUTASET, at p. 22.

\textsuperscript{31} See the intervention of A. RYSSDAL, at pp. 29–30.

\textsuperscript{32} TAIKALKOSKI, at p. 32, refers to a dispute where the in-house counsel of a company was asked to explain what she intended when she introduced in the contract the distinction between direct and indirect damages. Without giving any consideration to the sophisticated distinctions in this respect contained in her own legal system or in the governing law, she answered: ‘Isn’t it pretty obvious, direct damage is when money goes out of your pocket, and indirect damages is when money does not come into your pocket’. It is, therefore, not always justified to assume that parties have a high degree of awareness about the legal effects of their contract terms.

24
compromise. In addition, time and resources are often limited under negotiations. This means that the process of negotiating a contract does not necessarily meet all of the requirements that would ideally characterize an optimal process under favourable conditions. What could be considered as an indispensable minimum in the abstract description of how a legal document should be drafted does not necessarily match with the commercial understanding of the resources that should be spent on such a process. This may lead to contracts being signed without the parties having negotiated all the clauses or without the parties having complete information regarding each clause’s legal effects under the governing law. What may appear, from a purely legal point of view, as unreasonable conduct is actually often a deliberate assumption of contractual risk.  

Considerations regarding the internal organization of the parties are also a part of the assessment of risk. In large multinational companies, risk management may require a certain standardization, which in turn prevents a high degree of flexibility in drafting the single contracts. In balancing the conflicting interests of ensuring internal standardization and permitting local adjustment, large organizations may prefer to enhance the former.  

It is, in other words, not necessarily the result of thoughtlessness if a contract is drafted without having regard for the governing law. Neither is it a symptom of a refusal of the applicability of national laws. It is the result of a cost-benefit evaluation, leading to the acceptance of a calculated legal risk. Thus, it is true that clauses, originally meant to create certainty, upon interaction with the governing law, may create uncertainty. The uncertainty about how exactly a clause will be interpreted by a judge is deleterious from a merely legal point of view. However, this uncertainty may turn out to be less harmful from a commercial perspective: faced with the prospects of employing time and resources to pursue a result that is unforeseeable from a legal point of view, the parties may be encouraged to find a commercial solution. Rather than maximizing the legal conflict, they may be forced to find a mutually agreeable solution. This may turn out to be a better use of resources once the conflict has arisen.

In addition, this kind of legal uncertainty is evaluated as a risk, just like other risks that relate to the transaction. Commercial parties know that not all risks will materialize, and this will also apply to the legal risk: not all clauses with

---

uncertain legal effects will actually have to be invoked or enforced. In the majority of contracts, the parties comply with their respective obligations, and there is no need to invoke the application of specific clauses. In the situations where a contract clause actually has to be invoked, the simple fact that the clause is invoked may induce the other party to comply with it, irrespective of the actual enforceability of the clause. An invoked clause is not necessarily always contested. There will be, thus, only a small percentage of clauses that will actually be the basis of a conflict between the parties. Of these conflicts, we have seen that some may be solved amicably, exactly because of the uncertainty of the clause’s legal effects. This leaves a quite small percentage of clauses upon which the parties may eventually litigate. Some of these litigations will be won; some will be lost. The commercial thinking requires a party to assess the value of this risk of losing a law suit on enforceability of a clause (also considering the likelihood that it materializes) and compare this value with the costs of the alternative conduct. The alternative conduct would be to assess every single clause of each contract that is entered into, verify its compatibility with the law that will govern each of these contracts, and propose adjustments to each of these clauses to the various other contracting parties. This, in turn, requires the employment of internal resources to revise standard documentation and external resources to adjust to the applicable law and possibly engaging in negotiations to convince the other contracting parties to change a model of contract that they are well acquainted with. In many situations, the costs of adjusting each contract to its applicable law will exceed the value of the risk that is run by entering into a contract with uncertain legal effects.

The sophisticated party, aware of the implications of adopting contract models that are not adjusted to the governing law and consciously assessing the connected risk, will identify the clauses that matter the most and concentrate its negotiations on those, leaving the other clauses untouched and accepting the corresponding risk.

