

Regulation of International Commercial Contracts: A Dilemma of Philosophical Character?

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1 Introduction: The Philosophical Problem

Domestic contracts regulate domestic legal relationships; international contracts regulate international legal relationships. Domestic contracts are subject to domestic law (national law); reasons of symmetry seem to suggest that international contracts should be subject to international law. However, with some important exceptions such as the 1980 Vienna Convention on International Contracts for the Sale of Goods (“CISG”), there are no international sources in contract law. Hence, according to the traditional approach, international contracts are subject to national law: a branch of each national law, known as private international law or conflict of laws, provides mechanisms that permit to choose the applicable law, from the various national laws that have a connection with an international commercial relationship and may thus potentially be applicable. That many rules of private international law have been harmonised or even unified at a supra-national level does not change the result of their application: international contracts will be subject to a national law.

Those who find this asymmetry to be unsatisfactory, advocate for a third system, detached from national law and yet not international law, i.e. not formally based on treaties or conventions. An important purpose of this third system is to provide a uniform regulation for international contracts, which can be applied equally all over the world and irrespective of the national legal tradition with which the dispute is connected. One of the reasons for wishing to avoid the application of national law is precisely the lack of uniformity that follows from the circumstance that national laws differ from each other – this lack of uniformity is held to be confusing and costly for the parties.

This third system, that goes under a variety of names – such as *lex mercatoria*, transnational law or soft law – is based on a variety of sources, such as generally accepted principles, trade usages, contract practice, arbitration practice, publications by trade or branch associations such as the International Chamber of Commerce (“ICC”) or the International Bar Association (“IBA”) and, not the least, distillates of all these sources that, together with provisions suggested by the drafters as best rules, find their way in collections of principles, such as the UNIDROIT Principles of International Commercial Contracts (“UPICC”). One of the main purposes of these collections is to provide a systematic and easily accessible source of non-national principles, thus remedying one of the weakest spots of the *lex mercatoria*: its fragmentary character and the difficulty to prove its content.

Often the supporters of a transnational law link their preference for this third system to the circumstance that disputes connected with international contracts are very often subject to arbitration and not to national courts of law. The assumption is that international arbitration is detached from any national law and that consequently arbitrators must follow the will of the parties, rather than a national law. Transnational law is deemed to be an emanation of usages, practices and generally recognised principles, and thus to be suitable for application in arbitration.

The understanding of arbitration as delocalised is the result of an evolution, that can be illustrated following some Resolutions of the Institute of

International Law: while a resolution adopted by the XIV Commission in 1957 clearly stated that arbitration is subject to the law of the country where the arbitral tribunal has its seat, and that the private international law of the seat identifies the national law applicable to the merits of the dispute,¹ the XVIII Commission in 1989 expressly criticised the assumption that arbitration necessarily takes place within the framework of a national law.² The General Report emphasized the detachment of arbitration from any national law: “Realistically speaking, the principles and constraints that an adjudicatory process requires to be seen as reliable and legitimate can, in the case of non-domestic arbitration, derive only from a charter that all arbitrators are committed to follow. Earlier in this century, the jurisdictional theory provided that charter in the form of the law of the territory where the arbitration had its seat. With the jurisdictional theory’s decline, party agreement became the only source for the needed charter. Accordingly, international arbitrators should faithfully carry out the instructions given them by the parties even if those instructions are inconsistent with the position taken by one or more legal orders with significant links to the arbitration.”

The Resolution of the XVIII Commission regards disputes between foreign investors and the host states, and it can be seen as a step in the process of enhancing investment protection. Foreign investment needs a legal framework that is wider than the legal system of the host state – to ensure that the host state does not abuse its sovereignty to change the rules of the game to the detriment of the investor. Perhaps the most significant achievement in this process was, at that time, the 1965 Washington Convention on the Settlement of Investment Disputes between States and National of Other States, which established a special resolution mechanism for investor-state disputes. In this context, there are evident concerns in letting international contracts being subject exclusively to the national law of the host state. Less evident is the need to emancipate from national laws in purely commercial contracts. However, the delocalization theory has quickly expanded to cover also commercial arbitration and commercial contracts.

