Comparative Commercial Law:

Methodologies, Black Letter Law and Law-in-Action

by

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1 Introduction

Evaluating the strengths and weaknesses of international business transactions presents vexing challenges for the legal comparativist and practitioner. Divergent legal regimes impact business decisions, as commercial transactions extending across different legal jurisdictions may produce different and perhaps unexpected results. Exclusively relying on black-letter law does not sufficiently capture the entire comparative landscape. Rather, evaluating how black letter law, or law-in-the-books, reacts with law in practice presents the optimal analytical vantage point.[1] Such approach necessitates that a credible, neutral and objective method evaluates the international business transaction — one which considers that economic, cultural and sociological viewpoints, perhaps competing, all exist. These analytical methods, while providing valuable reference points, do not *independently* present a complete picture.[2] Rather, a hybrid comparative theory, *objective pluralism*, incorporating all of these methodologies, is a more effective evaluator tool providing the optimum means for evaluating comparative commercial law issues.[3] The totality of this review presents a balanced perspective offering unique issue insights.

Part one introduces the need for objective modes of comparative law analysis within the context of international business transactions, most notably contractual relationships. Discussing the disparate common and civil law families evidences why objective methods are necessary to explore legal problems extending over systematic divergences. Focusing on how good faith under comparative contract law is interpreted quite differently between (and within) these families demonstrates that legal concepts transplanted across legal families may have different meanings. Part two explores how black letter law is applied in practice, through the lens of objective pluralism, yielding nuances while providing comparativists with an important toolkit to further "test" a legal problems. The economic comparative method is evaluated, with special focus given to efficiency and transaction-based economic methodologies. Next, the sociological comparative method is analyzed, with emphasis on behavioral theory. Relational contracting, which contains elements of economic-based methodologies, is subsequently reviewed. The

[1] Palmer, Vernon Valentine, *From Lerotholi to Lando: Some Examples of Comparative Law Methodology*, 53 Am. J. Comp. L. 261, 266 (2005) ("the researcher must always delve beyond judicial decisions, doctrinal writings and the black letter law of code and statute and reach into the ill-defined region of "deeper structures" where law perhaps meets philosophy, sociology, and social culture"). *See also* Goldfarb, Phyllis, *Theoretics of Practice: The Integration of Progressive Thought and Action: Beyond Cut Flowers: Developing a Clinical Perspective on Critical Legal Theory*. 43 Hastings L.J. 717, 737 (1992) (law-in-action indicates chaotic interplay of a wide variety of detail and doctrine, variables and values, people and perspectives).

[2] Halperin, Jean-Louis, *Law in the Books and Law in Action: The Problem of Legal Change*, 64 Me. L. Rev. 45, 47 (2011) (discussing the ongoing debate of "how to build a legal science without erecting a phantasmagoria of imagined law without connection to how law is actually used and actually works").

[3] Note that this term was introduced in a philosophical context by Albert P. Brogan, *Objective Pluralism in the Theory of Value* 41 International Journal of Ethics 287-295 (1931). http://www.brocku.ca/MeadProject/Brogan/Brogan_1931.html.

paper then proposes the new methodology, objective pluralism, as the most efficient tool for analyzing the strengths and weaknesses of comparative business transactions. Practical application of objective pluralism involves a carefully-constructed survey or empirical study.

2 The Comparative Law Dilemma: The Need for Objective Standards, Divergent Systems

Comparative law study, in its quest to examine the function and utility of legal concepts among various legal systems, demands objective, neutral comparative standards. These standards allow a useful review of legal systemic commonalities and differences, unhindered by certain cultural-specific or innate characteristics which prevent *evaluating* the utility of an existing legal framework.[4]

The comparative method consists of reviewing the similarities and differences between legal systems, while assessing the breath of differences which the comparative researcher must consider.[5] One of the greatest challenges confronting comparative law projects remains the problem of equivalency: comparativists strive to prove how studied legal systems are similar or dissimilar.[6] Rarely do different legal systems share precise equivalents, although certain rules and institutions may, in a broad sense, be quite similar—which is a vexing problem for the comparative law scholar.[7]

Objective analytical devices yield important perspectives, allowing comparativists to focus on the similarities, and differences, between and among legal systems—presenting discoveries as to the unique aspects of the compared systems and how they commonly react to a specific issue.[8] The distinctive aspects of each system may be defined, while also creating an appreciation of legal system commonalities—which, together, create insights into a particular legal matter under review.[9] Comparativists must also present reasons for the differences and similarities between divergent legal systems, and provide analysis as to their significance for the studied cultures. Accordingly, comparative scholars argue that the legal analyst must look to, and beyond, the law, including "the respective political, economic, and social systems and historical traditions of which they are a part."[10] Effecting these goals is the real challenge, as scholars

[4] Substantial scholarship exists considering the various comparative law theoretical foundations. *See, e.g.*, De Cruz, Peter, Comparative Law in a Changing World (Cavendish, 1999); Glenn, H. Patrick, Legal Traditions of the World (Oxford Press, 2007).

[5] Reitz, John C., *How to Do Comparative Law*, 46 Am. J. Comp. L. 617, 620 (1998).

[6] *See id.* at 622.

[7] *See id.*

[8] Reitz, John C., *How to Do Comparative Law*, 46 Am. J. Comp. L. 617, 624 (1998).

[9] *See id.*

[10] Reitz, John C., *How to Do Comparative Law*, 46 Am. J. Comp. L. 617, 627 (1998).

evaluating comparative systems must collect and analyze data gathered from "cultural neutral" sources.[11]

2.1 Structural and Theoretical Differentiations: Civil and Common Law Traditions

For comparative purposes, objective pluralism takes into account the different legal systemic constructs and cultural norms/perceptions which *reflect* decision-making existing between (and among) the civil[12] and common legal traditions. These traditions diverge in several areas, including the influence of precedent (*stare decisis*)[13]. Under the civil law tradition, courts interpret and apply written laws, which include codes, [14] statutes and decrees.[15] Hearkening back to its Roman tradition, civil law regimes often look to legal scholarship for assistance in determining the state of the law on a given subject, serving to organize principles and decisions into a legal framework.[16] A civilian code[17] serves as an elaboration of legal doctrines, rules and

[11] For interesting discussions on cultural influences within comparative law, *see* Jackson, John D., *Playing the Culture Card in Resisting Cross-Jurisdictional Transplants: A Comment On Legal Processes and National Culture*, 5 Cardozo J. Int'l & Comp. 51, 63 (1997).

[12] While recognizing that not all member legal regimes of the common or civil law legal traditions are identical, the similarities greatly outweigh any divergences. Accordingly, this paper will not generally focus on the differences between members of the same legal traditions, such as, for example, those existing between Germany and France. Pejovic, Caslav, *Civil Law and Common Law: Two Different Paths Leading to the Same Goal*, 32 VUWLR 817, 818 n.3 (2001) at www.upf.pf/IMG/doc/16Pejovic.doc *citing to* Schlesinger, R.B. *et al*, Comparative Law 282 (1998) ("Even though the civil codes of different countries are not homogenous, there are certain features of all civil codes which bind them together and "sets them apart from those who practice under different systems").

[13] "The doctrine of stare decisis requires all tribunals of inferior jurisdiction to follow the precedents of courts of superior jurisdiction, to accept the law as declared by superior courts, and not to attempt to overrule their decisions." Sellers, N.S. Mortimer, *The Doctrine of Precedent in the United States of America*, 54 Am. J. Comp. L. 67, 86 (2006); *see also Auto Equity Sales v. Superior Court of Santa Clara County*, 369 P.2d 937, 939-940 (1962). For a comprehensive review of stare decisis' historical development in the United States, *see* Sellers, N.S. Mortimer, *The Doctrine of Precedent in the United States of America*, 54 Am. J. Comp. L. 67 (2006).

[14] The civilian legal tradition is born through codification, with clear divisions between public and private law. Stein, Peter G., *Relationships among Roman Law, Common Law, and Modern Civil Law: Roman Law, Common Law, and Civil Law*, 66 Tul. L. Rev. 1591, 1595-1596 (1992). For example, the exclusive source of private law under the civilian legal system is the written law, with systematized modern codes behind the civilian law's reasoning. *Id.* at 1596.

[15] Freisen, Jeffrey L., *When Common Law Courts Interpret Civil Codes*, 15 Wis. Int'l L. J. 1, 7 (1996).

[16] Freisen, Jeffrey L., *When Common Law Courts Interpret Civil Codes*, 15 Wis. Int'l L. J. 1, 8 (1996). *See also* Goutal, Jean Louis, *Characteristics of Judicial Style in France, Britain, and the U.S.A.*, 24 Am. J. Comp. L. 43, 44 (1976); Cappalli, Richard B., *Open Forum: At the Point of Decision: The Common Law's Advantage over the Civil Law*, 12 Temp. Int'l & Comp. L. J. 87, 94 (1998).

[17] Dainow defines "code" very broadly: "A code is not a list of special rules for particular situations; it is, rather, a body of general principles carefully arranged and closely integrated. A code achieves the highest level of generalization based upon a scientific structure of classification. A code purports to be comprehensive and to encompass the entire subject matter, not in the details but in the principles, and to provide answers for questions which may arise." *See* Dainow, Joseph, *The Civil Law and the Common Law: Some Points of Comparison*, 15 Am. J. Comp. L. 419, 424 (1967). *see also* Apple, James G. and Robert P. Deyling, A Primer on the Civil-Law System, at http://www.fjc.gov/public/pdf.nsf/lookup/CivilLaw.pdf/$file/CivilLaw.pdf. While recognizing that the

institutions.[18] Alternatively, the common law family is composed of organic law, with judges reliant upon precedents and the persuasive effect of the works of other common law jurisdictions.[19] Simply stated, common law is case law, with judicial decisions modifying new rules or adapting existing rules.[20] By studying case holdings that underlie the reasoning behind a particular decision, the reach of a precedent, considering a decision's origins and justifications, may be discovered.[21] The common law thus provides an organic continuum of law "creation," as each precedent builds upon, and into, the body of existing case law, providing future rules, definitions, branches or exceptions.[22]

substantive law of civil (and common) law systems may differ among countries, certain "general features that distinguish the civil-law tradition from the common-law tradition" exist, according to Apple and Deyling. Apple, James G. and Robert P. Deyling, A Primer on the Civil-Law System at 1 in http://www.fjc.gov/public/pdf.nsf/lookup/CivilLaw.pdf/$file/CivilLaw.pdf. These authors note that "[C]ivil codes…emphasize form, structure, and the enumeration of both abstract and concrete principles of law within a unified whole. The reasoning process from code provisions is deductive—one arrives at conclusions about specific situations from general principles. The function of the jurists within and for the civil-law system is to analyze the basic codes and legislation for the formulation of general theories and extract, enumerate, and expound on the principles of law contained in and to be derived from them." *Id.* at 19.

[18] Cappalli, Richard B., *Open Forum: At the Point of Decision: The Common Law's Advantage over the Civil Law*, 12 Temp. Int'l & Comp. L. J. 87, 93 (1998).

[19] *Id.* at 92. It has been asserted that the common law has an "obsession" with noting the reason behind rules. *Id.* at 91.