A faithful interpretation of the contract assumes an understanding of this uneven approach to contract drafting.

3.2. The Shift of Perspective from the Negotiations Phase to the Interpretation or Litigation Phase

The foregoing shows that the parties’ disregard of the governing law when drafting and negotiating the contract not necessarily expresses the parties’ refusal to subject their legal relationship to a national law - it rather expresses the acceptance of the risk that the governing law may affect the contract.

A further aspect should be taken into consideration in this respect: an important shift in attitude occurs from the phase of contract drafting to the phase of contract interpretation or litigation. The phase of negotiations and drafting is characterized by the above-described commercially inspired cost-benefit evaluations, which induce the parties to minimize the resources employed in
tailoring the contract to the governing law and to rely on a detailed and as exhaustive as possible description of the deal instead. Once a contract is signed, however, a new phase starts. The drafting lawyers (often termed ‘transaction lawyers’) are not involved with that contract anymore, and contract implementation is usually taken over by engineers or commercial people. When a dispute arises between the parties or a difference in the interpretation becomes apparent, other lawyers are involved, who usually deal with dispute resolution (often termed ‘litigation lawyers’). These litigation lawyers have a different approach from their negotiating counterparts: litigation and transaction lawyers often do not even talk to each other, so that the transaction lawyer is never informed about the problems arising out of his or her contracts and the litigation lawyer never gets insight into the reasoning behind a specific wording. The parties are interested in enforcing their rights, and for this purpose they depend on one or more national legal systems and their courts. Litigation lawyers carefully analyse the specific contract and its effects under the governing law and try to assess as precisely as possible the possibility of winning a case in court or in arbitration on the basis of the contract wording, the applicable law, and the degree of factual background that the governing law allows to bring into the dispute. On the basis of this assessment, they will develop a strategy that may range from suggesting reaching a commercial solution in case the probability of winning in court is not high to insisting on the party’s own position in case the prospects of a successful legal suit are high. In this phase, therefore, predictability of the legal framework and of the criteria applied for a decision is of the utmost importance.

In the context of such a picture, it is doubtful that the effects of the governing law on the contract shall be disregarded to permit the drafter’s ambitions of self-sufficiency to be realized. Once a contract is finalized, parties are interested in its enforceability and in the predictability of the parameters according to which enforcement may be achieved.36

3.3. The Importance of Predictability: Circulation of Contracts
Predictability permits evaluating the respective legal positions. This is important not only in case of disputes between the parties.

Contracts are often meant to circulate, for example, because they are assigned to third parties, are used as security, or serve as a basis for calculating insurance premiums. In these situations, it is essential that contracts are interpreted strictly in accordance with their terms: third parties are not aware of and should not be assumed to take into consideration the relationship between the original parties to the contract, what the original parties may have assumed or intended, or any circumstances that relate to the original parties and that may have had an impact on these parties’ interests. It is, therefore, expected that a contract is interpreted primarily, if not exclusively, in light of its terms – without considering things such as what a fair balance between the parties’ interests would be or what one party’s expectations might have been.

3.4. The Implications for Arbitration

As was seen above, the practice of drafting contracts without regard to the governing law does not mean that the parties have opted out of the governing law for the benefit of some transnational set of rules. Just because the parties decided to take the risk of legal uncertainty for some clauses does not mean that the interpreter has to refrain from applying the governing law or that the legal evaluation of these clauses should be made in a less stringent way than for any other clauses. In addition, knowing that some clauses (particularly, boilerplate clauses) are usually not negotiated indicates that giving them excessive importance in the interpretation of the contract would not necessarily result in being faithful to the parties’ intentions.

The arbitral tribunal is, therefore, expected to understand the dynamics of negotiations in order to properly give effect to the intention of the parties. Blindly applying the wording of the contract without any regard to the principles of the governing law or, to the extent that they are determinable and applicable, of transnational law, would not necessarily reflect the true intention of the parties if the clause that is being applied literally is one of the boilerplate clauses that the parties did not consider. Integrating or correcting a clause with national or transnational principles, on the other hand, might not necessarily reflect the parties’ intention either, if the clause that is being interpreted is one of the clauses that the parties carefully negotiated.

