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Norwegian Commercial Contracts in an Anglo-American Business Reality

A Comparative View on Commercial Contract Interpretation under English and Norwegian Law of Contract.

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1 Introduction

The way most commercial contracts today are written is inspired by Anglo-American contract drafting based on the principles[1] of English law.[2] Commercial contracts with Norwegian affiliation are no exception. The Anglo-American drafting style is characterised by extensive and detailed contracts that aim to regulate the contractual relationship as exhaustive and precisely as possible. This drafting style will be referred to as a "common law drafting style" or a "common law contract model" throughout this thesis. The professional parties often choose this drafting style because it is labelled as giving the most predictability if a dispute occurs. Sometimes a commercial contract is written in a common law drafting style, but Norwegian law governs potential disputes. The Norwegian courts would usually[3] interpret the contract according to Norwegian law of contract to determine its meaning and legal effects. This thesis claims that the interpretation principles in English and Norwegian law of contract may lead to very different results in some situations. Consequently, the common law drafting style may not provide the parties with the predictability they expect. For example, the conflict between certainty and fairness in contract interpretation can be treated quite differently depending on the legal system.

To avoid pitfalls, it is important that the lawyers of the contracting parties are aware of some of the differences between English and Norwegian law of contract. In addition, it is important for Norwegian lawyers to have knowledge about English law in order to prosper well within the field of international commercial law because English law is such a central part of it. This thesis aims to present the reader with knowledge of selected important differences and similarities between the English and Norwegian interpretation principles. The topic is commercial contract[4] interpretation. Consequently, consumer contracts, or contracts between two private parties will not be dealt with. Any reference to "contracts" throughout this thesis is meant to be understood as "commercial contracts". A commercial contract is a contract

[1] The word "principle" refers to a general norm associated with fundamental considerations for a type of legal relationship, a more comprehensive area of law or for the legal order in general.

[2] Cordero-Moss, " Ulike trekk ved norsk og engelsk kontraktsrett og deres betydning for kontraktens virkninger", (page numbers not stated in the article).

[3] It depends on the Norwegian conflict rules in the specific case.

[4] Contracts are defined as legally enforceable agreements that represent a vehicle for planned exchanges.

where both parties are professionals, and the agreement is entered into in the course of their business activities.[5]

Contract interpretation is a highly complex matter. Slight differences in the factual background can determine how a contract is interpreted. A concept or "rule" in either jurisdiction may therefore not apply in certain situations due to details in the factual context. Some principles or rules may also change as time evolves. In addition, different scholars sometimes disagree on *de lege lata.* Considering the word limit of this assignment and the complexity and nuances found within this field of law, the assignment is necessarily general in its character. The aim is not to give an exhaustive characterisation of the interpretation principles and rules found within the two jurisdictions, but to highlight some of the key differences and similarities between them within this field. There are also small differences in how the common law countries practise law. However, the common law legal tradition described in this thesis is English law of contract as it is practised in the United Kingdom.

Initially, the main characteristics of English law of contract and Norwegian law of contract will be described, before there will be a short narration of why many international commercial contracts are drafted in an Anglo-American drafting style. Section 4 marks the start of the comparative part of the thesis. Initially, it will be explained how both Norwegian and English law of contract describe their own interpretation process as "objective". However, there are distinct differences in how this is carried out in practice. In section 5, normative consideration and the principle of good faith and loyalty as interpretation tools in English and Norwegian law of contract will be addressed. The effect of the background law when interpreting a contract under these legal systems and the effect of boilerplate clauses in Norwegian law will be described and discussed thereafter. Lastly, the thesis will conclude on the main similarities and differences presented throughout the thesis.

[5] For a non-exclusive list on the content of the "commercial contract" term, see the Model Law on International Commercial Arbitration made by the United Nations Commission on International Trade Law (UNCITRAL) footnote 2 relating to Article 1.

1.1 Research Approach

The interpretation principles and rules in English and Norwegian law of contract and the differences between them within this field will be described and explained. Hence, the research approach is doctrinal legal research. The research is doctrinal because it involves analysing the legal sources to determine what the law is while also describing the theory behind it. It is constructed by taking into account both the judicial and academic descriptions of the process.

The comparative study in this thesis is inspired by the methodology from Rodolfo Sacco in his article Legal Formants: A Dynamic Approach to Comparative Law. The research aims to increase the reader's knowledge of the two legal systems. He states that the primary and essential aim of comparative law as a science is better knowledge of the legal rules in the compared systems. Comparative law studies are used to establish to what extent they are identical or different. His method also claims that two legal systems must have something in common in order to compare them. Consequently, the reader of this thesis will discover that interpretation principles that are similar in the two jurisdictions are presented as well. Comparative research after this methodology measures the extent of differences either small or large. The comparison act should not concern itself exclusively with the small differences or the large ones.[6] In his method he also acknowledges that one of the main problems of comparative law is translating linguistic expression that denote legal concepts.[7] It must be admitted that some expressions are untranslatable.[8] In this thesis, some terms from Norwegian law has been difficult to translate. When this has been the case the Norwegian word has been presented together with an explanation of the content of the term. In some case, the Norwegian word is inserted as a footnote.

[6] Sacco, "Legal Formants", 7.

[7] Sacco, "Legal Formants", 10.

[8] Sacco, "Legal Formants", 11.

2 About English Law of Contract and Norwegian Law of Contract

2.1 English Law of Contract

English law of contract is known to be concerned with preserving the parties' freedom to contract and ensuring that the contract is performed according to its precise wording.[9] The parties have the determination of their interests, and the consequences of their autonomy are respected by the legal system. This is the rule even if the interpretation result is considered to be unfair or disproportionate. The judges' primary task is to enforce what the parties have agreed on rather than creating justice based on external factors. This attitude originates from the central position England has had for centuries, and still has, in international business exchanges. It is expected of the parties to take care of their own interests. They should not expect the legal system to protect them; they should expect the legal system to give them tools to enforce what they already have agreed on.[10]

2.2 Norwegian Law of Contract

Norwegian law is categorised to belong in the civil law family. Sometimes they are also categorised to belonging in a separate legal family, Scandinavian law.[11] Civil law is mainly divided into the German approach (BGB) and the French (Code Civil).[12] Norwegian law is influenced by German law in the field of contract law.[13]

Norwegian law of contract has a more extensive background law than English law of contract has. In Norwegian law of contract, the parties traditionally write short contracts because they expect the contract to be interpreted in accordance with the background law. The background law was historically developed based on contracts between private or small traders. It considered the parties' intentions, surrounding circumstances and reasonableness.[14] These values are still prominent in Norwegian law of contract today.

[9] Cordero-Moss, *International Commercial Contracts,* 1-7.

[10] Cordero-Moss, "International Contracts between Common Law and Civil Law," 4.

[11] Cordero-Moss, "International Contracts between Common Law and Civil Law," 3.

[12] Alvik, "Alminnelige kontraktsrettslige prinsipper", (page numbers not stated in the article).

[13] Alvik, "Alminnelige kontraktsrettslige prinsipper".

[14] Cordero-Moss, "Europeisk og norsk kontraktsrett i utakt?" (page numbers not stated in the article)

3 The International Use of Common Law Style Contracts

Large international contracts today are often drafted in a common law drafting style. For some types of contracts, common law style contracts are the norm because of long and consistent practice.[15] Several international financial institutions, for instance the European Bank for Reconstruction and Development (EBRD), impose the use of common law style contracts for the transactions that they are financing. They require this regardless of whether or not the financed entities originate from a common law jurisdiction or not.[16] Contracts for the hedging of financial risk are also inspired by the common law drafting style even if they are entered into between a Norwegian company and a Norwegian bank and are governed by Norwegian law.[17] Consequently, operators in civil law states have had to draft contracts in the common law style to meet the expectations and requirements of different institutions.[18]

The widespread use of common law style contracts is even increasingly affecting traditional contract types and domestic legal relationships, such as rental of real estate or sale agreements within the borders of the same country. Even the contract model applied by the Norwegian public sector for public procurement is increasingly drafted based on a common law drafting model.[19] Because most international commercial contracts are common law style contracts, law firms and corporate lawyers in a variety of jurisdictions learn to draft international contracts based on these models too.[20] The clients may also request this contract drafting style because an extensive and detailed contract may give the impression of more predictability. Hence, international commercial practice has gradually acknowledged the drafting style that is typical for common law contracts, without really questioning its applicability to the civil law systems.[21]

4 Key Interpretation Principles

[15] Cordero-Moss, "International Contracts between Common Law and Civil Law,".

[16] Cordero-Moss, "International Contracts between Common Law and Civil Law,".

[17] Cordero-Moss, "International Contracts between Common Law and Civil Law,".

[18] Cordero-Moss, "International Contracts between Common Law and Civil Law,".

[19] Cordero-Moss, "International Contracts between Common Law and Civil Law,".

[20] Cordero-Moss, "International Contracts between Common Law and Civil Law,".

[21] Cordero-Moss, *International Commercial Contracts,* 143.

Interpretation can be explained as a four-stage process: Initially, a question of construction is identified; secondly, competing interpretations are put forward; thirdly, arguments in support of each construction are composed of the permitted materials; and, finally, the interpretation result is chosen.[22] This process is guided by principles, and these are the key interpretation principles.[23] In contract law, interpretive materials are defined prescriptively and proscriptively. This means that there are factors that must be considered in interpretation and there are factors that cannot be taken into account or should only be considered in very few circumstances. This thesis will discuss interpretive materials from both of these categories.

In Norwegian and English law of contract, the interpretation requires analysis of a prescribed set of materials. These materials are the text and potential meaning of words, relevant context and "the contract as a whole". [24] In this thesis, these are referred to as the key interpretation principles. Some of these interpretive materials, or key factors, are different from each other under English and Norwegian law of contract. The meaning of similar words in the two legal traditions does not necessarily have the same content. In this upcoming part of the thesis these key features of contract interpretation, or "rules of interpretation" will be analysed and compared.

4.1 Objective and Subjective Intentions

Under English law, the aim of contract interpretation is to infer the objective intention of the parties.[25] The "objective" approach to ascertaining intention under English law of contract does not take into consideration the parties' actual or "subjective" intentions.[26] Contrary to English law, the primary rule for contract interpretation in Norwegian law of contract is the subjective interpretation principle. The subjective interpretation principle implies that the contract will be interpreted according to the parties mutual understanding of the contract if such a mutual understanding can be detected, or according to one of the parties' understanding when entering into the contract if the other party knew or ought to have known of this

[22]Hagstrøm, *Obligasjonsrett,* 70; Catterwell, *A Unified Approach to Contract Interpretation*, 3-01.

[23] Catterwell, *A Unified Approach to Contract Interpretation*, 3-01.

[24] Hagstrøm, *Obligasjonsrett,* 70; Catterwell, *A Unified Approach to Contract Interpretation*, 3-01.

[25] Catterwell, *A Unified Approach to Contract Interpretation*, 3-01.

[26] Merkin, Santier, *Poole´s Textbook on Contract Law, 544;* Catterwell, *A Unified Approach to Contract Interpretation*, 2-09.

understanding.[27] However, in HR-2016-1447-A, the Norwegian Supreme Court confirmed the statements from Rt. 2010 p. 1345 and expressed that a contract entered into between two commercial parties has to be interpreted objectively and not according to the subjective interpretation principle which is the traditional starting point in Norwegian law. Accordingly, the aim of commercial contract interpretation in Norwegian law of contract is the "objective" interpretation principle as well.