The delocalization theory was strongly criticized already by some members of the XVIII Commission – for example, F.A. Mann affirmed:³ “I confess that I simply do not know what this means. Arbitrations take place on earth, in territories, in localities. They do not take place in a vacuum. [...] I fear that, when you speak of ‘delocalization’ you mean something like ‘delegalization’, the rejection of the control of law. If, as I fear, this is a correct interpretation, the disagreement is fundamental and almost of a philosophical character. [...]

1 Article 11 of the Resolution on *Arbitration in private international law*, *Yearbook – Institute of International Law* (57), II, 491-496; the XIVth Commission had already prepared a report on this subject in 1952 (*Yearbook – Institute of International Law* (52), I, 469-609), but a resolution could not be adopted because of the death of some members of the commission. In 1957, a new XIVth Commission adopted a resolution largely based on the 1952 Report.

2 Resolution on *Arbitration between states, state enterprises, or state entities, and foreign enterprises*, *Yearbook – Institute of International Law* (89), II, 324-331.

3 *Yearbook – Institute of International Law* (89), I, 173.

More than 50 years of very intensive and extensive practical experience have taught me that, when parties embark upon arbitration proceedings [...], they want to win and want to be told with what degree of likelihood they will win. In other words, they want to know the *law*. They are not in the least bit interested in what you seem to understand by ‘delocalization’. Nor are they interested in compromise solutions. On the contrary, they regard any tendency on the part of the arbitrators to adopt such solutions as a sign of weakness. In other words, they expect a judicial decision arrived at after a judicial process.”

The debate between the traditionalists who consider international contracts as subject to national law and the supporters of delocalization of international contracts and international arbitration is still ongoing.⁴ At times it has been so intense that it has been defined as “a war of religion”.⁵

2 Outline

In this article I will try to draw a balance relying on my earlier research, from the point of view of commercial contracts. The attempt is to fulfil the editors’ wish to “draw out trajectories from the current state of affairs, and to be a bit speculative. [...] the emphasis should be on ideas rather than on exhaustive references.”⁶ The reasoning of this article goes along the following lines: does contract practice support the assumption that there is the need for abandoning national law and embracing transnational sources? What are the disadvantages of applying national law to international contracts? What advantages may be achieved by applying transnational law to international contracts? Does transnational law meet the requirements that would ensure these advantages – if not, what is needed in order to meet the requirements?

I will start my observations from contract practice, as the will of the parties is invoked as an important basis for the delocalization theory. Contracts are often written in a standardised manner without giving consideration to the national law applicable to them. This could be interpreted as a symptom that the parties refuse application of a national law, thus as a confirmation that the delocalization theory corresponds to contract practice and that national law should be disregarded. A closer look at contract practice, however, shows that contract practice does not seem to permit drawing this conclusion (section 3).

I will so point at the consequences of applying national law to international contracts: the same contract wording may have different legal effects depending on the applicable law, and some national laws may interfere quite heavily with the contract terms. This may be seen as a confirmation that considering international contracts as subject to national law has undesirable

4 For references, see G. Cordero-Moss, *International Commercial Contracts*, Cambridge University Press 2014, pp. 27ff.

5 B. Leurent, *Reflections on the international effectiveness of arbitration awards*, in *Arbitration International* 1996, pp. 269-285, at p. 279.

6 Letter by the editors of *Scandinavian Studies in Law*, volume 62 to the authors, dated 28 September 2015.

consequences, and that it would be preferable to have uniform sources that give predictable results. As an illustration, I will look at the impact that Norwegian law has on contracts (section 4).

A close look at the transnational law shows that some transnational sources succeed in providing a uniform and predictable regulation for national contracts, while others don't. The sources that succeed have a restricted scope of application that does not require assessments of value by the interpreter. These sources may efficiently solve disputes within their restricted scope of application, but are not aiming at governing a whole legal relationship – that is, they may complete, but not substitute the governing law. More general sources of transnational law do not have a value-free application that may ensure uniformity, or a centralized court that ensures a coordinated case law. This does not ensure a uniform and predictable application of the sources. Also, some of these general sources are inspired by values comparable to the values underlying the national laws which most heavily interfere with contract terms, and thus it seems questionable to consider them as an emanation of the parties' will (section 5).