Leaving broad discretion to the interpreter, however, runs the risk of undermining predictability, if the criteria for exercising such discretion are not clearly determinable. As was seen above, interpretation of the contract should take into consideration the need for predictability. Overriding the terms of the contract in the name of principles of good faith or equity, thus, would lead to results that are not compatible with the expectations of international business practice, if the standards that are applied are not clearly determinable. From the overview made in section 2.3 above, it seems that the standard of good faith is not
sufficiently determinable on a transnational level. This seems to speak for the advisability of taking into consideration the criteria developed in the applicable law.

4. Arbitration as a Unitary System?
The question that arises, then, is: does international arbitration ensure such a nuanced interpretation of contracts?

International commercial arbitration is not a unitary legal system. What characterizes international commercial arbitration is probably the very lack of a unitary system.

4.1. The Legal Framework for Arbitration
The formal framework for arbitration grants it a relative autonomy, which actually gives the appearance of a unitary system. The main instrument upon which arbitration is founded is the 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards, which has been ratified by about 145 countries, and forces the courts of these countries to recognize arbitration agreements and thus dismiss claims that are covered by an arbitration agreement, as well as to recognize and enforce arbitral awards without any review of the merits or of the application of law – with only a restrictive and exhaustive list of grounds to refuse recognition and enforcement. An important instrument is also the UNCITRAL Model Law on International Commercial Arbitration, issued in 1985 and revised in 2006, which is used as a basis for national arbitration law in about 60 countries and has thus contributed to a considerable harmonization of the areas of arbitration law that are not covered by the New York Convention. The UNCITRAL Model Law is, in turn, based on the same principles as the New York Convention, which means that together, these instruments create a harmonized legal framework for arbitration. Both instruments give a central role to the will of the parties. The power of the arbitral tribunal actually derives from the agreement of the parties; therefore, the arbitral tribunal is obliged to follow the parties’ instructions in respect of the scope of the dispute, the law to be applied, the remedies to be granted, and so forth.

For the sake of completeness, it must be added that both instruments refer to national non-harmonized legislation in a number of instances, such as the definition of what may be subject to arbitration, when an award is deemed to conflict with public policy, what the criteria are according to which an arbitration agreement is binding on the parties, etc.37 The harmonized framework for

arbitration is, therefore, in several significant respects, subject to national law, and this may have an impact on the enforceability of arbitration agreements and of arbitral awards.\footnote{38 A research project at the University of Oslo analyses the limits that this may impose on party autonomy: www. http://www.jus.uio.no/ifp/english/research/projects/choice-of-law/index.html.}

4.2. The Balance between a Diversified Interpretation and the Need for Predictability

The foregoing draws a picture of international arbitration as mainly based on a few international sources giving a central role to the parties’ will and which meets only a few (albeit significant) limits in national law. It is therefore fully understandable that the general impression is that arbitration is a system that reflects the parties’ will without being subject to the formalities of a strict application of the law. When applied to the question of the interpretation of contracts, this may lead to the impression that arbitral tribunals are particularly faithful to the wording of the contract and are inclined to follow the parties’ will without interfering from considerations of law.

This system, however, does not necessarily lead to a predictable and uniform method for the interpretation of contracts. That arbitral tribunals shall follow the parties’ instructions means that they shall aim at being faithful to the contract by understanding the business purpose of the contract and the dynamics of drafting and negotiating contracts. This implies that the degree of literal interpretation may vary, depending on the importance that the clauses have for the commercial meaning of the contract as well as the level of awareness that the parties had in respect of the effects of the clauses. As was seen above, an important assumption for a faithful interpretation of the contract lies in understanding the process that leads to the text of the contract: drafting, negotiations, acceptance of legal risk.

This, however, has to fit with the requirement of predictability and objectivity.

Predictability is relevant, as was seen above, after the contract has been finalized and must be interpreted. Above we saw that, in the case of differences between the parties on the interpretation of the contract, the prospects of success of a legal suit need to be carefully evaluated. Moreover, predictability is important for the circulation of contracts, as was seen in section 3.3.