For both Norwegian and English law of contract, the "objective" interpretation has to be done in reference to how a "reasonable" person in the same context as the contracting parties would have interpreted it.[28] In 2015, the Supreme Court of the United Kingdom rendered a decision which quoted Lord Hoffmann in a prior case. It stated that the objective interpretation has to refer to "what a reasonable person having all the background knowledge which would have been available to the parties would have understood them to be using the language in the contract to mean."[29] The reasonable person's understanding of what was meant or intended is determinative. The evaluation is similar in both jurisdictions. The "reasonable person" refers to a sensible person, where the reference is "reasonable expectations of honest men".[30] In commercial contracts, the reasonable person would typically be a person familiar with the relevant business or industry.[31]

The objective interpretation principle as the starting point in Norwegian commercial contract interpretation have exceptions. If a common understanding between two commercial parties can be proven, the common understanding would most likely prevail.[32] Under Norwegian law, it would not be considered to be "fair" if a common understanding was proven and the defendant escaped the consequences with reference to how a "reasonable" person would have understood the contract.[33] In Rt. 2002 p 1155 (Hansa Borg) at p. 1159 the Norwegian Supreme Court stated that the wording of the contract is important due to the predictability it creates for third parties and others. They simultaneously expressed that a common understanding deviating from the wording of the contract will be decisive. Deviation from the

[27] Giertsen, *Avtaler*, 120.

[28] Tørum, *Interpretation of Commercial Contracts*, 23.

[29] Catterwell, *A Unified Approach to Contract Interpretation*, 2-27.

[30] Hagstrøm, *Obligasjonsrett*, 43;Tørum, *Interpretation of Commercial Contracts*, 24.

[31] Catterwell, *A Unified Approach to Contract Interpretation*, 2-27.

[32] Tørum, *Interpretation of Commercial Contracts*, 47.

[33] Tørum, *Interpretation of Commercial Contracts*, 48.

objective interpretation principle require relatively clear indications that the parties had the alleged deviating understanding, as stated in Rt. 2002 p. 1155 and confirmed in Rt. 2992 p. 1132 (Norrønafly). Evidence of a common understanding can be pre-contractual negotiations, previous drafts, qualification logs, minutes of meetings, management presentations, budgets, emails, and witness testimony.[34]

Contrary to Norwegian law, the parties can add an entire agreement clause to their contract under English law. An entire agreement clause is a clause that asserts that a contract constitutes the whole agreement between the parties. The purpose of it is to "… preclude a party to a written agreement from threshing through the undergrowth and finding the course of negotiations some (chance) remark or statement (often long forgotten or difficult to recall or explain) …".[35] Or in other terms: prevent the parties from relying on any preceding agreements, negotiations or discussions that have not been set out in the contract. The effect of entire agreement clauses in Norwegian law is dealt with in chapter 7.2.

Under English law, subjective intentions are relevant in the sense that they may well coincide with the objectively ascertained intentions of the parties. If it can be established that the promisee knew or ought to reasonably know the true position or the meaning intended by the promisor, the promisee cannot take advantage of this. The burden of proof rests on the promisor.[36] Apart from this, the subjective intentions of the parties are irrelevant under English law of contract. [37] The "reasonable person" must however be attributed to the common knowledge of the parties. He or she is also presumed to have certain characteristics, practically and normatively depending on the case and its context. [38] In Norwegian law of contract, the "reasonable person" also has to put himself in the context of the circumstances in which the contract was concluded, including the negotiation phase. This differs slightly from English law of contract where the negotiation phase is excluded from the assessment. Under English law, the parties are not allowed to present the judges with evidence as to what their intention was at the time of writing the contract. Nor does an English judge have access to pre-contractual negotiation or surrounding documentation to ascertain the common intention

[34] Tørum, *Interpretation of Commercial Contracts*, 49.
[35] Tørum, *Interpretation of Commercial Contracts*, 49.
[36] Merkin, Santier, *Poole´s Textbook on Contract Law, 35*
[37] Catterwell, *A Unified Approach to Contract Interpretation*, 2-27.
[38] Catterwell, *A Unified Approach to Contract Interpretation*, 2-28.

of the parties.[39] The English view is that admission of such evidence is likely to increase the cost of litigation and that it is rarely helpful in the interpretation process.[40]

Norwegian courts take an active role in relation to contractual terms. They start with a review of the wording, but they construe the contract in light of its purpose, supervening circumstances, principles of loyalty and considerations of fairness. As a result, the Norwegian courts may ultimately change the terms of the contract. All this is understood as being an "objective interpretation". The thesis will come back to these elements later.

4.1.1 Objective Interpretation Preliminary Summary; Same Wording, Different Outcome

Even though both Norwegian law of contract and English law of contract claim to interpret the contract "objectively" they allow and put different weight to the different interpretation elements. Consequently, the objective interpretation principle as it is carried out in practice may lead to different results in the two jurisdictions.

Some of the key differences between interpreting the contract objectively under English and Norwegian law of contract has to do with the weight given to, and the rules that follow, interpretation elements like the wording of the contract, context, normative considerations and implying terms. All elements that this thesis will describe more in detail later. But, as a summary of the initial introduction of objective contract interpretation, one of the key differences between the two jurisdictions is that English law does not put any weight on pre-contractual negotiations as Norwegian law does. Besides, objective interpretation in Norwegian law of contract does not mean that the contract exclusively is to be interpreted according to the natural understanding of the wording of the contract as stated in Rt. 2010 p. 961, Rt. 2012 p. 1729 and Rt. 2014 p. 866. Under English law, the court is much more bound to the contractual text because they see this as giving the most predictability for anyone affected by the contract. Both jurisdictions do however interpret the contract in light of how a reasonable person, in the same context as the parties, would have interpreted it.

[39] Cordero-Moss, *International Commercial Contracts*, 30.
[40] Lewison, *The Interpretation of Contracts*, 20.

4.2 The Wording of the Contract

Interpretation of a contract undoubtedly consists of addressing the potential meanings of the words in it. In English law, the wording of the contract has to be understood according to its plain and literal meaning.[41] This is true for Norwegian law as well. The Norwegian Supreme Court have in several cases, like Rt. 1997 p. 1807 (Gjeldsforsikringsdommen), used the phrase "natural understanding of the words" to describe this narrative.[42] In order to interpret the contract objectively in both jurisdictions, the wording of the contract is one of the most prominent sources for the court.

In investors Compensations Scheme Ltd v West Bromwich Building Society, Lord Hoffmann described interpretation as the ascertainment of the meaning of a contractual document.[43] He distinguished between the meaning of the words in a contract and the meaning of the contract, stating that: "The meaning of words is a matter of dictionaries and grammars; the meaning of the document is what the parties using those words against the relevant background would reasonably have been understood to mean". He simultaneously stated that the latter is the aim for interpretation. This narrative is true for Norwegian law of contract too and it is connected with what was discussed in chapter 4.1. In Equitable Life Assurance Society v Hyman, Lord Steyn put it this way: "The purpose of interpretation is to assign to the language of the text the most appropriate meaning which the words can legitimately bear.".[44]

The difference between English and Norwegian law of contract is that Norwegian courts seem to have a stronger tendency to deviate from the contractual text than the English courts seem to have. This statement is true for English law even if a strict interpretation of the contractual text leads to an unsatisfactory result. In the Union Eagle case (1997) the court interpreted the contract in a strict, literal way. The contract stated that it could be terminated if the performance had not been completed by 13.00 on a certain day. Completion took place on this date at 13.10. The delay did not have any consequences. However, the English judge found that the ten minutes delay constituted a delay according to the wording of the contract.

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[41] Cordero-Moss, *International Commercial Contracts*, 81.

[42] Giertsen, *Avtaler*, 120.

[43] Catterwell, *A Unified Approach to Contract Interpretation*, 2-13.

[44] Catterwell, *A Unified Approach to Contract Interpretation*, 2-05.

Consequently, the contract could be terminated. The Court reasoned that if the parties have stipulated the legal consequences of a default sufficiently clear in a contract, and it does not violate mandatory rules of law, the consequences of the contract will be enforced regardless of the fact that the result may be viewed as unfair.[45] It is not unusual to read an English court decision that gives effect to the wording of the contract, while simultaneously admitting that they consider the result unsatisfactory.[46] The difference on deviating from the contractual wording in the two jurisdictions can be illustrated with two judgements:

In Lombard North Central plc v. Butterworth, the contract had stipulated the consequences of a breach. It entitled the leasing company to recover possession of the computer and claim payment of the overdue unpaid instalments. In addition, it entitled them the payment for all the future instalments that were not yet due and payable at the moment the contract was terminated. The contract regulations would lead to the leasing company obtaining possession of the computer as well as the full price of the same computer. The court knew that this would be considered illegal if the payment could be interpreted as a penalty on the defaulting party. Besides, giving effect to the wording of the contract would create an unbalanced and unfair result. Yet, the terms of the contract could only be seen as a consequence of a breach of condition and a repudiation of the contract. This meant that they had to interpret the contract according to its wording even when the result turned out to be unsatisfying.

In Norwegian law, the wording of the contract is also one of the primary sources to infer intention. Having said that, Norwegian judges have the opportunity to deviate from the wording of the contract to a larger extent than their British colleges seem to have. In cases where the wording of the contract does not seem to have been thought through good enough, the Norwegian Supreme Court has interpreted the wording of the contract restrictive. In Rt. 1982 p. 1357 (Nortex) a company bought a warehouse where the snow made the roof of the building collapse. The reason for the collapse was deficiencies in the construction. The contract between the buyer and the seller stated that the property was supposed to be transferred to the buyer "as it was" at the time of transfer and without any responsibility for the seller. The Supreme Court concluded that it was reasonable to interpret the wording of the contract in a way that more "traditional" deficiencies, like visible damages, were included but

[45] Cordero-Moss, *International Commercial Contracts,* 83.
[46] Cordero-Moss, *International Commercial Contracts,* 83.

not construction errors. The Court came to this conclusion because the contractual wording did not seem to have been thought through thoroughly enough before the parties entered into it.[47] The Norwegian courts inferred intention by looking at the wording of the contract and the parties' subjective intentions when entering into it.

4.2.1 Resolving Lexical Issues

In contract interpretation, the traditional approach to ascertaining potential meaning for words involves reliance on various categories of meaning. [48] This thesis will not analyse all of these categories or which of these categories prevails over each other, but it will discuss some of the most common categories: ordinary meaning, customary or trade meanings and party-specific meanings. In addition, this chapter will discuss the lexical issues associated with the content of words changing over time.

4.2.1.1 The Issue of a Word with Several Meanings

Both English and Norwegian law of contract interprets the words in the contract according to their ordinary meaning as a starting point. However, a given word, phrase or numeral in a contract may have several potential "ordinary meanings". For example, the word "summer" can have an ordinary meaning referring to the six-month-long period opposite to winter. Another ordinary meaning refers to the three months constituting one of the seasons. A customary British meaning refers to the period spanning from April to October.[49] The ordinary meaning under both jurisdictions is understood to be the understanding of the word in common use in the community at large. Such meanings are derived in a common-sense manner by judicial notice or occasionally, by reference to a dictionary or even precedent.[50]

For business terms that have a special meaning within the industry, the terms are to be interpreted in accordance with the natural understanding of the terms in that industry in both jurisdictions.[51] For Norway, this also follows from the UNIDROIT Principles Article 4.3 a, which they are committed to. This Article states that the judge should find "the meaning commonly given to terms and expressions in the trade concerned".

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[47] Giertsen, *Avtaler,* 123.

[48] For summary of categories, see: Catterwell, *A Unified Approach to Contract Interpretation*, 3-09

[49] Catterwell, *A Unified Approach to Contract Interpretation*, 3-10.

[50] Catterwell, *A Unified Approach to Contract Interpretation*, 3-11.

[51] Giertsen, *Avtaler,* 122.

