The Examination of the Existence of International Contract Practice

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Abstract

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Abstract: With the rise of globalisation, international trade has increased. As a consequence, cross-border contracts have become more frequent which has led international commercial actors to use a common style when drafting contracts. The world has many different legal cultures and traditions, as a result of which legal concepts are tied to different assumptions, presuppositions, legal procedures, languages, ideas and social and cultural contexts. Further, the values and norms of these cultures have long historical ties. These different cultures have influenced national contract drafting style and contract law and, in the context of international contracts, they have influenced contractual interpretation.

If we are solely looking at the practice of contracting parties, it does appear that international contract practice exists, as international agreements are drafted in accordance with the common law drafting style. They are often drafted without considering the applicable law which results in the parties aiming for self-sufficient contracts that minimise the effects of national laws. The parties often include boilerplate terms in the contract, draft in a detailed manner, and aim to exclude external influences. A common tool used by international commercial actors is choosing arbitration as the dispute resolution mechanism, as this removes the case from the national litigation procedure and offers flexibility. The problem is that perfect contracts are nearly impossible to achieve due to market failures and cost efficiency. Contractual negotiations are seldom exhaustive and do not consider all possible outcomes, as negotiations often focus only on a few contractual terms. Therefore, jurisdictions have developed rules to correct and address possible imperfections and shortcomings. Default rules, adjustments and contractual interpretation supplement economic life and complement these incomplete contracts.

The problem that can be identified to the existence of international contract practice is that contract laws and interpretation have evolved within national contexts. This means that the interpretation does not necessarily take into account the international character of cross-border contracts. The interpretation of contracts is attached to certain assumptions, and these assumptions are not the same throughout the world. The assumptions can also affect the behaviour and understanding of the contracting parties, lawyers and arbitrators. The fact that national systems have different mechanisms for addressing specific legal problems and social needs does not preclude the existence of international contract practice, provided that the solutions adopted are compatible. However, at present there are still many differences in interpretation which has the possibility of leading to different outcomes in different legal systems, even if a contractual clause is worded similarly. Utilising arbitration is not enough to correct this divergence, as the contracting parties almost always choose national law as the applicable law, the arbitrators must still apply law correctly, and the arbitrators might have internalised a jurisdiction's approach to law and interpretation. Transnational sources of law are also not adequate to overcome the issue of interpretation. Transnational sources of law may provide neutral language and a compromise between legal traditions. They are not tied to specific national systems so they can have regard towards the international character of cross-border contracts. However, they do not provide sufficiently precise guidance or a complete system that could correct the impact of national jurisdictions. These sources cannot be said to provide adequate guidance on the interpretation of contracts.

This master's thesis does not seek to claim that international contract practice cannot emerge outside the confines of national legal systems, but rather it presents that if similarly worded contracts do not have uniform effect, the result is a mixture of national and international practices. Without uniform effect, international contract practice cannot be said to exist. It is therefore necessary to examine the interpretation of contractual clauses in domestic courts and arbitration and consider whether similarly worded clauses and different rules lead to different outcomes depending on the applicable law. The possibility of divergent interpretation can explain why international commercial parties prefer detailed contracts and wish to detach the contract from the governing law. However, in the current framework, it is not possible to completely eliminate the effects of the applicable law. Autonomous and standard contracts continue to be governed by national laws, they are subject to mandatory rules, and they are interpreted with ways established in the different legal systems and traditions.

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Tiivistelmä: Kansainvälinen kauppa on lisääntynyt globalisaation myötä, minkä vuoksi myös rajat ylittävät sopimukset ovat yleistyneet. Tämä on johtanut siihen, että kansainväliset kaupalliset toimijat käyttävät yhteistä tyyliä laatiessaan sopimuksia. Maailmassa on monia oikeuskulttuureja ja -perinteitä, minkä johdosta oikeudelliset käsitteet ovat sidoksissa erilaisiin olettamuksiin, oikeudellisiin menettelyihin, kieliin, ideoihin sekä sosiaalisiin ja kulttuurisiin konteksteihin. Kulttuureiden ja perinteiden arvoilla ja normeilla on pitkät historialliset siteet. Eri kulttuurit ovat vaikuttaneet kansalliseen laadintatyyliin ja lainsäädäntöön sekä kansainvälisten sopimusten yhteydessä sopimusten tulkintaan.

Kun tarkastelemme pelkästään sopimusosapuolten käytäntöä, näyttää siltä, että kansainvälinen sopimuskäytäntö on olemassa, sillä kansainväliset sopimukset laaditaan tapaoikeudellisten juridisten järjestelmien (*common law*) mukaisesti. Ne laaditaan usein ottamatta huomioon sovellettavaa lakia, koska osapuolet pyrkivät omavaraisiin sopimuksiin, jotka minimoivat kansallisten lakien vaikutukset. On yleistä käyttää boilerplate-ehtoja, luonnostella yksityiskohtaisesti ja pyrkiä ulkopuolisten vaikutusten minimointiin. Yleinen tapa omavaraiseen sopimukseen pyrittäessä on valita välimiesmenettely riidanratkaisumekanismiksi, koska se poistaa asian kansallisesta oikeudenkäyntiprosessista ja tarjoaa joustavuutta. Ongelmana on, että täydellistä sopimusta on lähes mahdoton saavuttaa markkinahäiriöiden ja kustannustehokkuuden vuoksi. Sopimusneuvottelut ovat harvoin tyhjentäviä eikä niissä huomioida kaikkia mahdollisia lopputuloksia, sillä neuvotteluissa keskitytään usein vain muutamiin sopimusehtoihin kustannustehokkuuden takia. Siksi hallintoalueet ovat kehittäneet sääntöjä mahdollisten puutteiden korjaamiseksi. Oletussäännöt, mukautukset ja sopimusten tulkinta täydentävät epätäydellisiä sopimuksia.

Kansainvälisen sopimuskäytännön olemassaolon ongelmana ovat kansalliset sopimusoikeudet ja tulkinnat, jotka ovat kehittyneet kansallisissa järjestelmissä. Tämä tarkoittaa sitä, ettei niissä välttämättä oteta huomioon rajat ylittävien sopimusten kansainvälistä luonnetta. Sopimusten tulkinta perustuu tiettyihin oletuksiin, eivätkä oletukset ole samoja kaikkialla maailmassa. Oletukset voivat myös vaikuttaa sopimuspuolten, asianajajien ja välimiesten käyttäytymiseen ja ymmärrykseen sopimuksesta. Kansallisten järjestelmien erilaiset mekanismit oikeudellisten ongelmien ja sosiaalisten tarpeiden ratkaisemiseksi eivät estä kansainvälisen sopimuskäytännön olemassaoloa, jos ratkaisut ovat yhteensopivia. Tällä hetkellä on kuitenkin monia tulkintaeroja, jotka voivat johtaa erilaisiin lopputuloksiin eri oikeusjärjestelmissä, vaikka sopimuslauseke olisikin muotoiltu samalla tavalla. Välimiesmenettelyn käyttäminen ei korjaa tätä eroa, sillä sopimuspuolet valitsevat sovellettavaksi laiksi lähes aina kansallisen lain, välimiesten on sovellettava lakia oikein ja välimiehet ovat saattaneet omaksua tietyn lähestymistavan lakiin ja sen tulkintaan. Kansainväliset oikeuslähteetkään eivät ratkaise tulkintaongelmaa. Ne voivat tarjota neutraalin kielen ja kompromissin oikeusperinteiden välillä, mutta niitä ei ole sidottu kansallisiin järjestelmiin, joten ne voivat ottaa huomioon rajat ylittävien sopimusten kansainvälisen luonteen. Kansainväliset oikeuslähteet eivät kuitenkaan tarjoa riittävän tarkkoja ohjeita eivätkä kokonaista järjestelmää, joka voisi korjata kansallisten oikeusjärjestelmien vaikutuksen. Kansainväliset oikeuslähteet eivät anna riittävän tarkkoja ohjeita sopimusten tulkintaan.

Tässä pro gradu -tutkielmassa ei pyritä väittämään, ettei kansainvälinen sopimuskäytäntö voisi syntyä kansallisten oikeusjärjestelmien ulkopuolella. Tarkoituksena on pikemminkin osoittaa, että kun samankaltaisilla sopimuksilla ei ole yhtenäistä vaikutusta, tuloksena on sekoitus kansallisia ja kansainvälisiä käytäntöjä. Kansainvälisen sopimuskäytännön ei voida sanoa olevan olemassa ilman yhtenäistä vaikutusta. Sen vuoksi on tarpeen tutkia sopimuslausekkeiden tulkintaa kansallisissa tuomioistuimissa ja välimiesmenettelyssä ja pohtia, johtavatko samalla tavalla muotoillut lausekkeet ja erilaiset säännöt erilaiseen lopputulokseen sovellettavasta laista riippuen. Kansainvälisten sopimuspuolien tapa laatia tarkkoja ja yksityiskohtaisia sopimuksia ja pyrkiä rajoittamaan sovellettavan lain vaikutusta voi johtua siitä, että eriävä tulkinta on mahdollista, vaikkakin on mahdotonta sulkea sovellettavan lainsäädännön vaikutusta täysin pois. Itsenäisiin sopimuksiin ja vakiosopimuksiin sovelletaan edelleen kansallisia lakeja ja pakottavia sääntöjä, ja niitä tulkitaan oikeusjärjestelmissä ja -perinteissä muodostuneilla tavoilla.

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List of Abbreviations

B2B	Business to business
B2C	Business to consumer
CESL	Common European Sales Law
CISG	Vienna Convention on Contracts for the International Sale of Goods
DCFR	Draft Common Frame of Reference
ECJ	European Court of Justice
EU	European Union
ICC	International Chamber of Commerce
IFI	International Financial Institution
INCOTERMS	ICC's International Commercial Terms
ITC	International Trade Centre
PECL	European Principles of Contract Law
PICC	Principles of International Commercial Contracts
UN	United Nations
UNICITRAL	United Nations Commission on International Trade Law
UNIDROIT	International Institute for the Unification of Private law
US	United States of America

Chapter 1. Introduction

1.1. Research Question and Scope of Research

The research question of this thesis is, “Does international contract practice exists?” This might seem like a simple question with an easy answer. With the rise of globalisation and international trade, commercial parties have established through practice a common way of drafting cross-border contracts. This common way manifests itself in contracting in a detailed manner and utilising specific language, clauses and arbitration as dispute resolution mechanism in order to create self-sufficient contracts. However, this is only the surface level, and the research question is actually far more complicated. Moreover, perhaps surprisingly, the answer does not purely lie in the practice of contracting parties, but also in the interpretation of contracts. This thesis presents that if these similarly worded contracts do not have uniform effect, international commercial practice cannot be said to exist.

My research question has the potential to cover a wide range of subjects. Therefore, certain themes, which are undeniably connected to international contract practice, will only be mentioned briefly or in passing. The examination of international contract practice is very closely connected to the examination of transnational rules, the convergence of legal systems, and private international law. The examination of contract practice requires the consideration of all these topics, which is not possible in the present work for length reason. Consequently, I have restricted the scope of this thesis in three main regards.

Firstly, I will be considering commercial contracts between businesses or B2B contracts. I have made few references to B2C contracts, but these mentions will not influence the argument I am making herein. Further, the sources of law and examples I will focus on mainly relate to sale of goods contracts, but the argument I am making is applicable to other cross-border contracts as well. Secondly, I will not engage in a detailed discussion of the relevant legal framework of private international law and international civil procedure. Thirdly, I will not consider the convergence or divergence of legal systems or the universalisation of legal rules extensively, but I will be making certain references to them as is necessary for the thesis. As a consequence of these limitations, the examination of whether transnational contract rules exist or can be established is also outside the scope. Therefore, the scope is limited to whether it is possible to say that an international contract practice exists.

Through the narrowing of my scope, I decided to approach my research question from three distinct point of views. Firstly, I will discuss the contract practice of different legal systems and cultures. This sets up the stage for the later discussion, because in order to establish international practice, the interaction of parties from wide ranging jurisdictions must be considered. If indeed an international contract practice exists, would this require that all parties have the same assumptions and understandings of contractual provisions and rules? Secondly, I will move on to the main ways international commercial actors draft their contracts. The intention behind this is to examine the common practice of contracting parties, which serves the wider discussion of whether the clauses that are commonly agreed by international commercial actors and the language they use have a similar effect in the interpretation of the contract. And thirdly, I will briefly discuss transnational sources of law. I discuss these as in my opinion international sources of law could potentially reflect the international commercial practice better than national sources of law. However, the question is whether national sources of law will inevitably have an influence on the interpretation of the contract, even if international sources of law exist. Through these three points of views, I will illustrate that the answer to my research question is far more complicated than considering how international commercial actors draft their contracts.

1.2. Background

Globalisation and advances in technology has caused a dramatic increase in international trade in the past 50 years. The highest growth is currently found in transition economies, especially Brazil, China, Russia and some African countries.[1] The internationalisation of the market offers opportunities for growth, but it also brings increased risks for contracting parties. These risks can exist in national contexts too, but they are more prominent in the international context as diverging national laws increase the complexity of rules governing the contract. Further, international commercial parties have to be aware of certain elements that are not as relevant in national contracts. These elements include the language of the contract, cultural and political sensitivities, and cultural differences and societal norms.[2] The parties should also be aware of the differing legal systems and the implications of the choice of applicable law, as this has implications on the dispute resolution and enforcement of judgements.

[1] Schwenzer and Whitebread 2014, p. 1; WTO World Trade Report 2011, p. 36.
[2] Little and Webster 2012; Thierry 2016.

Contracts are a central tool for economic activity and the right to contract is considered fundamental in most legal systems.[3] Contracts are agreements between two or more parties which determines their enforceable rights and obligations. Freedom of contract has contributed to the establishment of a market-based economy where predictability of commercial activities is treasured.[4] Based on freedom of contract, contracting parties have the power and right to contract and freely determine the provisions of contracts without arbitrary or unreasonable legal restrictions.[5] In situations where a clause is insufficient or non-existent, the default rules from the applicable national jurisdiction will be determinative.[6] Default rules fill gaps in a contract in the absence of an express provision, but they can be overridden by the parties in the agreement.[7] They exist to supplement contracts as contracting parties rarely negotiate all contractual clauses, but focus on only the most important ones.

Contracts represent the result of a compromise reached through negotiations between contracting parties, where each party is advocating for their own interests. This negotiation takes time and resources and is often very costly. As a result, not all of the contractual clauses are individually negotiated.[8] This has led to the formation of standardised models in international contracts and the formation of an international way of drafting contracts. International contracts tend to be written in English and in the common law drafting style.[9] International contracts aim to off-set issues of cross-border trade by including everything they have agreed in the written document. The theory is that if the contract is carefully drafted, it can frame the commercial relationship precisely and flexibly and take into account the international feature of the transaction.[10] Effective drafting would reduce the risk of costly and time-consuming disputes in the future. As a result, international commercial actors are faced with the challenge of finding a balance between cutting costs and detailed negotiations.

[3] The freedom of contract or party autonomy is important and has been recognised as a "general principle of civil law". See e.g., Hatzis 2002, p. 33; Case C-240/97 *Spain v European Commission*; Rome I Regulation, art. 3; Charter of Fundamental Rights of the European Union, art. 16; Civil Code of Russia, art. 1210; Federal Act on Private International Law of Switzerland, s. 116.
[4] Weber 2013, p. 52.
[5] Merriam-Webster 2021; Smyth and Gatto 2018, p. 2.
[6] Hatzis 2002, p. 12; Mitkidis and Neumann 2017, p. 187; Riley 2000, p. 367.
[7] US Legal (Default Rule).
[8] Cordero-Moss 2014a, p.15.
[9] Cordero-Moss 2014a, p. 8; Maria Celeste Vettese, 'Multinational Companies and National Contracts' in Cordero-Moss 2011, p. 21.
[10] Thierry 2016.

Essentially, the common way of drafting international contracts seeks to eliminate barriers to trade. However, as this thesis presents, this is not fully possible. This can be explained by the existence of different legal cultures which have developed in a complex process influenced by historical and cultural factors. As a result of the existence of legal cultures, legal concepts are tied to presuppositions, the legal system, legal procedures, language, ideas and the broader social and cultural context of the specific legal system.[11] The national legal systems may also have different solutions to legal problems.[12] The applicable law of international contracts does not always belong to the common law tradition, even if the contract is drafted in the common law style. As such, these contracts are interpreted in jurisdictions with vastly different cultures and in light of significantly different rules of interpretation. This may result in the same contractual clause having different effects depending on the applicable jurisdiction. This has implications on international contract practice as similarly worded contracts will not have a uniform effect everywhere in the world. This is one of the challenges that international commercial parties have to face when drafting international commercial contracts, that is the effect of national legal traditions and systems on international contracts.

1.3. Methodology and Sources

As might have already become evident, my chosen topic encompasses a wide range of different legal systems, cultures, laws, and rules. For this reason, this thesis has necessitated the use of many different methods. I started with traditional jurisprudential research[13] as I hoped that the examination of international codifications of contract law, such as the CISG and the UNIDROIT PICC, would hold the key to my research question. However, I quickly discovered that I must also utilise the tools of legal theory. It was paramount to consider the development of law and legal reasoning behind certain rules as well as understand the legal and social developments that have taken place and provide a backdrop to the laws in question.[14] This led me to the examination of the various legal traditions around the world. This helped to explain why international ways of contracting have formed the way they have.

[11] Siems 2018, p. 46; John Bell, 'Legal Research and the Distinctiveness of Comparative Law' in van Hoecke 2011, p. 170-176; Geoffrey Samuel, 'Does One Need an Understanding of Methodology in Law Begore One Can Understand Methodology in Comparative Law' in van Hoecke 2011, p. 185; Maurice Adams, 'Doing What Doesn't Come Naturally. On the Distinctiveness of Comparative Law' in van Hoecke 2011, p. 233-235.
[12] Cordero-Moss 2014a, p. 24.
[13] Jurisprudence presents an interpretation of the content of a norm and/or a statement of the norm by examining what exactly belongs to the existing law. See van Hoecke 2011, p. 4-11.
[14] Pauline Westerman, 'Open or Autonomous? The Debate on Legal Methodology as a Reflection of the Debate on Law' in van Hoecke 2011, p. 90-91, 107-108.

This examination also required a multidisciplinary approach and the consideration of history, politics and society as a whole.[15] The utilisation of economics was particularly useful given that understanding the underpinnings of markets and identifying incentives aided in recognising behaviours that influence the ways of contracting.[16] I utilised these tools to establish what is the international way of contracting, how different legal cultures function as well as how they interpret contracts.

This then brings me to the most significant methodological tool I used: comparative law. I firstly used socio-legal comparative law research which helped explain the natural universalisation of law and the relationship between law and society.[17] The purpose of this was to establish the international way of drafting contracts and where the ways have come from. For this, comparative legal explanations of natural transfer of rules through the actors in the international sphere, universalisation, and Anglo-Americanisation were especially useful.[18] I also utilised comparative law in my discussion of interpretation of contractual clauses. On an international level, comparative law can help understand how unification of law is achieved.[19] Utilising this method helped to establish the practice of commercial actors as well as contributed to the discussion of the problems of claiming the existence of international contract practice. Mainly, I utilised comparative law to discuss the divergence of interpretation of contractual clauses commonly utilised in international contracts. I illustrated my points and the divergences of legal traditions with examples from different jurisdictions.

Comparative research can be complicated as it can entail the examination of the power and legal structures of each system, laws and interpretation.[20] This can bring obvious problems such as language and understanding the historic and cultural context of each of these systems.[21] In my research, I chose to look at the tradition as a whole and focus on the result

[15] Horatia Muir Watt, 'The Epistemological Function of 'la Doctrine' in van Hoecke 2011, p. 129-131; Bart Du Laing, 'Promises and Pitfalls of Interdisciplinary Legal Research: The Case of Evolutionary Analysis in Law in van Hoecke 2011, p. 252-254; Jaap Hage,'The Method of a Truly Normative Legal Science' in van Hoecke 2011, p. 43-44.
[16] Cooter and Ulen 2014, p. 3-4, 7, 9.
[17] Siems 2018, p. 15, 26, 174-178.
[18] ibid, p. 241, 243-244.
[19] ibid, p. 4-5; 331-332.
[20] Jaakko Husa, 'Comparative Law, Legal Linguistics and Methodology of Legal Doctrine' in van Hoecke 2011, p. 209; John Bell, 'Legal Research and the Distinctiveness of Comparative Law' in van Hoecke 2011, p. 157, 169-170.
[21] For more details see Siems 2018, p. 46; John Bell, 'Legal Research and the Distinctiveness of Comparative Law' in van Hoecke 2011, p. 170-176; Geoffrey Samuel, 'Does One Need an Understanding of Methodology in Law Begore One Can Understand Methodology in Comparative Law' in van Hoecke 2011, p. 185; Maurice

a rule may have.[22] Of course, this can lead to seeing the legal world from a predominantly Western perspective. This manifests in either excluding non-civil and non-common law legal cultures from legal research or by examining non-Western legal systems or hybrid systems through the lens of common and civil law rhetoric.[23] This is also true of the majority of the literature on the topic. In an attempt to curtail the assumption that all findings related to Western countries would in fact be decisive in establishing the international viewpoint, I have consciously chosen literature on the major topics which also examine non-Western legal systems. This is important as one cannot claim the existence of a world-wide, international culture based on the point of view of, at the most, 16% of the entire population.[24] I will be providing examples to illustrate my argument and I have chosen them based on my own familiarity of the system. Therefore, it is good to note that these examples should not be construed as encompassing this whole area of law. It should be noted that I cannot address every single country or culture so there are many more differences or similarities in the cultures and jurisdictions than what I discuss herein.