To avoid the paradox of transnational sources, which are non-authoritative and thus depend on the spontaneous application by commercial parties, being based on values that contradict the parties' expectations, it seems necessary to ensure that these sources contain precise regulations which do not leave room to the interpreter's sets of values, or at least that give prevalence to the contract regulation (section 6).

3 The Gap Between Contract Practice and Contract Law

The observations made here regard carefully negotiated commercial contracts between equally strong and professional parties. These contracts are usually written with the ambition (often doomed to fail, as section 4 will show) of creating a self-contained system, fully predictable, based only on the contract terms and not subject to any interference from external elements. The reason for this drafting style is explained in this section.

Commercial contracts carefully negotiated between professional parties are usually extensive and detailed. As I have explained elsewhere,⁷ they are written in a way that attempts to be exhaustive, so that contracts may be interpreted, construed and applied without needing to look to external sources. In addition to regulating all eventualities that are thinkable in respect of the performance of the contract throughout its duration, these contracts usually contain a body of clauses (often referred to as "boilerplate clauses") aimed at regulating how the contract shall be interpreted, construed and applied. In other words, the contracts attempt to create their own body of general contract law, so as to render the governing law redundant and the contract self-sufficient. The next sections will show that the goal of self-sufficiency is doomed not to be achieved.

⁷ See Cordero-Moss, *International Commercial Contracts*, cit., p. 8-24.

Admittedly, many international commercial contracts are written, at least in part, on the basis of standardised wording. Particularly the above mentioned boilerplate clauses are seldom negotiated between the parties and often a result of copy-and-paste method. The circumstance that the parties have barely discussed these clauses, coupled with the possibility that the clauses may fail to have the intended legal effects when read in conjunction with the governing law, may induce to question whether these clauses actually should be taken into consideration when applying the contract. However, the relevance of standardised clauses should not be dismissed – as I have explained elsewhere,⁸ the use of standardised clauses in the attempt of achieving self-sufficiency is not necessarily the result of thoughtlessness on the part of the contract drafters. Reasons for standardisation are to be found in cost-benefit analyses during the formation of the contract,⁹ which may lead to accepting the legal risk connected with inserting a contract language not tailored to the governing law.¹⁰ Therefore, this contract practice is not due to ignorance of the risk that national law may affect the contract, nor is it an implicit desire to exclude the applicability of national law. It is a recognition that the risk of the governing law affecting the contract has a lower cost than negotiating each term for the sake of having a contract fully adjusted to the governing law. The drafting style in itself, therefore, may not be used as justification for disregarding the clauses or the governing law.

Moreover, the way in which contracts are administered once they have been signed, testifies that there is no reason to disregard that wording, even though parts of the contract may not have been actively negotiated. Once a contract is signed, its performance will be administered by an organisational part of the company that did not necessarily participate in the negotiations. In well organised companies, there will be a contract manager office, or corresponding function, that will carefully read the contract (including also its boilerplate clauses) and on that basis prepare guidelines for the rest of the organisation on how to perform the contract – for example: in case of default, what kind of notices shall be sent by which office of the company to which body of the other party, and within what time limits; what procedure to follow for amending the agreement or for making a variation order, etc. In this phase, all the terms of the contract are taken seriously by the parties and are used as measure for what conduct is permitted or required under the contract.

Furthermore, once a dispute arises, yet another part of the company or an external lawyer will be involved. In order to assess the company's legal position and suggest a strategy for solving the dispute, they will carefully consider all terms of the contract. Should, for example, a party have diligently followed the procedure for notice of defect contained in the contract, the

8 Cordero-Moss, *International Commercial Contracts*, cit., p. 14-17.

9 Maria Celeste Vettese, *Multinational companies and national contracts*, in Cordero-Moss (ed.), *Boilerplate clauses*, cit., p. 20-31.

10 David Echenberg, *Negotiating of international contracts: does the process invite a review of standard contracts from the point of view of national legal requirements?*, in Cordero-Moss (ed.), *Boilerplate clauses*, cit., p. 11-19.

strategy will be developed on the basis of the assumption that that party's rights are intact (unless mandatory rules of the governing law have been violated). The company may, therefore, be more lenient to assert its rights strongly and if necessary bring action in court. If that party has not followed the contractual procedures, it may assume that its rights are not intact and it would take a more cautious approach to avoid that the dispute ended in court.