[20] Freisen, Jeffrey L., *When Common Law Courts Interpret Civil Codes*, 15 Wis. Int'l L. J. 1, 11 (1996). American legal scholarship has extensively covered the modern emergence of so-called "super precedence" (or "super stare decisis"). *See* Sinclair, Michael, *Precedent, Superprecedent*, 14 Geo. Mason L. Rev. 363, 364 (2007) ("A super-precedent would be so effective in defining the requirements of the law that it prevents legal disputes from arising in the first place, or, if they do arise, induces them to be settled without litigation"); Reese, Jessica, *The Lone Second Amendment Interpretation: Has it Reached the Status of "Superprecedent?"* 32 S. Ill. Univ. Law Jour. 211, 220 (2007) *citing to Richmond Med. Ctr. For Women v. Gilmore*, 219 F.3d 376 (4th Cir. 2000) (In discussion of landmark abortion rights case *Roe v. Wade*, 410 U.S. 113 (1973), reviewing Judge Lettig stated that, due to repeated confirmation by courts, *Roe* reached "super stare decisis" status). A commentator suggests that several traditional factors may determine whether a reviewing court shall strictly follow a "superprecedent," as opposed to depart from existing law, including the type of case the court is deciding, whether the precedent's rule of law has been substantially relied upon by society, whether the court opinion serving as precedent as issued unanimously (or for a divided court), the decision's age and whether a decision could be "workable" or creating a clear standard to guide state governments and lower courts. Reese, Jessica, *The Lone Second Amendment Interpretation: Has it Reached the Status of "Superprecedent?"* 32 S. Ill. Univ. Law Jour. 211, 221 (2007).

[21] Cappalli, Richard B., *Open Forum: At the Point of Decision: The Common Law's Advantage over the Civil Law*, 12 Temp. Int'l & Comp. L. J. 87, 89-90 (1998). *But see* Pejovic, Caslav, *Civil Law and Common Law: Two Different Paths Leading to the Same Goal*, 32 VUWLR 817, 819 n.7 (2001) (Asserting distinction as to how stare decisis doctrine is applied by U.S. and English courts. "In the United States, under this doctrine a lower court is required to follow the decision of a higher court in the same jurisdiction. In England, the previous rule under which courts were bound by their own prior decisions was reversed by the House of Lords (Practice Statement) which declared that it considered itself no longer formally bound by its own precedents and announced its intention "to depart from a previous decision when it appears right to do so." [1966] 1 WLR 1234").

[22] Cappalli, Richard B., *Open Forum: At the Point of Decision: The Common Law's Advantage over the Civil Law*, 12 Temp. Int'l & Comp. L. J. 87, 93 (1998) *citing to* Cappalli, Richard B., The American Common Law Method (1997) (see Chapters 4, 10). Stare decisis has been elevated as "the characteristic and all-pervading method of the common law," The Right Hon. Lord Wright, Precedents, 8 Cambridge Law Jour. 118 (1943) *cited in* Sinclair,

Common and civil law theoretical divergences may also be found in perceptions of formalistic versus standards-based legal approaches, respectively.[23] Formalism is understood as those legal rules which limit the interpreter's focus to "a subset of materials that may or may not give rise to the same inferences as would the universe of materials as a whole."[24] Alternatively, standards-based or "substantive" interpretive approaches involve attempting "to come to a more all-things-considered understanding, based on all of the materials reasonably available."[25] Courts opting to involve formalist strategies often ensure compliance with all relevant legal formalities, follow rule-bound law and restrain judicial discretion as cases are decided.[26] Freedom of contract theory is influential in the development of the common law's more formalistic approach.[27] Such perspective focuses on leaving the contracting parties to their own agreement, recognizing that contracting parties are free to enter into mutually beneficial economic exchanges.[28] Under the common law interpretation, a court, absent demonstrable fraud, will not inquire into the bargain's wisdom.[29] Compare this to a civil law regime's theoretical

Michael, *Precedent, Superprecedent*, 14 Geo. Mason L. Rev. 363, 364 (2007). *See also Payne v. Tennessee*, 501 U.S. 808, 827 (1991) (Chief Justice Rehnquist held that stare decisis "promotes the evenhanded, predictable, and consistent development of legal principles, fosters reliance on judicial decisions, and contributes to the actual and perceived integrity of the judicial process").

[23] A scholar differentiates these legal interpretative perspectives by highlighting methods of evaluating formalism, as follows: "One sees the dichotomy expressed in terms of rules versus standards, rules versus discretion, textual versus contextual modes of interpretation, static versus dynamic interpretation, simplicity versus complexity, determinacy versus flexibility, objective versus subjective standards, and so on. Each of these opposed pairs highlights different functional aspects of the formalism problem, but what they have in common is that the first member of each opposed pair connotes an interpretive approach that focuses on a more limited set of authoritative or evidentiary materials, and the second member connotes an approach that embraces or allows for the consideration of a more expansive set of materials." *See* Katz, Avery W., *The Economics of Form and Substance in Contract Interpretation*, 104 Colum. L. Rev. 496, 515 (2004).

[24] *Id.* at 498.

[25] *Id.*

[26] Sunstein, Cass R., *Must Formalism be Defended Empirically?*, University of Chicago Law School John M. Olin Law & Economics Working Paper No. 70 (2nd Series) at 3 (1999), found at http://www.law.uchicago.edu/publications/working/index.html.

[27] *Henrietta Mills, Inc. v. Commissioner*, 52 F. 2d. 931, 934 (4th Cir. 1931) ("The court will not write contracts for the parties to them nor construe them other than in accordance with the plain and literal meaning of the language used"). *see also* Lu, Shumei, Gap Filling and Freedom of Contract (Master's Thesis, University of Georgia) (2000) at http://digitalcommons.law.uga.edu/ (last reviewed June 20, 2008).

[28] "The freedom of parties to structure their own agreement is universally acknowledged to be at the heart of the common law of contracts." DiMatteo, Larry A., *Theory of Efficient Penalty: Eliminating the Law of Liquidated Damages*, 38 Am. Bus. L. J. 633, 634 (2001). *see also* DiMatteo, Larry A., *Theory of Efficient Penalty: Eliminating the Law of Liquidated Damages*, 38 Am. Bus. L. J. 633, 641 (2001).

[29] Note that a growing legal movement, *new American formalism*, adopts a middle road: clear, direct interpretive guidelines should be legislated, which courts may interpret and refine through, ultimately, a body of caselaw. Charny, David, *The New Formalism in Contract*, 66 U. Chi. L. Rev. 842, 842-43 (1999); *see also* Katz, Avery W., *The Economics of Form and Substance in Contract Interpretation*, 104 Colum. L. Rev. 496, 505 (2004) (Courts must depart from traditional formalism in certain clear instances; the First Restatement of Contracts (First Restatement) (1932) made, for example, exceptions for fraud or mistake); Barnett, Randy E., *The Richness of Contract Theory*, 97 Mich. L. Rev. 1413, 1414-15 (1999) (book review).

underpinnings. Namely, under a standards-based approach, civil law judges are empowered to utilize a flexible interpretation method, with the ability to examine the intent of the parties rather than be limited to a contract term's literal meaning.[30]

2.2 Good Faith Doctrine and the Role of Judges: Black-Letter Civil Law

The contractual doctrine of good faith illustrates how seemingly similar commercial legal concepts may be interpreted and enforced quite differently in jurisdictions spanning across legal families. Legal systemic differences, such as the differing role of judges, also affect the application of legal doctrine. Such divergences demonstrate the need for comparative analysis of legal concepts via black letter law, while suggesting that a complementary law-in-action evaluative approach is also necessary.

While common law courts historically avoid judicial intervention into the contracting parties' relationship,[31] the civil law systems allow the judiciary a more expansive opportunity to interpret the parties' bargain.[32] Such proactive judicial stance has been collectively identified as

[30] Garello, Pierre, *The Breach of Contract in French Law: Between Safety of Expectations and Efficiency* (http://ideas.repec.org/a/eee/irlaec/v22y2002i4p407-420.html), 22 International Review of Law and Economics 407, 412 (2003); *see also* Gordley, James, *Contract Law in the Aristotelian Tradition*, in The Theory of Contract Law 266 (2001) (With respect to civil law, fairness and distributive justice are foundations of the binding force of contractual promises, rather than an individual will); Moss, Giuditta Cordero, *International Contracts between Common Law and Civil Law: Is Non-state Law to Be Preferred? The Difficulty of Interpreting Legal Standards Such as Good Faith*, 7 Global Jurist (Advances) 19 (2007).

[31] For a discussion of historical restraints by American judges to intervene, *see* Weigand, Tory, *The Duty of Good Faith and Fair Dealing in Commercial Contracts in Massachusetts*, 88 Mass. L. Rev. 174 (2004).

[32] For a description of the German legal regime, where courts have the power to rewrite a contract, *see* DiMatteo, Larry A., *An International Contract Law Formula: The Informality of International Business Transactions Plus the Internationalization of Contract Law Equals Unexpected Contractual Liability*, 23 Syracuse J. Int'l L. & Com. 67, 85-86 (1997) *citing to* von Teichman, Germany, Federal Republic, in 1 Legal Aspects of Doing Business in Western Europe 205, 218 (Dennis Campbell ed., 1983). *see also* Powers, Paul J., *Defining the Undefinable: Good Faith and the United Nations Convention on Contracts for the International Sale of Goods*, 18 Journal of Law and Commerce 333-353 (1999) found at http://www.cisg.law.pace.edu/cisg/biblio/powers.html#def (no page numbers online) ("Civil law states tend to use a more expansive approach to the good faith obligation applying it to both contract formation and performance. Common law states prefer a more narrow good faith duty applicable only to contract performance"). Note that Powers continues that "The civil law approach to good faith is more encompassing than its common law counterpart. A civil law contracting party owes a pre-contract duty of good faith to negotiate fairly and openly with the other party. This obligation extends to contract performance and requires parties to act reasonably, or more specifically, not to breach the relationship of trust with those with whom they negotiate and contract. Good faith is an important public policy in countries adhering to the civil law approach. In these countries, good faith can be relied upon by both parties to a contract." *See also* Moss, Giuditta Cordero, Commercial Contracts Between Consumer Protection and Trade Usages: Some Observations on the Importance of State Contract Law, in Schulze, R. (ed.), Common Frame of Reference and Existing EC Contract Law, 65, 68 (2008) ("[T]he civilian judge has a larger power to evaluate the fairness of the contract and intervene to reinstate the balance of interests between the parties; he or she is more concerned with creating justice in the specific case than with implementing the deal in the most predictable manner. In doing so, the civilian judge is guided by general clauses and principles of good faith and fair dealing").

the "good faith" interpretation,[33] where courts are empowered to address perceived gaps in the contracting parties' bargaining relationship. Civil law judges are thus able to use a subjective interpretation method, examining the good-faith intent of the parties rather than contract terms' literal meaning.[34] This standards-based approach is particularly evident in the Scandinavian legal context, as Bo Madsen describes its informal characteristics, evidenced by the recognition of contract formation on the basis of "social typical conduct," judging contracts on the general requirement of "fairness," interpreting contracts "pragmatically" (while taking into account the social and economic status of contracting parties) and, particularly in the consumer context, "employing in many connections "legal standards" which are often to be "filled out" in practice by quasi-legal bodies dominated by lay judges (e.g. The Consumers Complaints Board)."[35]

Thus, the civil law tradition accepts that individuals are bound by certain conduct, even if not included specifically within the contract.[36] While this may be captured in a statutory framework, as discussed below, it is accepted that legislatures "cannot foresee all possible situations."[37] Similarly, contract law under the French system is viewed as a "shared undertaking," with courts concerned that the parties adhere to their agreement and the law. French courts attempt to compel contractual performance before resorting to finding for damages as substitution relief for a contractual breach's "moral wrong doing."[38]

The Germanic system[39] also has an ethical character, as the law is understood as a positive system of rules and a way to develop new rules and to tackle societal problems.[40] Under the

[33] Good faith is defined as "an intangible and abstract quality with no technical meaning or statutory definition, and it encompasses, among other things, an honest belief, the absence of malice and the absence of design to defraud or to seek an unconscionable advantage…" Black's Law Dictionary 693 (1990). Mitchell, Andrew D., *Good Faith in WTO Dispute Settlement*, Melbourne J. Int'l Law, 14 (2006) (no page numbers available online) (In civil law context, good faith is "a principle of fair and open dealing").