I also want to briefly reflect on the literature that has been produced on my chosen topic as well as the sources I chose to utilise. This will help to explain the methodical choices I have made as well as the points of view I have chosen. Mainly, I want to note the somewhat theoretical nature of my chosen topic. This means that I have relied on different theories that are not expressly aimed at the examination of the existence of international contract practice. Rather they are an examination of international ways of contracting, the existence of legal convergence or international contract rules and so on. I have put these different topics together and included them in the discussion as this is necessary for the examination of international contract practice. These secondary sources in combination with primary sources from different countries (legislation, civil codes and court or arbitration cases), give a good idea of the situation of contract practices and interpretation. Even though these theories are not the main purpose of this thesis, their consideration can help to illustrate the divergence of interpretation which I consider to be the key to the examination of international contract practice.

Adams, 'Doing What Doesn't Come Naturally. On the Distinctiveness of Comparative Law' in van Hoecke 2011, p. 233-235.

[22] Cordero-Moss 2007, p. 3-4.

[23] Geoffrey Samuel, 'Does One Need an Understanding of Methodology in Law Begore One Can Understand Methodology in Comparative Law' in van Hoecke 2011, p. 183-184; Siems 2018, p. 97-109.

[24] This is by no means an official number, but rather my own calculation based on available numbers in Szmigiera 2021 and Western Population Review 2021.

1.4. Structure

I have structured my thesis as follows: Chapters 2, 3 and 4 will introduce the main three points of view that I have chosen for this thesis. Chapter 5 will draw these elements together and analyse what has been presented. In Chapter 2, I will discuss the existence of different legal cultures and contract practice. This serves the wider discussion of how the practice of parties on an international level is actually interpreted in different jurisdictions. In Chapter 3, I will introduce the standard ways of contracting as developed by international commercial actors. This will illustrate what international commercial parties strive for in their contracts and how they choose the applicable law. In Chapter 4, I will be giving an overview of certain transnational sources of law. The purpose of this is to firstly, show how the practice of commercial parties have influenced law and secondly, to set up the discussion of whether these sources could be utilised to off-set the issue of legal traditions' influence on the interpretation of contracts.

Chapter 5 will put these three elements together. This will allow me to highlight that the different interpretation of common contractual clauses poses an issue to the existence of international contract practice. Different legal systems have different approaches to contractual interpretation and different understandings of what certain contractual provisions really mean. Further, the utilisation of arbitration and the existence of transnational sources or the standard ways of contracting are not enough to circumvent these divergent interpretations. I will finish by considering what is required for the existence of international contract practice and whether the issues I have presented are enough to say that international contract practice does not exist.

Chapter 2. Legal Cultures and their Implication on International Contract Practice

Different legal cultures are shaped by the social orders prevalent in the society in question.[25] Law and legal systems "form a structure of meaning that guides and organizes individuals and groups in everyday interactions and conflict situations. This structure is passed on through socially transmitted norms of conduct and rules of decisions…"[26] These structures have been categorised into legal families of kinship and descent by comparative law scholarship.[27] They include the Western family (with the sub-groups of common and civil law), religious law, customary law and mixed legal systems.[28] These legal traditions largely guide jurisdictions' approaches to contract law.[29] In order to consider international contract practice, we must first understand the different legal cultures. This allows us to see where the inspiration to international contract drafting comes from as well as the divergent way of interpreting contractual clauses. For length reasons, I will only briefly introduce each legal culture and the main aspects of their contract practice.

2.1. Western Legal Cultures

Western legal culture is widely accepted of consisting of the common law and civil law legal traditions as their origins can be traced to Europe. Common law emerged in England during the Middle Ages and civil law developed in continental Europe around the same time.[30] These two legal systems are the basis of most nations' legal systems today.[31] They developed very differently and the result is two distinct approaches to contract law.

2.1.1. Common Law

Common law is generally uncodified and places heavy reliance on case law (or precedent) as a source of law. This separates it from civil law systems. It functions as an adversarial system, meaning that disputes are a contest between two parties and the judge has a role as

[25] Mousourakis 2019, p. 139.
[26] Bierbrauer 1994, p. 243.
[27] Mousourakis 2019, p. 142. I will not go into the discussion/debate about the classification. For more detailed discussion see e.g., Mousourakis 2019, p. 142-153; Reinmann and Zimmerman 2006; Malmström 1969.
[28] I am following quite closely to classifications developed by René David and Adolf Friedrich Schnitzer. See Mousourakis 2019, p. 142-153 for English explanations.
[29] Glenn 2008, p. 428.
[30] For more history on the emergence of common law and civil law legal systems see e.g., Bellomo 1995; Baker 2005; Stein 1999.
[31] Civil law (or systems mixed with civil law): over 30% of world's jurisdiction, encompassing over 55% of the world's population. Common law (or systems mixed with common law): a bit less than 30% of jurisdictions and 15% of population. Total: about 62% of jurisdictions and over 70% of world population. See Koch 2003, p. 2.

a moderator.[32] I will present the main features of English contract law as an example of a common law country to give an overview of common law contract practice. However, it should be noted that even though the common law countries belong to the same legal family, there are divergences in their approach to contract law. There is even divergence in the contract law of the states in the US.[33]

Contracts in common law jurisdictions tend to be drafted to be self-sufficient and interpretation is based on the contractual terms. The starting point of interpretation is to look at the intention of the parties, an objective test. Intention is identified by reference 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".[34] This essentially means that the intention of the parties is determined based on objective criteria, such as the language used, as opposed to substantial considerations, such as the interest of the parties.[35] Given that strong emphasis is placed on the written agreement, the contracts tend to be detailed, long and encompass all aspects of the contractual obligations.[36]

The courts will look at the language used and the commercial context in which the contract was drafted.[37] The words are given their natural and ordinary meaning[38] and the courts "do not easily accept that people have made linguistic mistakes, particularly in formal documents".[39] However, the worse the drafting of the contract is, the more willing the courts are to intervene and depart from its natural meaning.[40] This means that a more contextual interpretation is conducted, but the contract is still subject to an objective criterion, that is how a reasonable commercial actor would construe the contract.[41] The English courts

[32] Baker 2005, p. 2-8; Smyth and Gatto 2018, p. 21-23.
[33] For example, New York judges are more formalist and consider the contract to be definitive whereas Californian judges might be more receptive to arguments of morality, public policy, reason and equity. See Eisenberg and Miller 2009, p. 1475; Miller 2010, p. 1478; Kötz 2012, p. 1-2.
[34] Lord Hoffman in *Chartbrook Ltd v Persimmon Homes Ltd* [2009], para. 14.
[35] Cartwright 2007, p. 61; *Coastal (Bermuda) Petroleum Ltd v VTT Vulcan Petroleum SA (No 2) (The Marine Star)* [1996], p. 383. This includes prior negotiations (*Chartbrook Ltd v Persimmon Homes Ltd* [2009]; *Arnold v Britton* [2015], p. 36) and declarations of subjective intent (*ICS* [1998]; *Brian Maggs v Guy Marsh* [2006]). See also the parol evidence rule which may limit completely or partially any evidence of prior or concurrent agreements or negotiations if the contract was reduced to writing in Linzer 2002; Hadjiyannakis 1985.
[36] Mitkidis and Neumann 2017, p. 187.
[37] *Wood v Capita Insurance Services Limited* [2017], p. 24.
[38] *ICS* [1998], p. 913.
[39] Lord Hoffman in *ICS* [1998], p. 201.
[40] See Lord Neuberger in *Arnold v Britton* [2015], para. 18.
[41] *Prenn v Simmonds* [1971]; *Mannai Investments Co Ltd v Eagle Star Life Assurance Co Ltd* [1997]; *Chartbrook Ltd v Persimmon Homes Ltd* [2009].

appreciate certainty and consistency which leads to the strict enforcement of contractual performance with principles such as justice and fairness being essentially irrelevant.[42]

Other criteria that are considered by the court include other relevant provisions of the contract, the overall purpose of the clause and contract, the facts and circumstances known or assumed by the parties at the time of the execution of the contract, and commercial common sense.[43] However, the greatest emphasis is on textual analysis, especially with sophisticated parties as they usually have the assistance of skilled professionals.[44] In fact, the courts are unlikely to reject the exact wording even if one of the parties has made a bad bargain. This is because it is not for the court to improve the positions of the parties through re-writing the contract[45] or to influence the bargain as long as it is reasonable and commercially sensible.[46] This stems from the idea that a third party has no way of assessing the subjective position of the parties or any intentions that are not expressed in the text.[47] In situations of ambiguity or more than one possible construction, the other criteria are considered to help in the interpretation of the contractual text.[48]

Furthermore, in common law countries each party is responsible for ensuring their own interests. Each party is presumed to be able to assess the risk connected to the deal and allocate this risk as they see fitting.[49] The contract reflects this risk allocation. Hence, evidence that would contradict the written word is usually not taken into account, as long as the contractual text is deemed to incorporate the whole agreement between the parties.[50] For these reasons, a literal and predictable application is considered fair and drawing on external elements in the interpretation is rare. This means that the judge does not have a so-called "gap filling role", which on the other hand is common in civil law countries.

[42] See Lord Neuberger in *Cavendish Square Holding BV (Appellant) v Talal El Makdessi* [2015], para. 13. This is not without exceptions, namely duress and fraud. Further, there are rules that the English courts sometimes use to achieve justice between the parties e.g., clear words: the courts will not adopt a meaning that gives an unfair result if the drafting is ambiguous (e.g., *WRM Group Ltd v Wood* [1998]); *contra proferentem*: rule is interpreted against the party relying on it, but this is very limited in contracts between sophisticated parties (e.g., *Persimmon Homes v Ove Arup* [2017]; *Lexi Holdings Plc v Stainforth* [2006]; *Pratt v Aigaion Insurance Company* [2008]).
[43] *Arnold v Britton* [2015]; *Rainy Sky SA and Others v Kookmin Bank* [2011]; *Rugby Group Ltd v ProForce Recruit* Ltd [2006].
[44] *Wood v Capita Insurance Services Limited* [2017], p. 24
[45] Lord Neuberger *Arnold v Britton* [2015], para. 17-20.
[46] *Charter Reinsurance Co Ltd v Fagan* [1997], p. 313.
[47] Cordero-Moss 2014a, p. 11-12.
[48] Lord Neuberger in *Arnold v Britton* [2015], para. 18.
[49] The principle of *caveat emptor* was pronounced in *Stuart v Wilkins* [1778].
[50] Harvard Law Review 1985, p. 1320-1321.

As can be seen, much emphasis is based on contractual freedom and the parties' ability to evaluate risk. In my opinion, this approach is appropriate for sophisticated parties such as in B2B contracts. These types of parties aim to contract in a sufficiently clear and precise manner to avoid gaps or problems in interpretation and, to some extent, circumvent possible impositions by courts through ideas like fairness.[51] Of course fairness is not in itself a problem, but adjusting contracts based on it can hinder predictability and undermine the written text. This is not desirable for sophisticated contracting parties as they are capable of understanding the risks connected with the transaction and generally, they consider that the written text encompasses the intention behind the transaction. However, the criticism of the common law approach is that it is overly literal and leads to excessive detail in contract drafting.

2.1.2. Civil Law

Civil law is codified and (most) civil law systems have comprehensive legal codes that are updated continuously. These codes specify the actions that can be brought to courts, the applicable procedure, and the appropriate punishments.[52] They are inquisitorial systems where the judge's role is to establish the facts of the case and apply the provisions of the applicable code.[53] As opposed to the English system of precedents, civil law systems produce rules through legislation (and codification) and through the deduction of rules from general principles. These work in conjunction and are the result of centuries of systemising and organising laws in logical and hierarchical ways.[54] This means that even if there is an issue which at first does not appear to be legislated on, judges can infer a solution through these abstract concepts. Judges also make law in civil law jurisdictions, but not in the same way as in common law. For example, the courts aim to protect the expectations of those in the legal system through enshrining common understanding of what the legal result should be.[55] This can take the form of law-making in the absence of legislation or the ability to overturn outdated or inappropriate legislation.[56]

The main difference between the two systems can be summarised as follows: "[c]ommon Law is said to be inductive, pragmatic, fact-bound, and past-oriented, the Civil Law is

[51] Cordero-Moss 2014a, p. 13. There is more leeway in B2C contracts.
[52] Farlex 2021.
[53] Smyth and Gatto 2018, p. 9, 21-23.
[54] ibid, p. 23; Cuniberti, 2014, p. 498-499.
[55] Smyth and Gatto 2018, p. 24.
[56] E.g., Cour de Cassation, Chambre civile 1, du 20 February 2001, case no 99-15.170. See also Youngs 2014, p. 75–81.

deductive, logical and systematic, rule-bound, and future-oriented".[57] The effect of this is that:

> Common law authors focus on fact patterns and analyse cases presenting similar but not identical facts, extracting the specific rules, and then, through deduction, determine the often very narrow scope of each rule, and sometimes propose new rules to cover facts that have not yet presented themselves, while the civil law authors focus rather on legal principles and trace their history, identify their function, determine their domain of application, and explain their effects in terms of rights and obligations to deduce general and exceptional effects.[58]

As a result, the civil law approach to contract law places high importance on definitions and classifications. This is why civil law countries often separate and catalogue their contracts by type and specify rules for each of them that must be met to render the contract legally binding.[59] This type of classification is not shared in common law jurisdictions and the basis of this can be found in the above-mentioned approach to law through rationality. Most civil codes, first, define general law of contracts. This includes classification, capacity to enter, the object, formalities, evidence and effects. Secondly, they provide specific laws for certain types of contracts.[60] The contract law is fairly systemised and structured and relies on general principles, often ignoring details.[61] As a result, civil law contracts are in stark difference to the lengthy common law contracts and traditionally only include the main aspects of the agreement. It has been stated that the civil law tendency to have "[c]lear, predictable and accessible laws provide a real service to those who prefer to avoid extended negotiations."[62]

The starting point for interpretation is the subjective intent of the parties. This allows courts to consider the circumstances that led to the conclusion of the contract.[63] Civil law courts search for the mutual intention of the parties even if this may contradict the literal text of the contract.[64] This entails scrutinising what the parties understood and what they could

[57] van Hoecke 2011, p. 75.
[58] Hermida 2004, p. 343.
[59] ibid, p. 345; Smyth and Gatto 2018, p. 4.
[60] Hermida 2004, p. 345.
[61] Tetley 2000, p. 67.
[62] Torgans and Bushaw 2001-2002, p. 52.
[63] Johnston 1995, p. 1519, 1527.
[64] Hermida 2004, p. 357. See e.g., Civil Code of Louisiana 2011, art 2045: "Interpretation of a contract is the determination of the common intent of the parties." and The Finland Arbitration Institute 2016: "Under Finnish contract law, the prevailing objective of contract interpretation is to determine the common intent of the parties. A demonstrable common intent of the parties determines the contents of a contract and can supersede the wording of a contract if that wording stands in contrast to the proven intent of the parties."

reasonably be expected to understand. Therefore, in addition to looking at the written contract, civil law judges look at the circumstances surrounding the negotiation, subsequent performance and the execution of the contract.[65] This is a comprehensive assessment, and as such the written agreement and extrinsic evidence do not have a hierarchy. Even in a situation with a clear and unambiguous written agreement, extrinsic evidence may demonstrate that the will of the parties was something else to what is written in the contract.[66] If evidence suggests that there are two possible approaches to the intention, the one that best agrees with the matter of the contract is preferred.[67] The contract is also analysed through its type which is decided based on the terms, regardless of the name the parties may have given it. Further, civil law judges read contracts in light of multiple default rules, such as good faith, fairness and reasonableness, which can result in the creation of additional duties or obligations on the parties and supplement incomplete contracts.[68]

I again wish to highlight that civil law countries can have different approaches to contract law. For example, Switzerland could be considered more formalistic than Germany even though the German Civil Code[69] is more technical and precise than the Swiss Civil Code[70] which relies heavily on general principles.[71] The difference of cultures can be significant and has led to certain divergences among the civil law countries. Civil law includes subfamilies such as the Nordic countries whose laws are mostly embodied in legislation, but they do not have civil codes. The Nordic countries follow civil law traditions in a pragmatic manner.[72] Even with these differences, the main takeaway is that civil law countries have a greater number of mandatory contract rules, stronger duties such as good faith, and greater intervention in the interpretation and revision of contract terms than common law.[73]

2.2. Non-Western Legal Cultures

As has already been demonstrated, legal traditions are very diverse and I have only discussed Western countries. I will not be going into much detail on non-Western countries; however,

[65] Cuniberti 2014, p. 505-506.
[66] E.g., Swiss Federal Tribunal, case ATF 133 III 61; Swiss Federal Tribunal, case ATF 131 III 280; Swiss Federal Tribunal, case ATF 127 III 444.
[67] Civil Code of France 2016, art 1158; Hermida 2004, p. 357.
[68] Mitkidis and Neumann 2017, p. 187; Cordero-Moss 2007.
[69] Civil Code of Germany.
[70] Civil Code of Switzerland.
[71] Vogenauer 2013, p. 64-65; Tetley 2000, p. 688.
[72] Husa, Nuotio and Pihlajamäki 2008, p. 11-12.
[73] The other main differences which I will not consider in detail include the greater enforcement of penalty clauses and availability of specific performance in civil law and common law having the availability of contract discharge through a "fresh start" in bankruptcy. See Pargendler 2018, p. 143; Torgans and Bushaw 2001-2002, p. 37.

I want to give an overview of how legal approaches can diverge even further. The main categories that I have not discussed yet are customary law, religious law and mixed legal systems.[74] Further, there is socialist law, based on civil law with alterations and additions from Marxist-Leninist ideology,[75] but it has declined in usage since the fall of the Soviet Union.[76]

Religious law is founded in religious teachings or religious, philosophical and social systems. The idea of religious law, or the argument for its necessity, is the protection of a community's spiritual perfection through the regulation of an individual's internal mental world.[77] A religious legal system belongs to a certain religion or it was created within the framework of that religion.[78] If the system claims a divine origin, it can often be regarded as a religious legal system. Religious legal systems include the Talmudic and Islamic traditions which are based on the word of God and found in sacred books[79] and Hindu law is based on Hindu theology and philosophy.[80]

Customary (or traditional) law includes many different cultures such as laws of the Far East and African tribal laws. Based on a Western view, law has its own distinctive institutions, professions, literature, technical language, and etiquette. This definition can be problematic for customary law as, for example, Maori customary law (*tikanga*) does not require a strict set of formal rules, hierarchy of judges, or a legal profession.[81] Further, many African customary systems were handed down via oral transmission and law-making is a communal performance with the output being the collective legal wisdom. Through European colonialism, local variations of customary law were reduced through legislative action and restatement. They were collected in written form and accommodated to the colonial legal framework.[82] Since the independence of these countries, especially in Africa, revival of these traditions has taken place to a certain extent.

It is also possible that some states, territories or nations have a unique history and were exposed to multiple legal regimes which has resulted in having elements from multiple legal

[74] David and Brierley 1985, p. 19, 20, 22, 27-31.
[75] Maggs 2017.
[76] Mousourakis 2019, p. 149.
[77] Menahem 2021, p. 21-23; Aquinas 2014, q. 91, a. 4.
[78] Menahem 2021, p. 14.
[79] Mousourakis 2019, p. 158.
[80] Glenn 2000, p. 160; Menahem 2021, p.18.
[81] Mousourakis 2019, p. 157.
[82] ibid, p. 282.

traditions.[83] These are called mixed legal systems, which means that the substantive law bears features that are characteristic of at least two legal traditions.[84] These systems have evolved over time and been influenced by, for example, trade, changes in colonial or political allegiance, and the spread of legal philosophies.[85] These hybrids exist in the Western world too, for example the State of Louisiana in the US[86] and Scotland,[87] but they are more prevalent in non-Western nations. Non-Western examples include South Africa, Botswana, and Philippines (common law and civil law); Chad, China, and Congo (civil law and customary law); Bhutan, Ghana and Hong Kong (common law and customary law); Algeria, Egypt, and Bangladesh (common law/civil law and Muslim Law); Djibouti, Kuwait, Nigeria (common law/civil law, Muslim law and customary law); Cameroun, Sri Lanka and Zimbabwe (civil law, common law and customary law); Bahrain, Qatar and Yemen (common law, civil law, Muslim law and customary law); Israel (civil law, common law, Jewish law and Muslim law); and United Arab Emirates (Muslim Law and customary law).[88]

The above-mentioned examples of mixed legal systems illustrate the legacy of the two biggest colonial empires, the British and French. Most African countries are a mixed system as a result of Roman civil law or English common law imposed on them through colonisation.[89] In fact, mixed systems are often created when one culture imposes upon another culture, usually by conquest.[90] Southern and Central American countries (mainly) belong to the civil law tradition which can be attributed to the limited influence of customary law in these countries.[91] The other important conclusion is that religious law and customary law are more likely to exist in mixed regimes as opposed to being the sole basis of a jurisdiction's laws.