Finally, contracts often circulate among third parties: for example, an insurance company who needs to calculate the level of premium requested for insuring the activity under a certain contract, will need to evaluate the risk connected with that activity. In turn, an assessment of the risk will assume a full understanding of the rights and obligations under the contract. This understanding will be based on a careful assessment of all contract terms. Also, a contract may be given to a bank as a security for a loan, in which case the bank will need to assess the borrower's rights and obligations under the contract to evaluate the value of the contract as security. Also in this case, the assessment of the contractual rights and obligations will be carefully made on the basis of all contract terms, including also the boilerplate clauses. These third parties will have no knowledge about which clauses have been negotiated by the parties and which have been inserted without negotiation; they will have no possibility to take into consideration subjective circumstances relating to the contract's history. Their only basis to evaluate the contract, is given by the contract terms.

The foregoing shows that commercial contracts rely heavily on an accurate understanding of their terms. This is essential to render performance of the contract predictable, and predictability is, in turn, essential to the proper functioning of the contracts and all related transactions, such as insurance and financing.

4 The Interference by National Law

The need for predictability does not mean that the role of the governing law shall be diminished and that contracts shall be considered only on the basis of their own terms. When a contract is subject to a certain law, it will be overridden by the law's mandatory rules, it will be interpreted in light of the doctrine of interpretation of that law, it will be construed in accordance with that law. As I have shown elsewhere, this may lead to extensive or restrictive interpretation of the terms, to implying obligations that were not expressed in the contract, to restricting the exercise of rights that were spelled out in the contract.¹¹ As national laws may differ from one another, the same contract terms may have different legal effects, depending on which law governs them.¹² As will be seen in section 5, this is one of the reasons underlying the development of transnational sources: the desire to avoid inconsistent legal

11 See, more generally, Cordero-Moss, *International Commercial Contracts*, cit., p. 90-122.

12 Cordero-Moss (ed.), *Boilerplate clauses*, cit., shows how the same clause may have different legal effects in a series of different legal systems.

effects due to the differences among national laws and to provide a uniform regulation. Another reason underlying transnational sources is the desire to provide a regulation that responds to the needs of commercial practice. In other words, the parties may prefer to subject their contract to transnational sources instead of choosing a national law, if they can rely on these sources being able to govern the contract in a predictable and commercially oriented way.

A good example of the difficulty to determine the relationship between contract provisions and the applicable law, that I have examined elsewhere,¹³ may be found in Norwegian contract law. As will be seen in section 5, this example is particularly relevant as a comparison with one of the most important sources of the transnational law, the UPICC, as Norwegian literature considers the UPICC as reflecting the general principles implied in the Norwegian legal systems. There is no general codification of Norwegian contract law; there are some statutes regulating specific contract types, and otherwise contracts are subject to uncodified general principles and rules developed by court practice. The most influential treatise on Norwegian contract law often refers to the UPICC as reflecting the uncodified principles of Norwegian contract law.¹⁴ Of particular interest here is that Norwegian contract law has an overarching duty of loyalty between contract parties,¹⁵ that may be compared to the likewise overarching principle of good faith in the UPICC.¹⁶

Norwegian contract law is based on the principle that each party is responsible for its own evaluations and is expected to make adequate provision in the contract for preserving its own interests. However, this is considerably mitigated by the general duty of loyalty between contract parties, i.e. a duty to act in good faith and to take into consideration the other party's interests when interpreting the contract, performing the contract or exercising remedies under the contract. This means that the obligations and remedies regulated in a contract may be integrated or restricted by further obligations and remedies that are not expressly provided for in the contract, but are derived from the principle of loyalty.