This means, among other things, that an arbitral tribunal that decides a dispute under a law giving great importance to considerations of loyalty between the parties or of good faith in the negotiations and in the performance of the

---

contract might be inclined to apply the law flexibly and to give effect to contract arrangements according to their terms, whereas a court might have been more readily disposed to consider the terms as unbalanced or unreasonable and to interpret them restrictively or extensively to avoid the result that follows from them. There is not a clear line between the formalistic and contextual interpretation of contracts: context may be used to cast light on the parties’ intentions, particularly when the contract may be interpreted in different ways. There is, however, a difference between a contextual interpretation that is made necessary by a poorly drafted contract and second-guessing what the parties should have written in the contract to comply with principles of fairness or good faith.

4.3. Various Approaches

The observations made above result in the possibility that an arbitral tribunal adopts a mixed approach to the interpretation of one and the same contract, which is both formalistic and purposive depending on the clause.

In addition, there is, in the framework of arbitration, a variety of approaches to interpretation of contracts.

A panel in the already mentioned University of Oslo seminar discussed the arbitrators’ approach to the interpretation of contracts and identified a variety of approaches. Some arbitrators affirmed that they apply the governing law accurately if that law was chosen by the parties in the contract, quite irrespective of how considered the choice of law was and how much it influenced the actual drafting of the contract terms. These arbitrators, therefore, will superimpose on the contract terms any principles or rules of the governing law. Another approach was to take into consideration not only the governing law but also overriding mandatory rules of third countries, such as, for example, competition rules. According to a slightly less strict approach, arbitrators should take into account, though not necessarily strictly apply, the governing law as well as the rules of third countries. In a similar vein, it was said that the governing law should be applied, but not in an overly formalistic way. A different approach was that international contracts should be interpreted in the light of transnational principles. This latter approach would lead to an interpretation of the contract that is not merely based on the contract terms, since transnational principles such as the UPICC or the PECL, as was mentioned above, contain various expressions

40 See the intervention of S. JERVELL, at pp. 43–44.
41 See the intervention of L. FUMAGALLI, at p. 49.
42 See the intervention of I. ZYKIN, at p. 17.
43 See the intervention of A. KOMAROV, at pp. 45–46.
of the principle of good faith and fair dealing, which interfere quite heavily with the contract. Conversely, others found that contracts were increasingly being applied literally, without interference from outside principles, whether of law or of soft law. 44 Yet other arbitrators stated that international contracts were not interpreted exclusively on the basis of their own terms, but in light of the parties’ interests and trade usages. 45 Taking this line of reasoning even further is another approach, which is more based on a general understanding of the involved interests, rather than on specific sources of law. According to this approach, arbitrators are said to act according to a feeling of what is right, 46 based more on the gut reaction of the individual person than on the legal system to which he belongs. 47 Yet the legal background of the arbitrator is recognized as playing an important role, a sort of imprinting, which will influence the approach taken to, among other things, the interpretation of contracts. Thus, an arbitrator who arbitrates in various languages affirmed that she even thinks differently depending on the language in which she works and jokingly defined her approach as Freudian; that is, led by her (legal) subconscious. 48 This was echoed by others who spoke about the different ‘philosophical’ starting point from which lawyers from different legal traditions depart. 49 An extensive international experience was considered to contribute to moderating the strong influence of a national legal background. 50

If the debate in the mentioned seminar may be deemed to be somewhat representative of the approaches that may be met in international commercial arbitration, the picture that results is one of marked diversity in the approach to the interpretation of contracts in international commercial arbitration: contract terms are not necessarily always applied in strict accordance with their words. There are different degrees of interference, and the sources of the interference also vary quite considerably. There is a scale moving from a strict application of the governing law to integrate the contract via interpretation of the contract terms in the context of transnational soft law principles such as the UPICC and the PECL (which are heavily based on the principle of good faith and may give rise to a substantial possibility of interfering with the contract language), to interpretation of the contract on the basis of its own terms combined with the parties’ interests and trade usages, to interpretation of the contract solely on the basis of its own terms. There is also a further approach to interpretation of