In order to illustrate the importance of considering non-Western countries in comparative law, I want give China as an example of non-Western legal system. China's importance can be attributed to its status as a global economic power as a result of its transformation into a

[83] Smyth and Gatto 2018, p. 175; Tetley 2000, p. 677.
[84] Smyth and Gatto 2018, p. 176.
[85] ibid, p. 176. These systems can take different forms: the legal system has distinct elements but same institutions, both the legal system and institutions can be distinct, jurisdictions of legal dualism and pluralism which requires internal conflict rules, or jurisdictions where the traditions have become blended see Tetley 2000, p. 680; Örücü 1996, p. 335-344.
[86] Tetley 2000, p. 697-699.
[87] ibid, p. 688-692.
[88] JuriGlobe 2021.
[89] Watson 1974, p. 21-22.
[90] Örücü 1996, p. 348-349; Tetley 2000, p. 725; Mousourakis 2019, p. 178.
[91] Mousourakis 2019, p. 125.

market economy and the Communist Party prioritising economic developments since the 1980s.[92] Chinese legal change can be described as rapid which is in contrast to most Western countries where social change is gradual and political and economic systems are fairly stable.[93] The basis of Chinese law is Germanic-style civil law, socialist law and traditional Chinese approaches (customary law). The traditional system is based on Confucian ideals of harmony and morality which can explain the avoidance of litigation even in the presence of codified law.[94] After the legal system was exposed internationally, the Chinese chose to prepare their first civil code in 1929 based on the Germanic style as the system of precedents was not suitable for their institutions.[95] The origins of Chinese contract law can also be traced to the influence of German private law.[96] Currently, China seems to favour and place importance on historical but evolving customs as opposed to applying law in a strict fashion.[97] Since the late 1970s, the transfer of foreign legal institutions from the continental law system, Anglo-American legal system and the Soviet legal system has greatly affected the Chinese legal system.[98] This borrowing does not mean departing from Chinese legal ways, but rather the Chinese law-makers realised that they cannot ignore foreign private laws.[99] This also resulted in China signing onto the CISG in 1981 which correspondingly indicated the opening of their economy and following international standards for a market economy.[100]

2.3. International Legal Culture

The argument that an international legal culture exists is often based on ideas of harmonisation or convergence; harmonisation is a deliberate and negotiated process which aims to produce legislative act whereas convergence is a natural or unconscious common development of legal institutions as a result of mutual interests.[101] These arguments support the idea that "law can no longer be thought of in exclusively national terms, and a clear distinction between national and foreign law can no longer be assumed."[102] However, law can also be thought of as the product of the spirit of the people and the cultural and political

[92] Bu 2015, p. 103.
[93] Liu 2014, p. 432.
[94] Li 2002, p. 40; Mousourakis 2019, p. 175.
[95] Shiyuan Han, 'A Snapshot of Chinese Contract Law' in Chen and van Rhee 2012, p. 237.
[96] ibid, p. 237.
[97] Jingen and DiMatteo 2016, p. 29.
[98] Liu 2014, p. 420; Zhongxin 2013, p. 7.
[99] Shiyuan Han, 'A Snapshot of Chinese Contract Law' in Chen and van Rhee 2012, p. 238.
[100] Shiyuan Han, 'China' in Ferrari 2008, p. 91.
[101] Harlow 2002, p. 342; Hermida 2004, p. 340.
[102] Ruskola 2002, p. 199.

environment which are then concretised through codification or practice (precedence).[103] So, is it possible to say that the spirit of the people and the cultural and political environment of the world has indeed created an international legal culture (or even just international contract practice) when you can clearly identify many divergences in the different jurisdictions?

Of course, globalisation has developed law to a certain extent and "no legal system is entirely a prisoner of its own past traditions."[104] Civil law has influenced common law and vice versa.[105] For instance, this can be seen in the fact that common law contract models are being utilised by commercial parties in civil law countries, even in contracts without a cross-border element.[106] This is not to say that the cultures do not have differences, especially since there are quite stark differences in the clauses' effects and the traditions' approach to contractual interpretation. Nevertheless, it must be noted that legal transfers exist. Legal transfers involve the enactment of a new rule, underlying policy or a set of rules based on another country's laws or through the practice of contracting parties (the bottom-up formation of law). [107] However, the effects of the legal transplants might not be a harmonised approach to contract law, or even just the uniform effect of similar contractual clauses. A common criticism of legal transfers is that they are legal irritants as the legal rules are imposed on domestic legal systems which are then viewed through a domestic lens.[108] Therefore, the transfers rarely function in the same way in the country it was transplanted to as in the origin country.[109] For this reason, it is imperative to note that even if certain similarities between the legal systems may be observable, the systems still remain separate and different.

In addition, the origin of legal traditions can be found in the past, so the values and cultural norms of past generations are intrinsically linked to the legal cultures.[110] These values and norms influence ideas of contract law, approaches to legal transfers and the practice of contracting parties. As law is linked to the society, judges are inevitably influenced by the domestic character of their laws.[111] On the other hand, you can see similarities within the

[103] Law 2015, p. 71.
[104] Arvind 2010, p. 81.
[105] See e.g., Tetley 1999, p. 591; Henkin and Rosenthal 1990; Glenn 2000, p. 230.
[106] Cordero-Moss 2014a, p. 10-11.
[107] Siems 2018, p. 232. The theory of economics, namely cost efficiency and competitive markets, provide a rationale for choosing the most efficient legal rules which can include looking at the legal rules of another nation see Siems 2018, p. 232-233; Cooter and Ulen 2014, p. 3-4.
[108] Nicholas Foster, 'Comparative Commercial Law: Rules or Context' in Örücü and Nelken 2007, p. 263-269; Teubner 1998, p. 12.
[109] See Section 5.1.
[110] Mousourakis 2019, p. 136.
[111] Coendet 2016, p. 479.

cultures. For example, common law and civil law view contracts in a similar manner; they are an expression of the autonomy of will with freedom of contract, only limited by social, commercial, and legally acceptable norms. In comparison, socialist law sets limits to contracts through private law – they had to serve the task as set out by the state economic plan or they were considered void.[112] So, even though these systems employ different mechanisms to address legal problems and social needs, does not preclude the idea of convergence as long as the solutions adopted are compatible.[113] However, as will be shown later, the legal traditions still impact contractual interpretation which precludes the uniform effect of similar contracts. Further, as can be illustrated with the Chinese legal system, the world does not consist of only common law and civil law countries. China is a dominating market power and is therefore very relevant for international trade. China has the influence of socialist law in their system as well as a mix of traditional approaches to law, Germanic civil law and more recently Anglo-American influences. This approach to law is very different to the other main market powers, namely the US and EU. Therefore, it is not a big leap to assume that the diverse legal cultures can influence the way contracts are interpreted, which may result in differing outcomes of similar clauses.

Moreover, legal cultures impact the way the contracting parties view the contract. Imagine the scenario of two sophisticated contracting parties from different jurisdictions utilising skilled advisors (lawyers) from their own jurisdiction in a contractual negotiation. It stands to reason that their idea of contract law is attached to certain assumptions and these assumptions may not be the same. Even before the parties get into consideration of contractual terms, their understanding of the contract might already be different. The influence of legal cultures is therefore not limited to courts or arbitral tribunals, but they influence the contracting parties as well.

Essentially the divergent approaches to contracts and contractual interpretation means that the different legal cultures are a hinderance to the existence of international contract practice. If contracts and contractual clauses are not uniformly applied, the result the mixture of national and international contract practice.[114] This is a hinderance to trade as a whole, because drafting international contracts is more difficult. The contracting parties have to be aware of the intricacies of language and know whether the other party has the same

[112] Mousourakis 2019, p. 171.
[113] ibid, p. 173.
[114] Cordero-Moss 2014a, p. 29. Cordero-Moss was talking about the uniform application of transnational sources of law.

understanding of the clauses and the contract in the negotiations. They also have to be aware of the diverging approaches of the different legal systems to contractual interpretation and what this could mean to their contract.[115] These are some of the main challenges of contracting across borders, and as I present, a hinderance to the existence of international contract practice.

[115] Little and Webster 2012; Thierry 2016.

Chapter 3. International Contracts and Commercial Practice

What can be concluded from the aforementioned is that there are diverse legal cultures that approach legal issues in their own ways. Their approach to contract law and interpretation will have an influence on international contracts, and as such to the examination of the existence of international contract practice. In this Chapter I will introduce the goals of international commercial actors and the common way of contracting, in order to later consider the effects that the above-mentioned traditions have on international contracts and thus on international contract practice.

3.1. Background Explanations

Globalisation and economics have affected the development of contract law significantly, including the drafting style of international commercial parties. International contract drafting standards are relatively fluid as a response to the technological, economic, and financial developments of the world and the diverse backgrounds of international commercial actors. Essentially, they are a response to practical problems, the increase of international commerce, and the need for lawyers from different jurisdictions to have a common language and drafting style.[116] The international way of contracting has largely developed outside of domestic legal systems but with references to certain principles found within these systems, namely the common law.[117]

An economic analysis can provide an explanation for the common law influence. Economic developments worldwide have led the US to become a dominating global market power, as well as London being the centre of international economy.[118] Of course, current economic growth is happening elsewhere, but the way of contracting still seems to follow the "traditional" global economic powerhouses. As a result, international contracts have become quite standardised, they are drafted in English and in the common law drafting style, and they utilise similar clauses (or boilerplate clauses).[119]

The theory of efficiency (and minimising costs) can explain the behaviour of international contracting parties.[120] One way of achieving cost-efficiency is through standardisation. In

[116] De Ly 2002, p. 466, 470.
[117] Fontaine and De Ly 1989, p. 234, 237.
[118] Viggo Hagstrøm, 'The Nordic Tradition: Application of Boilerplate Clauses under Norwegian law' in Cordero-Moss 2011, p. 266; Maria Celeste Vettese, 'Multinational Companies and National Contracts' in Cordero-Moss 2011, p. 21.
[119] Cordero-Moss 2014a, p. 8.
[120] De Ly 2002, p. 466; Fishman and Sullivan 2017, p. 4.

addition to efficiency and minimum costs, contracting parties strive for certainty.[121] A basic theory of economics is the theory of rational choice. This is the modern economic axiom, and it provides that each individual is the best judge of their own interests. Through this freedom of contract and keeping of promises is cherished.[122] However, parties often suffer from cognitive limitations which bind their rationality.[123] For example, choice overload, especially in terms of choice of law, might lead to status quo bias or decisional paralysis.[124]

Contract law's function should be to perfect contracts by correcting market defects or failures which in turn reduces problematic situations and reduces transaction costs.[125] A perfect contract is "a promise that, if enforceable, is ideally suited to achieving the ends of the promisor and the promisee".[126] This would require foreseeing and regulating every contingency. However, actual markets function with imperfect information which results in imperfect contracts.[127] These can still serve the intentions of the parties adequately, but they can also lead to problems. In theory, for a perfect contracts to exists, certain conditions must be met. These conditions are: rational agents (who are trying to maximize utility), unconstrained choice (from private parties or state regulation), minor transaction costs, absence of externalities (no third party effects), perfect information (no severe informational asymmetries, imperfections or distortion of the choice of either party), and perfect competition (enough potential partners and no great market power or monopolies which can be exploited).[128] If all of these conditions are met, the contract can be considered perfect and it must be strictly enforced.

However, market failures exist. Therefore, jurisdictions have developed rules to correct these imperfections in the market through default rules.[129] These rules can be mandatory (for the purpose of public order) or optional (subject to the will of the parties). The most efficient division of these rules should be based on a market failure analysis as there are benefits and

[121] Cooter and Ulen 2014, p. 300-303.
[122] Hatzis 2002, p. 38.
[123] Sunstein 1999, p. 115; Langevoort 1998, p. 1499.
[124] Low 2013, p. 373; Schwartz 2000, p. 79; Kahneman, Knetsch and Thaler 1991, p. 193.
[125] Aristides Hatzis, 'Civil Contract Law and Economic Reasoning – An Unlikely Pair?' in Grundmann and Schauer 2006, p. 166; Hatzis 2002, p. 22; Cooter and Ulen 2014, p. 307, 341-354.
[126] Cooter and Ulen 2014, p. 230.
[127] Aristides Hatzis, 'Civil Contract Law and Economic Reasoning – An Unlikely Pair?' in Grundmann and Schauer 2006, p. 164.
[128] ibid, p. 165. See also David Echenberg, 'Negotiating International Contracts: Does the Process Invite a Review of Standard Contracts from the Point of View of National Legal Requirements?' in Cordero-Moss 2011.
[129] Riley 2000, p. 368.

costs for either classification.[130] If contracting parties are rational, they could choose the most appealing and functional rules as a basis of their drafting style.[131] However, as will be shown later, contracting parties rarely function solely on rationality and often prefer the familiarity of their own legal rules and traditions.[132] Further, as perfect contracts do not exist and commercial parties are not always rational, national jurisdictions have default rules and adjustments to supplement economic life. Therefore, the choice of jurisdiction is a significant choice the contracting parties have to make, and certainty and the security of business transactions is the foremost concern of the parties.[133] As such, the theories of efficiency and certainty are generally the guiding factors for international contracting parties.

3.2. International Contract Drafting

3.2.1. Basic Features

Contracts are the product of negotiating on different business considerations. The common language of international business transactions is undeniably English. Mostly communications are carried out in English and contracts are written in English. The English language has even influenced the way legal deals are conducted within single jurisdictions; indeed, it is now a common requirement for lawyers to have excellent English skills in addition to the language of the specific jurisdiction.[134] In addition, international contracts are drafted in a common law style, even in non-common law jurisdictions.[135] Some international institutions, such as IFIs, also utilise US or English style contracts. This has caused other legal traditions to draft their contracts also in the common law style to meet the expectations of these institutions.[136] This has even influenced certain domestic transactions as contracts might be inspired by English law and written in English even though they take place within a single non-common law jurisdiction.[137]

[130] Hatzis 2006, p. 166.
[131] This could even influence countries to strive to have internationally appealing standards which, in theory, would lead to choosing the most efficient legal rules see Cooter and Ulen 2014, p. 3-4. See also Vogenauer 2013. For example, this was the reason for the Finnish arbitration law reform as they wanted to follow international standards to become a more appealing jurisdiction see Merikalla-Teir 2019.
[132] Vogenauer 2013, p. 77; Cordero-Moss 2011, p. 9-10; Cordero-Moss 2014a, p. 27-31.
[133] Hatzis 2002, p. 39. See also Mattei 1994, p. 3 for consideration of the market for jurisdictions and rule suppliers being concerned with satisfying demand and ultimately the most efficient rule will be the winner.
[134] Cordero-Moss 2014a, p. 4-6.
[135] ibid, p. 10; Cordero-Moss 2011, p. 9; Glenn 2008, p. 427-428, 443.
[136] Cordero-Moss 2014a, p. 10; Cordero-Moss 2007, p. 2. E.g., European Bank for Reconstruction and Development utilised common law contract models for projects carried out in the former Soviet Union and East European countries even when all parties belonged to the civil law tradition.
[137] Cordero-Moss 2007, p. 3.

Further, a consequence of freedom of contract and party autonomy is that contracting parties wish to have increased control over their contracts and they may even wish to derogate from domestic laws, have self-management and self-regulation, and limit third party interference.[138] Contracting parties minimise risk by creating detailed, exhaustive and precise contractual terms,[139] in conformity with the common law drafting style. By adopting this style, international contracts may give the impression that the detail of the contracts will offset the influence of governing law. This is also supported by the fact that deals are sometimes negotiated and drafted before considering which law will govern it.[140] It should be noted that a jurisdiction from the common law tradition is not always chosen as the applicable law even though the common law drafting style is utilised, so contracts are often governed by laws belonging to other legal families. Further, due to the cost of negotiation, the negotiations typically focus on select legal issues. The detail and length of negotiations are therefore guided by their willingness to bear the costs as well as the risk tolerance of the individual contracting party.[141]

The idea behind detailed contracts is that the contract would not be influenced by any governing law, and are only interpreted based on the terms.[142] However, this is not fully possible as mandatory rules exist within every legal system. Mandatory rules are rules that cannot be derogated from by an agreement so the contracting parties must observe them.[143] Further, jurisdictions have different methods for solving legal problems and they can have certain requirements that must be met. Therefore, it is possible that the parties might not be fully complying with the requirements, which can prevent them from achieving the result they desired.[144] In addition, the ideas and perceptions of the interpreter of the contract will undoubtedly influence how the contract is interpreted and applied.[145] Even with the most detailed contract, the principles of the specific legal system are projected onto the contract. These principles relate, for example, to the function of the contract, fair balance of the parties' interests, the role of the interpreter in filling in gaps of the contract, the duty of

[138] De Ly 2002, p. 462.
[139] Cordero-Moss 2014a, p. 8; David Echenberg, 'Negotiating International Contracts: Does the Process Invite a Review of Standard Contracts from the Point of View of National Legal Requirements?' in Cordero-Moss 2011, p. 11.
[140] Cordero-Moss 2014a, p. 15.
[141] David Echenberg, 'Negotiating International Contracts: Does the Process Invite a Review of Standard Contracts from the Point of View of National Legal Requirements?' in Cordero-Moss 2011, p. 12.
[142] Cordero-Moss 2014a, p. 8.
[143] US Legal (Mandatory Rule).
[144] Cordero- Moss 2007, p. 4.
[145] See Section 5.2. for further discussion on this.

loyalty and principle of good faith.[146] The interpreter's idea of law and their approach to contractual interpretation influences the contract which can undermine the idea of self-sufficient contracts. Nevertheless, international commercial parties still prefer to draft in a detailed manner and, for efficiency reasons, they have created many ways to achieve self-sufficient contracts.

3.2.2. Aim of Self-sufficiency

It seems that international contracting parties prefer a literal approach to contractual interpretation and prioritising the contractual text. One way of ensuring this is by creating self-sufficient contracts through the utilisation of standardised contract terms, referring the dispute to a private resolution mechanism, and including detailed and extensive regulation of the legal relationship.[147] This way of contracting is widespread internationally. This means that common tools have been created to achieve the goal of a self-sufficient contract, as I go on to discuss below.

3.2.2.1. Boilerplate Clauses

Boilerplate clauses are clauses that are inserted into contracts out of habit, with little consideration. There has been a rise in the usage of boilerplate clauses and they are essentially universal barring minor contract specific changes. Almost without exception, they utilise standard language and have a general applicability, meaning that they take second place in the negotiations process.[148] They are a result of standardisation of best practises developed, however, it is possible that they are drafted in a sophisticated manner to consider the specific aspects of the case.[149] The standardisation of contractual terms is attractive as it reduces internal costs and time utilised in the complex exchanges of information.[150] Through boilerplate clauses, parties attempt to regulate the exercise of remedies and legal effects of future conduct and, most importantly for our purposes, the interpretation of the contract. It is no longer possible to identify the origin of their development as they are the result of most efficient rules from all the community.[151] There are many different types of boilerplate clauses, but I have chosen a few as examples.

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[146] Cordero-Moss 2014a, p. 8-9.
[147] ibid, p. 47.
[148] ibid, p. 18; David Echenberg, 'Negotiating International Contracts: Does the Process Invite a Review of Standard Contracts from the Point of View of National Legal Requirements?' in Cordero-Moss 2011, p. 14.
[149] De Ly 2002, p. 466. This perhaps has the effect of the term 'boilerplate' now referring more to the existence of a specific type of clause as opposed to the substance of the clause being the same across the board.
[150] Maria Celeste Vettese, 'Multinational Companies and National Contracts' in Cordero-Moss 2011, p. 21-22.
[151] ibid, p. 29; Mitkidis and Neumann 2017, p. 183.

An entire agreement clause[152] is a common law construct that is nowadays classified as a boilerplate clause and utilised widely. The purpose is to isolate the contract from external elements meaning that the contract is to be interpreted objectively and independently from extrinsic circumstances.[153] The clause clarifies that the contractual document establishes the whole agreement between the parties to create certainty and to limit liability for misrepresentation or other potential claims against the contract.[154] The clause is based on the parol evidence rule found in Anglo-American jurisdictions. The aim of the parol evidence rule is to exclude oral or other evidence that could establish that there are terms that were not included in the contract.[155] In the US, it might exclude evidence for the establishment of existing contradicting terms while allowing extrinsic evidence to establish additional terms.[156] In common law countries in normal circumstances, evidence may be produced on factual grounds existing at the time the contract was signed or before the date.[157] If there is an entire agreement clause, this evidence is excluded.[158] This is the reason why an entire agreement clause is important for party autonomy: it establishes that the parol evidence rule applies to the contract as a whole as opposed to simply the written terms.[159] The aim of the entire agreement clause is clearly the creation of self-sufficiency; it seeks to detach the contract from governing law by allowing less room to interpret the meaning of the contractual text.[160] The clause stems from the Anglo-American idea of the contractual text representing the entire agreement with other considerations or evidence being excluded from the interpretation.