[34] Garello, Pierre, *The Breach of Contract in French Law: Between Safety of Expectations and Efficiency*, 22 International Review of Law and Economics 407, 412 (2003); *see also* Moss, Giuditta Cordero, *International Contracts between Common Law and Civil Law: Is Non-state Law to Be Preferred? The Difficulty of Interpreting Legal Standards Such as Good Faith*, 7 Global Jurist (Advances) 19 (2007) ("As opposed to common law, concepts such as good faith or fair dealing and rules governing contracts in general or a certain type of contract in particular may be invoked in civil law to interpret the contract, to integrate it or even to correct it").

[35] Bo Madsen, Palle, *Scandinavian Contract Law within the EEC: A Social Dimension in Contract Law by Harmonization or Recognition*, in Perspective of Critical Contract Law 107, 109 (Thomas Wilhemsson, ed., 1992).

[36] De Ly, Filip, *Commercial Law as a Refuge from Contract Law: A Comparative and Uniform Law Perspective*, 45 Wayne L. Rev. 1825, 1854 (2000).

[37] *Id.* (Discussing the German legal tradition)

[38] Miller, Lucinda, *Penalty Clauses in England and France: A Comparative Study*, 53 ICLQ 79, 97-98 (2004). For a comprehensive analysis of French law, *see also* Wells, Michael, *French and American Judicial Opinions*, 19 Yale J. Int'l L. 81, 99-100 (1994) (*quoting* Dawson, John P., The Oracles of the Law 401 (1968) in Farber, Daniel A., *Book Review: The Hermeneutic Tourist: Statutory Interpretation in Comparative Perspective*, 81 Cornell L. Rev. 513, 527 (1996).

[39] DiMatteo, Larry A., *An International Contract Law Formula: The Informality of International Business Transactions Plus the Internationalization of Contract Law Equals Unexpected Contractual Liability*, 23 Syracuse J. Int' L. & Com. 67, 70 (1997).

German Civil Code (*Bürgerliches Gesetzbuch,* the "German Civil Code" or "BGB") established in 1900 (and revised in 2002), contracting parties are given broad freedom to structure their contractual relationships.[41] German jurists tend to look more to the *purpose* of the legal instruments used, rather than the literal judicial *interpretation* of the language.[42] German law does not restrict itself to a provision's literal wording, but rather pursues interpreting the provision in a manner that best addresses the provision's purpose.[43] Context in determining the actual intent of a contractual provision is paramount, with the goal of ascertaining such intention the cornerstone of German contract interpretation. Specifically, Article 133 of the German Civil Code holds that "When a declaration of intent is interpreted, it is necessary to ascertain the true intention rather than adhering to the literal meaning of the declaration."[44] It has also been asserted that Article 133 encourages contract interpretation "in light of the contractual economic purposes."[45]

The civil law judge may interpret contractual relationships to supplement, correct, or revise contracts.[46] Initially, a civil law judge will review a contract in such a fashion that revision is unnecessary, although it may *practically* revise the contract, through judicial interpretation. Civil law courts will then seek to reform the contract in light of new circumstances, revising the agreement in what is perceived as the parties' interests and intentions; if that fails, the entire

[40] De Ly, Filip, *Commercial Law as a Refuge from Contract Law: A Comparative and Uniform Law Perspective*, 45 Wayne L. Rev. 1825, 1854 (2000). *See also* Miller, Lucinda, *Penalty Clauses in England and France: A Comparative Study*, 53 ICLQ 79, 100 (2004) (Noting that the French Civil Code often contains certain "abstract concepts," such as good faith and morality, outside those traditionally found within the common law, in addition to doctrines of collaboration and loyalty. Collectively, these principles create a so-called moralization of law which encourages judicial redrafting of agreements and produces uncertainty).

[41] Moss Giuditta Cordero, *International Contracts between Common Law and Civil Law: Is Non-state Law to Be Preferred? The Difficulty of Interpreting Legal Standards Such as Good Faith*, 7 Global Jurist (Advances) 12 (2007). For the official English translation, *see* Bundesministerium der Justiz at http://www.gesetze-im-internet.de/englisch_bgb/index.html. For an interesting description of the historical development of German commercial law, *see* Zimmermann, Reinhard, *The German Civil Code and the Development of Private Law in Germany*, Oxford University Comparative Law Forum 1 (2006) at http://ouclf.iuscomp.org/articles/ zimmermann.shtml.

[42] DiMatteo, Larry A., *An International Contract Law Formula: The Informality of International Business Transactions Plus the Internationalization of Contract Law Equals Unexpected Contractual Liability*, 23 Syracuse J. Int'l L. & Com. 67, 70-71 (1997).

[43] *See id. see also* Temkin, Harvey L., *When Does the "Fat Lady" Sing?: An Analysis of "Agreements in Principle" in Corporate Acquisitions*, 55 Ford. L. Rev. 125, 206 (1986) (*citing to* Calamari, John D & Joseph M. Perillo, Contracts 2-7, at 30-33 (1977)).

[44] Official English Translation, Bundesministerium der Justiz at http://www.gesetze-im-internet.de/englisch_bgb/englisch_bgb.html - Section 133; *see also* DiMatteo, Larry A., *An International Contract Law Formula: The Informality of International Business Transactions Plus the Internationalization of Contract Law Equals Unexpected Contractual Liability*, 23 Syracuse J. Int'l L. & Com. 67, 71 (1997) *citing to* German Civil Code Book I, 133.

[45] DiMatteo, Larry A., *An International Contract Law Formula: The Informality of International Business Transactions Plus the Internationalization of Contract Law Equals Unexpected Contractual Liability*, 23 Syracuse J. Int'l L. & Com. 67, 71 (1997) *citing to* Naglar, Nassar, *Sanctity of Contracts Revisited: A Study in the Theory and Practice of Long-term International Commercial Transactions* 44 (1995).

[46] De Ly, Filip, *Commercial Law as a Refuge from Contract Law: A Comparative and Uniform Law Perspective*, 45 Wayne L. Rev. 1825, 1854 (2000) (German jurist perspective).

contract will be voided.[47] Norwegian jurists directly interpreting a commercial contractual relationship, or indirectly employing interpretative techniques to otherwise reach a perceived reasonable good-faith driven result,[48] share qualities found under civil law systems. According to DiMatteo, the German system believes that

> "the judiciary is very important as judges have to fill gaps that may exist, and have to develop the contracts and enforce them in accordance with both the parties' intent and objective standards of reasonable and fair dealing."[49]

As such, the full, entire contractual relationship can be used to determine contractual intent "in the face of an instrument that indicates otherwise."[50] Civil law countries use rules which may not necessarily allow one to immediately reach conclusions from a rule's application: such is the case with § 242 of the BGB (*Treu und Glauben*), through which judicial interventionism activates the rules operating as a delegation from the legislature to the judiciary "to fill gaps in the legislative system, to develop new rules, and to police contract law."[51] While § 242 allows adjusting contract law to meet new or specific circumstances, it has been proposed that the clause "may create unpredictability and uncertainties in contract law."[52]

Many of the civil legal regimes were substantially transformed in the early twentieth century, adopting good faith principles. The German Civil Code's proactive judicial character took roots soon in its formative period, and has been painted, through its proactive nature, as safeguarding certain value-laden contractual rights. This is the perceived "good faith" approach, which often is at odds with the common law perception of freedom of contract.[53] A clear example occurred

[47] DiMatteo, Larry A., *An International Contract Law Formula: The Informality of International Business Transactions Plus the Internationalization of Contract Law Equals Unexpected Contractual Liability*, 23 Syracuse J. Int'l L. & Com. 67, 85-86 (1997) *citing to* von Teichman, Christoph, Germany, Federal Republic, in 1 Legal Aspects of Doing Business in Western Europe 205, 218 (Dennis Campbell ed., 1983).

[48] *See* Dalbak, Camilla, *Lojalitetsplikt som grunnlag for å begrense og utvide fleksibilitet i avetaleforhold* (particularly section 2.2) (2007) at www.idunn.no.

[49] DiMatteo, Larry A., *An International Contract Law Formula: The Informality of International Business Transactions Plus the Internationalization of Contract Law Equals Unexpected Contractual Liability*, 23 Syracuse J. Int'l L. & Com. 67, 85-86 (1997) *citing to* von Teichman, Christoph, Germany, Federal Republic, in 1 Legal Aspects of Doing Business in Western Europe 205, 218 (Dennis Campbell ed., 1983). Schäfer, Hans-Bernd, *The Relevance of Law and Economics for Development of Judge Made Rules: Examples from German Case Law*, 40 European Economic Review 989, 991 (1996) (Large amount of German civil law based judge-made rules, filling legislative gaps).

[50] DiMatteo, Larry A., *An International Contract Law Formula: The Informality of International Business Transactions Plus the Internationalization of Contract Law Equals Unexpected Contractual Liability*, 23 Syracuse J. Int'l L. & Com. 67 (1997).

[51] De Ly, Filip, *Commercial Law as a Refuge from Contract Law: A Comparative and Uniform Law Perspective*, 45 Wayne L. Rev. 1825, 1854 (2000). *See* Bundesministerium der Justiz at http://www.gesetze-im-internet.de/englisch_bgb/index.html.

[52] *Id.*

[53] De Ly, Filip, *Commercial Law as a Refuge from Contract Law: A Comparative and Uniform Law Perspective*, 45 Wayne L. Rev. 1825, 1849 (2000). The Germanic principle of good faith performance may be traced to the Roman age,

during the 1920s, as German courts interpreted contract cases based on the notions of good faith and fair dealing under BGB § 242, and proposed that new obligations could be judicially supplemented into contracts under the *Ergänzungsfunktion*.[54] Moreover, courts can draw on good faith to "interfere with contract terms, and prohibit the exercise of contractual rights, if this conflicts with fair dealing (*Schrankefunktion*)."[55] Further, German courts may "adapt contracts to new circumstances as a result of a significant change in the circumstances that originally led to the conclusion of the contract, under the *Korrekturfunktion*."[56] The reviewing judge, under German Civil Code § 157, may thus fill in contractual gaps to ensure that the concept of good faith is adhered to.[57] BGB § 242 goes even further, serving "as a barrier against enforcement of a contractual right, in case the exercise of that right brings to unfair results or disrupts the balance of interest between the parties."[58] Finally, the German Law on General Business Conditions or AGB-Gesetz (*AGBG*) voids contract provisions which work to disadvantage a contract party in a manner "irreconcilable with good faith."[59] In each of these examples, the German jurist holds broad powers, which, as exercised, allow direct access into the contractual relationship. A French judge, similarly, may thrust elements of social and moral values into private bargaining,

and reemerged during middle ages. DiMatteo, Larry A., *An International Contract Law Formula: The Informality of International Business Transactions Plus the Internationalization of Contract Law Equals Unexpected Contractual Liability*, 23 Syracuse J. Int'l L. & Com. 67, 85 (1997) *citing to* Anderson, Jill P., *Lender Liability for Breach of the Obligation of Good Faith Performance*, 36 Emory L. J. 917, 919-920 (1987).

[54] De Ly, Filip, *Commercial Law as a Refuge from Contract Law: A Comparative and Uniform Law Perspective*, 45 Wayne L. Rev. 1825, 1849 (2000). *See also* Weigand, Tory, *The Duty of Good Faith and Fair Dealing in Commercial Contracts in Massachusetts*, 88 Mass. L. Rev. 175 n.5 (2004) (*Treu und Glauben* provides that the "debtor is bound to effect performance according to requirements of good faith giving consideration in common usage") *citing to* Powers, Paul J., *Defining the Undefinable: Good Faith and the United Nations Convention on Contracts for International Sale of Goods*, 18 J.L. & Com. 333 (1999).

[55] De Ly, Filip, *Commercial Law as a Refuge from Contract Law: A Comparative and Uniform Law Perspective*, 45 Wayne L. Rev. 1825, 1849 (2000).