Generally, the interpreter is expected to be quite objective when interpreting (construing) and enforcing commercial contracts entered into between professional parties. Commercial parties are expected to have carefully evaluated their respective positions and the effects of the provisions contained in the agreement. Therefore, commercial contracts will to a large extent be

13 G. Cordero-Moss, *Detailed contract regulations and the UPICC: parallels with national law and potential for improvements - the example of Norwegian law*, in UNIDROIT (ed.), *Eppur si muove: The Age of Uniform Law. Essays in honour of Michael Joachim Bonell to celebrate his 70th birthday*, Rome 2016, vol. 2, pp. 1302-1317.

14 Viggo Hagstrøm, *Obligasjonsrett*, 2nd ed. 2011, p. 67ff., 77ff. References to the UPICC may be found throughout the text.

15 A monograph is devoted to the principle of loyalty in contracts: Henriette Nazarian, *Lojalitetsplikt i kontraktsforhold*, 2007. The author defines the principle as a general principle at p. 85, with references to further literature.

16 See section 5 below.

interpreted (construed) in accordance with their terms and will only to a restricted degree be affected by interferences inspired by the principle of loyalty, aimed at ensuring a proper balance between the parties' interests or at avoiding unfair results. Elder case law has repeatedly affirmed that there is little room for construing clauses of commercial contracts restrictively¹⁷ or expansively,¹⁸ and that therefore the parties should not expect further obligations or remedies beyond those expressly provided for in the contract.

The foregoing shows that commercial contracts are usually said to be applied in accordance with their terms. However, this does not mean that there is no room for the principle of loyalty in commercial contracts: first of all, the Supreme Court's case law is not consistent in following the principle of objective interpretation of commercial contracts;¹⁹ secondly, the principle of loyalty may affect a contract in various ways that are not necessarily recognized by Norwegian legal doctrine or case law as interpretation or construction, and are therefore not affected by the principle of objective interpretation – such as reading ancillary obligations into the contract,²⁰ supplementing or even replacing the contract terms with default regulation in the governing law,²¹ or restricting the exercise of discretionary contract rights.²²

The question, then, is: in case of a commercial contract with detailed and extensive terms aiming at exhaustively regulating the relationship between the parties, how should Norwegian law be deemed to interact with the contractual regulation? Mandatory rules of the governing law will override the contract terms, that is unquestionable. But what about default rules, that are not mandatory, but apply if the parties have not agreed otherwise: will they be replaced by the contract terms? Will they supplement the contract terms?

The question is relevant not only when the contract terms are silent, but also when the contract has a regulation that deviates from the provisions of the governing law.

In a commercially oriented approach, the principle of *lex specialis* would seem to apply to the relationship between contract terms and governing law:²³ if the contract terms regulate in detail, for example, how the parties shall proceed in case of non-conformity of the products sold under the contract (what kind of notice of defect the buyer shall give to the seller, the content of that notice, the timing for giving notice, etc.), and that regulation is different

17 Rt. 2000 s. 806 at p. 815, Rt. 2002 s. 1155 at p. 1158f.

18 Rt. 1994 s. 581 at p. 587.

19 See Cordero-Moss, *Detailed contract regulations*, section 3.1, referring to two Supreme Court decisions (Rt. 2005 s. 268 and Rt. 1994 s. 581) that have the same starting point but apply it in different ways.

20 See Cordero-Moss, *Detailed contract regulations*, section 3.1.

21 Cordero-Moss, *Detailed contract regulations*, section 3.2.

22 Cordero-Moss, *Detailed contract regulations*, section 3.3.

23 W. Park, *The Predictability Paradox*, in F. Bortolotti, P. Mayer (eds.), *The Application of Substantive Law by International Arbitration*, ICC Dossiers, 2014, pp. 60-79, 62.

from the regulation provided for in the governing law, it could be assumed that the parties intended to derogate from the general regime of law by regulating their own procedure in the contract. Hence, the specific regulation of the contract would override the general regulation of the law, as long as the law provisions are not mandatory. However, this approach was not followed by the Norwegian Supreme Court in a recent case between two professional parties. The parties had regulated in detail the procedure to be followed for notification of defects. Under Norwegian law, the general principle of loyalty between the parties is deemed to be the basis of, i.a., a duty to give notice of defect to the defaulting party, within a reasonable time, in order to safeguard the defaulting party's expectation that the performance had been accepted. It should be expected that, as long as they are suitable to meet the above described purpose, the terms of a commercial contract negotiated between professional parties take precedence over the non-mandatory rules of the applicable law, such as the details of how notice shall be given. However, the Supreme Court did not consider the regulation contained in the contract, and applied only the statutory provisions.²⁴