Another common boilerplate clause is the no waiver clause. This clause ensures that the contractual remedies may be exercised in accordance with the wording of the contract at any time regardless of the conduct of the party who has a right to the remedy.[161] The idea is to exclude arguments about acquiescence through conduct or the requirement of exercising rights or remedies in good faith. These principles are based on the idea that if the party entitled to a remedy acts in a clear and unequivocal way which the other party could construe

[152] Or 'integration clause', 'entire contract clause', 'merger clause' or 'whole agreement clause'.
[153] Perell 1998, p. 288.
[154] ibid, p. 288.
[155] Cordero-Moss 2007, p. 5.
[156] De Ly 2000, p. 731-733.
[157] *Investors Compensation Scheme Ltd v West Bromwich Building Society* [1998]; *Bank of Scotland v Dunedin Property Investments Co Ltd* [1998].
[158] *McGrath v Shaw* [1987], p. 452.
[159] Bjørnstad 2009.
[160] Mitkidis and Neumann 2017, p. 190.
[161] Cordero-Moss 2014a, p. 19.

as them having waived the remedy, then they lose their right to exercise this remedy.[162] With this clause, this conduct is irrelevant. Further, the goal of this type of clause is to exclude any time restrictions within which remedies may be exercised, any protection of one party's expectation, or prevention of abuse of formal rights provided by the applicable law.[163]

Another boilerplate clause is the no oral amendments clause which also illustrates the usage of the common law contract drafting style in international contracts. This clause ensures that the written contract can be implemented in accordance with the written word regardless of what has been agreed later unless it was recorded in writing.[164] Third parties can thus rely on the fact that only authorised parties may change the contract. These three clauses illustrate the utilisation of boilerplate clauses by international commercial actors to create self-sufficient contracts. Further, they show the impact of the common law drafting style and the importance given to the written text by excluding external influences.

3.2.2.2. Other Clauses

I also want to briefly mention the possibility of parties utilising other types of clauses to detach the contract from any applicable laws (and the default laws) of the chosen jurisdiction which do not exactly qualify as boilerplate as they are not (essentially) always included in a contract. The idea behind utilising these clarifying clauses is that if parties are drafting contracts in a precise and clear manner, they will account for any possible situation that might take place. This in turn will minimise the effects of legal systems.

One example of such a clause is the early termination clause. This could take the form of giving one party the ability to terminate the contract early if the party has breached some specific obligation. The clause aims to avoid uncertainty that is connected to the evaluation of the seriousness of the breach and the impact the breach has on the contract.[165] Most legal systems have rules that state that the termination of contract is only available if there is a fundamental breach and in other situations alternative remedies such as specific performance are preferred. For example, Finland considers the termination of a contract to be the last option and the jurisdiction prefers only a partial termination in some cases.[166] Therefore, having a clause that defines which terms are essential for the parties or listing what breaches give power to terminate has a clarifying effect as well as detaches from any default rules that

[162] Gotterson 2017.
[163] Cordero-Moss 2014a, p. 19.
[164] ibid, p. 20.
[165] ibid, p. 22.
[166] Hemmo 2003, s. 357.

the chosen domestic jurisdiction might have. Other examples of clauses would include *force majeure*,[167] hardship, amendments to contracts, warranties and arbitration clauses.

These clauses are a result of contractual freedom which means that the wording of the clauses matters in most legal traditions and jurisdictions. If we are not dealing with mandatory provisions, parties are free to decide on the specific elements of the contract.[168] If they do not decide on these elements, the default rules are applicable.[169] Let us consider *force majeure* -clauses in Finland as an example. The parties are free to include a *force majeure* -clause in the contract, and by doing so the outcome of a *force majeure* situation might be different than under the default *force majeure* provision provided by law. Under Finnish law, if there is an external impediment beyond the control of the parties that could not reasonably have been foreseen and the consequences could not have been overcome, the seller is released from their contractual obligation without consequence for the duration of the impediment.[170] However, if the contract includes a *force majeure* -clause, this is considered decisive in a *force majeure* situation. General contract law principles apply so the starting point for the interpretation is the intention of the parties.[171] *Force majeure* -clauses are disclaimer-clauses which means that they are subjected to narrow interpretation in Finnish law.[172] Finnish law may influence this interpretation, however, party autonomy is still decisive unless certain exceptions are triggered.[173] The courts look at the wording of the clause, other material facts that relate to the contract as well as the behaviour of the parties and possibly the aim of the clause.[174] Due to contractual freedom, the clause can include a wider or a narrower variety of situations than what Finnish law provides. Essentially, contractual freedom allows the risk to be placed on the buyer with the seller consequently being released from their delivery obligations.[175]

[167] A doctrine used to excuse performance under a contract when the fulfilment of contractual obligations is actually or virtually impossible.
[168] Berger 2014, p. 525.
[169] Hatzis 2002, p.12; Mitkidis and Neumann 2017, p. 187.
[170] Finnish Sale of Goods Act, 23 §; Rudanko 2015. For the interpretation of this clause see e.g., Toiviainen 2008, p. 169-172; HE 93/1986, p. 70; Hoppu 2020, p. 290; Rudanko 2020.
[171] Hoppu 2020, p. 299. The other general principles include e.g., *dubio contra stipulatorem*, acceptance of risk, good faith and *rebus sic stantibus.* For Finnish contract interpretation principles see e.g., Gustaf Möller, 'The Nordic Tradition: Application of Boilerplate Clauses under Finnish Law' in Cordero-Moss 2011.
[172] E.g., KKO 1992:178.
[173] E.g., Finnish Contracts Act 1929, 36§ "if a contract term is unfair or its application would lead to an unfair result, the term may be adjusted or set aside". See also KKO 2007:27.
[174] Hoppu 2020, p. 300.
[175] Norri 2013, p. 130.

The examination of *force majeure* -clauses illustrates that if party autonomy is utilised, contracting parties can decide on contractual clauses to a wide degree. This leaves less room for interpretation, especially if the clauses are clear, unambiguous and they have been drafted by parties in similar bargaining positions and with similar information. As a result, the contract becomes more self-sufficient, which is the goal of international commercial actors.

3.2.3. Dispute Resolution and Arbitration Clauses

In addition to achieving self-sufficiency through contract negotiations, international parties are increasingly utilising arbitration as a form of dispute resolution due to its flexibility.[176] As mentioned before, the world has become increasingly globalised which has caused the rise of international contracts. The inevitable outcome of this is the fact that domestic courts are no longer a viable option for dispute resolution as regard must be had towards the international character of these contracts, which is limited in national courts. Therefore, arbitration has become the preferred dispute resolution mechanism with mediation additionally gaining some popularity.[177] The increased utilisation of arbitration as dispute resolution could be explained with the parties' preference of flexibility, confidentiality, informality, and speed of the proceedings.[178]

Referring a dispute to the arbitral tribunal gives an impression of self-sufficiency as national courts are excluded and the will of the parties dominate the legal relationship.[179] In most jurisdictions, courts are under an obligation to decline jurisdiction in disputes where the parties have agreed to submit the dispute to arbitration.[180] The arbitral tribunal exists because of the parties' agreement which means that the parties can determine its composition, procedural rules, scope of competence, and power.[181] The most important choice on the form of the arbitration is the decision between *ad hoc* arbitration and institutional arbitration. *Ad hoc* arbitration means that the tribunal constituted purely on the agreement of the parties and they decide how the panel is appointed, the venue, and rules of procedure. Institutional arbitration means that the parties have referred the dispute to a certain arbitration institute,

[176] In the last decades cases in the leading international arbitral institutions have at least tripled and there is some evidence that at least 60% of international contracts contain an arbitration clause. See Schwenzer, Hachem and Kee 2012, para. 5.25; HKIAC 2021; ICC Dispute Resolution Statistics. See Schwenzer and Whitebread 2014, p. 2-5 for a brief explanation of international arbitration in the context of contract law and the recent changes.
[177] Schwenzer and Whitebread 2014, p. 2.
[178] ibid, p. 5.
[179] Cordero-Moss 2014b, p. 48.
[180] Cordero-Moss 2014a, p. 218.
[181] Cordero-Moss 2014b, p. 49; Cordero-Moss 2008, p. 28.

such as the ICC, which will administer the proceeding and apply its infrastructure and rules.[182] Regulating all aspects of the procedure is lengthy and complicated, but *ad hoc* arbitration provides flexibility and the tailoring of the procedure. Choosing between the two depends on the priorities of the parties and how they want possible disputes to be conducted.

International commercial arbitration is aided by instruments such as the New York Convention and UNCITRAL Model Law on International Commercial Arbitration.[183] The New York Convention is considered the most successful instrument in international trade law as 168 countries have adopted it and it fulfils its goal of enforcement of foreign arbitral awards.[184] The New York Convention provides that the contracting states must recognise an agreement in writing where the parties submit disputes to arbitration and that courts must enforce foreign arbitral awards.[185] The arbitration agreement excludes the jurisdiction of ordinary courts and it is a prerequisite for the enforcement of arbitral awards.[186] There are only limited grounds where a court may refuse the enforcement, such as the agreement is not valid under the law the parties have subjected the agreement to.[187] The New York Convention's importance can be found in the obligation of signatories to enforce international arbitral awards even if the proceedings were carried out in another jurisdiction.

The primary way of determining the applicable law in arbitration is party autonomy, but it is possible to deviate from this choice if mandatory rules limit this choice.[188] Mostly arbitration takes place in the private sphere of the parties without interference from national courts. Arbitral tribunals are not part of the judicial system of the country where the tribunal is located. The tribunals are not created by states, but by the parties. States merely provide the legal framework in which the arbitral tribunal operates.[189] The arbitral tribunal is *de facto* bound by the arbitration laws of the place of arbitration, unless the parties have provided otherwise, as the award would be open to annulment proceedings if the parties do not correctly apply the conflict of laws provisions.[190] Formal requirements for arbitration agreements can differed considerably in different jurisdictions.[191] For example, in China *ad*

[182] Cordero-Moss 2014a, p. 213-214.
[183] UNCITRAL Model Law 1985, annex 1.
[184] Newyorkconvention.org.
[185] New York Convention, arts. II and III.
[186] Cordero-Moss 2014a, p. 212.
[187] New York Convention, art. V(1)(a).
[188] Stefan Kröll, 'Arbitration and the CISG' in Schwenzer 2014, p. 66.
[189] ibid, p. 64.
[190] ibid, p. 65; Cordero-Moss 2014a, p. 217, 221, 224-225.
[191] Cordero-Moss 2014a, p. 234.

hoc arbitration is not permitted.[192] So selecting Chinese law as the applicable law can invalidate the arbitration agreement if the parties fail to select an arbitral institution for the framework of the proceedings. This means that an international dispute arising out of cross-border contracts is still subject to national arbitration laws even if the award can be enforced abroad. Therefore, national arbitration laws are still relevant and the parties must be aware of intricacies of the different legal systems when choosing the applicable law governing the dispute.

For the purpose of this thesis, the rise of arbitration is relevant in two regards: firstly, it demonstrates the effect of Anglo-American contract drafting and secondly, it provides flexibility to the parties to remove a case from domestic jurisdiction, at the very least by removing it from the court procedure and specific way of interpretation. Firstly, arbitration clauses are commonly drafted in a very detailed manner especially with respect to the definition of the scope.[193] This can be traced to older case law where nuances of language were considered important.[194] The English courts no longer give much weight to certain verbal nuances in relation to arbitration clauses, but have instead adopted a more arbitration friendly attitude: "if the parties wish to have issues as to the validity of their contract decided by one tribunal and issues as to its meaning or performance decided by another, they must say so expressly."[195] This type of attitude is replicated by most jurisdictions. Regardless, most model arbitration clauses by arbitral institutions still 'recommend' the inclusion of a detailed clause.[196] This detail in the arbitration clause retains party autonomy and limits restrictive interpretations by the applicable arbitration law.

Secondly, the rise of arbitration as a means of international dispute settlement mechanism also means the decline of the utilisation of domestic courts. Removing the case from national jurisdictions is not fully possible with all disputes as state laws may restrict this ability, for example, with the case of competition law mandatory provisions.[197] What I want to focus on is the freedom of choice of law in arbitration which is not limited to a law connected to the

[192] Little and Webster 2012.
[193] Cordero-Moss 2014a, p. 23.
[194] E.g., *Overseas Union Insurance Ltd v AA Mutual International Insurance Co Ltd* [1988], p. 63.
[195] *Fiona Trust & Holding Corporation and others v Privalov and others* [2008], p. 257.
[196] E.g., Arbitration Institute of the Stockholm Chamber of Commerce 2021: "'Any dispute, controversy or claim arising out of or in connection with this contract, or the breach, termination or invalidity thereof"; Singapore International Arbitration Center 2021: "Any dispute arising out of or in connection with this contract, including any question regarding its existence, validity or termination"; ICC Arbitration Clause: "All disputes arising out of or in connection with the present contract".
[197] Cordero-Moss 2014a, p. 257-259.

transaction or parties.[198] This freedom is more limited in international litigation.[199] Under most arbitration laws, choosing the seat of the arbitrations determines the law applicable to the arbitration itself (*lex arbitri*) and so it determines the courts that can review the validity of the award, if necessary.[200] Most laws also provide that the parties have the freedom to also choose the law to govern the substance of the dispute which will be applied by the arbitrators to resolve the dispute.[201] This flexibility can also explain the rise of arbitration as dispute resolution mechanism as the parties are free to choose which laws are applicable to the dispute.

3.3. Choice of Applicable Law

As result of the above-mentioned goal of self-sufficiency, the international dimension of the contract and the freedom of choice of applicable law in arbitration, the parties have the possibility of choosing the law governing their contract. By exercising party autonomy, the parties can subject their contract to a governing law of their choice.[202] In arbitration this is not limited to a jurisdiction that is connected to the transaction or parties themselves[203] and most arbitration rules provide an obligation on the tribunal to follow the choice made by the parties.[204] Domestic courts limit this freedom of choice to domestic law.[205]

When law does not adequately provide legal protection, the enforcement of contract rights will not be done through the judiciary.[206] This means that the jurisdiction in question is not attractive as governing law. In theory, sophisticated contracting parties can choose based on their particular needs which, arguably, can make certain jurisdictions more attractive in these types of transactions. The role of contract law and the state should be to ensure the smooth operation of the legal system and nothing beyond that.[207] Of course intervention is inevitable when there are disparities in bargaining power,[208] however, it is for the judge to enforce

[198] E.g., UNICITRAL Model Law, art. 28.
[199] Particularly in the EU as per the Rome I Regulation, art. 3, however not to the same extent in the US. National judges are trained in the specific legal system so it is unrealistic (although not impossible) to ask them to apply another country's laws to a dispute. In arbitration parties are free to choose arbitrators based on their background and expertise see e.g., Cordero-Moss 2014a, p. 210-212.
[200] Born 2014, p. 2402.
[201] UNCITRAL Model Law, art. 28.
[202] Cordero-Moss 2008, p. 5. If the parties do not exercise party autonomy, the applicable law is determined by other choice-of-law rules. See Cordero-Moss 2014a, p. 134-209.
[203] Cuniberti 2014, p. 457. See Cordero-Moss 2014a, p. 134-209 for private international rules.
[204] E.g., UNICITRAL Model Law, art. 28(1); UK Arbitration Act, s 46(1); Swiss Private International Law Act, art 187(1).
[205] Bonell 2008, p. 22; Bonell 2009.
[206] Posner 2009, p. 44.
[207] Hatzis 2006, p. 167-168.
[208] E.g., consumer protection.

abstract norms of the law with neutrality. This neutrality is important for enhancing the predictability of law and this predictability is what is valued by capitalists in the legal framework.[209]

In international contracts both parties cannot be satisfied which means that they either choose one party's law or a third state law. In most contracts, the chosen jurisdiction belongs to one of the contracting parties. Choosing a third state law is most likely due to neither party wanting the other party's law to apply, or in the case that the parties could not reach an agreement on the applicable law.[210] It should be noted that transnational sources of law (such as the PICC) are rarely chosen as the applicable law.[211] Based on an empirical study of more than 4 400 international contracts, when parties utilise law other than their own, they generally choose one of five jurisdictions (English, Swiss, US, French or German) with English and Swiss being the most popular.[212] Around 30% of parties in international transactions are willing to subject their contract to a third-state law.[213] Therefore, the market for third-state law is not insignificant. Of course, this is a relatively small sample size considering how many commercial contracts are made each year and it only represents contracts which required external dispute resolution. One should bear this in mind as often disputes are settled outside of court, can be settled amicably between the parties or a dispute might not even arise. Further, in this study the data came from the ICC which means that European parties are overrepresented and American and Asian parties underrepresented. However, I still consider the results to have relevance because they can give an indication of what factors are important for contracting parties in the choosing of the applicable law.

Some explanations for the choice of law might be choosing an arbitration friendly country and utilising that country's law for the substance of the dispute. Further, the ability to understand the language, such as with English law as English is the most widely spoken language in international trade, might also be attractive.[214] Different jurisdictions might have some attractive qualities that others do not possess. For example, English law is marketed as transparent, predictable, flexible and adaptable with a less hands on regulatory system.[215] Whereas Swiss law is marketed through its neutrality, concise and easily accessible nature

[209] Posner 2009, p. 43; Cordero-Moss 2014b, p. 63.
[210] Cuniberti 2014, p. 464; Vogenauer 2013, p. 24.
[211] Cuniberti 2013, p. 369.
[212] Cuniberti 2014, p. 455.
[213] ibid, p. 468-470.
[214] ibid, p. 471-478.
[215] The Law Society of England and Wales 2019; Maria Celeste Vettese, 'Multinational Companies and National Contracts' in Cordero-Moss 2011, p. 24.

as well as having fewer mandatory rules.[216] Of course, these buzzwords are not specific only to these jurisdictions, but it does seem that the possibilities they present, in connection with other factors, might be attractive to contracting parties. In cases where a specific legal option is only offered in certain jurisdictions, it is natural to choose this legal system as the governing law. For example, this is the case with trusts offered under common law which allows the structuring of commercial transactions in a way that is unknown to civil law.[217] Sophisticated contracting parties are likely to choose laws that are attractive to them and based on the theory of efficiency, choosing a law with commonalities to their legal system might be preferable or they might follow the general practice of their field (for instance, English law is preferred for banking and finance transactions).[218] In addition, it seems that parties might also be willing to sacrifice income for certainty.[219]

In terms of legal rules, common law could have rules more supportive of economic efficiency which can be explained by the fact that the judges are appointed from the practice of law as opposed to civilian legal systems.[220] This is not to say that common law is always more efficient than civil law,[221] in fact both can be viewed as efficient. It is sometimes argued that civil law has found it difficult to respond to fast-changing economic circumstances, mainly due to the complexity of the issues.[222] However, the comprehensive and coherent nature of civil law is only one aspect of the system. Civil law can also be abstract when necessary, and this allows the regulation of economic activities even in fast-paced environments.[223] This application of law has resulted in stable, coherent and positive legal framework which includes default rules.[224] So, it is not only the common law culture that provides definitive and authoritative solutions without restricting party autonomy through heavy regulation. In my opinion, the preference of common law drafting style by commercial parties is due to their preference of self-sufficiency and the ability to contract in a detailed

[216] Scherer and Schneider 2005, p. 313.
[217] See e.g., Hudson 2016. In financial law, there is a possibility of establishing security trustees who hold and manage the securities for syndicate creditors. The appointment of a trustee is not possible to the same extent in civil law systems; however, some civil law jurisdictions have reformed their law of secured transactions but have not been able to reach the same satisfaction as trusts.
[218] Cuniberti 2014, p. 497-498, 500; Espar and Castell 2020, p. 121.
[219] Cuniberti 2014, p. 501.
[220] Posner 2009, p. 44.
[221] E.g., common law penalty doctrine has received a lot of criticism and civil law might actually be more efficient see Hatzis 2006, p. 181-189; Hatzis 2002, p. 40-44.
[222] Hatzis 2002, p. 1.
[223] ibid, p. 11.
[224] ibid, p. 12.

manner.[225] Of course, efficiency and certainty are attractive in legal systems, but one cannot say that common law is more efficient than civil law.

The more important factor in deciding on the applicable law, in my opinion, is the familiarity of a legal system. Each party is typically familiar with the laws of their own country and less so of other jurisdictions.[226] Therefore, it stands to reason that they would prefer their own jurisdiction as the law applicable to the transaction as they do not want to incur the additional costs of familiarising themselves with another system and they might be more comfortable with a familiar legal system.[227] The variety of national laws offers choice, but utilising autonomy requires awareness and adapting contract practice to the applicable law which is costly and time consuming. Therefore, drafting contracts that are not adjusted to the applicable law is a calculated risk which the drafters generally accept.[228] Often contracting parties are willing to bare the risk of not having complete awareness of the law governing the contract and larger multinational companies might prefer standardisation of contracts over flexibility for adjusting to local needs.[229] As an example, there is evidence that German parties often escape Germany's strict control of standard terms in B2B controls and go to Switzerland.[230] The German parties could choose English or New York law, but it seems that their own familiarity of civil law systems as well as the availability of Swiss law in German are the determinative factors in choosing a third state's law as the applicable law.[231] So even when choosing another state's laws, it seems that familiarity is important as opposed to the nuances of the specific legal system.