44 See the intervention of TAIKALKOSKI, at p. 37.
45 See the intervention of RYSSDAL, at pp. 29–31.
46 See the intervention of M. SCHNEIDER, at p. 57.
47 See the intervention of J. SEKLOEC, at pp. 11–12.
48 See the intervention of KESSEDJIAN, at p. 40.
49 See the interventions of ECHENBERG, at p. 35; NORBURG, at pp. 27–28; and SCHNEIDER, at p. 57.
50 See the intervention of BRAUTASSET, at p. 24.
the contract, which goes under the label of ‘splitting the baby’. This Solomonic approach consists in rendering an award in the middle range between the claims of each of the parties. This is not necessarily based on a literal consideration of the contract terms or on an integration of the contract with other sources, but simply on the desire to accommodate both parties.\textsuperscript{51} Interestingly, there does not seem to be a uniform perception of the frequency of this approach: a recent empirical study shows that the parties to arbitration perceive that they got a Solomonic award in 18\%–20\% of the cases, whereas the arbitrators perceive that they take this kind of equitable decision in only 5\% of the cases.\textsuperscript{52} This, therefore, adds a new variable to the equation of the interpretation of contracts. Not only is it uncertain whether the arbitrators will interpret the contract literally, whether they will use sources of law, or whether they will apply transnational principles to give a more purposive interpretation; it is also possible that the decision will be influenced by equitable considerations that are not based on the contract or on other legal sources.

This reveals an important lack of uniformity at two levels: parties’ contract drafting is not uniform, and arbitrators’ contract interpretation is not uniform. In this context, it seems quite illusionary to assume that international commercial arbitration acts as the voice of a unitary international business community.

\textbf{4.4. The Importance of the Selection of Arbitrators}

Given that at least six or seven different approaches to the interpretation of contracts were professed in a discussion involving about 18 arbitrators, it seems obvious that the outcome of a dispute will depend heavily on who is acting as an arbitrator in the particular dispute. It was even affirmed, rather provocatively, that it is not so much the applicable law that matters for the outcome of the dispute, it is rather the cultural background of the individuals who act as arbitrators.\textsuperscript{53}

Selection of arbitrators has been defined as the ultimate form for forum shopping.\textsuperscript{54} The process of selecting arbitrators has undergone tremendous development in the past decades. I remember one of the first arbitrations I was involved in in the mid-1980s as in-house counsel. I made contact with a law firm that specialized in arbitration and said that we were contemplating an arbitration

\textsuperscript{52} QUEEN MARY’s survey, p. 38.
\textsuperscript{53} See the intervention of SCHNEIDER, at p. 57. See also BRAUTASET, at p. 24.
and received, after just five minutes, a telefax with five names of people whom the law firm recommended as potential arbitrators. I had not been asked what type of contract the dispute was based on, who the counterpart was, what kind of expertise the dispute required, let alone whether we were interested in a formalistic or a purposive interpretation of the contract. Today, when parties take into consideration whether they shall appoint a certain arbitrator, they undertake fully fledged research analysing his writings and assessing whether he has expressed opinions that may be incompatible with the position that they will present in the proceeding, and they even invite him to a pre-appointment interview to discuss issues such as availability and conflict of interest.\(^{55}\) The relevance of the selection process also appears clearly in the success that a soft law instrument of the International Bar Association has achieved: the IBA Guidelines on Conflict of Interest in International Arbitration.\(^{56}\) This is an attempt to bring transparent and objective criteria to an area earlier dominated by recognition of established positions on the basis of reputation and implied criteria. Additionally, arbitral institutions are opening up to a more systematic approach to the criteria for appointment of arbitrators. The Arbitration Institute of the Stockholm Chamber of Commerce (SCC), for example, has recently published a study on the criteria that it applies in challenges to arbitrators appointed under the SCC rules.\(^{57}\) The importance of having detailed knowledge of the appointed arbitrators and the environment in which they operate is indirectly confirmed in the revision that was made in 2010 to the UNCITRAL Arbitration Rules: in regulating who should act as an appointing authority in the eventuality that one of the parties does not appoint an arbitrator, it was evaluated whether the Permanent Court of Arbitration (PCA) could carry out this function.\(^{58}\) It was concluded that a centralized body, even a body of the calibre of the PCA, would not be in a position to properly appreciate all the aspects of the appointment in each of the jurisdictions where appointment might be necessary. Therefore, Article 6.2 of the revised UNCITRAL Arbitration Rules ended up by giving the PCA the task of appointing the appointing authority, who, in turn, would appoint