In English law, party-specific meanings are generally accepted and prevail over the ordinary or industrial meaning of the word if derived from the contract as a whole, its objects or background.[52] Party-specific meanings prevail over the ordinary or industrial meaning in Norwegian law of contract as well, if this common understanding can be proven.[53]

4.2.1.2 The Issue of Time Evolving

As time evolves, the ordinary meaning of words can change. In addition, the wording of the contract may give an unsatisfying result because circumstances change. This is especially true for long-term contracts. The question is if the contract should be interpreted according to the natural understanding of the words at the time of entering into the contract or at the time of the dispute.

Changing the wording of the contract due to a change in circumstances over time is an area where English and Norwegian law seem to deviate from each other. As a starting point, both jurisdictions interpret the wording of the contract according to the meaning of the words at the time the parties entered into it. This gives the best description of what the parties agreed on.[54] If the meaning of the word as it is understood today supports the purpose of the contract better, this is a strong argument to interpret the contract in light of todays' meaning under Norwegian law.[55] This does not seem to be the case under English law. In 2015, the Supreme Court of the UK rendered a decision which stated: "The mere fact that a contractual arrangement, if interpreted according to its natural language, has worked out badly, or even disastrously for one of the parties is not a reason for departing from the natural language.".[56]

This difference can be illustrated by comparing two cases from the English and Norwegian Supreme Court. Interpreting the contracts according to their literal meaning would lead to undesirable results due to changes in surrounding circumstances in both cases.

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[52] Catterwell, *A Unified Approach to Contract Interpretation*, 3-12.

[53] Giertsen, *Avtaler*, 121.

[54] Giertsen, *Avtaler*, 121.

[55] Giertsen, *Avtaler*, 121.

[56] Cordero-Moss, " The Importance of Legal Culture for Contract Construction", 39.

In the English judgement, Arnold v Britton, the interpretation of a contract provision for a yearly service charge contribution of £90 was in dispute. The contract was signed in 1974, which was a time of very high inflation. The contract contained a rather clumsy provision intended to index the service charges payable yearly by the lessees. Instead of writing a common indexing clause linked to the inflation rate, the contract provided for a yearly increase of the service charges by 10% which reflected the rate of inflation in 1974. At the time of the dispute, the yearly increase in inflation had a dramatically disproportionate effect. As the court put it: If one assumes a lease granted in 1980, the service charge would be over £2,500 this year, 2015, and over £550,000 by 2072. This appears to be an alarming outcome for the lessees.[57] Even though circumstances had changed drastically (from a period of high inflation to low inflation) English Supreme Court confirmed the contractual wording. The majority (one Lord dissented) concluded: "It would be very satisfactory to read the wording differently, but there is no basis for that."

In Rt. 1991 p. 220 (Sollia Borettslag) the parties negotiated a long-term distribution contract for cogenerated heat. They agreed that payment should be made on a cost basis. Meters at the time were not sufficiently precise. After detailed negotiations, they decided that the price should be calculated on the basis of the surface that is being heated. Years later, meter technology improved. One of the parties installed a meter and saw that he had been paying for more heat than he actually consumed. The party requested that the price calculation in the contract be adjusted to reflect the actual consumption. The other party refused to change a contract which he viewed as valid and binding. The price calculation mechanism in the contract was the result of long and detailed negotiations. Both parties were aware of the uncertainties connected with the mechanism when they agreed to it. The purpose of the contract was that neither party should earn or lose money. The question was if this was sufficient to change the wording of the contract. The Court agreed on the surface-based price mechanism for a more reliable measurement instead of interpreting the contract according to its wording. In making the decision, the court looked at supervening developments, the parties' intention when entering into the contract and considerations of fairness. They

[57] Paragraf 30-32.

concluded that: "When it turns out that the preconditions do not work, the provision cannot preclude the transition to other and more reliable methods of apportioning the expenses". [58]

In Arnold v Britton and Rt. 1991 p. 220 the respective supreme courts were faced with similar questions. As time evolved the contracts turned out to be unfair for one of the parties. The purpose in Arnold v Britton was to regulate the rate according to the inflation and the purpose in Sollia Borretslag was that neither party should earn or lose money. With time, the contractual wording did not support the intentions of the parties in either cases. The English Supreme Court chose to stick with the contractual wording and the Norwegian Supreme Court chose to change the contract due to technological developments and the parties' intentions.

In Rt. 1991 p. 220 the disputed contract was not a typical commercial contract. Regardless of this, it is likely that Norwegian courts would interfere with commercial contract disputes in this way. In Rt. 1935 p. 122 (Falconbridge) the dispute concerned the delivery of the metal nickel from the producer, Falconbridge, to a refinery (buyer). As time evolved, the price of nickel skyrocketed due to a change of circumstances in England which affected the price. The buyer would earn a lot of money by reselling the nickel they bought from Falconbridge. The Norwegian Supreme Court concluded that Falconbridge was not bound to sell the nickel to the agreed price because of the changing circumstances. The Court used arguments of loyalty between the parties to deviate from the contractual wording. Rt. 1951 p. 371 concerned a sales contract of coal to governmental institutions. Because World War II broke out the prices of coal was five-doubled. The Supreme Court concluded that it would be unreasonable if the seller was responsible for the loss alone. Consequently, the seller could change the price of the coal despite the contractual wording.

4.2.2 Lexical Ambiguity, Inconsistency and Error

4.2.2.1 Ambiguity

Lexical ambiguity arises when a word has more than one meaning. In both Norwegian and English law of contract, ambiguity is resolved by weighing and balancing the competing arguments to arrive at the construction that was probably intended.[59] In the case of ambiguity, the dispute is usually determined by looking for arguments beyond the clause or phrase under

[58] Cordero-Moss, "Ulike trekk ved norsk og engelsk kontraktsrett og deres betydning for kontraktens virkninger".

[59] Høgberg, "Kontraktstolkning," 49; Catterwell, *A Unified Approach to Contract Interpretation*, 3-52.

consideration.[60] In Norwegian law of contract, these types of issues are often resolved by looking at the context of where the words are written.[61]

4.2.2.2 Inconsistency

Inconsistency can arise when a part of the contract text contradicts another part which makes concluding on the disputed issue difficult. It can also occur if the heading of the provision contradicts the text under it.[62]

English law has several rules to establish a hierarchy for resolving inconsistencies in the contractual text: negotiated terms override standard terms, the specific governs the general, words prevail over figures, the terms of a "host" document take precedence over incorporated terms and earlier clauses overrides a latter clause.[63] Inconsistency can also be resolved if one interpretation alternative adequately and sufficiently explains the subject in matter with certainty.[64] An inconsistency will likely be resolved by investigating which construction has the strongest foundation in the text as a whole.[65] Purposive or consequentialist factors are often determinative if the text does not provide a clear answer.[66]

Norwegian law of contract has several rules to establish a hierarchy for resolving inconsistencies as well. These rules are very similar to the ones found in English law. Hence, the two jurisdictions do not seem to differ much from each other in this area. For example, the text is superior to the headings, corrections are superior to the original wording and newer documents are superior to older documents in Norwegian law as well.[67] In Rt. 1997 p. 1807 a specific clause was superior to a general clause in the contract. Rt. 1877 p. 545 is an example of a case where the correction of the wording was superior to the original wording.

[60] Høgberg, "Kontraktstolkning," 49; Catterwell, *A Unified Approach to Contract Interpretation*, 3-52.

[62] Høgberg, "Kontraktstolkning," 52.
[63] Catterwell, *A Unified Approach to Contract Interpretation*, 3-54.
[64] Catterwell, *A Unified Approach to Contract Interpretation*, 3-54.
[65] McKendrick, *Contract law*, 298; Catterwell, *A Unified Approach to Contract Interpretation*, 3-61.
[66] Catterwell, *A Unified Approach to Contract Interpretation*, 3-61.
[67] Høgberg, "Kontraktstolkning," 53.

4.2.2.3 Error

An error in the contract occurs when it is obvious or clear that something must have gone wrong with the language in the contract. The conflict can be between a literal or linguistic interpretation. For instance, an interpretation advanced solely or predominantly by an argument regarding the meaning of the words. It can also be a purposive or consequentialist construction. For instance, a construction based primarily on an argument regarding contractual purpose or potential consequences.[68]

In English law of contract, an error can only be corrected during the interpretation process if there is both a clear mistake and a clear correction for the mistake.[69] In both jurisdictions, the judge will often look to the contractual text and explore to which extent the construction can be based on it. This is because the aim of interpretation is to infer objective intention from the choice of words in a contract.[70] The court would also usually evaluate the competing considerations to determine what was probably intended by the parties.[71] In some cases, the Norwegian courts may also use provisions found in the Norwegian Act on Formation of Contracts from 1918 [72] in this process.[73]

The Fiona Trust case illustrated that modern courts in England today rarely construe a contract in a strictly literal manner if a sensible alternative is put forward, and there is an opposing interpretation that is advanced by a range of persuasive arguments. In such cases, the courts would hold that the parties have made an obvious error.[74] In the Fiona Trust case, a strictly literal interpretation was rejected by the Court because it was based on a particularly weak linguistic argument.

[68] Catterwell, *A Unified Approach to Contract Interpretation*, 3-61.
[69] McKendrick, *Contract law*, 298; Catterwell, *A Unified Approach to Contract Interpretation*, 3-60.
[70] Catterwell, *A Unified Approach to Contract Interpretation*, 3-61.
[71] Hov og Høgberg, *Obligasjonsrett*, s. 416.
[72] Lov om avslutning av avtaler, om fuldmagt og om ugyldige viljeserklæringer from 31.05.1918.
[73] Hov og Høgberg, *Obligasjonsrett*, s. 403.
[74] Catterwell, *A Unified Approach to Contract Interpretation*, 6-27.

4.3 Relevant Context and Purpose

The word "context" goes by several definitions like background, surrounding circumstances, factual matrix or factual and legal matrix.[75] The context consists of things known or assumed by all the contracting parties when they entered into the contract. It relates to the very nature of the transaction, the relevant industry or market in which the parties operate, the legal or regulatory background or matters specific to the parties, such as a party's status or its terms of business.[76] The purpose relates to the parties' intentions when agreeing on the contract terms, or the state of affairs the parties aimed to achieve with the contract.[77] In Rt. 1991 p. 220 (Sollia borrettslag), for example, the purpose of the contract was that neither party would lose or earn money.

4.3.1 The Parole Evidence Rule in English Law vs. Context in Norwegian Law

The parole evidence rule is a general rule that prohibits an interpreter under English law to take into consideration external circumstances for construing the contract. The rule restricts reference to evidence of subjective intention, evidence of negotiations and evidence of subsequent conduct.[78] Subjective intentions in contract law consists of each party´s state of mind regarding 1) why it entered the contract and agreed to the contract terms 2) what constitutes the contract terms 3) the meaning of the words used 4) how the interpretive dispute should be resolved and 5) the rejection or deletion of a term.[79]

The scope of the parole evidence rule is a matter of some controversy. Some believe that in a case where the parties intended that the document contained all the terms of their contract it is not possible to lead evidence for adding to, varying, subtracting from, or contradict the terms contained in the document.[80] Another view is that the rule does not rest on the intention of both parties but consist of a presumption made by the courts. The presumption is that a document that looks like the whole contract is in fact the whole contract. This means that is it not possible to lead evidence for the purpose of adding to, varying, subtracting from, or

[75] McKendrick, *Contract law*, 361; Catterwell, *A Unified Approach to Contract Interpretation*, 3-15.
[76] McKendrick, *Contract law*, 365; Catterwell, *A Unified Approach to Contract Interpretation*, 3-15.
[77] Catterwell, *A Unified Approach to Contract Interpretation*, 3-19
[78] McKendrick, *Contract law*, 39; Catterwell, *A Unified Approach to Contract Interpretation*, 3-29.
[79] McKendrick, *Contract law*, 40; Catterwell, *A Unified Approach to Contract Interpretation*, 3-30.
[80] McKendrick, *Contract Law*, 298.

contradicting the terms contained in the written document.[81] Despite this, the modern court is viewed as more likely to admit the evidence and evaluate its significance than declare it to be inadmissible.[82]

Regardless of the parole evidence rule, the English interpreter must be aware of the factual background in which the parties were when they entered into the contract. The parole evidence rule also has several exceptions that admit evidence of the factual background existing at or before the date of the contract which both parties were aware of. For example, evidence is admissible to prove a custom[83], to show that the contract is invalid on a ground such as misrepresentation, or to prove the existence of a collateral agreement.[84]

Lord Hoffmann stated in Bank of Credit and Commerce International v Ali (2001) that the use of the factual matrix under English law referred to "anything which a reasonable man would have regarded as background". He furthermore stated that he was certainly not encouraging a trawl through "background" which could not have made a reasonable person think that the parties must have departed from conational usage".[85] That being said, the significance of the factual matrix under English law varies from case to case but the judges do not seem to have difficulty ascertaining what falls within the scope of the "matrix of facts".[86] The parties may prevent the admission of evidence of the factual background under English law by inserting a merger clause in their contract which states that the document contains the entire contract.