This seems to indicate that rules emanating from the general principle of loyalty will supplement, if not even substitute, detailed regulations contained in commercial contracts. There is no reason to assume that courts would reason differently if the contract terms include clauses such as Entire Agreement²⁵ or No Oral Amendments.²⁶ The contract in the above mentioned case did contain an Entire Agreement clause, but the Court did not consider it. Further case law shows that the inclusion of these clauses does not affect the court's ability to, respectively, read new terms into the contract²⁷ or modify existing terms of the contract.²⁸

Another situation where the relationship between contract terms and Norwegian law may be strained, is where the contract terms give one party the discretion to exercise a certain right – for example, to terminate the contract early or to exercise another remedy. At times, the exercise of the discretionary right may be motivated by that party's own commercial interest, and not by circumstances directly linked to the contractual relationship, such as a default by the other party. In the system of the contract, this discretionary "way out" of

24 Rt. 2012 s. 1779, para 55-65.

25 An Entire Agreement clause is a typical boilerplate clause and has the purpose of ensuring that the terms spelled out in the contract constitute the whole and final agreement between the parties, thus excluding the relevance of any external elements such as prior documents exchanged between the parties, discussions between the parties, etc.

26 A No Oral Amendment clause is a typical boilerplate clause and has the purpose of ensuring that the terms spelled out in the contract constitute the whole and final agreement between the parties irrespective of any subsequent conduct that might suggest a subsequent different agreement between the parties – unless the formalities described in the clause are complied with.

27 Rt. 1992 s. 796.

28 Rt. 1992 s. 295. See also Hagstrøm, *cit.*, p. 140, although with some concessions to the possibility that these clauses may be given more consideration, the more a contract is extensive and negotiated.

the relationship may have been carefully negotiated between the parties, and it may have been reflected in a substantial reduction of the price to be paid by the other party, or in other contract terms that reinstate the balance of interests between the parties. Seen isolated, however, the discretionary way out may be deemed to run counter a duty of loyalty intended as an overriding principle preventing the exercise of contract rights simply out of one's own commercial interest and without a justification linked to the contractual relationship.

Under Norwegian law, the duty of loyalty may manifest itself as a duty to act in good faith when exercising a right, so that the exercise of the right is not abusive. Case law has repeatedly affirmed that a party's discretion must be exercised in good faith,²⁹ and on this basis literature states that good faith is a prerequisite for the effectiveness of the exercise of a right - and by doing so it invokes the UPICC as a corroboration.³⁰ This is said to apply even when the contract terms clearly provide that the right may be exercised at the discretion of the party and do not attach any relevance to the reasons for exercising that right - a contractual setting that, as mentioned above, not necessarily should be deemed to create an abusive situation: the parties may have envisaged this scenario, and may have taken it into account during the negotiation of the other terms of the contract.

The superimposition of Norwegian law over the contract terms may, in situations as those described above, lead to results that are unforeseen or even undesirable to the parties (or at least were undesirable before a dispute arose). This may disappoint any ambition of predictability - as was described above, predictability is essential in commercial relationships. Considering that governing laws differ from each other, this may lead to different results for the same contract term if it was used in different settings, thus disappointing any ambitions not only of predictability, but also of standardisation.

However, this does not mean that it should be called for excluding the effects of the governing law on contracts. To the contrary, this should be taken as a confirmation that the parties to a commercial contract are well advised to take into consideration the effects of the governing law on their contract terms; if they don't, they have either been reckless, or they have taken a legal risk. In either situation, there is no reason for criticising the governing law or for invoking a more lenient application of the governing law in view of the international character of the contract. The parties' need for predictability could have been met if the parties had assessed the impact of the governing law on their contract terms. The parties also have the tools to react against the undesirability (if any) of the results to which the governing law would come: they may choose another law to govern their contract, a law that gives contract terms primacy.