[56] *See id.*

[57] Moss, Giuditta Cordero, *International Contracts between Common Law and Civil Law: Is Non-state Law to Be Preferred? The Difficulty of Interpreting Legal Standards Such as Good Faith*, 7 Global Jurist (Advances) 12 (2007); *see also* DiMatteo, Larry A., *An International Contract Law Formula: The Informality of International Business Transactions Plus the Internationalization of Contract Law Equals Unexpected Contractual Liability*, 23 Syracuse J. Int'l L. & Com. 67, 85 (1997) *citing to* von Teichman, Christoph, Germany, Federal Republic, in 1 Legal Aspects of Doing Business in Western Europe 205, 217 (Dennis Campbell ed., 1983) (Modern German Civil Code also voids contractual terms considered contrary to good faith).

[58] Moss, Giuditta Cordero, *International Contracts between Common Law and Civil Law: Is Non-state Law to Be Preferred? The Difficulty of Interpreting Legal Standards Such as Good Faith*, 7 Global Jurist (Advances) 12 (2007). Section 242 of the German Civil Code uses the good faith concept of Geschaftsgrundlage, or "basis of the bargain" to excuse performance. DiMatteo, Larry A., *An International Contract Law Formula: The Informality of International Business Transactions Plus the Internationalization of Contract Law Equals Unexpected Contractual Liability*, 23 Syracuse J. Int'l L. & Com. 67, 85-86 (1997) *citing to* von Teichman, Christoph, Germany, Federal Republic, in 1 Legal Aspects of Doing Business in Western Europe 205, 218 (Dennis Campbell ed., 1983).

[59] DiMatteo, Larry A., *An International Contract Law Formula: The Informality of International Business Transactions Plus the Internationalization of Contract Law Equals Unexpected Contractual Liability*, 23 Syracuse J. Int'l L. & Com. 67, 85 (1997) *citing to* von Teichman, Germany, Federal Republic, in 1 Legal Aspects of Doing Business in Western Europe 205, 217 (Dennis Campbell ed., 1983).

as it is allowed to consider the parties' bad (or good) faith, enabling the judge to examine the contract through many prisms.[60]

2.3 Exploring Additional Divergences Outside and Within Legal Families: Norway and the Civil Law System

Comparative review may discern complexities within a single legal family.[61] Despite the overall consistencies with the civil law family, a comparativist must recognize key factors which distinguish the Norwegian (and Scandinavian) [62] legal tradition[63] from other civil law traditions, including the lack of a systematic codification of the law of obligations, perceived elements and understandings of judicial pragmatism and a vibrant, pervasive goal, and sense, of social solidarity, which elevates equitable justice over individual autonomy.[64] The Nordic model's "harmonization" of contract law, in particular, stemmed from the shared history, language and continuing Nordic cultural unity, which is further based on "common ideological and political values."[65] The similarity in social ideals and the Nordic nations' mutual development in the region created legal uniformity, with closeness made stronger through determined cooperation in legal issues, as evidenced in the "general clause."[66] The Nordic countries also share many traits in commercial laws, ranging from business registration rules to real estate acquisitions,

[60] Miller, Lucinda, *Penalty Clauses in England and France: A Comparative Study*, 53 ICLQ 79, 100-101 (2004).

[61] For discussions on divergent comparative contractual outcomes within a shared legal family, *see* Canuel, Edward T., *Comparing Exculpatory Clauses under Anglo-American Law: Testing Total Legal Convergence*, pp. 81-103, in Cordero Moss, Giuditta, *et. al.*, Boilerplate Clauses, International Commercial Contracts and the Applicable Law (Cambridge Press, 2011) (Analyzing how Anglo-American courts interpret and apply exculpatory clauses, finding that the clauses have varying legal effects even within the same legal family).

[62] Norwegian law is grouped within the Scandinavian legal systems, classified as a separate legal family, but accepted as largely having its roots, particularly within contract law, in the Germanic legal tradition. Moss Giuditta Cordero, *International Contracts between Common Law and Civil Law: Is Non-state Law to Be Preferred? The Difficulty of Interpreting Legal Standards Such as Good Faith*, 7 Global Jurist (Advances) 11 (2007).

[63] For a basic overview of the various Scandinavian legal systems, *see* Michael Bogdan, *Comparative Law* (1994); Zweigert, Konrad and Hein Kötz, *Introduction to Comparative Law* (1987). *See also* Pejovic, Caslav, *Civil Law and Common Law: Two Different Paths Leading to the Same Goal*, 32 VUWLR 817, 818 n.3 (2001) at www.upf.pf/IMG/doc/16Pejovic.doc ("The term "civil law" has two meanings: in its narrow meaning it designates the law related to the areas covered by the civil codes, while broader meaning of civil law relates to the legal systems based on codes as contrasted to the common law system").

[64] Moss, Giuditta Cordero, *International Contracts between Common Law and Civil Law: Is Non-state Law to Be Preferred? The Difficulty of Interpreting Legal Standards Such as Good Faith*, 7 Global Jurist (Advances) 14 (2007). Unlike other Germanic-inspired countries, Norway has not codified its obligations law. Rather, Norway has founded its contract interpretation on The Act on Formation of Contracts of 1918. *See, e.g.,* Moss, Giuditta Cordero, *International Contracts between Common Law and Civil Law: Is Non-state Law to Be Preferred? The Difficulty of Interpreting Legal Standards Such as Good Faith*, 7 Global Jurist (Advances) 13 (2007) *citing to* Hov, J., Avtaleslutning og ugyldighet, Kontratsrett I, 60, 167-168 (2002).

[65] Bo Madsen, Palle, *Scandinavian Contract Law within the EEC: A Social Dimension in Contract Law by Harmonization or Recognition*, in Perspective of Critical Contract Law 107, 109 (Thomas Wilhemsson, ed., 1992).

[66] *See id.*

from patent protections to the sale of goods.[67] Alternatively, the common law family is composed of organic law, with judges reliant upon precedents and the persuasive effect of the works of other common law jurisdictions.[68]

The Scandinavian reasonableness rule has been held as not a dramatic departure from German law, particularly given that the good faith obligations found under the German Civil Code's § 242 "largely serve the same purpose of equitable justice."[69] A Norwegian jurist, similar to a German judge, would "correct the literal interpretation of a contract to avoid an unfair result, and would integrate the terms of the contract in case of gaps: it would go even further than a German court, and would correct the wording of the contract to achieve a better balance of interest between the parties, even if the [applicable] contract regulation does not lead to unfair results."[70] Similar contract interpretation is also found under Norwegian contract law, with respect to both performance and negotiations, which include "a duty to take into consideration the other party's reliance on contractual negotiations, and in a duty to inform the other party of matters that might have a material significance for that party's evaluation of the prospective contract."[71] Further evidencing such interpretation of necessary equitable requirements, Cordero Moss notes that "§ 33 of the Act on Formation of Contracts provides that a contractual provision is not binding on a party, if enforcement thereof would be unfair because of circumstances that were known to the other party at the moment of conclusion of the contract."[72]

Focusing less on the individual freedom and more on justice and reasonableness than other civilian systems,[73] the Norwegian judge enjoys broad flexibility in the interpretive process.[74] These underlying principles may be evidenced through contract formation requirements, a system which requires neither specific contractual form, nor invalidates oral agreements (which, under the Norwegian system, are as binding as a written contract).[75] The Norwegian fact finder seeks the contracting parties' objective intent, while strongly influenced in the context of

[67] *See* Gustafsson, Leif, Business Laws in the Nordic Countries: Legal and Tax Aspects (1998).

[68] Cappalli, Richard B., *Open Forum: At the Point of Decision: The Common Law's Advantage over the Civil Law*, 12 Temp. Int'l & Comp. L. J. 87, 92 (1998). It has been asserted that the common law has an "obsession" with noting the reason behind rules. *Id.* at 91.

[69] *See* Moss, Giuditta Cordero, *International Contracts between Common Law and Civil Law: Is Non-state Law to Be Preferred? The Difficulty of Interpreting Legal Standards Such as Good Faith*, 7 Global Jurist (Advances) 15 (2007).

[70] *Id.*

[71] *Id.*

[72] *Id.* at 16.

[73] Note that judicial roles vary among civil law legal regimes. For general discussions as to the different approaches between the Germanic and French legal systems, *see*, *respectively*, DiMatteo, Larry A., *An International Contract Law Formula: The Informality of International Business Transactions Plus the Internationalization of Contract Law Equals Unexpected Contractual Liability*, 23 Syracuse J. Int' L. & Com. 67, 70 (1997); Miller, Lucinda, *Penalty Clauses in England and France: A Comparative Study*, 53 ICLQ 79, 97-98 (2004). *See also* Pearce, Brian, *The Comity Doctrine as a Barrier to Judicial Discretion: A U.S.-E.U. Comparison*, 30 Stan. J. Int'l L. 525, 567-570 (1994).

[74] Moss, Giuditta Cordero, *International Contracts between Common Law and Civil Law: Is Non-state Law to Be Preferred? The Difficulty of Interpreting Legal Standards Such as Good Faith*, 7 Global Jurist (Advances) 14 (2007).

[75] Gustafsson, Leif, Business Laws in the Nordic Countries: Legal and Tax Aspects 392 (1998).

contract law by the subject agreement's purpose.[76] Contract interpretation by the Norwegian judge will follow what is perceived to be the contract's function.[77] For example, given the absence in formal requirements, Norwegian law also considers it decisive that the "company or person who has issued a statement, written or orally, did so with the *intention* to establish rights and obligations between the parties considered."[78]

In short, Norway's civil law framework emphasizes a standards-based review rather than a formalistic approach.[79] Norwegian courts stress the flexibility of a judge, particularly in a quest to ensure compliance with good faith principles. Gap-filling is a highly-accepted element of civil law legal regimes. Civil law judges are empowered with far-ranging judicial tools, allowing them significant opportunities and ability to intervene as necessary when perceived contractual intent is violated.[80] Providing a Norwegian judge procedural or interpretive flexibilities embraces legal realism goals, less concerned as to levels of judicial discretion and more focused upon avoiding static, rigid mechanisms which may promote mistakes or inequities.[81] Within the contract law context, Section 36 of the Act on Formation of Contracts of 1918[82] provides Norwegian judges expansive interventionist powers, allowing them to either void or reformat a contractual clause deemed unreasonable.[83] Norwegian judges either directly or *indirectly* use section 36.[84]

[76] Moss, Giuditta Cordero, *International Contracts between Common Law and Civil Law: Is Non-state Law to Be Preferred? The Difficulty of Interpreting Legal Standards Such as Good Faith*, 7 Global Jurist (Advances) 14 (2007).

[77] *See id.*

[78] Gustafsson, Leif, Business Laws in the Nordic Countries: Legal and Tax Aspects 392 (1998) (emphasis added). A discussion of how Norwegian law contends with oral contract amendments (and general analysis as to when American contracts are allowed to be oral in form), is found in Westly, Jens Christian, *No Oral Amendments Clauses*, paper presented in Norway at the Anglo-American Contract Model Project Seminar on June 16-17, 2008 (on file with author).

[79] Civil law regimes often place great importance upon legislated codes which suggests a formalist approach. Germany provides an interesting example, as it codified the principle of good faith under section 242 of the German Civil Code, which provides a reviewing judge the power to render standards-based decisions. *See* Bundesministerium der Justiz at http://www.gesetze-im-internet.de/ englisch_bgb/index.html.

[80] *See* Miller, Lucinda, *Penalty Clauses in England and France: A Comparative Study*, 53 ICLQ 79,100-101 (2004); De Ly, Filip, *Commercial Law as a Refuge from Contract Law: A Comparative and Uniform Law Perspective*, 45 Wayne L. Rev. 1825, 1854 (2000).

[81] Katz, Avery W., *The Economics of Form and Substance in Contract Interpretation*, 104 Colum. L. Rev. 496, 497 (2004) ("positive imperatives of lawmaking thus lead naturally to interpretive conventions that disfavor formalist decision-making").