In Norwegian law of contract, the parties can provide evidence of relevant context and establish its relevance to their proposed interpretation to the judge.[87] Examples of relevant context under Norwegian law can be the circumstances in which the contract was concluded, written exchanges between the parties before entering into the contract (pre-contractual negotiations), customs between the parties in similar contracts, the purpose of the contract (including subjective intentions) and the parties' behaviour after they entered into the contract

[81] McKendrick, *Contract Law*, 298.
[82] McKendrick, *Contract Law*, 301.
[83] Hutton v Warren (1836), p. 334, Chapter 10, Section 3.
[84] City and Westminster Properties Ltd v Mudd, Chapter 129; McKendrick, *Contract Law*, 301.
[85] McKendrick, *Contract Law*, 372.
[86] McKendrick, *Contract Law*, 373.
[87] Tørum, *Interpretation of Commercial Contracts*, 29.

(subsequent conduct).[88] These elements must have been available or known to the other party when the contract was entered into. The goal of allowing these pieces of evidence is to envisage how the contract *in casu* appeared to the relevant addressee when the contract was entered into. It is, therefore, hard to rule out certain circumstances as irrelevant according to the Norwegian legal tradition.[89] In contrast, English law of contract prohibits the use of subjective intentions, evidence of pre-contractual negotiations and subsequent conduct in construction.[90] This legal tradition claim that the parole evidence rule enhances predictability in the course of commerce for the contractual parties and third parties affected by the contract.[91] Their point of view is that evidence of subjective intentions would create insecurity for third parties because they have no knowledge of the subjective intentions of the parties or their pre-contractual negotiations. The exceptions from the parole evidence rule have been criticised for not being in compliance with the requirement of predictability in commercial contracts.[92]

Common for the two jurisdictions is that the context must be relevant to play a role in construction. [93] It can be relevant in several ways. It can be used to establish a potential meaning for a word, it can be relied upon directly to arrive at the objective intention of the parties, or it can assist in ascertaining the object or purpose of a contract.[94]

4.3.2 Purpose

A newer decision from the English Supreme Court has gone far in affirming that an interpretation of a contract that is more consistent with the commercial purpose of the contract is to be preferred.[95] Simultaneously, the court has underlined that this assumes that that particular construction is possible based on the wording of the contract.[96] The parties may therefore include a clause in their contract stating the purpose of the contract. This clause would then be taken into consideration when interpreting the contract because it is a part of

[88] Giertsen, *Avtaler*, 124.

[89] Tørum, *Interpretation of Commercial Contracts*, 30.

[90] McKendrick, *Contract Law,* 372.

[91] Cordero-Moss, "International Contracts between Common Law and Civil Law,".

[92] McKendrick, *Contract Law,* 301.

[93] Giertsen, *Avtaler*, 126.

[94] Catterwell, *A Unified Approach to Contract Interpretation*, 3-17.

[95] Cordero-Moss, *International Commercial Contracts, 82.*

[96] Cordero-Moss, *International Commercial Contracts, 82.*

the written document. Lord Hoffmann has also stated that one could, when interpreting a contract, adapt the wording to the contract to the purpose of it. This can be done by taking into account the factual background of which the parties knew or could reasonably have known of at the moment of entering into the contract.[97] The parole evidence rule would prohibit the court from applying evidence of subjective intentions and purposes that is not part of the written contractual document. Hence, previous negotiations of the parties, their declarations of subjective intent and the subsequent conduct of the parties should not be taken into consideration under English law.[98]

In Reardon Smith Line Ltd v Yngvar Hansen-Tangen a sub-charterer of an oil tanker refused to accept delivery of it because it did not match the contractual description. The vessel was identified by reference to its yard or hull number. In the sub-charter, the vessel was identified in the preamble as: "Newbuilding motor tank vessel called Yard No 354 at Osakra". The dispute arose because the vessel was built in a different yard. Consequently, it had the yard number "Oshima 004". The interpretation question for the House of Lords was if a yard number 354 in Osakra was required or if a vessel identifiable as "yard number 354 at Osaka" was sufficient. The House of Lords concluded on the latter and stated that the correct inference of *intention* was clear. This construction was supported by the contractual text, linguistic, purposive and contextual arguments.[99] Neither the contractual text nor the context reinforced the inference that the vessel had to be built in yard number 354 in Osakra.[100] This exemplifies how important the literal interpretation principle is in English law of contract, but that the court can rely on the purpose of the contract if the wording and other surrounding circumstances support this conclusion.

The Norwegian point of view is that the contract aims to fulfil a purpose for the contracting parties. If interpretation result x aligns better with the purpose of the contract than interpretation result y, this can be a valid argument under Norwegian law to conclude on interpretation result x. Rt. 1998 p 122 (Rørmateriell) gives an example of this. The company Rørmateriell sold a property to the Port Authority in Stavanger. Rørmateriell was supposed to rent the building from the Port Authority and was contractually responsible for "internal and

[97] Cordero-Moss, *International Commercial Contracts*, 81.
[98] Cordero-Moss, *International Commercial Contracts*, 81.
[99] Catterwell, *A Unified Approach to Contract Interpretation*, 6-11.
[100] Catterwell, *A Unified Approach to Contract Interpretation*, 6-11.

external maintenance". Five years later the roof had to be changed due to leaking. The parties disagreed on who was responsible to pay for this. The Norwegian Supreme Court looked at the purpose of the contract and relevant context. They concluded that Rørmateriell had to pay the expenses related to changing the roof. The Court stated in its reasoning that it was Rørmateriell who had the economic interest in fixing the roof because they entered into the sale agreement with the purpose of renting the building from the Port Authorities. The Port Authority's purpose for entering into the contract was to buy the plot, not the building. They were most likely going to demolish the building after the lease agreement expired.

Furthermore, in Rt. 1991 p. 220 (Sollia borrettslag), the purpose of the contract was that neither party should earn or lose money. Supervening developments, purpose and considerations of fairness made the court conclude on a result in alignment with this purpose. Rt. 1991 p. 220 is a rather old case, and the disputed contract was not a typical commercial contract. However, the court would likely interfere in disputes involving other kinds of commercial contracts in this way too, as seen in HR-2016-1447-A and Rt. 2012 p. 1779 which are dealt with later on in this thesis.

4.4 The Contract as a Whole

As stated previously, the obvious focus in interpretation is the text of the contract. What makes up the contract text for construction is, however, broader than one might think. This reflects the principle that a contract must be constructed as a whole. This narrative is true for both Norwegian and English law of contract. The question is how the two jurisdictions practice this.

4.4.1 What "The Contract as a Whole" Implies

The "whole contract" in English law of contract implies recitals, headings and marginal notes, counterparts and attachments, such as schedules, appendices or annexures.[101] In addition, it extends to incorporated terms and potentially implied terms.[102] It may also include simultaneously executed documents and agreements cited in a contract. These may also be

[101] Catterwell, *A Unified Approach to Contract Interpretation*, 3-07.
[102] Catterwell, *A Unified Approach to Contract Interpretation*, 3-07.

viewed as part of the admissible background.[103] Under Norwegian law of contract, everything from chapters, headings, scheme and the title of the contract can be elements to consider when looking at the contract "as a whole".[104]

The different headings and chapters normally imply that the different topics are governed solely by the chapters and provisions they belong to. For example, if the contract contains an extensive and consistent chapter on the buyer´s remedies for breach of contract, the provisions set out elsewhere in the contract are presumably not intended to serve as remedies for the buyer.[105] Even though there is no "sole remedy" clause, an extensive regulation of the remedies may be regarded as exhaustive in this example for English law as well.[106]

4.4.2 "The Contract as a Whole" as an Interpretation Element

The Norwegian Supreme Court use the scheme of the "contract as a whole" as a second step in the "objective" approach to interpretation.[107] This methodology has recently been explicitly confirmed in HR-2016-1447-A (KLP), which concerned the interpretation of a standard contract. The effect of the contract as a whole is relevant when the contract is unclear or silent on disputed issues.[108] The judge is then forced to search beyond an objective interpretation of the mere wording of the contract to determine its content.[109] The Norwegian view is that a provision may have a bearing on the disputed issue, even though it is not expressly addressed in the contract. For example, the rationale in the provision may typically support an analogous solution to the issue in dispute.[110]

Under English law, some components of the "whole contract" are regarded as subordinate to others, i.e., recitals, headings and marginal notes. In Norwegian law, there are no components that are regarded as subordinate to others. In Rt. 2014 p. 520 the judge wrote that "The history and system of the contract clearly indicate that (…)".[111], which illustrates that the Norwegian

[103] Catterwell, *A Unified Approach to Contract Interpretation*, 3-07.
[104] Hagstrøm, *Obligasjonsrett*, 43; Tørum, *Interpretation of Commercial Contracts*, 136.
[105] Tørum, *Interpretation of Commercial Contracts*, 137.
[106] Tørum, *Interpretation of Commercial Contracts*, 137.
[107] Hagstrøm, *Obligasjonsrett*, 77; Tørum, *Interpretation of Commercial Contracts*, 128.
[108] Tørum, *Interpretation of Commercial Contracts*, 128.
[109] Hagstrøm, *Obligasjonsrett*, 77; Tørum, *Interpretation of Commercial Contracts*, 128.
[110] Tørum, *Interpretation of Commercial Contracts*, 137.
[111] Para 40.

judge can use several elements from the contract in construction. That several elements from the "contract as a whole" could be relevant was also confirmed in HR-2016-1447-A. Furthermore, in HR-2016-2555 (para 26) the heading of the relevant provision was explicitly given weight.

The fact that the contract as a whole is relevant in contract interpretation in Norway is not new. However, clearly inspired by the common law drafting style, Norwegian commercial contracts are increasingly more extensive. Because of this, there has become a presumption that the different elements of the contract have been written with the purpose of constituting a coherent whole. Consequently, the influence of the common law drafting style has actually made the approach of "the contract as a whole" more relevant than it used to be in Norwegian law.[112]

In common law style commercial contracts, a provision stating "headings shall be ignored" commonly appears. In Gregory Products Ltd v Tenpin Ltd (2012) the heading and content of the clause were materially inconsistent. Lord Lewison stated that respect for party autonomy means that the headings cannot be allowed to alter what would otherwise have been the interpretation of the clause in question. Contrary to this, in Citicorp International Limited v Castex Technologies Limited (2017) the Court found it impossible not to be assisted by a clause heading in construing the contract despite a provision stating that "headings shall be ignored". However, in Doughty Hanson & Co Ltd v Roe (2007) and SBJ Stephenson Ltd v Mandy (2000) the court was faced with a contractual clause stating that clause headings are inserted for convenience only and shall not affect the construction of the contract. In the SBJ case, the court determined that it was possible to look to the heading which could "tell the reader at a glance what the clause was about". In the Doughty case, the Court determined that the heading was admissible in construction "as descriptive of what the provision is about". Giving these cases it is hard to generally conclude on when headings are admissible in construction under English law. However, it seems to be true that where the content of a clause is inconsistent with the heading, the heading must be ignored in construction.