---

55 The QUEEN MARY’s survey, pp. 6 and 7, reports that 86% of the respondents consider it appropriate to conduct pre-appointment interviews.


the arbitrator – on the basis of the assumption that a local authority would be in a better position to select the arbitrators.

The development from a list of potential arbitrators quickly scribbled on a fax to a full due-diligence process is remarkable, but selection is still made on the basis of what has been defined as a bizarrely outdated technique mainly based on personal knowledge and hearsay. This is due to the structure of arbitration as a largely private and non-transparent system. Seen from the outside, these features of arbitration may give the impression of a unitary system. As the overview above has shown, however, there is no basis for assuming that arbitration is a unitary system.

5. Conclusion
International arbitration does not have a uniform approach to contract interpretation: it may range from a formalistic application of the contract’s wording to an interpretation of the wording in light of the governing law, to an interpretation of the wording in light of transnational principles of soft law or even of a more equitable character. Even the same arbitral tribunal may adopt more than one approach to the same contract, depending on the tribunal’s understanding of the dynamics of negotiations that led to that particular contract’s text.

Transnational sources do not for the moment give a framework for interpretation of contracts that is sufficiently harmonized, thus leaving it open to the arbitral tribunal to decide to what extent the contracts shall be interpreted literally and, to the extent that the arbitral tribunal determines that the wording of the contract shall be interpreted in light of principles such as the principle of good faith, what exactly this principle entails.

This picture certainly contradicts the usual assumption that international commercial arbitration is a harmonized system, uniformly giving expression to the interests of the ‘international business community’.

60 ROGERS, *ibid.* See also the intervention of KAI-UWE KARL in the APA project seminar of 2011, at p. 53.
List of Contributors

EWOUD HONDIUS
Professor of European Private Law
Utrecht University
Molengraaff Instituut voor Privaatrecht
Janskerkhof 12
NL-3512 BL Utrecht
E-mail: E.H.Hondius@uu.nl

GIUDITTA CORDERO-MOSS
Professor, University of Oslo
Visiting address:
Karl Johans gate 47 0162
Oslo Norway
Postal address:
Department of Private Law
Pobox 6706 St. Olavs plass
0130 Oslo Norway
Tel.: +47 22 85 97 37
E-mail: g.c.moss@jus.uio.no

OLHA CHEREDNYCHENKO
Associate Professor of European Private Law and Comparative Law
University of Groningen
Visiting address:
Faculty of Law, Private Law - Private Law and Notary Law
Oude Kijk in ‘t Jatstraat 26
9712 EK Groningen
The Netherlands
Postal address:
Postbus 716
9700 AS Groningen
The Netherlands
Tel.: +31 50 363 2419
E-mail: o.o.cherednychenko@rug.nl

ESTHER VAN SCHAGEN
Postdoctoral Researcher
University of Groningen
Visiting address:
Faculty of Law, Groningen Center of Law and Governance
Oude Kijk in ‘t Jatstraat 26
9712 EK Groningen
The Netherlands
Postal address:
Postbus 716
9700 AS Groningen
The Netherlands
Tel.: +31 50 363 2419
E-mail: e.a.g.van.schagen@rug.nl

ALOÏS VAN OEVELEN (BELGIUM)
Gewoon hoogleraar verbintenissen en contractenrecht
Universiteit van Antwerpen
Address: Stadscampus
S.V.241
Venusstraat 23
2000 Antwerpen
Tel.: +32 32655476
E-mail: alois.vanoevelen@uantwerpen.be