[82] The 1918 Act is composed of four separate chapters, with section 36 found in chapter three, dealing with contracts voided due to exploitation of another party's weakness, fraud or duress. Krüger, Kai, Norsk Kjøpsrett 693 n.70 (1999); Hagstrøm, Viggo, Obligasjonrett 275 (2003). Prior to its amendments, the original section 36 did specifically address the concern that excess penalties could be misused.

[83] Swedish law specifically provides for an evaluation of the relative bargaining power of the parties in making the reasonableness determination. Section 36(2) of the Swedish Commercial Code provides that "particular consideration" shall be given to protecting the party "in a subordinate position in the contractual relationship." DiMatteo, Larry A., *Theory of Efficient Penalty: Eliminating the Law of Liquidated Damages*, 38 Am. Bus. L. J. 633, 654 (2001) *citing to* International Chamber of Commerce, Guide to Penalty and Liquidated Damages Clauses 38 (1990).

2.4 Good Faith Doctrine and the Role of Judges: *Black-Letter Common Law*

Anglo-American contract law varies significantly from the civil law interpretations of good faith, which also indicate the differing role held by judges. Under the common law approach, good faith is found sporadically in certain areas, such as contract termination and good faith in negotiations.[85] The common law system's reluctance to integrate equitable principles between the contracting parties, such as good faith, evidences the importance stressed upon commerce and business, given that such principles may create uncertainty.[86] Additionally, a civil legal regime's good faith excuse for non-performance may result in contractual rescission, which would be nearly impossible to pursue, if ever, under the common law context.[87] The common law tradition focuses more on remedies, or remedial satisfaction, but somewhat less on the rights and duties that are at its core, as compared to civil law's concentration on the obligor's duty of performance and the underlying right of the obligee to receive performance.[88]

Under the U.S. interpretation, duties of good faith and fair dealing[89] are "elusive and ill-defined," with courts opting to address claims under such legal doctrines on an "individualized, fact-

[84] *See* Hagstrøm, Viggo, Obligasjonrett 275 (2003); Woxholt, Geir, Avtalerett (2003); Dalbak, Camilla, *Lojalitetsplikt som grunnlag for å begrense og utvide fleksibilitet i avetaleforhold* (particularly section 2.2) (2007) at www.idunn.no.

[85] DiMatteo, Larry A., *An International Contract Law Formula: The Informality of International Business Transactions Plus the Internationalization of Contract Law Equals Unexpected Contractual Liability*, 23 Syracuse J. Int'l L. & Com. 67, 86 (1997); *see also* Hillman, Robert A., *An Analysis of the Cessation of Contractual Relations*, 68 Cornell L. Rev. 617 (1983); Weigand, Tory, *The Duty of Good Faith and Fair Dealing in Commercial Contracts in Massachusetts*, 88 Mass. L. Rev. 174 (2004).

[86] Moss, Giuditta Cordero, *International Contracts between Common Law and Civil Law: Is Non-state Law to Be Preferred? The Difficulty of Interpreting Legal Standards Such as Good Faith*, 7 Global Jurist (Advances) 1 (2007). *See also* DeMott, Deborah A., *Puzzles and Parables: Defining Good Faith in the MBO Context*, 25 Wake Forest L. Rev. 15, 19 (1990) ("A key component of business judgment analysis [in the U.S.], good faith, has always been a concept arguably unequalled for its malleability and formlessness").

[87] DiMatteo, Larry A., *An International Contract Law Formula: The Informality of International Business Transactions Plus the Internationalization of Contract Law Equals Unexpected Contractual Liability*, 23 Syracuse J. Int'l L. & Com. 67, 85-86 (1997) *citing to* von Teichman, Christoph, Germany, Federal Republic, in 1 Legal Aspects of Doing Business in Western Europe 205, 218 (Dennis Campbell ed., 1983); Moss, Giuditta Cordero, *International Contracts between Common Law and Civil Law: Is Non-state Law to Be Preferred? The Difficulty of Interpreting Legal Standards Such as Good Faith*, 7 Global Jurist (Advances) 1 (2007).

[88] Miller, Lucinda, *Penalty Clauses in England and France: A Comparative Study*, 53 ICLQ 79, 97 (2004).

[89] Good faith and fair dealing concepts are found in the Restatement (Second) of Contracts and the U.C.C., which is a uniform act promulgated to harmonize the law of the sale of goods and other transactions in the U.S., and adopted, in whole or in part, by all U.S. states. For example, U.C.C. § 1-203 specifically refers to an obligation of good faith, and notes that every contract/duty within the U.C.C. imposes such good faith obligation. *See also* Farnsworth, E. Allen, *Good Faith Performance and Commercial Reasonableness Under the Uniform Commercial Code*, 30 U. Chi. L. Rev. 666 (1983); Restatement (Second) of Contracts, Section 205 ("Every contract imposes upon each party a duty of good faith and fair dealing in its performance and its enforcement."). *But see* Weigand, Tory, *The Duty of Good Faith and Fair Dealing in Commercial Contracts in Massachusetts*, 88 Mass. L. Rev. 174, 177 (2004) *citing to* White, James J. & Summers, Robert S., Uniform Commercial Code § 4 (1988) (U.C.C. is "not applicable to a majority of commercial transactions and leaves many issues such as contract formation to the "common law"""). *See also* Appellant *Brief for Shelby Resources, LLC v. Wells Fargo Bank, National Association*, 2006 WL 4082450 at 2 (2006) (arguing that "weight of authority is that all of the common law should be applied to U.C.C. claims when it

specific basis."[90] Jurists have argued that such doctrines act as "an unwarranted invitation to the judiciary to impermissibly intrude into freedom."[91] In Massachusetts, for example, good faith and fair dealing were limited in the early 20th century to isolated cases, including the prohibition of employees using garnered business information with their former employer's competitor, and protecting the vendee's goodwill against the possibility of a vendor creating a rival business.[92]

Confined to such limited instances, U.S. courts generally hold that the words and terms used in the contracting parties' agreement must be given primacy. This understanding embodies freedom of contracting principles. The rationale is that the contracting parties, except in limited instances where public policy would otherwise be contravened, should have contractual freedom to dictate their own agreements.[93] Unambiguous contracts are to be construed by courts within the agreements' "plain terms" or "four corners," where introducing any extrinsic evidence in contract disputes that contradict or supplement the agreement's express terms were forbidden.[94]

Recent U.S. decisions mainly reject alleged contractual breaches of the duty of good faith and fair dealing, and reemphasize the freedom of contract.[95] Many modern opinions contain a repetitive

appears that duties in addition to U.C.C. duties exist on the part of a Defendant); Weinberg, Lisa G., *Letter of Credit Litigation: Bank Liability for Punitive Damages*, 54 Fordham L. Rev. 905, 911 n.31 (1986) (Asserting that common law applies unless displaced by Code, noting U.C.C. § 1-103 (1977) states that "[u]nless displaced by the particular provisions of this Act, the principles of law and equity . . . shall supplement its provisions"). For a general discussion as to how sales of goods are distinguished from sales of services, *see* Gimeno, Christine, *et. al.*, 79 C.J.S. Secured Transactions §2.

[90] Weigand, Tory, *The Duty of Good Faith and Fair Dealing in Commercial Contracts in Massachusetts*, 88 Mass. L. Rev. 174 (2004). For a description of the English view toward good faith, *see* Judge Brimham LJ in *Interfoto Picture Library Ltd. v. Stiletto Visual Programmes Ltd.* [1988] 2 W.L.R. 615 ("English law has, characteristically, committed itself to no such overriding principle [as the principle of good faith] but has developed piecemeal solutions in response to demonstrated problems of unfairness…") *cited in* Moss, Giuditta Cordero, *International Contracts between Common Law and Civil Law: Is Non-state Law to Be Preferred? The Difficulty of Interpreting Legal Standards Such as Good Faith*, 7 Global Jurist (Advances) 9 (2007).

[91] Weigand, Tory, *The Duty of Good Faith and Fair Dealing in Commercial Contracts in Massachusetts*, 88 Mass. L. Rev. 174-175 (2004) *citing to* N. Heel Corp. v. Comp. Indus., 851 F.2d 456, 466 (1st Cir. 1988).

[92] *See id.* at 174, 176, *citing to Essex Trust Co. v. Enwright*, 214 Mass. 507 (1913); *Foss v. Roby*, 195 Mass. 292, 298 (1907).

[93] *See Levenson v. Feuer*, 60 Mass. App. Ct. 428, 437-438 (2004) (conveyance instrument which would assist real estate contracting parties seeking to dodge statutes concerning government foreclosure process was voided); *Beacon Hill Civic Ass'n v. Ristorante Toscano, Inc.*, 422 Mass. 318, 320 (1996), quoting Farnsworth, E. Allan, *Contracts*, 5.1 at 345 (1990) ("the public interest [is] to accord individuals broad powers to order their affairs through legally enforceable agreements").

[94] Weigand, Tory, *The Duty of Good Faith and Fair Dealing in Commercial Contracts in Massachusetts*, 88 Mass. L. Rev. 174, 177 (2004); *see also Shoe & Leather Nat'l Bank v. Dix*, 123 Mass. 148, 150 (1877) (Where contracts inoperative under their "true meaning," the courts cannot "suppose a meaning which the parties have not expressed"); *PDC-El Paso Meridien, LLC v. Alstrom Power*, 18 Mass. L. Reptr. 14 (2004) (no page numbers available online) (Absent "special circumstances," court held that "[i]t is not the role of the court to alter the parties' agreement").

[95] Weigand, Tory, *The Duty of Good Faith and Fair Dealing in Commercial Contracts in Massachusetts*, 88 Mass. L. Rev. 174, 188 (2004). Note that freedom of contract theory is influential in the development of common contract law. The theory focuses on leaving the contracting parties to their own agreement, recognizing that contracting parties

holding that such duties will not be used to "rewrite the parties' agreement."[96] Courts refuse to "accomplish by judicial fiat what [a party] neglected to achieve contractually."[97] Commercial parties will be held to their chosen language and the relationship embodied in the contract. Courts will thus not "attempt to rewrite the parties' contract to conform to the court's sense of equity or preference for a different outcome, no matter how appealing."[98] For example, in the Massachusetts case *Owen v. Kessler,* 56 Mass. App. Ct. 466 (2002), a real estate commitment outlined a specific timeframe as to when an executed purchase and sale agreement must be provided. When the buyer delivered the agreement late, less than half an hour later than the agreed time, the seller refused to sell the property.[99] The Appellate Court rejected the buyer's claim of a violation of the good faith and fair dealing duty, finding any such duty could not override an express contractual term.[100] A U.S. court has also flatly rejected a good faith duty even when a preliminary agreement expressly stated or inferred such obligation, holding that "[a]n agreement to negotiate in good faith is amorphous and nebulous, since it implicates so many factors that are themselves indefinite and uncertain that the intent of the parties can only be fathomed by conjecture and surmise."[101]

Good faith interpretation ensuring a core civilian contracting value, a reasonable dispute outcome, is less exalted in the common law systems. The common law focuses often on contractual freedom, a contract's literal meaning, the individual contracting parties' autonomy and expected judicial recognition of the contracting parties' relationship—even when a contract may yield "unfair" results.[102] For example, English courts are reluctant to impose additional

are free to enter into mutually beneficial economic exchanges. *See* DiMatteo, Larry A., *Theory of Efficient Penalty: Eliminating the Law of Liquidated Damages*, 38 Am. Bus. L. J. 633, 641 (2001) ("The freedom of parties to structure their own agreement is universally acknowledged to be at the heart of the common law of contracts").

[96] *See* Weigand, Tory, *The Duty of Good Faith and Fair Dealing in Commercial Contracts in Massachusetts*, 88 Mass. L. Rev. 174 at 188 n. 182 (2004) *citing to Chokel v. Genzyme Corp*., 2003 Mass. Super. LEXIS 417 (Nov. 12, 2003) (Van Gestel, J.) ("New or independent duties separate from those already in contract cannot be added by a judge under the cloak of an implied covenant of good faith and fair dealing"); *Kroutik v. Momentix, Inc*., 2003 Mass. Super. LEXIS 112 (Apr. 2, 2003); *Owen v. Kessler*, 56 Mass. App. Ct. 466 (2002) (same).