[112] Tørum, *Interpretation of Commercial Contracts*, 130.

Many commercial contracts contain an introduction where the parties' purpose for entering into the contract and the subject of the contract is described.[113] This is called the preamble. The preamble in Norwegian law of contract can be relevant to the interpretation of the contract.[114] It may stipulate certain starting points or principles governing the contract. These may reveal or underpin the underlying structure of the contract or the relevant provisions.[115] To an extent, this means that if a principle is clearly expressed in the preamble, it can be given significant weight in the interpretation of an unclear provision.[116] The preamble may also give indications to the purpose of the disputed provision. [117] Lastly, it may contain statements on the factual context of the contract, which can guide what kind of contract it is. For example, if the parties aimed to establish a long-term relationship this can reveal the contract's underlying rationale.[118] The factual statements in the preamble can also give indications to the parties' assumptions when they entered into the contract. This can confirm that the current circumstances are substantially different from what the parties envisaged for, which may be relevant, *inter alia,* to the application of the doctrine of failed assumptions.[119] Because the preamble is a part of the written document it can be used in construction under English law as well. The guidelines for how to use the preamble in construction seem to be quite similar to Norwegian law. However, as stated earlier, English law does not allow elements of the parties' subjective intentions/assumptions in construction. As far as the preamble is used as an interpretation element it has to be interpreted according to its precise wording under English law.

If a relevant provision in the contract is not governing the relevant disputed question, other provisions in the contract may. In Norwegian law of contract, the judges can apply another provision by analogy.[120] This possibility is however not without restrictions. Severe effects require clear indications in the wording of the relevant provision.[121] In the Norwegian "Snøvhvit" case a subcontractor (A) had caused damage on the property of another

[113] Tørum, *Interpretation of Commercial Contracts*, 138.
[114] Tørum, *Interpretation of Commercial Contracts*, 138.
[115] Tørum, *Interpretation of Commercial Contracts*, 138.
[116] Tørum, *Interpretation of Commercial Contracts*, 138.
[117] Tørum, *Interpretation of Commercial Contracts*, 138.
[118] Tørum, *Interpretation of Commercial Contracts*, 139.
[119] Tørum, *Interpretation of Commercial Contracts*, 139.
[120] Tørum, *Interpretation of Commercial Contracts*, 139.
[121] Tørum, *Interpretation of Commercial Contracts*, 139.

subcontractor (C). C claimed damages from A in delict. Both A and C had entered into similar contracts with the same client (B). These were contracts based on the Norwegian offshore contract temple (NTK). The contracts applied the "knock-for-knock" regime, whereby both subcontractors had accepted the risk of damage to their property. The Court concluded that, even though there was no contractual relationship between A and C, it would undermine the knock-for-knock regime in the contracting pyramid if C was allowed to claim such damages from A. This means that A was considered to be a third-party beneficiary under the contract between B and C, allowing A to use this contract as a shield against C's claim. This case illustrates that the court can use analogy as a valuable interpretation element in Norwegian law. Especially where there is no distinct background law that can fill the gaps, or where the background law is too vague or underdeveloped to provide any real guidance. In this specific case, the overall scheme of the contract provided a solution that was more consistent with the contract than a solution provided by the background law.

4.5 "Key Interpretation Principles" Conclusion

Both Norwegian and English courts claim to interpret contracts objectively, but their understanding of "objective interpretation" is quite different. The objective interpretation principle under English law of contract and Norwegian law of contract does have many similarities. Nonetheless, they also diverge from each other in quite a lot of areas. In both English and Norwegian law, judges tend to be very loyal to the wording of the contract. They are especially loyal when the parties are professionals. [122] Consequently, one would assume that the two legal systems are equal in this area. However, the interpretation of the contract may lead to different results in the two jurisdictions. Predictability is a very important value in construction under English law. Predictability is important for the contracting parties as well as any third party the contract may affect, like an insurance company or a bank etc. These parties do not necessarily know the intentions or interests of the contracting parties. Nor do they know what the parties have discussed before the contract was drafted, or their subsequent conduct either. Hence, subjective intention, negotiations and subsequent conduct are materials rarely admissible in contract interpretation under English law. Instead, the objective intention

[122] Cordero-Moss, "Ulike trekk ved norsk og engelsk kontraktsrett og deres betydning for kontraktens virkninger".

of the parties is inferred by focusing on the prescribed materials. The court usually base their interpretation on the text, the potential meaning of the words and the background law.[123]

In Norwegian law of contract, predictability in commercial contracts is very important as well. Strong grounds are required in order to deviate from a strictly objective understanding of the contractual wording. This is stated, among other places, in Rt. 2002 p. 1155.[124] However, the judge can rely on pre-contractual negotiations to determine what the objective meaning of the contract should be, which is not generally admissible under English law. The judge only does this if there are strong grounds to deviate from the objective understanding or if this objective understanding is hard to detect.

5 Normative Considerations

Normative considerations in contract law can be defined as arguments of fairness, loyalty or reasonableness. The goal in using normative considerations is to come to a good and fair solution to the contractual dispute.[125]

Norwegian law of contract is to a large extent regulated according to the type of contract in question. A lot of important contract types including commercial contracts are not subject to extensive regulation.[126] The leading perception is that contracts like these are subject to general contractual principles called *alminnelige kontraktsrettslige prinsipper* which works as an uncodified background law.[127] These principles are highly discussed among Norwegian scholars. The content of them and their scope of application is therefore not uniformly agreed upon.[128] In this thesis, some of these key contractual principles will be explained. The reader is asked to keep in mind that their scope of application is controversial in Norwegian law. Different scholars might have a diverging opinion from what is being presented here. English law of contract has contractual principles as well. These have been developed more gradually. They are also more bound to the specific case and other commercial principles, like party

[123] Catterwell, *A Unified Approach to Contract Interpretation*, 3-06.
[124] p.1159.
[125] Hov, *Obligasjonsretten*, 60.
[126] Alvik, "Alminnelige kontraktsrettslige prinsipper og kontraktstyper i norsk rett".
[127] Alvik, "Alminnelige kontraktsrettslige prinsipper og kontraktstyper i norsk rett".
[128] Alvik, "Alminnelige kontraktsrettslige prinsipper og kontraktstyper i norsk rett".

autonomy.[129] Consequently, the following description and discussion of the principles is necessarily general due to the different nuances found in this area and the word limit.
In order to compare the use of normative considerations under English and Norwegian law of contract, it is important to define what the two jurisdictions traditionally view as a "fair" result. Under English law, a predictable interpretation result based on the contractual wording is highly valued. A literal and thus predictable interpretation of the contract is perceived as the fairest approach. Predictability is also important under Norwegian law, especially when it comes to commercial contracts.[130] However, in addition to predictability, Norwegian courts seem to argue that sometimes a *reasonable* solution can be a fair solution. Meaning that, in some cases, the wording of the contract may be set aside or interpreted in light of other elements in order to achieve a reasonable result. Very generally speaking one could therefore argue that English courts claim that a predictable interpretation gives a fair result and Norwegian courts claim that a predictable interpretation can lead to a fair result, but that a reasonable result create the fairest solution in some cases.

5.1 The principle of "Good Faith" and "Loyalty"

Good faith is a concept originating from Roman law.[131] It still has no commonly accepted definition.[132] It is used in both an objective and subjective sense, but it is the objective sense that is relevant for the following discussion. In an objective sense, good faith can be said to refer to a standard of conduct according to which the parties must act in good faith.[133] This means that it is a method used to cling to moral contractual relations and to mitigate the inequalities that may result from party autonomy.[134] Good faith is usually considered to be a norm whose content cannot be abstractly defined but which depends on the case.[135] The standard of good faith is found in international legal sources like the CISG Article 8 (1), UPICC Article 4.2 (1) and PECL Article 5:101 (2). It results in, among other things, a duty to take into consideration the other party's reliance on contractual negotiations. As well as a duty to inform the other party of matters that might have a material significance for that party's

[129] Alvik, "Alminnelige kontraktsrettslige prinsipper og kontraktstyper i norsk rett".
[130] Alvik, "Alminnelige kontraktsrettslige prinsipper og kontraktstyper i norsk rett".
[131] Gjoni and Peto, "An Overview of Good Faith as a Principle of Contractual Interpretation", 288.
[132] Gjoni and Peto, "An Overview of Good Faith as a Principle of Contractual Interpretation", 288.
[133] Gjoni and Peto, "An Overview of Good Faith as a Principle of Contractual Interpretation", 289.
[134] Gjoni and Peto, "An Overview of Good Faith as a Principle of Contractual Interpretation", 289.
[135] Gjoni and Peto, "An Overview of Good Faith as a Principle of Contractual Interpretation", 290.

evaluation of the contract.[136] The principle of loyalty is the Nordic equivalent to the principle of good faith.[137]

Under English law of contract, the traditional point of view has been that there is no legal principle of good faith of general application.[138] However, in the last couple of decades, some English court decisions have stated that "good faith" has become a generally acknowledged principle in English law of contract.[139] As an example, Justice Legatt has explicitly and extensively argued that English law should now be considered as having recognized a general principle of "good faith".[140] The Supreme Court has denied this development. In 2015, they explicitly referred to these recent suggestions in case law. The Supreme Court said that these "should not be invoked to undervalue the importance of the language of the provision which is to be construed."[141] In the Marks & Spencer judgement (2015), the Supreme Court also stated that the traditional and extremely restrictive right to intervene in the contract still applies today.

General clauses and principles of good faith and fair dealing makes it possible to come to a reasonable solution and they are therefore admissible in Norwegian law of contract. The principle of good faith and fair dealing in Norwegian law leads to extensive duties of loyalty between the parties, both during the performance as well as in the phase of negotiations. Norwegian scholars Hov and Høgberg state in their book that fundamental contractual principles[142] are important under Norwegian law of contract and loyalty is mentioned as one of the most important.[143] However, they are comprehensive about using the term in a judgement because it is a term without a clearly defined content. Hence, the term can be misused by referencing to it without having legitimate grounds for the interpretation result.[144] In a commercial setting, the use of general principles that are neither codified nor assembled

[136] Cordero-Moss, *International Commercial Contracts*, 129.

[137] Sund-Norrgård, Kolehmainen and Suhonen, "The Principle of Loyalty and Flexibility in Contracts", 190.

[138] DiMatteo et. al, *Commercial Contract Law*, 225.

[139] Cordero-Moss, "Ulike trekk ved norsk og engelsk kontraktsrett og deres betydning for kontraktens virkninger".

[140] Cordero-Moss, "Ulike trekk ved norsk og engelsk kontraktsrett og deres betydning for kontraktens virkninger.

[141] Cordero-Moss, " The Importance of Legal Culture for Contract Construction", 39.

[142] "Sentrale grunnprinsipper på obligasjonsrettens område" in Norwegian.

[143] Hov og Høgberg, *Obligasjonsrett*, s. 31.