FRANCESCO GIGLIO (ENGLAND & WALES)
Senior Lecturer
The University of Manchester
Address: Williamson Building-3.30
School of Law
The University of Manchester
Manchester
M13 9PL
United Kingdom
Tel.: +44 161 275-3860
E-mail: mailto:francesco.giglio@manchester.ac.uk
H. KENFACK (FRANCE)
Professeur, Doyen de la Faculté de droit de Toulouse
Université Toulouse 1 Capitole
Address: Université Toulouse 1 Capitole
2 rue du Doyen-Gabriel-Marty
31042 TOULOUSE Cedex 9
France
Tel.: 05 61 63 37 71
E-mail: hugues.kenfack@ut-capitole.fr

CHRISTINE GODT (GERMANY)
Professor of Law, University of Oldenburg,
Director Hanse Law School
Postal address:
Department für WiRe
(Fachbereich der Wirtschaftswissenschaften)
Fakultät 2: Informatik, Wirtschafts- und Rechtswissenschaften Carl von Ossietzky Universit"at Oldenburg
Postfach 2503
26111 Oldenburg
Germany
Tel.: +49 4417984154
E-mail: christine.godt@uni-oldenburg.de

ADAM MCCANN (OPENING REMARKS + IRELAND + COMPARATIVE OBSERVATIONS)
Research Fellow, Groningen Centre for Law and Governance and PhD Candidate for the Endowed Chair Law and Governance, University of Groningen
Visiting address:
Faculty of Law, Groningen Centre for Law and Governance
Oude Kijk in ’t Jatstraat 26
9712 EK Groningen
The Netherlands
Postal address:
Postbus 716
9700 AS Groningen
The Netherlands
Tel.: +31 50 363 2836
E-mail: a.mccann@rug.nl

GIOVANNI COMANDÈ (ITALY)
Full Professor of Private Comparative Law, Scuola Superiore S.Anna, Pisa, Italy
Address: Scuola Superiore Sant’Anna
Piazza Martiri della Libertà 33
I-56127 Pisa
Italy
Tel.: +39 50 8832 83 90
E-mail: gico@sssup.it

LUCA NOCCO (ITALY)
Research Fellow at Scuola Superiore Sant’Anna
Address: Scuola Superiore Sant’Anna
Piazza Martiri della Libertà 33 I-56127 Pisa
Italy
Tel.: +39 50 883547
E-mail: lucanocco@sssup.it

FOKKO T. OLDENHUIS (OPENING REMARKS + THE NETHERLANDS + COMPARATIVE OBSERVATIONS)
Professor by religion and law
University of Groningen
Visiting address:
Faculty of Law, Private Law - Private Law and Notary Law
Oude Kijk in ’t Jatstraat 26
9712 EK Groningen
The Netherlands
Postal address:
Postbus 716
9700 AS Groningen
The Netherlands
Tel.: +31 50 363 5472
(+31503635472)
E-mail: f.t.oldenhuis@rug.nl
AURELIA COLOMBI CIACCHI (OPENING REMARKS + COMPARATIVE OBSERVATIONS)
Professor of Law and Governance
University of Groningen
Visiting address:
Faculty of Law, Groningen Centre for Law and Governance
Oude Kijk in ’t Jatstraat 26
9712 EK Groningen
The Netherlands
Postal address:
Postbus 716
9700 AS Groningen
The Netherlands
Tel.: +31 50 363 5687
E-mail: a.l.b.colombi.ciacchi@rug.nl

JACQUELINE GRAY
PhD candidate, Utrecht Centre for Research into European Family Law
Utrecht University
Address: Molengraaff Institute for Private Law
Janskerkhof 12
Room T.013
3512 BL
UTRECHT The Netherlands
Tel: +31 30 253 8021
E-mail: j.t.gray@uu.nl

PABLO QUINZÁ REDONDO
Research scholar of the Ministry of Education, Culture and Sport of Spain, Área de Derecho Internacional Privado
Facultat de Dret - Universitat de València
Addr: Facultat de Dret - Universitat de València
Av. Los Naranjos, s/n - 46022 Valencia
Spain
Tel.: +34 96 382 85 51
E-mail: Pablo.Quinza@uv.es

ALLARD RINGNALDA
PhD Candidate
Utrecht University
Address: Utrecht University
Achter Sint Pieter 200
3512 HT Utrecht
The Netherlands
Tel.: + 31 30 2537153
E-mail: a.ringnalda@uu.nl