[225] This is supported by the fact that English law upholds a more formalist or textualist interpretation of contracts see Cuniberti 2014, p. 493; Eisenberg and Miller 2009, p. 1475.
[226] This view is shared by Vogenauer 2013, p. 77: "There is no empirical evidence that parties choose the applicable contract law or the forum on the basis of the quality of specific legal rules and that lawmakers improve the quality of these rules to attract more users. Choices of law and forum are hardly made with a view to the substantive merits of the available legal rules but are dominated by other factors, most importantly the degree of familiarity with the chosen regime and, less importantly, intuitive global judgments on the overall sophistication of different legal systems." See also Cordero-Moss 2011, p. 9-10; Cordero-Moss 2014a, p. 27-31.
[227] Cuniberti 2014, p. 463.
[228] Cordero-Moss 2014a, p. 18- 22, 28.
[229] David Echenberg, 'Negotiating International Contracts: Does the Process Invite a Review of Standard Contracts from the Point of View of National Legal Requirements?' in Cordero-Moss 2011, p. 11; Maria Celeste Vettese, 'Multinational Companies and National Contracts' in Cordero-Moss 2011, p. 20.
[230] Vogenauer 2013, p. 63-64.
[231] Cuniberti 2014, p. 496; Vogenauer 2013, p. 65. English law has common law doctrines such as consideration and equitable estoppel which do not exist in Germany where as Swiss contract law relies on doctrines that mostly exist in Germany too.

It is also possible that that model contracts may already provide a specific governing law.[232] This is interesting in the case of the ICC, arguably the most famous international arbitration institution, because they usually provide for the application of non-national rules.[233] These model contracts include INCOTERMS[234] as well as other contracts for sales, intermediary contracts, commercial agency contracts and distributorship contracts.[235] These model contracts state that the parties adopt the rules and principles of law recognised in international trade, trade usages and UNIDROIT PICC as the applicable law. Alternatively, they provide for the option of the application of a national law that the parties choose. The rationale behind this is that the ICC drafts their clauses without attaching them to a specific jurisdiction and assume they will be governed by international principles.[236]

So, what can be concluded from this is that contracting parties give high value to cost efficiency, which is why they appreciate familiarity, predictability, and certainty of a given legal system. In some cases, attractive rules may also be decisive. The ability to choose the governing law is another way that the parties can influence the contract and obtain self-sufficiency. However, things can become complicated when trying to compare each country's approach to contract interpretation and even more so when the possibility of choosing transnational sources of law as the governing law is considered. As per the theory of efficiency, seldom are all possible situations covered in contract negotiations and this may include interpretation of specific contractual clauses. Therefore, the contract can have unforeseen consequences as a result of the influence of the different jurisdictions and this prevents the uniform applicability of similarly worded contractual clauses. However, efforts have been made, for example by the ICC, to include non-domestic laws as a possibility for the choice of applicable law.

[232] E.g., The Grain and Feed Trade Association conduct business under English law see Gafta 2021; The Refined Sugar Association conduct business under English law see The Refined Sugar Association 2021.
[233] The ICC Model Occasional Intermediary Contract (2000), art. 13.1; The ICC Model Commercial Agency Contract (2002), art. 24.1.A; The ICC Model Distributorship Contract (2002), art. 24.1.A. Available at ICC Model Contracts.
[234] ICC Incoterms 2020.
[235] Available at ICC Model Contracts.
[236] Cuniberti 2014, p. 481-482.

Chapter 4. Transnational Sources of Law

International commercial parties have clear goals that they strive for in international contracts which has led to the drafting of contracts in a specific way. The examination of the existence of international contract rules (and the question of whether they are binding) falls outside the scope of this thesis, however, I want to now examine transnational codification of common principles and rules as these can be seen as reflecting the general practice of contracting parties. These transnational sources seek to help cross-border transactions by creating efficiency as well as providing legitimacy to specific ways of contracting. Further, I have already mentioned difficulties of interpretation briefly. The examination of transnational sources is also important in this regard as it has been suggested that the difficulties could be overcome by referencing sources that are not tied to specific national legal system.[237] I have selected a few transnational sources, to illustrate the types of codification that take place and to discuss their effects on international contracts and thus international contract practice.

4.1. Uniform Law Instruments: CISG

Multilateral, law-unifying treaties are contracts governed by international law between the contracting states.[238] They can be considered uniform law instruments and they have a more recognised role under international law compared to private codification.[239] Once a state has ratified such a convention, they are under an obligation to incorporate the uniform law instrument into their national legal system and the rules become prevailing law. Uniform law instruments require formal incorporation by national Parliaments, but they still represent a special body of law that has been prepared and agreed at the international level.[240] One such instrument is the CISG which was drafted by the UNICITRAL in 1980 and has 94 parties.[241] The CISG is considered one of the most successful conventions for the unification of commercial law.[242] The purpose of the convention is to develop international trade and promote friendly relations among states on the basis of equality and mutual benefit. As

[237] Cordero-Moss 2007, p. 1.
[238] Roth and Happ 1997, p. 707.
[239] ibid, p. 700. In addition to the CISG, such instruments also include the UNIDROIT Convention on International Financial Leasing and UNIDROIT Convention of International Factoring.
[240] Roth and Happ 1997, p. 700-701; Cordero-Moss 2014a, p. 33-34.
[241] UNICITRAL (CISG Status) 2021.
[242] Schtoeter 2015, p. 206.

claimed by UNICITRAL, by providing a modern, uniform and fair regime, it creates certainty in cross-border commercial exchanges and decreases transaction costs.[243]

The CISG applies to contracts of sale of goods between parties "whose places of business are in different States: (a) when the States are Contracting States; or (b) when the rules of private international law lead to the application of the law of a Contracting State."[244] However, the principle of party autonomy is also enshrined into the convention. This permits the parties to agree to exclude the CISG's application completely or in part at the time of or after the conclusion of the contract.[245] Given huge differences in law at the domestic level, the drafters of the CISG were faced with the difficulty of deciding on the language and style in which the CISG was drafted. The starting point was the neutrality of language, and, in theory, the legal terms are not supposed to reflect legal concepts of national legal systems.[246] The drafters were faced with finding the middle ground. The convention's language and style do not have a preference on the seller or buyer or in terms of their legal backgrounds.[247] In relation to cost reduction in contractual negotiations, through the parties utilising the CISG as the background of the negotiations, there are fewer issues and clauses that need to be negotiated. In addition, both the buyer and seller have been taken into account in clauses concerning breach of contract, damages and time limits.[248] The CISG can be viewed as the compromise that the parties would have reached at the end of costly negotiations. Parties often value neutrality of law and the CISG can be viewed as a more neutral choice than national jurisdictions.[249]

Further, neutrality is maintained through autonomous interpretation and the limited influence of domestic preconceptions. [250] The most difficult issues of the CISG have been addressed by domestic courts and arbitral tribunals as well as the CISG Advisory Council.[251] This does provide a certain amount of certainty in the application of the CISG which combined with its international character (which is lacking in domestic legislation), makes the CISG attractive. However, there is always a risk of domesticating the terms through

[243] UN Commission on International Trade Law 2021.
[244] CISG, art. 1.
[245] ibid, art. 6.
[246] Pascal Hachem, 'The CISG as Transnational Rules – Framework and Use in Practice' in Schwenzer and Whitebread 2014, p. 18.
[247] ibid, p. 26.
[248] ibid, p. 27-28.
[249] ibid, p. 26.
[250] Cordero-Moss 2014a, p. 112.
[251] Pascal Hachem, 'The CISG as Transnational Rules – Framework and Use in Practice' in Schwenzer and Whitebread 2014, p. 28-30. See section 5.4.1. for more in-depth discussion.

being subject to national jurisdictions' methods of interpretation, regardless of having an international origin and nature.[252] This is the weakness in the creation of international uniform law. However, the CISG has attempted to off-set this by noting that there is a need to promote uniform application and requiring that it must be interpreted autonomously and with consideration towards its international character.[253]

4.2. Private Codification and "Soft Law" Instruments

Private forms of international codifications also support the idea of international contract practice and they can be seen as supplementing national law or multilateral treaties, such as the CISG.[254] These codifications are efforts to restate international contract practice or recognised principles and usages. The aim of the private codifications is to improve the position and fragmentary character of customs of international commercial actors (better known as *lex mercatoria* rules) and to contribute to their availability by recognising them as laws or legal sources.[255]

4.2.1. International Instruments: UNIDROIT PICC

One example of international codification are the model clauses for the UNIDROIT PICC which was first published in 1994 (with updated versions in 2004 and 2010). UNIDROIT is an intergovernmental organisation that operates on the basis of consensus of its member states. They created the PICC as a non-legislative codification (or restatement) of general law of international commercial contracts.[256] The PICC was produced by a group of independent academics and experts from the major legal systems of the world.[257] It has been generally accepted on an international, supranational and regional level and has a quasi-normative force which is derived from the trust and confidence of those who use it.[258]

The drafters did not debate the existence of *lex mercatoria* or whether the principles qualified as law, but rather they focused on systematic codification of international civil law. The purpose of the PICC is the restatement of transnational contract law and the combination of

[252] Berger 2014, p. 535. See e.g., *Fothergill v Monarch Airlines Ltd* [1981], p.251 where Lord Diplock stated that international convention is for "a much wider and more varied judicial audience" than "purely domestic law" so it should be interpreted "unconstrained by technical rules of English law."
[253] Cordero-Moss 2014a, p. 112; CISG, art. 7(1). See also art. 7(2): "[q]uestions concerning matters governed by [the CISG] which are not expressly settled in it are to be settled in conformity with the general principles on which it is based."
[254] For example, the PICC has been endorsed by the UN Commission on International Trade Law see UN Commission on International Trade Law, 2007, para. 210; PICC, preamble [5].
[255] Cordero-Moss 2007, p. 2.
[256] Bonell 2010, p. 177.
[257] UNIDROIT (IBA Working Group) 2021; Cordero-Moss and Behn 2014, p. 571.
[258] Berger 2014, p. 521.

generally accepted principles and rules of contract law, which is based on extensive comparative research. They present a private form of rule-making which is a persuasive source of international law because of the wide recognition of UNIDROIT and the systematic nature of the text.[259] The importance of these private codifications is their soft law character and flexibility and informality. This can also be considered a disadvantage as their function and application is reliant on the will of the parties.[260] This is the difference between international uniform law instruments like the CISG which are conventions and have direct applicability.[261] Further, as the PICC represents a soft law instrument, it is not adopted by domestic legislatures into domestic laws. If the applicable law based on the conflict rules are the laws of a specific legal system, then the PICC is not applicable. This is different to the CISG which requires parties to opt out of its application.[262] The applicability of the soft law rules requires the parties to opt in.

The PICC are considered to be part of *lex mercatoria* and may be chosen to govern a contract, at least to a certain extent.[263] Very rarely do parties agree on the application of the PICC in their contract before the dispute is taken to arbitration. This has been linked to the ignorance of the PICC's existence, the abundance of choice of applicable law, the failure of deciding between domestic laws and the PICC, and the lack of legal sophistication.[264] However, the PICC model clauses have been utilised in model contracts of the ICC and ITC. The PICC have a larger role before international arbitral tribunals as opposed to domestic courts. This role in international arbitration can be derived from the UNICITRAL Model Law on International Commercial Arbitration which provides that "the arbitral tribunal shall decide the dispute in accordance with such rules of law as are chosen by the parties as applicable to the substance of the dispute."[265] This is very similarly worded as many other arbitration rules such as ICC's Arbitration Rules.[266] These allow the application of transnational rules as the applicable law of the contract. In arbitration, the transnational rules would override

[259] ibid, p. 520.
[260] ibid, p. 523.
[261] CISG, art 1(1): "This Convention applies to contracts of sale of goods between parties whose places of business are in different States: (a) when the States are Contracting States; or (b) when the rules of private international law lead to the application of the law of a Contracting State".
[262] ibid, art 6: "The parties may exclude the application of this Convention or, subject to article 12, derogate from or vary the effect of any of its provisions."
[263] Cordero-Moss and Behn 2014, p. 581. See Section 5.4.2. for discussion on the limitation of choosing PICC as governing law due to insufficiency in excluding national law.
[264] Cuniberti 2014, p. 497; Berger 2014, p. 522.
[265] UNICITRAL Model Law, art. 28(1).
[266] ICC 2021 Arbitration Rules, art. 21(1).

mandatory provisions of the applicable domestic law with the exception of overriding mandatory provisions.[267]

4.2.2. Regional Instruments: PECL, DCFR and CESL

Another example I want to focus on is a more regional effort of harmonisation of contract principles. The reason I have chosen these examples is twofold: firstly, I want to illustrate the harmonisation efforts on a more regional level as this might prove to be easier than international efforts. Secondly, I have chosen Europe as an example because of the wide variety of harmonisation efforts as a result of the EU[268] as well as my own familiarity with the region. However, similar developments exist elsewhere[269] so this is only an illustrative example of regional codification. There have been many different harmonisation projects in the EU, but they have gained little support.[270] The EU has only a limited competence in legislating on form or enforcement of contracts,[271] therefore, even in the close cooperation of the EU, contract law remains in the competence of national regimes. However, there is a growing willingness to elevate private law principles to "general supranational principles".[272] The ECJ has made references to "general principles of civil law"[273] and relied on contract law principles such as *pacta sunt servanda* and party autonomy.[274] These principles have been enshrined in "soft law" instruments which reflect the EU's efforts to harmonise and unify contract law with the PECL being the most notable instrument.

The PECL was produced by the Commission on European Contract Law in three successive volumes (published in 1995, 2000 and 2003) and contains a general account of the principles considered common in European member states.[275] The work consists of systematically organised and specific rules that cover all major topics of general contract law.[276] These

[267] Berger 2014, p. 525; Rome I Regulation, art. 9(1): "Overriding mandatory provisions are provisions the respect for which is regarded as crucial by a country for safeguarding its public interests, such as its political, social or economic organisation, to such an extent that they are applicable to any situation falling within their scope, irrespective of the law otherwise applicable to the contract under this Regulation.".
[268] See Bonell 2008, p. 9-15.
[269] E.g., OHADA Uniform Act on General Commercial Law.
[270] Smyth and Gatto 2018, p. 5.
[271] E.g., Consumer Sales Directive; Unfair Contract Terms Directive. For the procedural mechanisms for enforcement of contractual obligations see Rome I Regulation; Brussels I Recast.
[272] Adar and Sirena 2013, p. 5.
[273] E.g., Case C-277/05 *Société thermale d'Eugénie-les-Bains v Ministère de l'Économie, des Finances et de l'Industrie*, para. 24; Case C-412/06 *Annelore Hamilton v Volksbank Filder eG*, para. 24; Case C-47/07 *Masdar (UK) Ltd v Commission*, para. 50.
[274] Adar and Sirena 2013, p. 5.
[275] PECL; Bonell 2008, p. 9-10.
[276] Bonell 2008, p. 10.

principles are not binding; "their force is based on influence, not on power".[277] Further, they are mainly considered an academic exercise as they are not widely known in the international business community.[278] They can be incorporated into a contract by explicit reference or they can be used as evidence of general principles for the interpretation of contracts. The PECL has a clear territorial scope, as opposed to the PICC.[279] In their work, the Commission on European Contract Law referred to domestic laws of EU member states, EU law and non-European sources such as the CISG.[280]

The PECL have been invoked in arbitral proceedings as international standards and they have had some influence in the revision of civil codes in the EU.[281] Another impact of the PECL's efforts to codify European contract law was the setting up of Study Group on European Civil Code and the Research Group on EC Private Law which published the DCFR in 2009.[282] The DCFR contains principles, definitions and model rules which do not have the force of law but they can be considered as representing the existing form of law even though they cannot be considered rules per se.[283] Their importance comes in the interpretation of EU's legislative acts and filling gaps as well as "legitimising" other instruments such as the PECL.[284] The reason I am mentioning the DCFR is because in contrast to the PICC and PECL, it addresses general contract law and considers most matters that are typically addressed in civil codes with the exception of family law and laws of inheritance.[285] The project received criticism for this reason, especially regard the wide reach of the project, the drafting and style, and excessive regulatory appearance.[286] However, the DCFR can still have an impact "to improve the quality and coherence of the existing acquis and future legal instruments in the area of contract law".[287] It is referred to as "academic" and should not be confused as the final result of the European political process that could potentially culminate to contract codification.[288] Further, the DCFR (as well as PECL) had an influence on the European Commission's CESL which was the culmination of the EU's

[277] Kötz 2012, p. 5.
[278] ICC Arbitral Award No. 12111 of 6 January 2003 in UNILEX 2003.
[279] Cordero-Moss 2014a, p. 36.
[280] Bonell 2008, p. 10. The PECL has a clear focus on Europe, but it also took into account the non-European contract development see Lando and Beale 2000, p. xxvi.
[281] Kötz 2012, p. 5.
[282] Bonell 2008, p. 12; Cordero-Moss 2014a, p. 29.
[283] Grundmann 2008, p. 225; Adar and Sirena 2013, p. 29.
[284] Hartkamp, Hesselink, Hondius and Du Perron 2010, p. 129.
[285] Schwenzer and Whitebread 2014, p. 10.
[286] ibid, p. 10; Schwenzer, Hachem and Kee 2012, para. 3.63; Bonell 2008, p. 12-13.
[287] Commission 2004, para. 2.1.1.
[288] Cordero-Moss 2014a, p. 36.

efforts to establish general contract law in relation to sales law.[289] CESL is primarily aimed at B2C contracts and functions as an opting-in instrument.[290] All of these instruments can be viewed as the development of European contract codification. They differ from international instruments due to their regional applicability, but these regional efforts also influence contract law and interpretation of contracts in national legal systems.

4.3. Impact of Transnational Sources

Lex mercatoria originates as customary mercantile law for the solving of cross-border disputes dating back all the way to the 11th century. It was revived in the 1960s as an informal and flexible net of rules that were primarily applied by arbitrators.[291] "The *lex mercatoria* is not based on any one legal system, but incorporates international commercial rules, general principles of law, standards, and trade usages"[292] which unsurprisingly has led to debate on what actually belong to the rules and whether it qualifies as law.[293] The above mentioned codification efforts are providing these principles recognition and legitimacy as "law" to a certain degree. However, merchants still have autonomy which can influence the future development of *lex mercatoria.* The codification of *lex mercatoria* can help in identifying international contract practice, but not necessarily in a definitive way. Essentially, looking at transnational sources is important because "the adoption of uniform rules which govern contracts for the international sale of goods and take into account the different social, economic and legal systems would contribute to the removal of legal barriers in international trade and promote the development of international trade".[294] This removal of barriers would potentially remove the main thing I argue to be the obstacle to the existence of international contract practice, that is the effects of national legal systems on international contracts through interpretation and national contract practice.

Codification can make international principles appear like state law and more naturally fit into the national legal order; thus, they can have a similar function in a framework of the state.[295] Legal principles have an important and distinctive function within a legal system and their recognition represents a law-making technique. In other words, the label of "legal

[289] Cordero-Moss 2014a, p. 29.
[290] Schwenzer and Whitebread 2014, p. 10.
[291] Johnson 2015, p. 151; Michaels 2007, p. 447.
[292] Moses 2012, p. 65.
[293] I will not go into the debate for length reasons as it presents a more theoretical view on international contract practice. See e.g., Berger 2010; Teubner 1997.
[294] Lord Justice Kennedy 1909, p. 214–15. See also Schtoeter 2015, p. 206.
[295] Johnson 2015, p. 166.

principle" is given by an official agent of a jurisdiction which means the absorption of a new legal norm through a restatement of an already widely recognised norm.[296] These principles can be viewed as being tied to morality, justice and the law of specific jurisdictions or traditions, but increasingly they have transcended national legal orders.[297] The PECL and PICC can be considered "principles"; the PECL are "'intended to be applied as general rules of contract law in the European Union"[298] and the PICC "set forth general rules for international commercial contracts".[299] The PECL and PICC are a reflection of general contract law which means they are applicable to a contract regardless of the substance, in contrast to particular contract law which can also be found in most national legal orders.[300] "[T]hey have been drafted as a written consolidation of the common core of the national legal traditions regarding contracts and of the so-called *lex mercatoria*, i.e., the whole of the legal practices which have established themselves in international commerce."[301]

This push towards coherence through codification can be seen as a distinctive feature of civil law systems and the product of the rationalist tendencies that were prevalent in European political philosophy in the 18th and 19th centuries.[302]

> It is not surprising that the strongest advocates of the new law merchant are from civil law jurisdictions where general legal principles constitute the primary source of law and specialized courts have long handled commercial disputes at an intermediary level of the legal system. Nor is it astonishing that the most virulent critics of lex mercatoria and delocalization are steeped in the common law tradition of narrow rules and holdings, where decisional law is the foremost source of law and courts are its oracles.[303]

Nevertheless, these instruments are contributing to the reconciliation of differences between legal systems, at least to some extent. The CISG has especially had influence and it was even utilised as a model for the UNIDROIT PICC, PECL and DCFR. Further, the EU Consumer Sales Directive,[304] Sale of Goods Acts of Nordic Countries,[305] the Contract Law of the

[296] Adar and Sirena 2013, p. 12.
[297] ibid, p. 4.
[298] PECL, art. 1:101(1).
[299] PICC, preamble para. 1.
[300] Adar and Sirena 2013, p. 28.
[301] ibid, p. 28.
[302] Mousourakis 2019, p. 177.
[303] Carbonneau 1998, p. 37.
[304] Consumer Sales Directive.
[305] E.g., Finnish Sale of Goods Act; Swedish Sale of Goods Act; Danish Sale of Goods Act; Norwegian Sale of Goods Act.