[97] *Northern Heel Corp. v. Compo Indus., Inc.,* 851 F.2d 456, 466 (1st Cir. 1988); *Mathewson Corp. v. Allied Marine Indus., Inc*., 827 F.2d 850, 855 (1st Cir. 1987) (Court held it is "[f]ar wiser for a court to honor the parties' words than to imply other and further promises out of thin air").

[98] Weigand, Tory, *The Duty of Good Faith and Fair Dealing in Commercial Contracts in Massachusetts*, 88 Mass. L. Rev. 174, 188 n. 184 (2004) *citing to Epstein, Becker & Green, P.C. v. Atlas Venture*, 2003 Mass.Super. LEXIS 84, 10 (2003); *Rogaris v. Albert*, 431 Mass. 833, 835 (2000).

[99] *Owen v. Kessler,* 56 Mass. App. Ct. 466, 467-469 (2002).

[100] *See id.* at 471-472. *see also Bryant v. Nickerson*, 65 Mass. App. Ct. 1118 (2006) (no page numbers available online) (Prospective real estate buyer failed to provide notice of inability to obtain financing at date designated in purchase agreement; seller awarded liquidated damages contemplated under the agreement).

[101] *Candid Prods., Inc. v. Int'l Skating Union*, 530 F. Supp. 1330, 1337 (S.D.N.Y. 1982); *see also Metromedia Broadcasting Corp. v. MGM/UA Entertainment Co., Inc*., 611 F. Supp. 415 (D.C. Cal 1985).

[102] De Ly, Filip, *Commercial Law as a Refuge from Contract Law: A Comparative and Uniform Law Perspective*, 45 Wayne L. Rev. 1825, 1852 (2000); Moss, Giuditta Cordero, *International Contracts between Common Law and Civil Law: Is Non-state Law to Be Preferred? The Difficulty of Interpreting Legal Standards Such as Good Faith*, 7 Global Jurist (Advances) 4 (2007).

contract terms, and, in but few examples (such as the doctrine of frustration) will not revise contracts in the instance of changed circumstances which make it more difficult for a contracting party to perform.[103] Moreover, English contract law does not interpret contracts by examining party intent, but focuses on what the contracting parties have "expressed and written down."[104] "English judges do not openly interfere with contract terms in order to supplement, correct, or revise them. The basic attitude is much more pragmatic; contracts work most efficiently if the parties stick to what they have expressed, without judges interfering to speculate about their intentions and to depart from the terms of the commercial deal and negotiation power."[105]

Under the common law, as contracting parties will be held to their bargain, and courts will not interpret a contract outside the agreement's expressed meaning.[106] Extrinsic contract circumstances, such as conduct during, before, or after contract execution, are generally not considered by the judge.[107] Thus, in order to ensure commercial predictability, the common law parol evidence rule disallows parties producing evidence which may vary, add or contradict a contract's wording.[108] But note that the parol evidence rule has a series of exceptions that admit evidence of the factual background existing at or before the date of the contract (but not after that date, as opposed to the civilian systems), at least in respect of facts that were known to both parties.[109]

The Anglo-American legal tradition's maintenance of an approach more formalistic than the civil law system is also demonstrated when comparing contract formation requirements. The Norwegian tradition, for example, finds that oral agreements are valid and binding.[110] Compare this with the American approach, involving the Statute of Frauds. Under the Statute, certain

[103] De Ly, Filip, *Commercial Law as a Refuge from Contract Law: A Comparative and Uniform Law Perspective*, 45 Wayne L. Rev. 1825, 1852 (2000). A commentator proposes that U.K. courts are unlikely to inordinately intervene with commercial dealings, which "interruptions" will be damaging for business dealings and comprises predictability. Miller, Lucinda, *Penalty Clauses in England and France: A Comparative Study*, 53 ICLQ 79, 90 (2004).

[104] De Ly, Filip, *Commercial Law as a Refuge from Contract Law: A Comparative and Uniform Law Perspective*, 45 Wayne L. Rev. 1825, 1852 (2000).

[105] DiMatteo, Larry A., *An International Contract Law Formula: The Informality of International Business Transactions Plus the Internationalization of Contract Law Equals Unexpected Contractual Liability*, 23 Syracuse J. Int'l L. & Com. 67 (1997); *see also* Moss, Giuditta Cordero, *International Contracts between Common Law and Civil Law: Is Non-state Law to Be Preferred? The Difficulty of Interpreting Legal Standards Such as Good Faith*, 7 Global Jurist (Advances) 4 (2007) (the common law judge's central role enforcing what the parties agreed through their bargain, rather than creating justice).

[106] Weigand, Tory, *The Duty of Good Faith and Fair Dealing in Commercial Contracts in Massachusetts*, 88 Mass. L. Rev. 174, 188 n. 184 (2004).

[107] Moss, Giuditta Cordero, *International Contracts between Common Law and Civil Law: Is Non-state Law to Be Preferred? The Difficulty of Interpreting Legal Standards Such as Good Faith*, 7 Global Jurist (Advances) 5 (2007). In repeated caselaw, American courts underscore that interpretation is bound to the "four corners" of the contract.

[108] *See id.* at 5 n.7.

[109] *See id.* at 6. For a description of various American parol evidence rule exceptions, including contractual negotiations, *see* Glasser, Mark K. and Keith A. Rowley, *On Parol: The Construction and Interpretation of Written Agreements and the Role of Extrinsic Evidence in Contract Litigation*, 49 Baylor L. Rev. 657, 705-711 (1997).

[110] Gustafsson, Leif, Business Laws in the Nordic Countries: Legal and Tax Aspects 392 (1998).

contracts are deemed unenforceable unless the agreements are in writing and executed by the person bound under the contract's terms. Although formalized requirements vary from state to state, particular industry or trade-specific agreements are bound under the Statute's requirements. Typical contracts requiring the Statute include those: (i) involving real property interests, (ii) sureties, (iii) agreements for the sale/lease of goods at $500 or more, (iv) certain non-competition agreements, (v) separation agreements and (vi) made by or on behalf of a municipality.[111]

Contractual intent is thus also a means of contrasting the common and civil law traditions. For example, the common law legal system holds that business communications with uncertain contractual intent are presumed unenforceable.[112] Under the traditional common law view, all enforceable commercial contracts maintained a proof of a clear intent to enter a legal relationship, and certainty as to all material contract terms.[113] Conversely, civilian countries do not demand contract relations as a prerequisite to contract enforceability, as in the common law.[114] Accordingly, as compared to the common law jurisdictions, civil law countries tend to find contractual parties legally bound "at an earlier stage of the negotiation process."[115]

The common law approach in the U.S. thus places great weight (and responsibility) on the parties, as effected through their contractual arrangement.[116] Exercising judicial interpretation based upon good faith violations is exceedingly rare. Unambiguous contracts are to be construed by courts within the agreements' "plain terms" or "four corners," where introducing any extrinsic evidence in contract disputes that contradict or supplement the agreement's express terms were forbidden.[117] Alternatively, civil law courts attempt to avoid unjust

[111] Brinkley, Martin H., *The Regulation of Contractual Change: A Guide to No Oral Modification Clauses for North Carolina Lawyers*, 81 N.C. L. Rev. 2239 (2003).

[112] DiMatteo, Larry A., *An International Contract Law Formula: The Informality of International Business Transactions Plus the Internationalization of Contract Law Equals Unexpected Contractual Liability*, 23 Syracuse J. Int'l L. & Com. 67, 69 (1997).

[113] *See id.*

[114] *See id.* at 67, 70.

[115] DiMatteo, Larry A., *An International Contract Law Formula: The Informality of International Business Transactions Plus the Internationalization of Contract Law Equals Unexpected Contractual Liability*, 23 Syracuse J. Int'l L. & Com. 67, 70 (1997) *citing to* Klein, John & Carla Bachechi, *Precontractual Liability and the Duty of Good Faith Negotiation in International Transactions*, 17 Hous. J. Int'l L. 1, 17 (1994).

[116] *Publishers Resource Inc., v. Walker-Davis Publications, Inc.*, 762 F.2d 557 (7th Cir. 1985), *citing to* Stein v. Malden Mills, Inc., 9 Ill. App. 3rd 266, 270-271 (1972) ("Obviously the terms of the contract control, and it is not our [the court's] function to rewrite them according to our own notions of fairness"); *Dresser Indus. v. Pyrrhus AG*, 936 F.2d 921, 933 (7th Cir. 1991); *Scheduling Corp. of America v. Massello*, 503 N.E.2d 806, 811 (1987).

[117] Weigand, Tory, *The Duty of Good Faith and Fair Dealing in Commercial Contracts in Massachusetts*, 88 Mass. L. Rev. 174, 177 (2004); *see also Shoe & Leather Nat'l Bank v. Dix*, 123 Mass. 148, 150 (1877) (Where contracts inoperative under their "true meaning," the courts cannot "suppose a meaning which the parties have not expressed"); *PDC-El Paso Meridien, LLC v. Alstrom Power*, 18 Mass. L. Reptr. 14 (2004) (no page numbers available online) (Absent "special circumstances," court held that "[i]t is not the role of the court to alter the parties' agreement").

solutions stemming from a contract's literal interpretation.[118] Such is the divergence between a civilian good faith approach and a common law interpretation of contractual relations.

3 Exploring Law-in-Action: Objective Pluralism Considerations

Reviewing the comparative commercial civil and common law precepts of good faith demonstrates that key legal concepts may be interpreted differently across legal families. Exploring the black letter law of good faith reveals divergences. In order to ascertain how the law acts in practice, an additional dimension to a theoretical textbook framework is, however, needed. Thus, a law-in-action approach is demanded. In addition to ascertaining the strengths and weaknesses of one's own legal regime, reviewing an international business law legal standard presents practical implications. Namely, business parties are presented with opportunities to evaluate legal *equivalency*—decision-makers are informed on the implications of pursuing multi-jurisdictional transactions. Yet, the challenge remains to find evaluative, objective measures which complement a traditional black letter law review.[119] Such is objective pluralism, which analyzes a comparative legal problem from economic, social, behavioral and, as applicable, relational contracting law perspectives. The totality of such review produces balanced insights, using a multiplicity of factors—precluding the dangers of approaching a problem with the mislaid goal of a "one-size-fits-all" perspective.[120]

3.1 The Economic Method: Transaction Costs, Efficiency

Economic analysis allows the evaluation of business law in divergent legal systems, necessitating the consideration of several interlinked factors, including transaction costs, risk allocation and economic utility. Despite criticism, such analysis offers comparativists insights and modes of comparison otherwise unavailable when distinguishing law under purely sociological mechanisms. When analyzing legal concepts under different legal regimes, economics can ultimately create efficient models "which work as homogeneous grounds of comparison."[121] Economic analysis increases outcome prediction success rates,[122] while avoiding value

[118] Moss, Giuditta Cordero, *International Contracts between Common Law and Civil Law: Is Non-state Law to Be Preferred? The Difficulty of Interpreting Legal Standards Such as Good Faith*, 7 Global Jurist (Advances) 1 (2007).

[119] Karl N. Llewellyn, *The Bramble Bush 12* (2nd ed. 1951) ("[R]ules alone, mere forms of words, are worthless") *cited in* Halperin, Jean-Louis, Law in the Books and Law in Action: The Problem of Legal Change, 64 Me. L. Rev. 45, 52 (2011).

[120] Palmer, Vernon Valentine, *From Lerotholi to Lando: Some Examples of Comparative Law Methodology*, 53 Am. J. Comp. L. 261, 264 (2005) ("Reaching the "law in action" is still a scientific ideal of mainstream comparative law, but one is never quite sure how high the cognitive bar has been set").