29 Rt. 1931 s. 169, Rt. 1934 s. 779, Rt. 1992 s. 295 and Rt. 1992 s. 796.

30 Hagstrøm, cit., p. 68f., referring to article 2.1.15 of the UPICC, and p. 78, referring to article 1.7 of the UPICC.

5 No Uniform and Predictable Application of Transnational Sources

The governing law's impact on the contract terms may, as the example of Norwegian law showed, deprive at least some of the negotiated terms of contract of their intended role as primary regulation of the parties' conduct under the contract.

In contrast, transnational sources of law offer a regulation that promises reasonable and predictable solutions, uniformly applied all over the world, thus permitting to escape the inconsistencies and surprises that may follow the application of national law.

A first challenge to the application of non-national sources, however, is their level of abstraction. This makes it necessary to interpret the sources and thus exposes them to the influence of the interpreter's background or inclination. This challenge does not apply to all collections of non-national principles: there are some publications, issued for specific sectors, that have a high degree of precision and achieve their purpose of offering a uniform regulation. As I have shown elsewhere,³¹ the INCOTERMS (regulating the passage of risk from the seller to the buyer) and the UCP 600 (regulating the functioning of letters of credit) are examples of publications with specific regulation, which to a large extent are interpreted and applied uniformly irrespective of the interpreter's background.

Other collections of principles, however, are not limited to specific regulations of narrow matters, but offer a whole contract law, including underlying principles such as the principle of good faith and general principles on the allocation of risk between the parties. In such a large setting, application of the principles depends more on the interpreter's set of values.

As I have shown elsewhere, the example of how the UPICC apply to contract clauses often recurring in international contract practice, such as the Entire Agreement clause and the Force Majeure clause, shows that the UPICC's heavy reliance on the principle of good faith, as well as their high level of abstraction, necessarily create uncertainty about the specific scope and content of their rules.³² Provisions based on general standards need a set of values to be applied. These values inspire the interpreter's understanding of its role when solving a dispute: does the interpreter see its role as that of ensuring that the terms negotiated by the parties are applied accurately? Or does it see its role as that of ensuring that the deal between the parties is balanced notwithstanding what the terms of the contract might spell out? As long as the values are not unified, on a sliding scale between these two opposed positions, the interpreter will understand the scope of the UPICC differently, depending on the interpreter's own inclination between formal accuracy and substantive justice. The risk is, therefore, that the UPICC will have a uniform wording, but the wording will be given different effects, depending on the interpreter's set of values.

31 Cordero-Moss, *International Commercial Contracts*, pp. 37f.

32 Cordero-Moss, *International Commercial Contracts*, cit., p. 43-52.

The set of values that I analysed in my research is connected with the different legal traditions in the common law and in the civil law,³³ but I suspect that it may be possible to identify further values, such as the economic context of the interpreter, its political inclination or its commercial expertise.

The lesson to be learned here is that if a uniform result is to be achieved, application of law in a variety of socio-economic and legal contexts assumes a very precise regulation that gives little room for interpretation, a centralised court who may coordinate jurisprudence or a uniformity of the fundamental values underlying the application of contract law, or a combination of these three.

Another challenge is the already mentioned gap between contract practice and some of the transnational sources. The UPICC are based on an overarching principle of good faith informing numerous provisions regulating issues that are usually the subject of detailed contract regulation.³⁴ It seems, therefore, reasonable to inquire whether the UPICC should be deemed to override and supplement contract terms (along the lines followed by Norwegian courts and described above), or whether they should be applied according to the *lex specialis* principle. As long as the relationship between the UPICC and contract terms is not clarified, there is a risk that the UPICC will not be able to reach the aim of predictability, which is so important for commercial contracts. Furthermore, if the UPICC are to be considered as a commercially oriented set of rules, they should clarify this relationship so as to establish that the regulation contained in the contract takes precedence.

The attractiveness of the UPICC, therefore, would be considerably enhanced if under their regime there were no uncertainties about the ability to use negotiated contract terms as the primary regulation of the parties' conduct under the contract.