People's republic of China,[306] and many other pieces of legislation are built on the CISG.[307] Of course, this is not to say that all countries have modified their contract law, but the CISG has still had far-reaching effects. The UNIDROIT PICC has also had an influence on Chinese law[308] and the laws of non-Western nations[309] and the common law countries.[310] The most important impact it has had is giving consideration to the international character of cross-border contracts. For example, the CISG provides that regard must be had to its international character in its interpretation, and that there is a need to promote uniformity in its application.[311] This approach is beneficial for international contracts as the contracts are not put into the box of national notions of contract law. Further, the transnational instruments can be used to supplement the governing law either directly (binding instruments such as the CISG) or through incorporation of parties (soft law instruments such PICC, PECL etc.).

The last thing I want to note is that most international instruments, including the PICC and PECL (not the CISG), lack binding character. This allowed the working groups more flexibility as they could agree on the "best" rules more easily, but the final result qualifies only as an academic recommendation.[312] The PICC and PECL are a codification of adopted principles as well as what the experts from around the world considered to be "best practices".[313] These instruments can be invoked by commercial parties to corroborate arguments and demonstrate conformity with internationally accepted standards.[314] Further, the PICC can aide in the interpretation of the CISG as there is an obligation to take into account its international character.[315]

It is also possible that international commercial law could prove to be an alternative to domestic law as international contracts are often drafted without accounting for the requirements of a particular contract law.[316] In the case of the PICC, this could be possible in disputes solved by arbitration because of the flexibility in choice of applicable law.[317]

[306] Contract Law of the People's Republic of China.
[307] Schwenzer and Whitebread 2014, p. 8; Bonell 2008, p. 5-9.
[308] Danhan 2003, p. 107; Ritaine and Lein 2007, p. 119.
[309] See Izadi 2001, p. 301.
[310] E.g., Australia see *Hughes Aircraft Systems International v Airservices Australia* (1997); New Zealand see *Hideo Yoshimoto v Canterbury Golf International Limited* [2000]; England see *Proforce Recruit Limited v The Rugby Group Limited* [2006].
[311] CISG, art. 7.
[312] Cordero-Moss 2014a, p. 35.
[313] ibid, p. 35; Torgans and Bushaw 2001-2002, p. 40.
[314] Bonell 2008, p. 24. See e.g., ICC 2021 Arbitration Rules, art. 17: "apply the rules of law which [they] determine to be appropriate" and "in all cases… shall take account of… relevant trade usages".
[315] Bonell 2008, p. 25; CISG, art. 7.
[316] See e.g., De Ly 1992; Berger 2010.
[317] PICC, preamble, comment 4a; Cordero-Moss and Behn 2014, p. 571.

Increasingly contracting parties and working groups are encouraging domestic legislatures to allow full party autonomy so that transnational sources could be chosen as the law applicable and courts would interpret conflict rules in a more liberal way.[318] However, the problem is that these conventions and texts are incomplete in their coverage so deferring to domestic law is still necessary on occasion. Therefore, these sources can support international ways of contract drafting and make cross-border transaction easier, but they lack binding character and cannot function as the main source of law.

[318] E.g., Hague Principles on Choice of Law in International Commercial Contracts see HCCH 2015, art. 3: "[law] includes rules of law that are generally accepted on an international, supranational or regional level as a neutral and balanced set of rules, unless the law of the forum provides otherwise."

Chapter 5. Challenges of Establishing an International Contract Practice

Chapters 3 and 4 have presented favourable conditions for the establishment of international contract practice through an international way of drafting contracts and transnational sources of law. Is the clear conclusion that the legal cultures are converging, and transnational sources and ways of contracting are emerging? Is this creating or has it created international contract practice? As I already alluded to in Chapter 2, the answer is not that simple. In fact, there are multiple reasons to discredit the argument that there is an emergence of international contract drafting, with the most prevalent being there are different approaches to contract interpretation in different legal traditions and jurisdictions. There may be globalisation and legal sharing of thoughts, but is this enough to create international practice?

5.1. Legal Traditions' Effects on International Contract Practice

Legal traditions are an expression of

> Deeply rooted, historically conditioned attitudes about the nature of law ... the role of law in ... society and the polity, the proper organization and operation of a legal system, and about the way law is, or should be made, applied, studied, perfected and taught. The legal tradition relates the legal system to the culture of which it is a partial expression. It puts the legal system into cultural perspective.[319]

One of the major challenges of establishing whether international contract practice exists is the examination of whether domestic legal cultures are in fact converging. From the point of view of formation of international contract practice, a major inhibitor is the influence of different legal traditions and jurisdiction on these contracts, especially through interpretation. As has been shown in the previous Chapters, international ways of contracting exist, and they take the form of common law concepts being utilised in transactions that may not be governed by a common law legal system. Some say that legal rules and concepts survive without their original connection to a particular legal system.[320] Others say that legal rules are given function and meaning through interpretation which is always subjective and shaped by the specific country, culture and mentality.[321] Finally, some would argue that new rules or clauses are a mixture of the original and current culture and so they function in a

[319] Merryman 1985, p. 2.
[320] Watson 1976, p. 81; Siems 2018, p. 236-237.
[321] Siems 2018, p. 238.

new and modified way.[322] The way that these clauses are received is reliant on ideological compatibility. So, if there is a compatibility of legal culture and system as well as policy objectives and values, the rule will take a similar role to the origin country or system.[323] Additionally, to a certain extent, national laws can be separated from the original legal culture so they do not bear the full burden of the original context and institutions.[324]

Historically, sharing of law and legal ideas has been very common between continental European countries. There may be some differences between the way the rules and clauses are interpreted but this is minimal. The transfer of legal rules between common and civil law is more recent and a result of globalisation.[325] This can take the form of transferring a principle such as good faith from civil law into British contract law through the European consumer Protection Directive 1994[326] or the increase of usage of common law contract concepts such as entire agreement clauses in commercial contracts.[327] The latter can be explained by the influence of Anglo-American contract drafting on international contracts due to the increase of international commerce. Ever since the Second World War, the US has also had an increasing influence in continental European law.[328]

For non-Western countries, Western countries have been a source of inspiration and exports of legal ideas. Colonialism has the most influence as civil and common law systems were imposed on many different countries and regions.[329] However, the transfer of legal ideas can also be voluntary such as Japan copying large parts of French and German codes between 1880 and 1922.[330] Ever since China shifted to the market economy, they have increasingly utilised US legal concepts.[331] Further, in terms of contract law, China adopted the CISG in 1988 which is largely based on Western style contract aw. Further, China harmonised its domestic and foreign contract laws in a Western fashion through the enactment of a new national contract law in 1999.[332]

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[322] Nelken and Feest 2001, p. 19.
[323] Peerenboom 2006, p. 833.
[324] Teubner 1998, p. 16.
[325] Siems 2018, p. 243.
[326] Unfair Contract Terms Directive implemented into UK law through The Unfair Terms in Consumer Contracts Regulations.
[327] Glenn 2008, p. 428; De Ly 2002, p. 466.
[328] Siems 2018, p. 243.
[329] ibid, p. 249.
[330] ibid, p. 253. This was limited to criminal law and procedure, civil law and procedure, commercial law and bankruptcy law.
[331] Kronke 2016, p. 223; Zhou and Siems 2015, p. 177.
[332] Jingen and DiMatteo 2016, p. 46. Chinese had already utilised concepts from western countries previously see Shiyuan 2014, p. 157.

Whenever legal transfers take place, certain issues arise, especially between Western and non-Western countries. Firstly, when a law is built by reference to multiple foreign sources, inconsistencies and gaps are inevitable.[333] Interpretation of these legal rules or contractual clauses in courts often resolves the gaps, but not necessarily without transforming the rule or clause so that it no longer resembles the original legal system's rule or clause. This can be considered an evolution of the rule or clause, however for the purpose of this thesis, it can also provide an argument to the lack of international contract practice. Secondly, transferring legal rules and contractual clause will sever the rule or clause from its former social, economic, and political context which will also create gaps and omissions.[334] This is especially prevalent in China as the Chinese courts have often failed to understand the conceptual scheme behind the transplant, which has led to significant differences to the original system.[335] Therefore, utilising a rule or clause without the original legal tradition in the background will lead to diverging results.

Thirdly, the choice of law can prove to be a problem for the establishment of international commercial practice. The reason choice of law interests us is not to answer the question of where to take a dispute when a conflict arises, but rather where can you take the dispute and which legal culture can influence the interpretation of the contract. The assumption of private international law is that international legal relationships are governed by national laws so its purpose is to identify the country which laws are applicable.[336] Granting preference to non-national sources and having this "uniform" law cover the full extent of the legal relationship could be ideal for the parties. However, any possible system of transnational law is far from exhaustive, systematic, easily ascertainable and uniformly applied which means that this is not currently possible.[337] Therefore, in most disputes national rules have to be consulted. As such, choice of law is important in international contracts and the parties must be aware of the choice's consequences on the interpretation of the contract.

Essentially the question comes down to interpretation and whether the same clause or rule has different outcomes. The possibility of different interpretation in different jurisdictions explains the detail in international contracts as the parties wish to detach it from governing law as far as possible. Interestingly, the idea of detaching contracts from the governing law

[333] Jingen and DiMatteo 2016, p. 49.
[334] ibid, p. 50-51.
[335] ibid, p. 52.
[336] Cordero-Moss 2008, p. 2.
[337] ibid, p. 2.

is not the purpose of common law contract law or the lengthy contracts. In fact, certain representations and warranties clauses are criticised by English lawyers.[338] Regardless, the issue is that the lengthy contracts and clauses which strive for self-sufficiency might not achieve what they set out to, especially in civil law jurisdictions as a result of the principle of good faith and fairness. Common law jurisdictions might also not utilise the exact literal interpretation that the international commercial actors aim for.[339] As a consequence of the different principles of interpretation, legal traditions undoubtedly have an effect on international contracts. As has already been alluded to and will be discussed in detail in this Chapter, it is not fully possible to detach international contracts from the influence of national jurisdictions. Therefore, international contracts will not have uniform effect in every single jurisdiction and this is the main inhibiter to the existence of international contract practice.

Lastly, I want to mention Westernisation in relation to convergence of law. The consideration of convergence of law of nations is not a good starting point for the contemplation of contract practice. The idea of convergence through internationalisation, globalisation and even Europeanisation can lead to the idea that countries have the objective of uniformization of law through the integration of their socio-economic structures.[340] This is greatly reliant on the assumption that international legal practice can exist without the diversity of legal systems and traditions. Of course, countries might be willing to adopt solutions from other countries to enhance trade, and in fact they have done so in the past with the CISG.[341] However, the assumption should not be that international contract practice can be found solely by looking at Western countries. Of course, parties from, for example, the US and EU might be in a stronger position to influence which clauses and legal rules, and legal system as a by-product, are utilised in international contracts.[342] However, the world does not only consist of these two large regions, and for this reason, it is imperative to consider the contract practice of a wide variety of countries and cultures as fragmentation of culture is not as evident on a regional level.[343] I have already brought forth the example of China as it is one of the major market powers in the world and it does not belong solely to the civil law or common law traditions. Therefore, by only looking at contractual

[338] Cordero-Moss 2014a, p. 13.
[339] Edwin Peel, 'The Common Law Tradition under English Law' in Cordero-Moss 2011, p. 129.
[340] Teubner 1998, p. 13.
[341] ibid, p. 13.
[342] Peerenboom 2006, p. 831.
[343] Teubner 1998, p. 13.

interpretation in civil law and common law countries would exclude large players in and influencers on international trade. Essentially what I am arguing is that even if convergence is observable, legal cultures and mentalities remain separate and unique.[344] This can be observed in comparing common law and civil law, but it is also obvious in comparing Western countries and non-Western countries.

5.2. Legal Traditions' Effects on the Interpretation of International Contracts

5.2.1. Hinderance to Self-Sufficiency

Despite the parties' ability to draft contracts in a detailed manner and to choose an applicable law, the contract they end up with still may not always have the result that the parties want. For example, if the contract has implications on an area of law where party autonomy is restricted by specific private international law rules (such as labour-, property- or insolvency law),[345] parties may not negotiate themselves all aspects of the legal relationship. Further, there can be rules which are applicable due to their overriding character (such as competition law) or because of public policy.[346] Even contracts that are drafted to be autonomous or standard contract are subject to governing law and cannot derogate from mandatory rules.[347] As an example, a contract between a Norwegian and a Ukrainian party containing an arbitration clause was considered invalid because the Ukranian party did not have the legal capacity to sign the contract according to Ukranian law. [348] The parties had chosen Swedish law and Swedish courts set the arbitral award aside as they determined that legal capacity is not subject to the choice of law of the parties, but the law of each of the parties. These are a few things that restrict party autonomy and could be considered a hinderance to the existence of international contract practice. However, I want to mainly focus on interpretation of contractual terms which can hinder party autonomy.

There is a misconception that commercial parties desire a flexible legal system where the interpreter would have the ability to adapt rules to the needs of the parties in that situation. In fact, legal practitioners aim for the predictability of a legal system and the objective application by the interpreter.[349] This can be explained by striving for certainty. The

[344] Teubner 1998, p. 14; Legrand 1997, p. 111.
[345] Cordero-Moss 2008, p. 4; Cordero-Moss 2014b, p. 48.
[346] Cordero-Moss 2008, p. 4; Cordero-Moss 2014b, p. 48. E.g., Case C-126/97 *Eco Swiss China Time Ltd v Benetton International NV* [1999].
[347] Cordero-Moss 2014a, p. 75.
[348] *State of Ukraine v Norsk Hydro ASA* (2007).
[349] Cordero-Moss 2014a, p. 30.

international way of drafting aims to permit the "harsh" effects of common law,[350] however, this might not always be possible as governing law has an impact on the interpretation. This might have the effect of restricting the contract's self-sufficiency, especially if the agreed terms or legal framework needs specification by external sources or may be interpreted in more than one way.[351]

A legal system's approach to interpretation greatly relies on the specific legal tradition and the jurisdiction's approach to contract law.[352] Civil law judges are viewed to have more power to evaluate fairness of the contract as they are guided by general clauses and principles such as good faith and fair dealing. Common law jurisdictions have legal techniques that can be viewed as reaching a similar result, however, common law courts still consciously strive for commercial certainty through strict interpretation. [353] In addition to civil and common law, we have mixed legal systems. Taking China as an example again. As already alluded to, China has taken steps to make their contract law friendly for international commerce in the past. However, China has a different social and legal system which means that Chinese courts may have prejudice on the outcome of litigation that departs from the approaches of civil law and common law countries.[354] It is clear that there are diverse legal systems which impact contractual interpretation, but the question is to what extent do these divergences affect international contracts. Answering this question will help to answer whether international contract practice exists.

5.2.2. Example: Good Faith

To illustrate how legal traditions can influence the interpretation of contracts, I have chosen two examples. The first is the principle of good faith. This principle is commonly utilised in civil law countries to impose a duty on parties in negotiations, but, depending on the country, it can also impact the interpretation of contractual clauses. In common law countries, parties are presumed to be able to assess the risk connected to the transaction. This means that the notions of good faith or fair dealing are not relevant as this would allow discretion on the interpreter which creates uncertainty.[355] This is undesirable in commerce. Civil law countries, on the other hand, utilise concepts of reasonableness, good faith and fair dealing

[350] ibid, p. 90.
[351] Cordero-Moss 2014b, p. 48.
[352] Glenn 2008, p. 427-428.
[353] Cordero-Moss 2014a, p. 87.
[354] Little and Webster 2012.
[355] Cordero-Moss 2007, p. 1.

in the interpretation of contracts which allows correcting unjust outcomes, but with the result of circumventing the literal interpretation of contracts. As stated previously, common law systems tend to exclude interference with contractual terms, in contrast to civil law systems.

The common intention of the parties is the starting point of interpretation in civil law countries, but the principle of good faith can influence the interpretation of the contract.[356] In Germany there is a general duty of good faith on the parties concerning the rights and interests of the other party[357] and this duty has been extended to the phase of negotiations.[358] German courts have also extended he principle to the interpretation of the contract.[359] The rule is aimed at filling the gaps that were left by the parties or preventing the exercising of a right that would bring unfair results or disturb the balance of interests that exists between the parties.[360] Italy has taken a more conservative approach. The will of the parties is interpreted based on the text of the parties[361] with the will being integrated through the conduct of the parties.[362] Balancing the parties interest through good faith is only possible if the other means of interpretation have not created clarity to the contractual relationship.[363] However, the Italian judge must pay attention to the general provision of good faith as well as the other principles of the legal system in the interpretation of the contract.[364] The Italian appreciation of the contractual text may lead to similar outcomes as in English law, but the principle of good faith might still be relevant to prevent unfair result. In civil law countries the interpreter is of course bound by clear language, but good faith may be invoked to interpret the contract or even to correct it.[365] The doctrine might function in different ways across civil law countries, but the main takeaway is that it can be used to balance the interests of the parties.

Likewise, the mutual intention of the parties is the starting point for interpretation in England and this intention is established based on the contractual document and wording. The parol evidence rule generally excludes the consideration of external circumstances for construing the contract. These approaches to contractual interpretation seek to enhance the

[356] E.g., Civil Code of Germany, § 157 and § 242; Act on Formation of Contracts of Norway, § 36; Civil Code of Italy, art 1337.
[357] Civil Code of Germany, § 242.
[358] ibid, § 311.
[359] ibid, § 157.
[360] Cordero-Moss 2007, p. 13.
[361] Civil Code of Italy, art. 1362-1371.
[362] ibid, art. 1362 CC.
[363] ibid, art. 1371.
[364] Cordero-Moss 2007, p. 18.
[365] ibid, p. 13.

predictability of commerce. The result of this is that the judge's role is to only interpret the contract and not to create the contract for the parties. The lack of the principle of good faith seems to indicate that there is no obstacle to literal implementation of contractual provisions as long as they are sufficiently clear.[366] Therefore, gap filling is only done when it is necessary for the business efficiency or the inclusion of the term is considered obvious.[367] This can even lead to upholding the wording of the contract, even in a situation which the court may recognise as unsatisfactory.[368] This approach seeks to uphold the freedom of the parties and restricting the liberty of negotiations does not really belong to a system that prioritises the economic aspects of transactions.[369] Therefore, a general principle of good faith cannot be allowed to have an overriding character on the actual contract. Rather, England utilises other techniques to prevent unfair situations such as the intervention of equity in unconscionable bargains, rules against the imposition of exemption clauses, and giving more consideration towards certain types of contracts.[370] The English approach is to not have a general principle, but rather have specific rules for specific situations.

In China, the principle of good faith was adopted as a doctrine with the reform of their contract law in 1999 and it poses an obligation on the parties to observe the general principle.[371] Chinese courts use the doctrine broadly to resolve different types of disputes such as filling in legislative and doctrinal gaps and excusing contract performance.[372] The doctrine is viewed as enforcing the traditional Chinese notions of morality and business ethics (the Confucian ideas), which is why it is used as a "catchall theory" for contract violations.[373] For example, this approach can be seen in the fact that Chinese courts take into consideration the implication of the interpretation of the contract on the society as large.[374] In contrast, for example, the US has been reluctant to recognise it as a general principle.[375] The US generally only requires good faith with regard to contractual performance and enforcement, but they construe it narrowly and the duty does not exist prior to the formation

[366] Cordero-Moss 2008, p. 25.
[367] *Phillips Electronique, Grand Publique S.A. v B.S.B Ltd*. [1995].
[368] E.g., in *Lombard North Central plc v Butterworth* [1987]; *Goodlife Foods Limited v Hall Fire Protection Limited* [2018]; *Stuart v Wilkins* (1778).
[369] Cordero-Moss 2007, p. 9.
[370] See Bringham LJ in *Interfoto Picture Library Ltd. v Stiletto Visual Programmes Ltd.* [1988], p. 615.
[371] Leonhard 2010, p. 305; Contract Law of China, arts. 6, 42, 60, 92, 125.
[372] Leonhard 2010, p. 310. E.g., *Zhong, Chongqing v Shanghai City Jin Xuan Da Di Real Estate Project Development Company Contract Dispute* (2007); *Gu, Jun v Shanghai Transportation Bank Savings Account* (2004).
[373] Leonhard 2010, p. 310, 317, 326.
[374] Novaretti 2010, p. 970.
[375] ibid, p. 307.

of the contract.[376] The principle may be used in gap filling, but only if specific obligations are not spelled out.[377] So in the US, the parties can enforce specific terms to the extent they were spelled out without being subjected to good faith requirements. Likewise, China allows good faith to guide interpretation of contracts if the language is ambiguous, but they also go further and require that parties observe it in bargaining, offer and acceptance, and it may be used to adjust the contract. The Chinese courts may be seen as taking a more civil law approach to good faith, but they might also go even further by imposing the interests of the society as a whole on the contractual relationship as a result of the socialist influence on their legal system.