[144] Hov og Høgberg, *Obligasjonsrett*, s. 40-41.

in a system can contradict the principle of predictability which is very important in a B2B[145] setting. Having said that, the principles of good faith and loyalty are very well-known principles. It should, therefore, be less likely that they interfere with the requirement of predictability.

In Rt. 2012 p. 1779, the court used the good faith principle as an argument to deviate from the contractual wording in a commercial contract. They concluded that the buyer had lost its right to exercise contractual remedies against the seller's default. Within the terms of the contract, the buyer had sent a notice of defect. The parties had previously negotiated for some months trying to find a solution to the defect. After negotiations failed, the buyer requested reimbursement for damages resulting from the seller's breach of contract. The Supreme Court found that the original notice of defect was not sufficient even though it complied with the contractual requirements. In addition to mentioning what the defect consisted of, the notice should have contained information that the buyer intended to exercise contractual remedies. This latter specification was not required in the contract which was a commercial contract entered into between two professional parties. However, the Supreme Court reasoned that this information was required due to the duty of loyalty between the contracting parties. In both Rt. 1935 p. 122 (Falconbridge) and Rt. 1951 p. 371 the Norwegian Supreme Court relied on arguments of loyalty between the parties to change the contractual wording. As time evolved and circumstances changed, the contractual wording would create a substantial loss for both sellers in these cases. The Court concluded that requirements of loyalty between the parties was a sufficient reason to deviate from the contractual wording.

The scope of the good faith rule in Norwegian law does have its limits too. Where a professional party (A) alleges that he had an understanding that deviates from an objective interpretation of the contract, it cannot be concluded that this understanding prevails over the contract because A has proven that his counterparty (B) "should" have understood that A had this understanding. That would run counter to another principle in Norwegian commercial contract law set out in Rt. 1970 p. 794, Rt. 1994 p. 581 and HR-2017-1664-A, that each of the parties carries the risk if their respective alleged understanding was not expressed in the contract. The good faith standard, therefore, relies up on more than what B should have understood. To apply the good faith standard, the Court have to assess whether there are good

[145] Business to business

reasons to deviate from the clear starting point that each of the parties carries the risk that their intent is not reflected in the contract.[146]

The absence of a general rule on good faith does not necessarily mean that English law cannot achieve the same results as Norwegian law of contract applying the rule of good faith in particular contexts.[147] Other legal techniques can be applied to obtain results that are similar to a general duty of good faith. For instance, misrepresentation, mistake, duress and implied terms are frequently seen as securing at least a minimum level of good faith.[148] In addition, piecemeal solutions have been developed in response to problems of unfairness. Furthermore, the principle of equity is used to strike down unconscionable bargains. However, these piecemeal solutions do not necessarily always have the same scope of application as a general principle.[149] Some also argue that the implication of terms acts as a surrogate for good faith in English law.[150] Nevertheless, English courts are still said to remain very conscious of the need to maintain commercial certainty in their approach to the construction of express terms. This consciousness can be seen in their continued rejection of a general principle of good faith.

5.2 Other Normative Considerations

5.2.1 Business Common Sense

In both English and Norwegian law, an objective interpretation of commercial contracts aims to conclude on how a reasonable businessperson in the same context would have understood the contractual wording.[151] Evidently, elements of commercial common sense may be relevant under both jurisdictions.[152] Business common sense can be defined as how a person familiar with the kind of business in question would *reasonably* have understood the contract in the relevant context.[153] However, the scope of application is different in the two jurisdictions.

[146] Tørum, *Interpretation of Commercial Contracts*, 96.

[147] DiMatteo et. al, *Commercial Contract Law*, 225.

[148] DiMatteo et. al, *Commercial Contract Law*, *225.*

[149] Cordero-Moss, *International Commercial Contracts*, 88.

[150] DiMatteo et. al, *Commercial Contract Law*, 223.

[151] Hagstrøm, *Obligasjonsrett,* 43; Tørum, *Interpretation of Commercial Contracts*, 40.

[152] Tørum, *Interpretation of Commercial Contracts*, 40.

[153] Hagstrøm, *Obligasjonsrett,* 43; Tørum, *Interpretation of Commercial Contracts*, 40.

English courts have shown signs of applying "business common sense" as an important interpretation element in the last couple of decades. The courts rely upon these standards to assess results and to ascertain the commercial purpose of a business contract. This development has been criticised. The Supreme Court addressed the matter in Arnold v Britton (2015) where it was stated that normative considerations should be used causelessly. The court expressed that "commercial sense" cannot be used to avoid an undesirable result when the wording of the contract gives another solution. Hence, the wording of the contract remains the main focus under English law of contract today.

In Antaios Compania Naviera SA v Salen Rederierna AB (1985) the English courts applied business common sense when forced to choose between two interpretation alternatives. They simultaneously addressed the threshold for deviating from a more literal construction under English law. This threshold was later refined by Lord Clarke in Rainy Sky with reference to Co-operative Wholesale Society Ltd. v National Westminster Bank plc. If the contract is unambiguous concerning the disputed issue and the court is left with two possible constructions, it should choose the construction that is most consistent with business common sense.[154] In Rainy Sky the court stated in section 23 that: "If there are two possible constructions, the court is entitled to prefer the construction which is consistent with business common sense and to reject the other". This approach is found in Norwegian law as well. In Rt. 2000 p. 1049 an insurance contract did not provide a clear solution to the disputed issue. The Norwegian Supreme Court acknowledges that certain terms in the contract supported another interpretation, but they chose to arrive at the interpretation that provided the best solution (p. 1055). The Rainy Sky case suggests that there is a limit to how far the business common sense argument can be taken under English law. If the words are wholly clear, there is no scope for saying that they should be interpreted to mean something different. Consequently, if the wording of the contract is unambiguous concerning the disputed issue, that would be decisive.[155]

In Norwegian law of contract, business common sense is seen as an inherent part of the objective interpretation principle.[156] In contrast to English law, there does not seem to be clear guidelines as to *when* business common sense arguments might be decisive for the

[154] Tørum, *Interpretation of Commercial Contracts*, 43.
[155] Tørum, *Interpretation of Commercial Contracts*, 46.
[156] Tørum, *Interpretation of Commercial Contracts*, 40.

interpretation result.[157] The fact that the contract would be more sensible or more balanced would at least not be sufficient to deviate from a more literal construction, according to scholar and jurist Amund Tørum.[158] In Norwegian law, other normative considerations like the consideration of loyalty between the parties or fairness seem to be more used to conclude on a construction that is in accordance with business common sense.

5.2.2 Fairness

Apart from reasonableness and business common sense, fairness is also a normative standard that can be used in construction. Fairness can be regarded as a standard underpinned by notions of honesty, assisting others, not taking advantage of anyone and foregoing self-interest.[159]

In English law of contract, fairness is rarely overly relied upon in construction, and it is not regarded as a universal guiding factor.[160] Evaluating whether the contract is fair or not is considered not to be in compliance with the expectations of an English judge.[161] The court is not expected to draft or change the contract for the parties, but rather to enforce what they already agreed upon. This is seen as the most appropriate for the commercial and financial business to flourish.[162]

Contrary to this, the Norwegian judge can use several considerations collectively referred to as *reelle hensyn* to evaluate the fairness of the contract. These considerations can also be used to reinstate the balance of interests between the parties. Especially if the disputed issue remains unsolved after the court has considered the overall scheme of the contract, the background law and usage.[163] The courts does it to avoid an unfair result stemming from a strict, literal interpretation of the contract. In addition, the judge can go as far as correcting the wording of the contract to achieve a better balance of interest between the parties.[164] The aim

[157] Tørum, *Interpretation of Commercial Contracts*, 41.
[158] Tørum, *Interpretation of Commercial Contracts*, 41.
[159] Høgberg and Øyrehagen Sunde, *Juridisk metode og tenkemåte*, 636.
[160] Catterwell, *A Unified Approach to Contract Interpretation*, 3-27.
[161] Cordero-Moss, "International Contracts between Common Law and Civil Law,".
[162] Cordero-Moss, "International Contracts between Common Law and Civil Law,".
[163] Alvik, "Alminnelige kontraktsrettslige prinsipper og kontraktstyper i norsk rett".
[164] Cordero-Moss, "International Contracts between Common Law and Civil Law,".

would then be to arrive at a solution that generally appears sensible to the kind of contract in question.[165] Contrary to this, the English Supreme Court should never rewrite the contract "in an attempt to assist an unwise party or to penalise an astute party" according to Lord Carnwath in reference to the Rainy Sky verdict and the need to avoid "a nonsensical result".[166] This is an example of how English law and Norwegian law of contract use normative considerations differently in construction.

Norwegian courts can also be apprehensive about applying general principles of fairness[167] into the contract. If an objective interpretation of a commercial contract provides a clear solution to the disputed issue, this will normally be decisive in commercial contracts. The process of interpretation will not go any further.[168] This is characterized as being a "firm" starting point. "Strong reasons" are required to deviate from this solution. This is stated in several judgements like Rt. 1994 p. 581 (Scanvest), Rt. 2010 p. 1345 (Veisalt) and Oslo Energi. In Rt. 2000 p. 806 (Oslo Energi) the Court stated that there was no basis for deviating from the wording in the contract. The contract was simple, and the wording was unambiguous. Both parties accepted that there was a risk of changes. The parties could easily have agreed on a different mechanism. The court also emphasised that the provider of the draft was a very professional party.

In HR-2016-1447-A, the court explained the meaning of objective construction in this way: "It does not mean that one is supposed to follow a purely literal interpretation. A series of elements will be relevant for interpreting the contract [...] The wording of the terms must be seen, inter alia, in light of their purpose, as well *as of other considerations of fairness.*"[169] The case concerned the interpretation of a standard contract for the lease of industrial facilities. A provision stated that the lessee was liable for any damages that were "due to the lessee." The question was whether this provision applied in a situation where the premises were damaged in a fire that was caused in the course of the lessee's recycling activity. The court found that

[165] Tørum, *Interpretation of Commercial Contracts*, 189.

[166] Austen-Baker, *Commercial Contract Law, 233*

[167] In Norwegian: Reelle hensyn

[168] Tørum, *Interpretation of Commercial Contracts*, 39.

[169] Cordero-Moss, " The Importance of Legal Culture for Contract Construction", 40.

although the wording seemed to indicate that the lessee would be liable for any damages caused in the course of its activity, the correct interpretation was that liability assumed that the lessee was in breach of contract. As the lessee had not violated any of the contract's provisions, the simple circumstance that the fire was caused in the course of the lessee's activity was not a sufficient basis for liability. However, contrary to Oslo Energi, the contract in this case was not completely unambiguous and the Court used considerations of fairness only to support an interpretation result already available in the contractual wording.

The importance of fair dealing in Norwegian law of contract became more evident in 1983 with the introduction of § 36 in the Norwegian Act on Formation of Contracts.[170] The judge was given extensive power to correct the parties' will in the name of reasonableness with this rule. § 33 of the Act on Formation of Contracts also states that a contractual provision is not binding on a party if enforcement of the contract would be unfair because of circumstances that were known to the party at the moment of conclusion of the contract. In Rt. 1988 s. 295 (Skjelsvik) the court used § 36 to alter the contract because the contract had become very unreasonable due to the inflation. However, this was not a commercial case. In commercial contracts, the court is expected to be very restrictive in the application of these rules.[171] In Rt. 2000 p. 806 (Oslo Energi) the Norwegian Supreme Court stated that the threshold for applying § 36 in commercial contracts was very high.

6 Implying Terms

There is a distinction between implying terms from the background law and implying terms and assumptions "in fact". Terms "in fact" are essentially what makes up the contract. To illustrate the difference between the two types, Rt. 1982 p. 1357 can be used as an example. In this case, the roof of the building collapsed due to heavy snowfall. The buyer of the building argued that he assumed that the roof was dimensioned to bear the weight of such amount of snow (term in fact) and that the collapse constituted a defect (term in law).[172] In this thesis implying terms from the background law and implying terms "in fact" will be dealt with separately.