Since the UPICC regulate commercial contracts, objective interpretation and the primacy of contract terms seem to be the right starting point. There may be the need for less objectivity when the parties, though commercial, have different bargaining power or insight; for detailed contracts between equally professional parties, however, there seem to be good reasons for giving primacy to the contract terms, interpreted objectively. The many provisions in the UPICC that restrict the exercise of contract rights or impose ancillary obligations where the contract is silent, however, seem to suggest the opposite approach, i.e. that the UPICC be superimposed over the contract terms and lead to a situation where the detailed contract regulation either is disregarded or is supplemented. This may render the choice of UPICC less attractive to govern commercial contracts: if the parties have spent considerable resources in drafting and negotiating certain terms, developing contract management systems on the basis of those terms and assessing their legal position on the

33 Cordero-Moss, *International Commercial Contracts*, cit., p. 80ff.

34 On the significance of the principle of good faith in the UPICC see Comment No. 1 to article 1.7, "www.unidroit.org/english/principles/contracts/principles2010/integralversion/principles2010-e.pdf", last visited on 10 October 2015, making reference to 37 provisions that are direct or indirect application of the principle of good faith. See also Cordero-Moss, *International commercial contracts*, cit., p. 43-46.

basis of those terms (as described in section 3 above), why should they choose, as a governing law, a set of rules that may deprive some of those terms of their effects or supplement them with other, not negotiated terms?

Of course, commercial contracts need a governing law. Gaps must be filled, inconsistencies must be solved, unclear regulation must be interpreted. It cannot be excluded that even commercial contracts would from time to time need a corrective, and that it is necessary to strike a balance between the need for predictability proper of commercial relationships on the one hand, and, on the other hand, the need to provide a framework ensuring the respect of principles of loyalty and good faith. However, it seems that the attractiveness of the UPICC to commercial parties would lie rather in their ability to respect the primacy of contract terms, than in their ability to override contract terms.

Elsewhere I have suggested that the explanatory comments to the UPICC could contribute to clarifying the relationship between the UPICC and contract terms, in situations that are analogous to the Norwegian cases mentioned in section 4.³⁵

6 Conclusion

The foregoing shows that non-national sources are designed to provide an autonomous source for international contracts, as an alternative to the dichotomy between national law and international law, thus filling a perceived gap affecting international contracts. To be filling the gap in an efficient way, however, it is necessary that these sources are applied uniformly. As there is no centralised court ensuring a coordinated jurisprudence, and many rules are formulated generally, uniform application is up to the good will and self-discipline of courts and arbitral tribunals.

Sources developed on the basis of contract practice, such as the INCOTERMS or the UCP 600, enjoy a high degree of acknowledgement in practice, as they have a precise regulation and do not have to rely on a set of values to be applied.

Sources that depend on assessment of value to be applied, on the contrary, do not guarantee a predictable and uniform application. To meet this concern, the UNIDROIT has established a database on decisions and materials issued on the UPICC (www.unilex.org), that may be searched by provision. While the database does not in itself have the competence to influence case law in the various jurisdictions, it has the important function of disseminating all available material and thus contributing to a spontaneous coordination of case law over time.³⁶ As I suggested elsewhere, an effective means of enhancing a consistent development of case law could be represented by expanding the

35 See Cordero-Moss, *Detailed contract regulations*, section 4.

36 For an analysis of how the database shows different approaches to the application of the provision on Entire Agreement clauses, see Cordero-Moss, *International Commercial Contracts*, cit., p. 47-50. Hopefully will the continued updating of the database over time show a convergence of case law towards one single application.

explanatory comments published by the UNIDROIT on each provision of the UPICC.³⁷ Through the comments, the UNIDROIT has the possibility to explain the rationale of each provision and guide the interpreter in the application of that provision.

Furthermore, non-authoritative sources that rely on values that contradict the expectations of commercial parties, may meet difficulties in being spontaneously applied in practice.

In the absence of measures ensuring a uniform and predictable application of the transnational sources, and clarifying these sources' relationship with contract terms, the effects of applying the transnational law will depend on the inclination of the interpreter. This in turn will not be advantageous to predictability, which is one of the most important criteria for commercial parties. In such a scenario, F.A. Mann's philosophical criticism presented at the beginning of this article is likely to maintain its relevance.

37 The explanatory comments can be found at "www.unidroit.org/english/principles/contracts/principles2010/integralversionprinciples2010-e.pdf".