The principle of good faith has also been transferred into different restatements of principles of contract law such as UNIDROIT PICC[378] and PECL.[379] Good faith is given a central role in the PICC and PECL and a restricted role in the CISG, but there is still uncertainty as to its scope in the correction or adjustment of contracts.[380] Its importance can be a problem because an interpreter from a legal tradition that has a strong principle of good faith might consider interference necessary if a literal application would disrupt the balance of interests between the parties. On the other side, an interpreter from a tradition where good faith does not exist as a general principle, the wording of the contract indicates that the parties considered possible risks and fairness consists of an accurate interpretation of the contract.[381] This leads to the unsatisfactory outcome that the two interpreters have fundamentally different starting points to the interpretation of the contract. Further, the restatements do not give a precise standard of good faith that could be applied uniformly, even if they might have it in an important role for the interpretation of contracts.[382] This uncertainty cannot be solved by looking at national systems as the instruments are to be interpreted without reference to national systems of law. The effect of the transnational sources could be that an English lawyer would have to adapt their drafting style to fit a system that focuses on fairness,

[376] *Empire Gas Corp v American Bakeries Co*., p. 1339; *Birt v Wells Fargo Home Mortgage, Inc.* (2003), p. 650.
[377] *Inc. v First Bank Whiting* (1990), p. 1357; *Empire Gas Corp v American Bakeries Co.* (1988), p. 1338-1339.
[378] PICC, arts. 1.7, 4.8, 5.1.2, 5.3.3 and 5.3.4.
[379] PECL, arts. 1:102, 1:106, 1:201, 1:302, 1:305, 2:301, 4:103, 4:107, 4:109, 4:110, 4:118, 5:102, 6:102, 6:111, 8:109, 11:204, 11:308 and 16:102.
[380] Cordero-Moss 2007, p. 27; Cordero-Moss 2014a, p. 43. The CISG is silent on good faith as a conscious decision taken during drafting.
[381] Cordero-Moss 2014a, p. 45.
[382] ibid, p. 29; Cordero-Moss 2014b, p. 56.

whereas civilian lawyers might need to draft with the assumption that the sources focus more on predictability than their systems.[383]

As already stated, international contracts are largely based on the common law style, where adjustments to contracts are not expected which has led to detailed contracts. Therefore, there can be tension between the detailed contract and the rules belonging to the governing law. In relation to good faith, the contract may be drafted based on a structure which does not recognise the principle, but rather focuses on literal interpretation of contracts.[384] Civilian interpreters tend to have wide berth in the interpretation of contracts as a result of the principle of good faith, which can be seen as contradicting the self-sufficient and exhaustive purpose of the international contract.[385] Civilian judges could utilise good faith to extend the contract, fill gaps and even correct it. This approach is also shared by Chinese courts. Common law judges on the other hand are more likely to interpret clear contractual terms literally, even if this does not always lead to satisfactory results. It is unclear whether transnational sources would allow the disregarding of clear wording.

5.2.3. Example: Entire Agreement Clauses

My second example is the interpretation of entire agreement clauses. As already stated, the purpose of the entire agreement clause is to isolate the contractual document from extrinsic evidence.[386] The right to limit evidence is supported by party autonomy, but legal systems might provide obligations either as a result of the contract type, the general principle of good faith or preventing abuse of rights which limits this autonomy.[387] As such, depending on the governing law concerned, some obligations cannot be excluded from the contract. In addition, many civil law systems permit pre-contractual material for the interpretation of the written terms.[388]

English courts tend to prefer the strict or narrow interpretation of entire agreement clauses. However, some consideration is given to the evaluation of the objective mutual intention of the parties, as in the intention a reasonable person would have if they were in the same

[383] Cordero-Moss 2007, p. 34.
[384] Cordero-Moss 2007, p. 20.
[385] Cordero-Moss 2014b, p. 57.
[386] ibid, p. 54.
[387] Cordero-Moss 2014a, p. 91.
[388] Gustaf Möller, 'The Nordic Tradition: Application of Boilerplate Clauses under Finnish Law' in Cordero-Moss 2011, p. 254-258; Ulrich Magnus, 'The Germanic Tradition: Application of Boilerplate Clauses under German Law' in Cordero-Moss 2011, p. 179-182.

circumstances at the time of entering the contract.[389] To some extent, the facts are contextualised, and the contract is interpreted in the light of sensible commercial actions and the reasonable conduct of businessmen in that specific context. However, English judges are not very willing to deviate from the plain meaning of the words as the judges are meant to identify 'the natural and ordinary meaning of the words which the draftsman has used'.[390] For example, English law rarely allows the consideration of pre-execution negotiations[391] or performance post-execution.[392] The starting point is the written contract with an express statement usually being decisive. On occasion the clause is only viewed as one piece of evidence and other evidence may be brought forth, but this is quite rare.[393]

The US has seen similar developments with the entire agreement clause being considered a major indication of the intent of the parties.[394] However, the US has also drawn a distinction between individually negotiated contracts and B2B and B2C contracts.[395] As already shown, international contracts are becoming increasingly standardised which means that a party may lack awareness as to the meaning of certain provisions. Therefore, the distinction between individually negotiated contracts may lead to a case where the entire agreement clause is considered unconscionable. On occasion, the US courts only consider the entire agreement clause as one piece of evidence, as the interpretation of contractual provisions is done in the context of the agreement as a whole.[396] So, boilerplate clauses cannot be interpreted in

[389] *Pioneer Shipping Ltd v BTP Tioxide Ltd* [1982]; *Prenn v Simmonds* [1971]; *Investors Compensation Scheme Ltd v West Bromwich Building Society* [1998].
[390] *Breadner v Granville-Grossman* [2001], p. 536. However, in *Haywood v University of Pittsburgh* (2013), p. 606 it was stated that the exclusionary purpose of evidence is different to the interpretive guidelines of judges so interpretation can potentially still take place even with the existence of the clause. See Mitkidis and Neumann 2017, p. 189 for explanation of the evidentiary purpose and the distinctions made by English courts between different types of evidence and De Ly 2000, p. 756: "entire agreement clauses… exclude extrinsic evidence to establish contract terms that contradict or add to written terms but generally do not intend to affect the meaning to be given to contract terms where these terms are ambiguous or to rule on the filling of contractual gaps."
[391] *Prenn v Simmonds* [1971]; *Chartbrook Ltd v Persimmon Homes Ltd* [2009].
[392] *L. Schuler AG v Wickman Machine Tool Sales Ltd.* [1974], p. 252.
[393] In *Orth-O-Vision, Inc. v Home Box Office* (1979) the clause was considered to create a presumption of intention and in *AXA Sun Life Services Plc v Campbell Martin Ltd and Others* [2011] the express statement was decisive, but in *Betz Laboratories, Inc. v Hines* (1981) and *Seiden v American Express Co.* (1981) the clause was just a part of the interpretation. Contractual provisions are interpreted in the context of the agreement as a whole as provided in *Wood v Capita Insurance Services Limited* [2017]. Therefore, boilerplate clauses cannot be interpreted in isolation and terms can still be implied into contract if there is an obvious gap as provided in *Hipwell v Szurek* [2018] and *NF Football Investments Ltd v NFCC Group Holdings Limited* [2018].
[394] *Haywood v University of Pittsburgh* (2013).
[395] E.g., the Uniform Commercial Code of the US, s. 1-304 contains a federal obligation to conduct agreements in good faith.
[396] *Orth-O-Vision, Inc. v Home Box Office* (1979) (merger provision creates presumption of intention) c.f. *Betz Laboratories, Inc. v Hines* (1981); *Seiden v American Express Co.* (1981) (entire agreement clause just part of the interpretation). See also *Wood v Capita* [2017]: *Hipwell v Szurek* [2018]; *NF Football Investments Ltd v NFCC Group Holdings Limited* [2018].

isolation if there is an obvious gap. Yet, given that the entire agreement clause stems from the parol evidence rule means that the US still considers its examination as an evidentiary question and the starting point for contractual interpretation is the written contract.[397] Therefore, express statements are usually the determining factor in US courts.

With the rise of internationalisation, international contracts have also become subject to or influenced by international instruments. In terms of entire agreement clauses, the CISG does not contain specific evidence rules, but the Advisory Council has said the following: "if the parties so intend… [an entire agreement clause may] bar evidence of trade usages. However, in determining the effect of such a [clause], the parties' statements and negotiations, as well as all other relevant circumstances shall be taken into account." The PECL follows on similar lines and considers that unless the clause is individually negotiated, there is only a presumption that prior statements, undertakings and agreements are not part of the contract.[398] Further, the PECL allows the admittance of evidence that is contrary to the written text.[399] The UNIDROIT PICC have a slightly lower threshold and provides that evidence may be admitted for the purpose of interpreting the written text even if an entire agreement clause exists.[400] These international sources have clearly taken a more inclusive view on evidence which means that it is for the party relying on the clause to prove that the intention of the clause was to exclude pre-contractual evidence.

The international sources can be seen more rooted in the civil law perception of entire agreement clauses. As an example, I consider Finland. The concept of entire agreement clauses has been inserted into the country through the practice of commercial parties, and so it is not surprising that transnational principles might be looked at in their interpretation in the jurisdiction. The starting point for interpretation is the common intention of parties. Finnish law does not allow the exclusion of the duty to disclose information, however an entire agreement cause may minimise the effects of pre-contractual conduct on interpretation. This is especially the case if the issue can be expected to be regulated in the contract.[401] Further, the clause may prevent gap-filling if it is not required for the functioning of the contract. However, unreasonableness or unfairness may justify the amending or

[397] *AXA Sun Life Services Plc v Campbell Martin Ltd and Others* [2011].
[398] De Ly 2000, p. 758.
[399] PECL, art. 2.105.
[400] PICC, art. 2.1.17.
[401] Gustaf Möller, 'The Nordic Tradition: Application of Boilerplate Clauses under Finnish Law' in Cordero-Moss 2011, p. 256.

disregarding the agreed terms.[402] The entire agreement clause is considered binding from the get go and applied broadly under the principles of contract law. Therefore, even if there are extenuating circumstances that would require the setting aside of the clause, it may still have a limited effect given that the original intention of the parties is fairly determinative.[403] That being said, the Finnish courts are still more receptive to considering the circumstances of the case and the environment that the clause was drafted in, for example whether the clause was brought into the attention of the other party, was it drafted by one side, and whether the parties are sophisticated contracting parties.[404] Essentially, the Finnish courts give relevance to the contractual language but still give consideration towards circumstances and the expectations of parties. Departing from the plain meaning of the contract terms is possible in case of unconscionability.

Finland provides an interesting example as it has more restrictive interpretation than some other civil law systems. Danish courts sometimes give the entire agreement clause full effect, but sometimes it is considered invalid.[405] Indeed, "Danish judges are often unwilling to or not able to rely on strict formal statutes as these are very limited and even when they are available, judges generally do not feel strictly bound by the wording of such statutes."[406] Danish courts often give priority to the likely expectation of the parties in the specific dispute which can be seen as diverging from the common law effects and intentions behind the entire agreement clause.[407] The Danish courts do not want to be confined by strict formalistic rules.[408] Norwegian courts have taken a similar approach to entire agreement clauses. They usually place a heavy burden of proof on a professional party if they want to contradict the wording of the contract as they are considered to have the required knowledge for contracting.[409] However, the Norwegian courts also utilise logical inference in the interpretation of the intention of the countries. The entire agreement clause will prevent

[402] ibid, p. 257; Finnish Contracts Act, art. 36.
[403] De Ly 2002, p. 467.
[404] KKO 2001:34; KKO 2009:45.
[405] E.g., *Sandrew Metronome International v Angel Scandinavia*, Danish Supreme Court, SH2005.H-0132-02; *Rotate Avation v Air Kilroe*, Danish Supreme Court, SH2012.H-0011-11.
[406] Mitkidis and Neumann 2017, p. 197.
[407] ibid, p. 204.
[408] Peter Møgelvang-Hansen, 'The Nordic Tradition: Application of Boilerplate Clauses under Danish law' in Cordero-Moss 2011, p. 234.
[409] E.g. Norwegian Supreme Court in Rt. 2005.268, Rt. 2002.1155, Rt. 1998.1584 and Rt. 1994.581.

supplementation if it is not required for the functioning of the contract.[410] Similar approaches can be seen in France,[411] Italy[412] and Russia.[413]

In terms of China, standard terms may be used in Chinese contracts, provided that the party supplying those terms observes the principles of good faith and fairness.[414] This includes an obligation to bring the clause into the other party's attention.[415] The term is interpreted in accordance to the way it is commonly understood, but against the party supplying the term if there are more than one interpretation.[416] Boilerplate clauses can pose problems as Chinese counterparts in negotiations may not share a similar understanding of the concepts or assumptions that underpin the clauses. It is likely to have to spend more time negotiating all the miscellaneous clauses of the contract than the core operative clauses.[417] Further, entire agreement clause may be subject to adjustment in interpretation based on good faith as the Chinese courts have taken a broad approach to the principle.[418] The Chinese courts also take into consideration the implication of the interpretation on the society as large, so the courts are not only concerned with balancing the interests of the contractual parties.[419] It seems that the Chinese courts have discretion to rectify what it perceives as unfair especially in relation to boilerplate terms. For this reason, it seems that Chinese courts would be receptive to considering extrinsic evidence even if an entire agreement clause is included in the contract. They might also be more willing to interfere with the contract and the clause given that the court must take into account societal considerations and they might not share a similar understanding of the purpose of the clause as their common law, or even civil law, counterparts.

The main difference between the common and civil law approaches is that the Anglo-American jurisdictions consider the interpretation of the entire agreement clauses to be an evidentiary question whereas Finland (and other civil law countries) approach it as a substantive question. Finland seems to be willing to limit the material for the interpretation

[410] *Pepsico*, Norwegian Supreme Court, Rt. 1992.796; Viggo Hagstrøm, 'The Nordic tradition: application of boilerplate clauses under Norwegian law' in Cordero-Moss 2011.
[411] See Lagarde, Méheut and Reversac, 'The Romanistic tradition: application of boilerplate clauses under French law' in Cordero-Moss 2011, p. 210-226.
[412] Giorgio De Nova, 'The Romanistic Tradition under Italian Law' in Cordero-Moss 2011.
[413] Ivan Zykin,' The East European Tradition under Russian Law' in Cordero-Moss 2011.
[414] Hsu 2007, p. 128-129; Chinese Contract Law, arts. 39-41.
[415] ibid.
[416] ibid, art. 41; *Huizhou TCL Jinneng Battery Co., Ltd. v Huizhou Shitong Communications Co., Ltd. re Product Distribution Contract* (2002).
[417] Lewis 2008, p. 40.
[418] Leonhard 2010, p. 310, 317, 326.
[419] Novaretti 2010, p. 970.

of the contractual text, but not material that is outside the contractual matter, for example, the consideration of circumstances.[420] The full exclusion of all extrinsic evidence is unlikely as the civil law tradition gives substantive weight to proof of intention and expectation.[421] In terms of China, boilerplate contract terms are subject to ideas of fairness and consider the clause's implication to the society as a whole, and this includes entire agreement clauses. The use of good faith in contract interpretation is also common in civil law countries and this may lead to adjustments of the clause based on fairness. However, it should still be noted that the clause has an important effect as the contract is considered to contain the intention of the parties and it will have a significant influence as evidence.

Entire agreement clauses, and the principle of good faith, show that the common law drafting techniques might be met with legal reasoning emanating from different legal cultures or international principles.[422] Therefore, the contractual parties need to consider the principles of interpretation of the governing law (as well as mandatory provisions) as the entire agreement clause might have different effects in different jurisdiction. The interpretation of the entire agreement clause and the doctrine of good faith show that "the same wording, in combination with different governing laws, may lead to dramatically different results."[423] The doctrine of good faith and entire agreement clauses have evolved differently in the jurisdictions because of fundamental cultural and political differences in the countries presented.[424] Of course, it is possible that the different courts reach a similar result, but given that they have drastically different approaches to contractual interpretation, there is still a high risk of divergent interpretation. This can be traced to the influence of national legal systems on contracts that have an international character.

5.3. Legal Traditions' Effects on Arbitration

Arbitration is said to be more flexible than ordinary courts which raises the question of whether the problem of divergent interpretation can be off-set by choosing arbitration as the dispute resolution mechanism. International commercial parties commonly utilise arbitration as the means of dispute resolution. This can be seen as limiting the influence of national jurisdictions through interpretation. The parties' expectation of self-sufficiency can be met

[420] Mitkidis and Neumann 2017, p. 200, 205.
[421] Smyth and Gatto 2018, p. 24; Johnston 1995, p. 1519.
[422] Lars Gorton, 'The Nordic Tradition: Application of Boilerplate Clauses under Swedish Law' in Cordero-Moss 2011, p. 300.
[423] Cordero-Moss 2014a, p. 24.
[424] Leonhard 2010, p. 324.

if the arbitral tribunal gives full effect to the will of the parties and the arbitral award is complied with. The New York convention together with the UNICITRAL Model Law gives a central role to the will of the parties.[425] Therefore, arbitration can be viewed as upholding the contract more accurately. In fact, the problem of divergent interpretation is fairly limited in situations where arbitration is decisive.

The problem of divergent interpretation becomes a reality if the arbitral award is invalid or unenforceable.[426] The previously mentioned New York Convention requires national courts to recognise and enforce arbitral awards without review of the merits or of the application of law with only an exhaustive list of grounds to refuse recognition and enforcement.[427] However, there are still multiple grounds where an arbitral award may be refused such as public order.[428] In a situation where the award may be invalidated, domestic courts can "impose" their own interpretation on the case. As such, there is still a possibility that arbitration does not detach the contract from the influence of national law. Further, it should be noted that the New York Convention and the UNICITRAL Model Law both refer to national, non-harmonised legislation.[429] Arbitration is still bound to the arbitration laws of the place of arbitration, as the award is open to annulment proceedings if the parties do not correctly apply the conflict of laws provisions, and these laws are not uniform and can diverge quite significantly.[430] The international framework is therefore, still subject to national law.

In addition, the arbitrators might internalise the influence of legal systems which can influence their approach to the interpretation of contractual terms.[431] This should be understood in interpretation, given that self-sufficiency might not be maintained by the arbitral tribunal to the extent that the parties would want, even if the arbitrators are not confined to national standards of interpretation. There is no guarantee that the interpretation is faithful to the intention of the parties even if they follow the parties' instructions. The degree of literal interpretation may vary as the arbitrators still have to interpret the importance of clauses based on commercial meaning and the awareness of the parties as to

[425] See Section 3.2.3.
[426] Cordero-Moss 2014b, p. 48.
[427] New York Convention, art. 5.
[428] See Cordero-Moss 2014a, p. 227-257.
[429] Cordero-Moss 2014a, p. 126.
[430] Stefan Kröll, 'Arbitration and the CISG' in Schwenzer 2014, p. 65; Cordero-Moss 2014a, p. 217, 221, 224-225.
[431] Cordero-moss 2014a, p. 129.

the effects of the clauses.[432] Of course, the primary means of interpretation is based on the terms agreed by the parties, in order to foster predictability and objectivity, as well as in light of the parties' interests and trade usages.[433] However, different arbitrators might still reach a different outcome.

The possibility of different outcomes is also possible, because perfect contracts are nearly impossible to achieve, as previously illustrated. If the parties have chosen the applicable law of the dispute to be a national law,[434] arbitration does not prevent different outcomes as the effects of legal traditions are still observable. Arbitral tribunals can consider the contractual terms exclusively, but they might find that these terms are not sufficient for the basis of their decisions, and as such they must look to other sources for guidance.[435] This essentially means looking at the applicable legal systems to aid in the interpretation of contractual terms which are not self-explanatory. The examples of good faith and entire agreement clauses are therefore relevant even if the chosen dispute mechanism is arbitration. Utilising arbitration is not enough to correct the divergence of interpretation, as the contracting parties almost always choose national law as the applicable law, the arbitrators must still apply law correctly, and the arbitrators might have internalised a jurisdiction's approach to law and interpretation. So clearly legal traditions can influence the approach to interpretation in national courts as well as in arbitration.

5.4. Transnational Sources of Law: An Inadequate Solution

The main issue I have noted to the establishment of the existence of international contract practice is the possibility of divergent interpretations of contractual clauses in ordinary courts and arbitral tribunals. This problem can be traced to the choice-of-law. The choice of governing law is important as the parties are undoubtedly trying to avoid unfamiliar laws and unintended consequences of those laws. However, as presented, this choice will influence the way that a contract is interpreted which means that international contracts will not have uniform effect. One suggested way of avoiding the influence of national jurisdictions is by relying on international principles. These principles have arguably helped to unify international contract practice, but can they off-set the influence of national jurisdictions?