JOELLE LONG
Lecturer in Private Law
University of Turin
Address: University of Turin
Dipartimento di Giurisprudenza Lungo Dora Siena 100 A
10153 Torino
Italy
Tel.: + 39 116709448
E-mail: joelle.long@unito.it

BARBARA PASA
Associate Professor of Private Comparative Law
University of Turin
Address: University of Turin
Dipartimento di Giurisprudenza Lungo Dora Siena 100 A
10153 Torino
Italy
Tel.: + 39 116703463
E-mail: barbara.pasa@unito.it
EUROPEAN REVIEW OF PRIVATE LAW
REVUE EUROPÉENNE DE DROIT PRIVÉ
europäische zeitschrift für privatrecht

Contact
Jessy Emaus, e-mail: J.M.Emaus@uu.nl

Editors
E.H. Hondius, Universiteit Utrecht
Jessy Emaus, e-mail: J.M.Emaus@uu.nl

Editorial Board
W. Cairns, Manchester Metropolitan University, England, U.K.; Florence G’Sell-Macrea, Université de Bretagne Occidentale, France; J.F. Gerken, Universität Liege, Belgium; A. Janssen, Universiteit van Amsterdam, The Netherlands; M.E. Storme, Katholieke Universiteit Leuven, Belgium

Advisory Board
B. Lurger, University College London, U.K.; B. R. Clark, Faculty of Law, University College Dublin, Republic of Ireland; F. Ferrari, Università dell’Insubria Como, Italy; S. Whittaker, St. John’s College, Oxford University, Oxford, England, U.K.

Founded in 1992 by Ewoud Hondius and Marcel Storme

ISSN 0928-9001

All Rights Reserved. ©2014 Kluwer Law International

No part of the material protected by this copyright notice may be reproduced or utilised in any form or by any means, electronic or mechanical, including photocopying, recording or by any information storage and retrieval system, without written permission from the copyright owner.

Typeface IT Coda Bodoni Twelve

Design Dragaj | Peter Oosterhout, Diemen-Amsterdam
Printed and Bound by CPI Group (UK) Ltd, Croydon, CR0 4YY.

EUROPEAN REVIEW OF PRIVATE LAW
REVUE EUROPÉENNE DE DROIT PRIVÉ
europäische zeitschrift für privatrecht

Guidelines for authors
The European Review of Private Law aims to provide a forum which facilitates the development of European Private Law. It publishes work of interest to academics and practitioners across European boundaries. Comparative work in any field of private law is welcomed. The journal deals especially with comparative case law. Work focusing on one jurisdiction alone is accepted, provided it has a strong cross-border interest.
The Review requires the submission of manuscripts by e-mail attachment, preferably in Word. Please do not forget to add your complete mailing address, telephone number, fax number and/or e-mail address when you submit your manuscript. Manuscripts should be written in standard English, French or German.

Directives pour les Auteurs
La Revue européenne de droit privé a pour objectif de faciliter, par la constitution d’un forum, la mise au point d’un Droit Privé Européen. Elle publie des articles susceptibles d’intéresser aussi bien l’universitaire que le praticien, sur un plan européen. Nous serons heureux d’ouvrir nos pages aux travaux comparatifs dans tout domaine du droit privé. La Revue est consacrée en particulier à l’étude comparée de la jurisprudence. Les travaux centrés sur une seule juridiction sont admissibles, à condition de présenter un intérêt dépassant les frontières.
Nous souhaitons recevoir les textes par courrier électronique, de préférence en Word. Ajoutez l’adresse postale complète et le numéro de téléphone de l’auteur, un numéro de télécopie et l’adresse électronique.
Les textes doivent être rédigés en langue anglaise, française ou allemande standard.

Leitfaden für Autoren
Manuskripte sind in korrektem Englisch, Französisch oder Deutsch zu verfassen.

Style guide
A style guide for contributors can be found in online at http://www.kluwerlawonline.com/europeanreviewofprivatelaw.

Index
An annual index will be published in issue No. 6 of each volume.