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[170] Cordero-Moss, "International Contracts between Common Law and Civil Law,".

[171] Hov and Høgberg, Obligasjonsrett, s. 412; Cordero-Moss, "International Contracts between Common Law and Civil Law,".

[172] Hov and Høgberg, *Obligasjonsrett*, s. 403.

It would be difficult and often artificial to try to distinguish between gap-filling and interpretation. Gap-filling should be considered and addressed as an integral part of the interpretation process. By "gap-filling" this thesis refers to the process where the outcome of the interpretation process may end up giving significant weight to the solution provided by the background law or surrounding circumstances, as one of several elements in the interpretation process.[173]

This chapter aims to answer key questions concerning how and when the two jurisdictions seem to imply terms from the background law or terms in fact in such a way that the interpretation deviates from the contractual wording.

6.1 Implying Terms from the Background Law

Traditionally, an English judge is seen to be less concerned with providing means for ensuring a balanced relationship between the parties, and more concerned about enforcing the agreement the parties voluntarily entered into as shown throughout this thesis. For a judge to correct or integrate any term that would run counter to the expectation of the contract is not something that would be considered "fair" under English law of contract. The only exception to this practice is if the provision in the contract is illegal or if specific statutory rules would require a judge to do so. This mainly happens in the context of consumer contracts[174], which is not a topic for this thesis.

Even though commercial contracts are predominantly governed by the terms expressed in the contract, some acts have introduced statutory terms that are to be deemed implied terms of a commercial contract if it falls within its scope.[175] Both the Sale of Goods Act from 1979 and the Unfair Contract Terms Act from 1977 are acts that imply terms into a commercial contract. The Sale of Goods Act implies four terms into a commercial contract. Among other things, the goods are required to correspond with the description given and be of satisfactory quality and fit their purpose. The Unfair Contract Terms Act is particularly important when exclusion and restriction clauses are included into the contracts. These acts cover principles

[173] Tørum, *Interpretation of Commercial Contracts*, 148.
[174] Cordero-Moss, *International Commercial Contracts*, 87.
[175] McKendrick, *Contract Law Text Cases and Materials*, 329.

and rules that, in some cases, are self-explanatory or should be expected to be a part of the contract. For example, that liability can never be excluded or restricted in claims for death or personal injury.

In Norwegian law of contract, the contractual obligations between two commercial parties must be determined based on the interaction between the contractual document and the background law.[176] Contrary to English law, the Norwegian perspective is that even the most carefully drafted contract will have gaps and ambiguities. Consequently, the background law can play an essential role in the interpretation process.[177] The background law can be used where the contract is unclear or silent on the disputed issue in Norwegian law, as seen in HR-2016-1447-A (KLP). In this case, the judge wrote that "… there is no doubt that the background law will be relevant as an independent factor in the interpretation process where the present contract does not provide a clear solution".[178]

In Rt. 2012 p. 1779 (Victocor) the Norwegian company Hydro had agreed on a contract of a long-term lease with a professional supplier that was supposed to deliver equipment to their production. The contract followed Hydros' usual and professionally written contract. The supplier did not manage to deliver the equipment according to the parties' agreement, and Hydro asked for compensation for their loss. The question was if Hydro had made their claim too late. The contract itself contained detailed regulations of how Hydro should act in a case of a breach. However, the background law had more extensive rules the company needed to follow in case of a breach. The Norwegian Supreme Court concluded that the contract should be corrected according to the background law. The contracts own regulation of what the complaint should contain and how it should have been done were set aside, and the terms found in the background law was implemented. The Supreme Court implemented the background law, even though it was a commercial contract and even though the contract itself contained a detailed description of how the complaint was supposed to be.

The effect of the background law in construction is another area that shows how the objective interpretation principle can lead to contradicting results in English and Norwegian law of contract. In Norwegian law, the need for background law is evident because the parties cannot

[176] Tørum, *Interpretation of Commercial Contracts*, 9.

[177] Alvik, "Alminnelige kontraktsrettslige prinsipper og kontraktstyper i norsk rett".

[178] Para 46 See also Rt. 1976 p. 1117 (Siesta), Rt. 1979 p. 1099, Rt. 1981 p. 455 (Davanger) and Rt. 1992 p. 1157.

and should not provide for all eventualities in their contracts.[179] By not expecting this, Norwegian law of contract reduces the transaction costs of negotiations and drafting by providing a fall-back mechanism in the form of the background law if the parties have failed to agree on a term or as a form of protection if they are prohibited from agreeing on a specific term. [180]

The Norwegian rationale is that if the wording of the contract gives a solution to the interpretation issue that is contrary to the background law the wording of the contract may appear so unreasonable, irrational or unbalanced that the court considers it to be unlikely that the parties intended to regulate these terms into their contract. The background law can also give arguments to support the assumption that the parties did not intend to agree to those contractual terms. If that is the case, the court would be able to come to an interpretation results that is alignment with the background law and not with the wording of the contract. In addition, the fact that a solution appears to be the most reasonable can be a strong argument to interpret the contract in accordance with the background law under Norwegian law.

The Norwegian Supreme Court's decision to use the background law instead of putting weight to the terms in the contract in Rt. 2012 p. 1779 (Victocor), is a big contrast to how reluctant English courts are to change the wording of a contract or to go beyond the scope of the meaning of the contract as demonstrated in the Marks and Spencer v BNP verdict. Both cases concerned implying terms into a commercial contract. It is interesting to note that the Court explicitly states that a detailed agreement between two commercial parties cannot be implemented with terms from the background law in the Marks & Spencer judgement. Their reasoning is that the Court cannot know if the parties' intention was to regulate the contract fully or not. Whereas in Victocor the Norwegian Supreme Court sets the parties' contractual regulation aside and implies terms from the background law into the contract while simultaneously acknowledging that the parties intended to regulate the issue exhaustively in their contract.

6.2 Implying Terms "in fact"

[179] Tørum, *Interpretation of Commercial Contracts*, 144.
[180] Tørum, *Interpretation of Commercial Contracts*, 144.

The English interpreter has little possibility to fill in gaps in the contract by reading implied terms into commercial contracts.[181] The general rule is that a judge's task is to interpret the contract, not to draft the contract for the parties.[182] This is stated in Marks and Spencer PLC v BNP Paribas Securities Services Trust Company (Jersey) Limited & another (Marks and Spencer v BNP). In this case, Marks and Spencer PLC ("the Tenant") entered into a 12-year lease of four floors of an office building in Paddington with rent payable quarterly in advance. The contract included a break clause and the conditions in the break clause were met by the Tenant. The lease did not contain an express provision dealing with the Tenant's entitlement to any refund for the rent paid in the period after the break date. The Tenant demanded repayment of rent and other payments for the remainder of the quarter following the break date from the Landlord who refused to pay. The Court of Appeal reasserted the well-established principle that a term can only be implied into a contract if it is necessary to achieve the parties' express agreement. The Court stated that the starting point should be that if there is no express term, none should be implied. If the parties intended that a particular term should apply to their relationship, they would have included a term to that effect, rather than leave it to implication. In this instance, it should have been obvious to the parties that if the Tenant were to exercise the option to break the lease, rent would need to be paid in full (including for the remainder of the quarter after the break date) on the last quarter day as a condition of the successful operation of the break clause. The parties could easily have dealt with the issue of apportionment when the lease was negotiated. For example, by inserting express provisions into the lease for the Landlord to make repayments to the Tenant following the break date. This was not done. Hence, the Court concluded that no such clause should be implied.

If the judge finds himself in a position where it is necessary to imply terms, he needs to follow key tests that were set out and refined in Marks and Spencer v BNP. According to these tests, the courts should only fill in gaps in the contract where this is necessary to give business efficacy to the contract. Alternatively, when the inclusion of such a term is so obvious that it goes without saying.[183] What the parties hypothetically would have agreed on

[181] Cordero-Moss, *International Commercial Contracts*, 87.

[182] Cordero-Moss, "Ulike trekk ved norsk og engelsk kontraktsrett og deres betydning for kontraktens virkninger".

[183]Cordero-Moss, "Ulike trekk ved norsk og engelsk kontraktsrett og deres betydning for kontraktens virkninger".

is relevant. However, this is not the hypothetical answer of the actual parties, but what reasonable people in the same position as the parties would have agreed on at the time the contract was entered into.[184] Furthermore, the term must not contradict any express term of the contract. A term should not be implied into a commercial contract merely because it appears fair. In addition, the term must be reasonable, equitable and capable of clear expression.[185] Despite these tests, case law has demonstrated that the default position is that nothing is to be implied into the contract. This means that the tests impose a rather high threshold under English law.[186] This assumption also seems to be stronger the more detailed and complete the contract is.[187]

The English doctrine on "implied terms" can to some extent also serve as a summary of the patterns in Norwegian case law for when the court can imply terms and assumptions into a commercial contract as well.[188] The reasoning in both Rt. 1994 p. 581 (Scanvest) and Arnold v Britton are equivalent. In these cases, the Supreme Courts argued that to imply a term, the term must be necessary or so obvious that "it goes without saying".

When interpreting commercial contracts, the Norwegian Supreme Court has set out a clear starting point concerning implied terms. In Rt. 1994 p. 581 (Scanvest) the Court stated that the judge shall not save a professional party (A) from his carelessness to the detriment of the other party (B) by inserting by way of interpretation a term or assumption which A should have tried to include in the contract. However, the court should not be completely prevented from implying terms and assumptions that are not expressly set out in the contract. If this was required, the parties would have to try to set out in detail even the most obvious terms and assumptions into their contract[189], as is the case under English law. From a Norwegian law point of view, this would make the drafting of the contract very complicated, time-consuming and costly.[190]

[184] Tørum, *Interpretation of Commercial Contracts*, 110.
[185] Tørum, *Interpretation of Commercial Contracts*, 111.
[186] Tørum, *Interpretation of Commercial Contracts*, 111.
[187] Mckendrick: *Contract Law*, 334; Tørum, *Interpretation of Commercial Contracts*, 111.
[188] Tørum, *Interpretation of Commercial Contracts*, 105.
[189] Tørum, *Interpretation of Commercial Contracts*, 103.
[190] Tørum, *Interpretation of Commercial Contracts*, 103.

6.3 Summary

The interaction between the contract and the background law can be complex. Implying a term from the background law into a commercial contract may even be considered to be judicial intervention, which may be hard to align with the principle of freedom of contract.[191]

If the background law has detailed rules on a matter this will serve as a good argument to use those rules to imply terms into the contract, from a Norwegian law point of view. Contrary to this, English law is much more reluctant to imply terms from the background law into the contract. For the contracting parties this can be both an advantage and a disadvantage depending on the case. The Norwegian "method" can be said to ensure a more reasonable result in some cases. Simultaneously, English law claim they provide the most predictable solution. Norwegian law would also claim to give a predictable result because a lot of the background law is codified and available for the contracting parties.