[432] ibid, p. 127.
[433] ibid, p. 129.
[434] Parties seldom choose non-national laws as the governing law of the dispute see Cuniberti 2013, p. 369.
[435] Cordero-Moss 2014b, p. 55.

5.4.1. Interpretation of Transnational Sources

Divergent interpretation might not be very problematic with transnational sources of law, especially under the CISG, as extensive case law and guidance have been produced on its application. The possible divergence of common law and civil law jurisdictions was even taken into consideration in the drafting of the CISG, with the drafters seeking a balance between the contrasting attitudes and concepts.[436] The CISG does allow states to opt-out of certain provisions which in turn means that it is up to the national courts to determine the effects on contracts.[437] This ability to opt-out might be viewed as enabling a wider uniformity through encouraging wider adoption of the Convention, but it can also be seen as creating divergence even under an uniform instrument.[438] In addition, not all countries are signatories to the CISG. However, nine out of ten largest export and import states are contracting parties, with the exception of the UK.[439] Some conclusions have been made as to what this means: approximately 80% of international sales contracts are governed by the CISG unless parties opt-out.[440] This indicates that the CISG has a wide impact and countries opting-out of certain provisions is not enough to discredit its effect.

The rules of the CISG are in force as domestic law, but interpreting in the light of domestic rules of interpretation would carry a risk of divergent interpretations. This is problematic because uniform law instruments can only fulfil their function if they are applied uniformly in contracting states.[441] Therefore, the CISG has an obligation that it must be interpreted autonomously and with consideration towards its international character.[442] This means that relevant previous decisions by courts or arbitral tribunals should be taken into account.[443] Following precedent creates uniformity, but it is also possible that it creates problems. Such problems include the burden of finding cases from other countries, language barriers, and perhaps even lack of understanding of the rationale of the interpretation. With the CISG these problems have been attempted to be off-set through databases and collections of decisions, CISG Advisory Council opinions, and different commentaries.[444] Given that the

[436] Goode 1995, p. 927.
[437] CISG, arts. 92-96.
[438] See Schtoeter 2015, p. 203.
[439] World Trade Organization, 'International Trade Statistics 2011', p. 24 available at WTO Trade Statistics 2011.
[440] Schwenzer and Whitebread 2014, p. 8.
[441] Roth and Happ 1997, p. 700.
[442] CISG, art. 7.
[443] Roth and Happ 1997, p. 709.
[444] E.g., through UNILEX Database created by the Center for Comparative and Foreign Law Studies; UNICITRAL CLOUT. See also Jingen and DiMatteo 2016, p. 49.

CISG does not present an autonomous legal system, there is no final instance ruling on issues that might arise on uniform interpretation and application which does create a small danger that domestic courts might decide identical issues differently.[445] However, the main issues of the CISG can be considered settled, domestic courts are increasingly utilising databases and look at case law on the CISG's application, and the CISG contains many interpretive principles that can be looked to.[446] Given the positive aspects of the CISG (neutrality, cost saving and uniformity) and the limited divergent interpretation, the CISG can be viewed as creating uniform application of contract law which could off-set the influence of national legal systems. In turn, the argument that international contract practice cannot be said to exist due to the influence of national jurisdictions on international contracts would be moot.

With other transnational sources, there are greater risks of divergent interpretation and application given that the interpreter's discretion is still applicable to a certain extent.[447] However, the main problem of interpretation can be found in the fact that none of the transnational sources, including the CISG, represent a complete legal system. Therefore, they cannot be applied as the governing law of a contract. These international sources are not sufficiently precise to answer questions on function of contract, the interpreter's role, duty of loyalty, duty of good faith and so on.[448] In terms of PECL, DCFR and CESL, they attempt solve these issues by referring to good faith, but as can be seen in the previous section, a sufficiently precise or uniform legal standard of good faith does not exist internationally. Of course, transnational sources can also be used to supplement national law such as in the cases of ICC's published INCOTERMS which allocates obligations between buyer and seller concerning transportation and insurance.[449] However, the scope of these instruments do not concern. among other things, the validity of contract or negligence. These tools are useful to complement governing law as they can be incorporated into the contract by parties and they do not violate mandatory rules.[450] However, with all of these transnational sources, the inability to utilise them as applicable law is more prominent for the purpose of this thesis.

[445] Pascal Hachem, 'The CISG as Transnational Rules – Framework and Use in Practice' in Schwenzer and Whitebread 2014, p. 30.
[446] ibid, p. 30; CISG, art. 7. See also Ingeborg Schwenzer, 'Interpretation and Gap-Filling under the CISG' in Schwenzer and Whitebread 2014.
[447] Cordero-Moss 2008, p. 6.
[448] Cordero-Moss 2014a, p. 29.
[449] ibid, p. 38.
[450] ibid, p. 41.

5.4.2. Transnational Sources as Applicable Law

International sources of law can be described as more adequately reflecting the wills and ideas of commercial parties operating in the international sphere. It might be in the best interest of international parties to choose the sources as the governing law of a contract.[451] Having exclusive application of transnational legal principles would detach the contract from domestic laws and principles such as good faith and fair dealing, thus, allowing arbitral tribunals a less rigid application of law.[452] This is also one of the attractive qualities of arbitration as the parties would have more control over the contract. Arbitration might be able to give effect to the contract without having an obligation to comply with some peculiarities of the applicable law. However, it seems that contracting parties rarely choose international principles to govern their contracts and rather choose national law.[453] This can be explained by the fact that there are no real alternatives to state law.[454] Given that contractual terms are not self-explanatory, they must be interpreted in light of the applicable legal system[455] and this legal system currently cannot be a transnational source of law.

Some soft law instruments are noteworthy because they advocate international law as choice-of-law. In terms of transnational sources of law, parties enjoy autonomy as to choosing their applicability but this is largely limited to arbitration as domestic courts are not (generally) allowed to apply transnational commercial law.[456] There is some confusion as to the extent that private international law rules permit parties to choose soft law instruments as governing their contract in lieu of a domestic legal system. In terms of arbitration the answer seems to be yes, but domestic courts limit this freedom of choice to domestic law.[457] As an example, the EU considered the possibility of allowing parties to choose internationally recognised principles and rules for the substantive law. [458] This would have excluded *lex mercatoria* as it is not considered precise enough and some private forms of codifications that do not enjoy recognition while allowing, for example, PICC or PECL

[451] di Brozolo 2012, p. 862.
[452] Berger 2014, p. 529.
[453] See Cuniberti 2013, p. 369.
[454] Cordero-Moss 2014a, p. 28.
[455] Cordero-Moss 2014b, p. 55-56.
[456] Berger 2014, p. 526; Benell 2008, p. 22. However, certain recognition regionally of transnational sources of law have taken place see Inter-American Convention on the Law Applicable to International Contracts, art. 9(2): ""The Court will take into account all objective and subjective elements of the contract to determine the law of the State with which it has the closest ties. It shall also take into account the general principles of international commercial law recognized by international organizations.".
[457] Bonell 2008, p. 22; Bonell 2009.
[458] Commission 2005, p. 14.

as choice-of-law.[459] The EU did not include this possibility in the final version of Article 3(2) of the Rome I Regulation because

> [T]o permit selection of the Principles of International Commercial Contracts as the applicable law raises an issue of legitimacy, for its effect would be to enable the parties to displace the domestic mandatory rules of the forum State by a set of rules in the preparation of which neither business interests nor governments were involved and which were not subject to any legislative scrutiny.[460]

As of now, the Rome I Regulation requires that non-state law are incorporated as contractual provisions by the parties, but the contract will still be governed by the chosen domestic law.[461] Due to contractual freedom it is possible for the parties to incorporate any transnational sources into their contract and this can even include an obligation on state courts or the arbitral tribunal to interpret the provisions in accordance to the chosen instrument. However, the contract will still be interpreted in accordance to the applicable law's legal system.

Additionally, it is hard to place the transnational principles (so not uniform legal instrument) within the category of traditional sources of law. For example, the UNIDROIT PICC is not a treaty, compilation of usages or standard terms of contract.[462] They are a manifestation of transnational law, but there is a lot of scepticism as to whether transnational law actually exists.[463] Even in a regional sphere, transnational sources of law are dismissed as applicable law and the domestic courts are not tied by the principles of these international instruments (with the exception of CISG if the country has implemented it). The PECL is a fairly comprehensive codification but it lacks legal basis for being considered binding, especially when it does not comply with mandatory rules of national laws.[464] As already stated, the major issue is that these sources do not constitute an exhaustive body of rules.[465] Of course, internal gap filling is possible as these are self-contained systems of principles and rules so solutions for new issues can be deduced.[466] For example, the gaps within the PICC are

[459] Berger 2014, p. 526.
[460] Goode 2005, p. 545.
[461] Rome I Regulation, preamble para. 13: "does not preclude the parties from incorporating by reference into their contract a non-State body of law or an international convention"; Berger 2014, p. 527.
[462] *Joseph Charles Lemire v. Ukraine*, ICSID Case No. ARB/06/18, para. 109.
[463] E.g., *Société Pabalk Ticaret Limited Sirketi v Société Norsolor*, Vienna Court of Appeal Decision, p. 514: "world law of questionable validity".
[464] Cordero-Moss 2014a, p. 61.
[465] Berger 2014, p. 529; Ferrari 2013, p. 187; Vogenauer and Kleinheisterkamp 2009, preamble para. 46; Schlechtriem and Schwenzer 2010, art. 7 para. 27; Cordero-Moss 2014a, p. 69-70.
[466] Schlechtriem and Schwenzer 2010, art. 7 para. 30; CISG, art. 7(2); PICC, art. 1.6(2); Berger 2014, p. 529.

"settled in accordance with their underlying general principles".[467] However, there are also gaps that are outside the scope of these sources. For example, the PICC does not deal with the lack of capacity of the contracting party[468] and the CISG does not deal with property law issues arising on the property the goods are sold.[469] Further, there can be conflicts with overriding mandatory rules.[470] It is possible for the parties to expressly provide that external gaps are filled by, for example, generally accepted principles of international commercial law,[471] thus, excluding domestic laws in this respect. However, these types of considerations are uncommon and would require long and expensive negotiations. In addition, if a contract has implications beyond contract law (such as with property law, company law or insolvency law), party autonomy and their choice-of-law is not decisive. In these types of situations specific conflict rules are decisive[472] which means looking at national law.

Lastly, transnational sources do not always give uniform solutions to the interpretation of contracts. We can take the previous examples entire agreement clauses and good faith as an example again. You can find that entire agreement clauses are recognised in the PICC[473] and PECL,[474] however, they also specify that prior statements or agreements can be used to interpret the contract. This is a similar view to that of civil law countries. However, the conventions also specify that a party cannot act inconsistently to reasonable expectations that the party has created as a result of their conduct.[475] This would indicate that extensive discussions in negotiations on certain aspects could create reasonable expectation so their exclusion could be deemed to be against good faith even if they were not actually included in the contractual text. On the other hand, the whole purpose of entire agreement clause is to exclude terms that were not included in the contract and it indicates the intention to not be bound by these negotiations.[476] Given that the PICC and PECL have not specified what the principle of good faith means, there can be a gap in the interpretation. In fact, cases which

[467] PICC, art. 1.6(2). For the principles see e.g., art. 1.7 (good faith); art. 1.1 (freedom of contract); art. 1.3 (*pacta sunt servanda*); art. 7.3.1 (*favor contractus*); arts. 1.9(2), 2.2.5(2), 3.3.2(1), 4, 5.1, 7.2.2 and 7.3.1(2)(a) (reasonableness); art. 5.1.3 (cooperation in good faith).
[468] PICC, art. 3.1.1.
[469] CISG., art. 4(b).
[470] PICC, art. 1.4.
[471] E.g., ICC Model International Franchising Contract, art. 32A and ICC Distributorship Contract, art. 24 available at ICC Model Contracts; PICC, preamble para. 3.
[472] Cordero-Moss 2014a, p. 63.
[473] PICC, art. 2.1.17.
[474] PECL, art. 2:105.
[475] PICC, art. 1.8; PECL, art. 2:105(4).
[476] Cordero-Moss 2014b, p. 59-60.

have interpreted the PICC have shown diverging approaches: primacy of the contractual text or primacy of the real intentions of the parties.[477]

If international instruments are relied upon by contracting parties, they could contribute to the reconciliation of the differences between legal systems as long as the parties are exclusively referring to international law, general principles of law, or customary usages. [478] As I have discussed previously, it might appear that there is some support to the idea that transnational sources of law have created a uniform system. However, the existence of the rules is not enough to state that they give adequately precise guidance on the interpretation of contracts. These instruments lack clarity and necessary technical details and they do not present a complete legal system.[479] As a result, applicable rules and principles and guidance on interpretation of contracts are found under national laws. Transnational sources of law might be contributing to the convergence of approaches to contract law, but they cannot fully off-set the influence of national jurisdictions as they cannot be the sole source for contractual interpretation. Therefore, choosing transnational sources as the governing law does not fix the issue of divergent interpretation.

5.5. Defining "International Contract Practice"

What can be concluded from everything I have said is that legal systems still have very distinctive interpretation of contracts. This can lead to divergent interpretation of contractual provisions and utilising arbitration or transnational sources as the applicable law are unable to rectify this. Yet, international commercial actors have a distinct way of contracting. Therefore, the question becomes whether the first sentence prevents the existence of contract practice which would be based on the second sentence?

Law can emerge outside the confines of domestic legal systems through self-regulation, co-regulation, standardisation of contracts and development of codes of conduct.[480] Legal development is not only legal but social, economic, political and cultural.[481] The problem is that "[i]f the alternative is less than a uniformly applied and exhaustive law, the result is a

[477] Giuditta Cordero-Moss, 'Does the Use of Common Law Contract Models Give Rise to a Tacit Choice of Law or to a Harmonised, Transnational Interpretation?' in Cordero-Moss 2011, p. 52-60; Cordero-Moss 2014a, p. 48-50. See also ICC Award No. 9117, 10 ICC Bull. No. 2, 1999; *Proforce Recruit Limited v The Rugby Group Ltd* [2006]; *Joseph Charles Lemire v Ukraine*, ICSID Case No. ARB/06/18.
[478] Schreuer 2010, art. 42 para. 36; Conference presentations in ICC's Institute of International Business Law and Practice 1995.
[479] Schreuer 2010, art 42 para. 36.
[480] Law 2015, p. 74.
[481] ibid, p. 73.

mixture of national laws and partly harmonised rules – some of which are not necessarily applicable, and others of which may be subject to a variety of interpretations."[482] It would stand to reason to approach the question of international contract practice from a similar starting point. It can emerge outside the confines of national legal systems, but if it does not have uniform effects, the result is a mixture of national practices and international practices. For this reason, the consideration of interpretation is necessary and it can indicate that international contract practice does not exist.

The mere existence of contractual freedom shows that the intentions and actions of the parties will be decisive in any contract. In a normal situation, with a country, region or a group of countries, contract practice can be quite easily identified – regardless of whether it is common law, civil law or hybrid regimes. The reason why contract practice can be identified even in a situation where different parties have different motivations, expertise or objectives is the limited number of people that are considered. Considering England, the UK, the UK and US, or the UK and old English overseas territories is still a very limited sample with many historical ties. Therefore, the common law tradition is easily identifiable. It stands to reason that drawing a similar conclusion on the existence of a global contract practice is much harder. There are many different types of people(s) around the world which manifests in diverging motivations, objectives and ways of conducting business. This is all reflected in the existence of different legal traditions which leads to divergent interpretations of contract. Therefore, for all the reasons presented in this Chapter, the existence of international contract practice cannot be said to exist, but rather what exists are international ways of drafting contracts.

On the other hand, not many cases actually reach dispute resolution. The problem of interpretation that I have presented does not actually manifest in all contracts. I want to note this, because the theory I have presented can be quite removed from actual practice of contracting parties. That is to say that in conducting business, parties are often willing to settle their disputes through negotiations as this is cost efficient and can result in both parties being happy.[483] Further, not all risk will materialise nor are clauses which could have divergent interpretation always invoked, enforced or contested.[484] Therefore, these parties will never encounter the effects of legal interpretation to their "self-sufficient" contracts. So,

[482] Cordero-Moss 2014a, p. 29.
[483] E.g., American Bar Association 2019.
[484] Cordero-Moss 2014a, p. 16.

perhaps the right approach is not actually looking at law, contractual interpretation and legal culture, but at the actual ways of conducting business and commerce, business culture and economics. If this is the case, this thesis would for the large part be moot, however, it needs to be noted that international contract practice might actually be developing outside legal concepts.

Chapter 6. Conclusion

In a very lawyer-ish way, the answer to my research question of whether international contract practice exists is "it depends". The answer is yes, if you are looking at the conduct of contracting parties because an international language for contract drafting has undoubtedly emerged. However, if you are looking at the effects of the ways of contracting, you will see that the "harmonised" way of conducting business does not result in the same solutions and effects. Therefore, the answer is no, because these similar contracts might have different effects depending on the applicable law either through interpretation or mandatory and overriding rules. Further, utilising arbitration or transnational sources of law are not adequate to correct this divergence.

The main inhibitor to the existence of international contract practice is the fact that legal concepts are tied to presuppositions which are prevalent in the legal system. This means that the interpretation of international contracts takes place in a similar process than national contracts, which lacks consideration towards the international character of the contract. Of course, the mere existence of different legal traditions does not preclude converge as long as the solutions that have been adopted by the different systems are compatible. It is not enough to say that different approaches mean divergence if the ways are functionally the same or reach a similar result. In this sense, the threat of divergent interpretation might not even be that high. However, in relation to contract practice, different outcomes can still be identified as illustrated with entire agreement clauses and the principle of good faith. The jurisdictions I gave as examples might reach a similar outcome, but this is not a guarantee.

It can be said that an international way of contracting has emerged. International contracts are largely drafted in the common law drafting style. The aim is to have long and exhaustive contracts, in order to detach the contract from domestic laws and principles. This has also led to the formation of transnational sources of law and the codification of this practice. However, given that there are many different legal systems, these concepts are interpreted differently even if the clause is worded in the same way. The interpreter's idea of law will influence the interpretation of the contract and this can undermine the goal of self-sufficiency. This is a problem to the claim that international contract practice exists as parties from different jurisdictions can have diverging understanding of what certain clauses actually mean. There are divergences to contractual interpretation between common law and civil law countries, and these differences only become more prominent when we consider non-Western countries and mixed legal systems.

Further, the ability of the parties to choose the applicable law and dispute resolution mechanism can give the parties more autonomy in relation to the contract. However, even with the flexibility of arbitration, the arbitrators still need to apply law accurately and seldom are all possible situations covered in negotiations. This means that they will need to look at national laws or national legal systems, which have certain presuppositions to the interpretation of contracts. The arbitrators might have also internalised a specific tradition's approach to contractual interpretation. Transnational sources of law could help to overcome the differences between legal systems to a certain extent. However, the transnational sources of law do not represent a complete legal system which means that even if they are utilised by the parties or the interpreters are referencing them, there would still be divergences in contractual interpretation.

If we are solely looking at business culture and ways of conducting business, international contract practice could be said to exist. It is also the intention of businesses to have a successful agreement as they want to be profitable. The goal is smooth business which is hindered by conflicts and delays. This would indicate that international practice exists, if conflict situations do not arise. However, it is necessary to look beyond the ways of contracting and see what impact the contract will have. When you consider this impact, meaning interpretation and enforcement, it is harder to claim that international contract practice exists. A gap can be identified between the way that international contracts are written and how they are interpreted (and enforced). Parties prefer familiar legal systems in conflict situations and the choice-of-law can off-set attempts of drafting contracts self-sufficiently. The parties might aim to achieve exhaustive and precise wording to determine and define the underlying contractual relationship as fully as possible, but the element of national law cannot be fully removed from the contract. Given that the impact of national legal systems cannot be eliminated, the differences between national legal systems and traditions becomes important for the consideration of international contracts.

That being said, the examination of my research question has necessitated the examination of the existence of transnational rules and the convergence of national jurisdictions. These are both very big topics which are closely related to my chosen research question. For length reasons it has not been possible to give each of them the consideration they deserve as they could surely each fill the pages of a thesis on their own, if not several. I have presented a framework of international ways of drafting contracts which is hindered by interpretation in domestic legal systems. However, my answer to the research question should be construed

as the starting point for future research and the other topics I have mentioned need to also be examined thoroughly. More research is needed especially in relation to harmonisation, convergence, the existence of international contract law, and private international law. Further, there are also many different aspects to arbitration that should be considered. I would also like to examine overriding mandatory principles, public policy considerations and interpreter's discretion more fully. This would necessitate a more in-depth examination and comparative study of different national legal systems and the broader examination of non-Western countries. This thesis has questioned the existence of international contract practice, but there are still many other topics that need to be consider in order to give the full answer to my research question. Nonetheless, in the scope of this thesis, the answer to my research question is that international contract practice cannot be said to exist because of the lack of uniform effect of international contracts. What currently exists are international ways of drafting contracts and national contract practice.