[121] *See* Mattei, Ugo, Comparative Law and Economics 94-95 (1997).

[122] Ogus, Anthony, *What Legal Scholars can Learn from Law and Economics*, 79 Chi.-Kent L. Rev. 393 (2004). *see also* Friedman, Milton, *The Methodology of Positive Economics*, in Essays in Positive Economics 3, 14-16 (1953)

judgments generally associated with sociological studies which often seek to determine what composes *fair* law and policy.[123] Economics also predicts what economic consequences flow from the differences among legal systems.[124]

Several issues emerge when employing an economic analysis of comparative law. It has been argued that three key elements characterize modern law and economic theory: (i) people "maximize," in that they try to reduce costs and increase benefits, (ii) markets reconcile individual wants with the limited resources available and (iii) more efficient markets and laws have the potential to make people "better off."[125] Looking deeper at legal economic theory,[126] significant scholarship has been dedicated to studying how transactional parties contend with internal and external costs—all within the context of economic efficiency. Utilizing the economic evaluative method mandates focus on two distinct areas: economic efficiency and transaction costs, which often intersect.

3.1.1 Understanding Efficiency

"Efficiency" is defined in economic terms as acting with a minimum of effort, waste and expense.[127] In the contracting context, agreements are viewed as efficient means of wealth maximization.[128] Efficiency, when voiced in the context of international legal transactions from a contracting standpoint, involves the costs of instituting required legal mechanisms—all while

(unimportant that economic reasoning is based on assumptions that do not reflect the "real world" so long as those assumptions produce "predictable" results).

[123] Posner, Richard A. and Anthony T. Kronman, The Economics of Contract Law 1-5 (1979).

[124] Ogus, Anthony, *What Legal Scholars can Learn from Law and Economics*, 79 Chi.-Kent L. Rev. 393 (2004) (Under rubric of French and English law, economics provides evaluation of differences between national legal principles governing identical factual situations)

[125] Baird, Douglas G., *The Future of Law and Economics: Looking Forward*, 64 U. Chi. L. Rev. 1129, 1164 (1997).

[126] Law and economics, at least with respect to the so-called "Chicago School" of economics, has been defined as sharing certain familiar characteristics, including "reliance on the neo-classical assumption that individuals are rational maximizers; equating change in legal rules with change in relative prices; and adoption of Kaldor-Hicks efficiency ("potential Pareto efficiency," in more obscure terms) in the sense of wealth maximization as a standard of evaluation." Harris, Ron, *The Uses of History in Law and Economics*, 4 Theoretical Inquiries L. 659, 666-667 (2003).

[127] Malloy, Robin Paul, Law and Economics: A Comparative Approach to Theory and Practice 38 (1990).

[128] Dimatteo, Larry A., *Theory of Efficient Penalty: Eliminating the Law of Liquidated Damages*, 38 Am. Bus. L. J. 633, 642 (2001); Brizzee, David, Note, *Liquidated Damages and the Penalty Rule: A Reassessment*, 1991 BYU L. Rev. 1613, 1615.

weighing the necessary autonomy of contracting parties.[129] This creates tensions, which economists urge should be considered in terms of overall transaction costs.[130]

Note that reviewing comparative business law regimes under an efficiency prism must overcome hurdles. For example, how is efficiency effectively (if not singularly) measured, particularly within the contractual law context? Economists measure efficiency differently, most notably through Pareto superior and Kaldor-Hicks models. If an economic transaction is "Pareto superior," the contractual breaching party would be in a more favorable economic position following breach, while the non-breaching party would not be in a worse position.[131] Pareto efficiency thus occurs if no superior points are available, meaning that it is impossible to "make any individual better off without making someone else worse off."[132] The classic example is a voluntary market exchange where, in the absence of factors such as fraud or duress, both parties are bettered by the exchange. Each party valued the other bargained object "more than which they were originally holding, or else they would not have made the exchange…[and it is thus] ascertainable as to how great transaction costs may prevent otherwise efficient exchanges"[133] Pareto analysis therefore "allows economists to identify improvements without assessing relative values of these improvements to parties." [134]

Under the Kaldor-Hicks standard, an economic action is efficient if a new outcome allows the benefiting party to be "sufficiently better off," receiving a utility increase, even if the contractual

[129] A legal economist argues that drafting "efficient" contract terms may be prohibitively costly, particularly as negotiating clear language may be overly time-consuming to, or both parties will lack essential information necessary for drafting such clauses. Charny, David, *Nonlegal Sanctions in Commercial Relationships*, 104 Harv. L. Rev. 373, 436 (1990).

[130] "The difficulty of balancing various dimensions of efficiency in heterogeneous circumstances suggests two general institutional responses: choosing legal default rules that are second best, and permitting freedom of contract so that individual parties can use their local knowledge to improve on the general defaults that public lawmakers have set. For example, if we think that private bargaining is relatively costly due to bilateral monopoly or other transaction costs, we should choose default rules to implement the tradeoff that best suits majority preference; conversely, if we think that private bargaining is relatively cheap, we should select default rules that encourage such bargaining." Goetz, Charles J. and Robert E. Scott, *The Limits of Expanded Choice: An Analysis of the Interactions between Express and Implied Contract Terms*, 73 Cal. L. Rev. 261 (1985) *cited in* Katz, Avery W., *Remedies for Breach of Contract under the CISG*, 25 Int'l Rev. of L. and Econ. 382 (2005).

[131] Coleman, Jules, Markets, Morals, and the Law 97 (1988); Dodge, William S., *The Case for Punitive Damages in Contracts*, 48 Duke L. J. 629, 652 n.132 (1999) (Pareto efficient transactions result in a net increase in wealth, without anyone in a worsened condition as a result of the transaction; the contract gainers compensate losers for any losses caused by the transaction); *see also* Cooter, Robert & Thomas Ulen, Law and Economics 41-42 (1997) (discussing Pareto efficient transactions and the Kaldor-Hicks standard); Malloy, Robin Paul, Law and Economics: A Comparative Approach to Theory and Practice 39 (1990) (Pareto superiority refers to a status quo change where at least one person is made better off without making anyone else worse off). For an additional "textbook" analysis of Pareto theory, *see* McLure, Michael, Pareto, Economics and Society (Routledge, 2008).

[132] Malloy, Robin Paul, Law and Economics: A Comparative Approach to Theory and Practice 39.

[133] *See id.* at 40.

[134] Cender, Joshua, *Knocking Opportunism: A Reexamination of Efficient Breach of Contract*, 1995 Ann. Surv. Am. L. 689, 697 (1996); *see also* Posner, Richard A., Economic Analysis of Law 13 (1992).

"losers" would be compensated:[135] the efficiency of an action may be weighed if an alternative policy, condition, or program is "better."[136] The Kaldor-Hicks theory therefore focuses on whether society's aggregate utility is maximized, and not whether resource allocation will make certain parties worse off.[137] Within a contractual context, efficiency may also look to the duration of an agreement and the relationship between the parties.[138] In short, resource reallocation is efficient if those gaining from it obtain enough to compensate for those who lose from it, although no requirement exists that actual compensation occurs.[139] The Kaldor-Hicks theory therefore focuses on whether society's aggregate utility is maximized, and not whether resource allocation will make certain parties worse off.[140] Distinguishing between Kaldor-Hicks and Pareto superior models of efficiency thus involves, in the former instance, a social utility dimension.

A hypothetical case demonstrates the tensions between both efficiency theories under a legal setting.[141] For example, a commercial landlord's office building may be targeted by municipal authorities for use in its redevelopment plans. A developer asserts that a major project at the site will rejuvenate the city, and provide the municipality with twice the fair market value which the city offers the landlord. The landlord resists the offer, instead preferring to remain operational. It would *not* be a Pareto superior state if the municipality opts to pay the fair market value, given the landlord's objections to sell, and its decreased utility following the conveyance. The Kaldor-Hicks test would find an efficient transaction, assuming that the

[135] Sidhu, Dawinder, *The Immorality and Inefficiency of an Efficient Breach*, 8 Tenn. J. Bus. L. 61, 65 (2006) *citing to* Coleman, Jules, Markets, Morals, and the Law 98 (1988); Linzer, Peter, *On the Amorality of Contract Remedies- Efficiency, Equity, and the Second Restatement*, 81 Colum. L. Rev. 111, 114. (1981) ("Society's welfare increases through a benefit to one individual, even as loss also passes to another party, to the extent that the benefited party may fully compensate the "losing party," and "remain better," than before. If the breaching party is not required to compensate the nonbreaching party, the breach is Kaldor-Hicks efficient"); Dodge, William S., *The Case for Punitive Damages in Contracts*, 48 Duke L. J. 629, 652 n.132 (1999) ("a transaction is Kaldor-Hicks efficient if the gainers gain more than the losers lose"); Posner, Richard A., *The Ethical and Political Basis of the Efficiency Norm in Common Law Adjudication*, 8 Hofstra L. Rev. 487, 491 (1980); Posner, Richard A., The Problems of Jurisprudence 19 (1990) (Wealth maximization standard only requires that "the winners' gains exceed the losers' losses"); Posner, Richard A., Economic Analysis of Law 13-16 (1992) (Kaldor-Hicks involves wealth maximization state, where a more superior state exists when more wealth is generated); Katz, Steven B., *The California Tort of Bad Faith Breach, the Dissent in Seaman's v. Standard Oil, and the Role of Punitive Damages in Contract Doctrine*, 60 S. Cal. L. Rev. 509, 521-28 (1987). But *see* Cender, Joshua, *Knocking Opportunism: A Reexamination of Efficient Breach of Contract*, 1995 Ann. Surv. Am. L. 689, 697 n.59 (1996) (Kaldor-Hicks theory is limited as it ignores wealth distribution; unlike Pareto model, as long as one party's gain is higher than another party's loss, Kaldor-Hicks superior state realized). For an additional "textbook" analysis, *see* Varian, Hal R., Intermediate Microeconomics (W.W. Norton & Co., 6th ed. 2006) at 15-16.

[136] Schelling, Thomas C., *Economic Reasoning and the Ethics of Policy*, 63 The Public Interest, 37, 50 (1981).

[137] *See id.*

[138] Schelling, Thomas C., *Economic Reasoning and the Ethics of Policy*, 63 The Public Interest, 37, 50 (1981).

[139] Malloy, Robin Paul, Law and Economics: A Comparative Approach to Theory and Practice 40 (1990).

[140] *See id.*

[141] The illustration is based on an example found in Malloy, Robin Paul, Law and Economics: A Comparative Approach to Theory and Practice 41-42 (1990).

municipality's increase in value (considering that the pay-out of fair market value to the commercial landlord is sufficient, and that the community will reap reward from the developer in this beneficial redevelopment project) will result in a total social utility increase, even if the landlord is somehow worsened by the transaction.[142]

3.1.2 Transaction Costs

Transaction costs drain the efficiencies flowing from contractual provisions and are associated with all aspects of such clauses, from negotiation to implementation. While transaction costs have many definitions and interpretations, they are *generally* understood in the commercial contracting context as those costs incurred during the actual contractual negotiations, given that parties remain possibly uncertain as to whether other contracting partners shall honor their contractual commitments, or breach.[143] Acquisition of information is a necessary, central transaction cost.[144] Nevertheless, transaction costs may have alternate meanings in different legal systems, and cultures---the depth of what such topic covers may also be unwieldy in scope. The breaching contracting party's reputational loss is another cost, as parties would hesitate to enter into contracts with "deliberate breachers," or parties prone to breaching; if they do, onerous contractual terms to deter a breach would likely be required.[145] Transaction costs also include expenses associated from dealing with the breach, including dispute resolution costs, finding alternative suppliers, and entering into new agreements.[146] The transaction costs may vary in international settings, where, for example, disputing costs and monitoring costs are higher, given the unfamiliarity with the forum involved and local legal requirements.[147]

With respect to drafting, note that commercially-incomplete contracts are quite expensive to create, given that drafting parties may seek to withhold information needed to complete the agreement. The parties may also purposefully leave the contract incomplete (missing significant contractual terms), hoping to agree on certain terms at a later date.[148] Contracts, particularly those encompassing international transactions, necessitate a multiplicity of jurisdiction-specific rules and further require specific drafting in order to not only provide parties their desired

[142] Malloy, recognizing this social dimension, thus holds that "a Kaldor-Hicks test permits moves where a Pareto superior test does not." Malloy, Robin Paul, Law and Economics: A Comparative Approach to Theory and Practice 41-42 (1990).