Norwegian law does not have a distinct doctrine for implying terms "in fact", as English law of contract does. Whether a term "in fact" should be implied under English law is set out in general tests. By contrast, in Norwegian law this is often assessed exclusively by relying on earlier case law. This makes the deciding factors more subtle.[192] The implication of terms has not been considered as problematic in Norwegian law as in English law.[193] This may also explain why Norwegian case law is not very explicit about when terms and assumptions can be implied in a contract.[194]

7 Boilerplate Clauses

Under English law, the parties can implement several clauses that regulate how the terms in the contract should be interpreted.[195] These clauses are called boilerplate clauses, and their purpose is to make the contract self-sufficient and consequently replacing the effect of the background law.[196] These clauses concern the interpretation and general operation of

[191] Mckendrick: *Contract Law*, 338; Tørum, *Interpretation of Commercial Contracts*, 144.
[192] Tørum, *Interpretation of Commercial Contracts*, 150.
[193] Tørum, *Interpretation of Commercial Contracts*, 105.
[194] Tørum, *Interpretation of Commercial Contracts*, 105.
[195] Cordero-Moss, *Den nordiske kommersielle retten i en anglo-amerikansk forretningsvirkelighet*, 213 - 222.
[196] Cordero-Moss, *Den nordiske kommersielle retten i en anglo-amerikansk forretningsvirkelighet*, 213-222.

contracts. They are found in most commercial contracts irrespective of the content of the contract. They are relatively standardised, and their wording is not usually given attention to during negotiations.[197] From an English law point of view, implementing terms from the background law into the contract creates uncertainty. Consequently, the use of boilerplate clauses is justified with reference to the need for predictability in commercial contracts.

Norwegian law does not have a doctrine on boilerplate clauses. If Norwegian law governed a contract written in a common law drafting style which included boilerplate clauses, the implementation of the background law would not be prevented because of it. In addition, the wording of the clauses may have a different legal effect under Norwegian law than it would have under English law.[198]

There are many different kinds of boilerplate clauses that regulate different aspects of the contract. Due to the word limit, this thesis is limited to presenting and examining how two common boilerplate clauses, sole remedy clauses and entire agreement clauses, possibly would be interpreted if included in a commercial contract governed by Norwegian law.

7.1 Sole Remedy Clauses

A "sole remedy" clause is a provision stating that the remedies set out in the contract shall be considered exhaustive or that the contract more generally shall be interpreted as constituting an autonomous scheme, more or less independently of the background law.[199] A sole remedy clause therefore typically specifies that the absence of certain remedies in the contract has been deliberately excluded.

For a Norwegian judge, an essential question is how to interpret contractual silence. Is the silence supposed to be regarded as a gap to be filled by the background law, or should the silence be interpreted as a deliberate choice to opt-out of the solution provided by the background law? It is not possible to provide a general answer to this question. However, parties to commercial contracts under Norwegian law increasingly tend to agree on such matters by inserting "sole remedy" clauses into their contracts which seem to be respected by

[197] Cordero-Moss, *International Commercial Contracts*, 9.
[198] Cordero-Moss, *International Commercial Contracts*, 17.
[199] Tørum, *Interpretation of Commercial Contracts*, 170.

the courts unless it contradicts binding rules from the background law as discussed in chapter 6 of this thesis.

7.2 Entire Agreement Clauses

An "entire agreement clause" can for example read: "The Contract constitutes the whole agreement between the parties and supersedes any previous agreement, understanding or agreement between them relating to the subject matter it covers".[200]

The purpose of inserting entire agreement clauses have historically been to ensure strict enforcement of the parole evidence rule[201] [202]. The effect of an entire agreement clause under English law was stated and summarised in Grove Investments Ltd v Cape Building Products Ltd. The judge wrote that "The purpose of an entire agreement clause is to preclude a party to a written agreement from threshing through the undergrowth and finding in the course of negotiations some (chance) remark or statement (often long forgotten or difficult to recall or explain) on which to found or claim such as the present to the existence of a collateral warranty.".

Entire agreement clauses are frequently incorporated into commercial contracts governed by Norwegian law but they do not have a Nordic origin.[203] Whereas a sole remedy clause can regulate that certain remedies in the background law are not applicable, implying that the remedies set out in the contract are considered to be more or less exhaustive, an entire agreement clause does not usually aim to exclude remedies in the background law.[204] Entire agreement clauses clarify the limit to which documents are to be regarded as part of the contract, and/or the factual context regarded as relevant to interpreting the contract.[205]

[200] McKendrick, *Contract Law Text Cases and Materials*, 394.
[201] Tørum, *Interpretation of Commercial Contracts*, 176.
[202] For definition see chapter 4.
[203] Tørum, *Interpretation of Commercial Contracts*, 176.
[204] Tørum, *Interpretation of Commercial Contracts*, 176.
[205] McKendrick, *Contract Law Text Cases and Materials*, 394.

Norwegian law has never recognised any concept that limits the principle of free evaluation of evidence.[206] Hence, the English law jurisprudence regarding entire agreement clauses cannot be directly transplanted into Norwegian law.[207] In Norwegian law of contract, the traditional starting point for interpretation is the parties' common understanding, and this starting point must necessarily allow evidence of what the parties intended by the wording.[208] Even though this starting point is only nominal in a commercial contract.

Where the entire agreement clause prohibits the English court to take into consideration anything but the contractual text or other things that are specified in the clause, a clause like this would only serve as adding clarity to which documents are to be considered to be part of the contract under Norwegian law. If the parties have made an extensive contract and listed its exhibits and the dispute is to be governed by Norwegian law of contract, an entire agreement clause would strengthen the presumption that the written agreement is intended to be a complete encapsulation of the agreement. This would raise the threshold for considering further documents to be part of the contract in Norway.[209]

An entire agreement clause would not render certain circumstances irrelevant to the interpretation of the contract under Norwegian law. The parties' common understanding is the Norwegian starting point in commercial contracts too. Even though an entire agreement clause would state that they deviate from this starting point, this will hardly suffice unless it has been individually negotiated according to Tørum. And even then, he claims that it should be considered as a rebuttable and not an absolute presumption under Norwegian law.[210] Such an entire agreement clause would be too difficult to align with the principle of free assessment of evidence under Norwegian law.[211]

Under Norwegian law evidence of drafts and negotiations are relevant and may be given significant weight in the interpretation process by the court. According to Tørum standard entire agreement clauses would therefore not necessarily reduce the weight such evidence

[206] Tørum, *Interpretation of Commercial Contracts*, 177. (In Norwegian: fri bevisbedømmelse)
[207] Tørum, *Interpretation of Commercial Contracts*, 177.
[208] Tørum, *Interpretation of Commercial Contracts*, 178.
[209] Tørum, *Interpretation of Commercial Contracts*, 178.
[210] Tørum, *Interpretation of Commercial Contracts*, 179.
[211] Tørum, *Interpretation of Commercial Contracts*, 179.

have in the interpretation process.[212] In Rt. 1992 p. 796 (Pepsi Cola) the Norwegian Supreme Court concluded that an entire agreement clause did not prevent gap-filling of the contract. The Court expressed that the entire agreement clause was not decisive for the interpretation but indicating that it might affect the weight given to it. However, Tørum also states in reference to this judgement that it should be even harder to convince the court that the solution following from an objective interpretation of the contract does not reflect the parties' common understanding if a comprehensive and carefully drafted contract contains an entire agreement clause that is individually negotiated.[213] In Rt. 2012 p. 1779 (Victocor) as mentioned above, it was expressly held that the entire agreement clause did not change the effect of the background law, nor the threshold for filling in gaps in the contract with the background law.[214] Tørum also explains in his book that this is the widely-recognised understanding of such clauses in Nordic law. [215] Tørum is the only author who explicitly address the issue of entire agreement clauses in Norwegian law of contract. However, other authors like Hagstrøm, and Hov and Høgberg generally write that the background law can be an important interpretation element in construction, regardless of the contractual wording.[216]

8 Conclusion

The comparative exercise performed in this thesis has shown that the two legal systems are based on different considerations of what is deemed fair. In Norwegian law of contract, the Court seems to have more flexibility to deviate from the contractual wording in commercial contracts if the result of the contract would be deemed unreasonable. English law of contract seems to be more concerned about enforcing what the parties agreed upon rather than ensuring the most reasonable result. It allows the parties to consider what is fair by interpreting the contract according to its wording. The differences between these two fundamental principles can lead to very different results in a dispute, despite the fact that they may seem to be similar at a glance.

[212] Tørum, *Interpretation of Commercial Contracts*, 179.
[213] Tørum, *Interpretation of Commercial Contracts*, 179.
[214] Tørum, *Interpretation of Commercial Contracts*, 180.
[215] Tørum, *Interpretation of Commercial Contracts*, 180.
[216] Hagstrøm, *Obligasjonsrett,* 52; Hov and Høgberg, *Obligasjonsrett,* 32.

International commercial contracts are often written in a common law drafting style because the parties assume this gives them the most predictable result in case of a dispute. English law is also often chosen as the governing law of the contract.[217] Norwegian law of contract is often not chosen to be the governing law in case of a dispute between two commercial parties, due to § 36.[218] The parties should however keep in mind that Norwegian law can complement the contract in a way that gives a more fair and desirable result in some cases. For example, in the Falconbridge case, mentioned earlier in this thesis, the result would have been disastrous for the seller if the court did not deviate from the contractual text. Commercial parties need to keep in mind that there is a possibility that the contract could turn out disastrously for them too as time evolves or circumstances change. In that case, Norwegian law of contract would be a more beneficial governing law for the losing party. Choosing between either jurisdiction can, therefore, be a calculated risk. On the one hand, English law of contract does provide predictability because the contract is interpreted according to its wording. On the other hand, there seems to be a large possibility to deviate from the contractual text if the result is very unsatisfactory in Norwegian law of contract, compared to English law.

In some cases, one can probably achieve the same interpretation results in both jurisdictions. However, it is important to be aware of which elements differ from each other. Sometimes the two jurisdictions do not always put the same weight on the same considerations. The Norwegian Supreme Court have in several judgements stated that commercial contracts should be interpreted according to the objective interpretation principle, see HR-2016-1447-A that reference several Supreme Court decisions stating the same. Among others, Rt. 1994 p. 581 (Scanvest) and was later confirmed in Rt. 2000 p. 806 (Oslo Energi) and Rt. 2002 p. 1155 (Hansa Borg). Deviation from the objective starting point into the common understanding principle requires "strong reasons" according to Rt. 200 p. 806 (Oslo Energi). The Norwegian objective interpretation does, however, manifest itself in a very different way than the English objective interpretation principle. Contrary to English law of contract, the objective interpretation in Norwegian law can be deviated from based on the common understanding rule and the good faith standard. This is traditional sees as one of the main features that distinguish English and Norwegian law of contract. Furthermore, an objective interpretation

[217] Cordero-Moss, "Den nordiske kommersielle retten i en anglo-amerikansk forretningsvirkelighet", 213 – 222.
[218] Cordero-Moss, "Den nordiske kommersielle retten i en anglo-amerikansk forretningsvirkelighet", 213 – 222.

that is contrary to business common sense may, in principle, be set aside based on the Contract Act Section 36.[219]

In a common law drafting style little or no integration of the contract is expected, with the consequence that the contracts are very comprehensive and detailed and aimed at being self-sufficient without any inference from the background law. Some argue that the threshold for deviating from the contractual wording in commercial contracts has become higher in Norwegian law as well because of this. However, Norwegian law of contract is a system where the courts expect the parties to be aware of the governing law because the court can imply terms into the contract from the background law, if necessary.

Professional parties often write their B2B contracts in an Anglo-American drafting style believing that the interpretation of the contract will be the same, regardless of the governing law. This thesis has shown that the interpretation principles under English and Norwegian law of contract are different from each other in several areas. It is important to be aware of the fact that a contract written in an Anglo-American drafting style does not prohibit Norwegian courts from applying its interpretation principles. This may seem like a good argument for not choosing Norwegian law of contract as the governing law. However, this is not the intention. The parties need to decide what they value the most, the possibility for a reasonable solution or predictability. By choosing English law to govern the contract the parties may risk something too. Under English law the parties may end up with an undesirable result if the contract turns out to be unreasonable. The parties, therefore, have to evaluate if the price for predictability is worth paying.

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