[143] Sidhu, Dawinder, *The Immorality and Inefficiency of an Efficient Breach*, 8 Tenn. J. Bus. L. 61, 89 (2006).

[144] Georgakopoulos, Nicholas L., Principles and Methods of Law and Economics: Basic Tools for Normative Reasoning 246 (2005) (Noting that buyers entering into transactions after precisely researching the exact benefits never into disadvantageous acquisitions. "If at time of contracting the buyer's benefits are imprecise, then by entering into the contract the buyer takes some risk").

[145] Sidhu, Dawinder, *The Immorality and Inefficiency of an Efficient Breach*, 8 Tenn. J. Bus. L. 61, 89 (2006).

[146] *See id.*

[147] Katz, Avery W., *Remedies for Breach of Contract under the CISG*, 25 Int'l Rev. of L. and Econ. 383 (2005).

[148] Baker, Scott and Kimberly D. Krawiec, *Incomplete Contracts in a Complete Contract World*, 33 Fla. St. U. L. Rev. 725, 726 (2006).

confidence, but also to be sufficiently clear for judicial enforcement.[149] Common law parties, in particular, will likely strive for an exact document which provides mechanisms revealing, for example, how to comply with the terms of the bargain, setting out the procedures should breach occur, and whether, if not how, to sue. Form commercial documents may also add transaction cost pressures, given that revisions to standard forms, due to unique situations, could escalate the contract drafting expenses.[150] Finally, parties seeking background knowledge of the local rules in international contracting may increase contract negotiating and drafting costs.[151]

3.1.3 Criticism of Economic Analysis

Critics challenge the usefulness and merit of economics as a comparative analytical tool. First, economics offer "hazy" definitions of efficiency, which proponents confess have no clear definitional parameters.[152] Critics present that a pure economics analysis disregards the unending complexities of human behavior, and that neoclassical economic analysis narrowly (and incorrectly) presupposes that maximizing welfare, measured by wealth increase, dominates societal decisions.[153] Definitions, including pure economic loss, also vary among legal systems.[154] Some economists presuppose that a comparative legal approach must "refrain from

[149] Charny, David, *Nonlegal Sanctions in Commercial Relationships*, 104 Harv. L. Rev. 373, 403 (1990). *see also* Hirsch, Werner Z., Law and Economics: An Introductory Analysis 148 (1988) (Transaction costs include the costs of negotiating, preparing and signing a contract)

[150] Hirsch notes that, at least within a consumer sense, non-negotiated boilerplate contracts may reduce transaction costs, avoiding the need for drafting new contracts (assuming no negotiation is involved). Hirsch, Werner Z., Law and Economics: An Introductory Analysis 154 (1988).

[151] Gilson, Ronald J., *Value Creation by Business Lawyers*, 94 Yale L. J. 239 (1984).

[152] Mattei, Ugo, *Comparative Law and Economics* 145 (1997); Rogers, Catherine A., *Gulliver's Troubled Travels, or The Conundrum of Comparative Law*, 67 Geo. Wash. L. Rev. 149, 185 (1998). Supporters rebut such presumption noting that economic legal theory, including a flexible definition of efficiency, is particularly relevant in comparative law insofar that comparison allows academics to discern which rule or institution possesses lower transaction costs and greater market acceptance. *See, generally*, Mattei, Ugo, Comparative Law and Economics 145 (1997).

[153] Hillman, Robert, *The Limits of Behavioral Decision Theory in Legal Analysis: The Case of Liquidated Damages*, 85 Cornell L. Rev. 717 (2000). Under the neoclassic view, a free market's voluntary exchange occurs as parties value what is received more than what is lost. *See id.* As such exchange moves resources to "higher valued uses," allocative efficiency is increased. Farnsworth, E. Allan, Contracts 762 (1999). *see also* Posner, Eric A., *A Theory of Contract Law under Conditions of Radical Judicial Error*, 94 Nw. U. L. Rev. 749 (2000) (Neoclassical model refers to contracts understood as "discrete, one-shot exchanges"); Posner, Richard A., Economic Analysis of Law 10-11 (1992) (Efficiency occurs when resources used when their value is highest, and people thus benefit society as they pursue self-interest); Hillman, Robert, *The Limits of Behavioral Decision Theory in Legal Analysis: The Case of Liquidated Damages*, 85 Cornell L. Rev. 717, 726 (2000); *H.M.O. Sys., Inc. v. Choicecare Health Servs., Inc.*, 665 P.2d 635, 639 (Colo. Ct. App. 1983); Rogers, Catherine A., *Gulliver's Troubled Travels, or The Conundrum of Comparative Law*, 67 Geo. Wash. L. Rev. 149, 185 (1998), *citing to* Becker, Gary S., The Economic Approach to Human Behavior 14 (1976).

[154] *See* Dari-Mattiacci, Giuseppe and Hans-Bernd Schäfer, *The Core of Pure Economic Loss*, 27 Int'l Rev. of Law and Econ. 8, 12 (2007) *citing to* Bussani, Mauro, Pure Economic Loss in Europe at 4 (2003). Pure economic loss is outlined in law and economics theory.

attempting a conceptual definition" of pure economic-loss.[155] Economists also necessarily use several noteworthy, and often contested, assumptions in the law and economics framework, including: (i) individuals may access a reasonable information flow, (ii) individuals know their own wants and needs, which understanding may not be shared by a third party, (iii) people understand market signals, (iv) the market disregards fairness or justice issues—and thus individuals should not be offended by market functions, (v) market competition, involving multiple actors, is assumed, (vi) people and resources are freely transferable and (vii) an existing distribution of income and resources is accepted.[156] Criticism is raised when individuals are considered to act as rational utility maximizers, a key element of the law and economics movement.[157] A legal theorist contends that individuals frequently deviate from "rational norms" in their decision-making process.[158] Comparative legal systems have different methods of evaluating the strength of business law precepts. While aspects of economic analysis of comparative law problems add crucial insights, such analysis alone also presents questions and concerns.

3.2 Sociology as an Objective Method: Behavioral Theory

Sociological studies, while allowing empirical data to be collected in comparative legal reviews, face many criticisms from legal scholars, primarily those attacking the limited ability to involve neutral evaluative standards. One proposed example of a sociological methodology is behavioral theory. The relative inflexibility of that comparative method, however, renders its usefulness as questionable.

Behavioral theory, asserting that individuals act irrationally, serves as a challenge to the legal economists' view of the "global rationality of man."[159] The theory's goal is the attainment of a modeling which determines how individuals react to inconsistent legal rules and regimes, with the expectation that the results of such reactions lead to predicting individual responses, with

[155] Dari-Mattiacci, Giuseppe and Hans-Bernd Schäfer, *The Core of Pure Economic Loss*, 27 Int'l Rev. of Law and Econ. 8, 12 (2007). Dari-Mattiacci, Giuseppe and Hans-Bernd Schäfer, *The Core of Pure Economic Loss: Working Paper*, Amsterdam Center for Law and Economics Working Paper No. 2005-003 (2005) (Abstract), at http://www.law.gmu.edu/assets/files/publications/working_papers/05-22.pdf (no page numbers available online) ("The established law and economics wisdom considers pure economic loss as a transfer of wealth from the victim to a third party, whose earnings increase as a consequence of the accident. Such transfers do not amount to a social loss and, hence, should not be compensated").

[156] Malloy, Robin Paul, Law and Economics: A Comparative Approach to Theory and Practice 33 (1990).

[157] Prentice, Robert A., *Chicago Man, K-T Man, and the Future of Behavioral Law and Economics*, 56 Vand. L. Rev. 1663 (2003).

[158] *Id.* at 1667. The Chicago School's assumption of individual goals for wealth maximization has been suggested to allow "no room for cognitive limitations, emotion, or altruism, [describing] neither how man does act nor how man should act." *Id.* at 1672.

[159] *See* Simon, Herbert A., *A Behavioral Model of Rational Choice*, 69 Quarterly J. Econ. 99 (1955).

certainty.[160] Within a comparative contractual analysis, behavioral legal theory introduced the concept that the non-breaching party's loss of contractual rights at breach is an entitlement loss.[161] As such, the non-breaching party ultimately values the loss greater than any gain, even if common law compensatory damages adequately compensated the *monetary* loss. [162]

Behavioral law theory attacks pure economic-guided legal review, challenging the central legal economist assumption that individuals behave rationally, at least as far as an individual's pursuit of wealth maximization.[163] Behavioral theorist opponents debunk the reasoning that actors always behave irrationally.[164] An economic theorist challenges such assumption, concluding that uniform, cross-cultural irrationality is not a given:

> "[D]ifferences in education, training, cognitive capacity, thinking dispositions, sex, and cultural background across individuals appear to be reliably associated with different levels of cognitive performance. Furthermore, emotional differences, developmental differences, and different modes of mental processing appear to be associated with different levels of cognitive performance within individuals. Therefore, depending on the characteristics of the individual and the system of thought activated in a particular decision making situation, the behavior of different groups of individuals and the behavior of the same individual may vary considerably, from perfect rationality to seeming irrationality."[165]

Many legal theorists doubt behavioral theorist propositions that individuals consistently act irrationally, and the assertion that "departures from rationality are sufficiently systematic to be useful in making legal policy."[166] Proposing legal "trends" of irrationality is, by definition, inconsistent, and whether behavior theory offers a means to adjudge the competence or validity

[160] Rostain, Tanina, Educating *Homo Economicus: Cautionary Notes on the New Behavior And Law and Economics Movement*, 34 Law & Soc'y Rev. 973, 983 (2000).

[161] Dimatteo, Larry A., *Theory of Efficient Penalty: Eliminating the Law of Liquidated Damages*, 38 Am. Bus. L. J. 633, 704 (2001) *citing to* Sunstein, Cass R., *Behavioral Analysis of Law*, 64 U. Chi. L. Rev. 1175 (1997); *see also* Pouncy, Charles R.P., *The Rational Rogue: Neoclassical Economic Ideology in the Regulation of the Financial Profession*, 26 Vt. L. Rev. 263, 264 (2002) ("Economic rationality as it is currently deployed is a grossly inadequate approximation of the factors motivating human conduct").

[162] Dimatteo, Larry A., *Theory of Efficient Penalty: Eliminating the Law of Liquidated Damages*, 38 Am. Bus. L. J. 633, 704 (2001) *citing to* Sunstein, Cass R., *Behavioral Analysis of Law*, 64 U. Chi. L. Rev. 1175 (1997).

[163] Prentice, Robert A., *Chicago Man, K-T Man, and the Future of Behavioral Law and Economics*, 56 Vand. L. Rev. 1663, 1722 (2003).

[164] *See* Mitchell, Gregory, *Taking Behavioralism Too Seriously? The Unwarranted Pessimism of the New Behavioral Analysis of Law*, 43 Wm. & Mary L. Rev. 1907 (2002); Mitchell, Gregory, *Why Law and Economics' Perfect Rationality Should not be Traded for Behavioral Law and Economics' Equal Incompetence*, 91 Geo. L. J. 67 (2002).

[165] Mitchell, Gregory, *Why Law and Economics' Perfect Rationality Should Not Be Traded for Behavioral Law and Economics' Equal Incompetence*, 91 Geo. L. J. 67, 87 (2002).

[166] Prentice, Robert A., *Chicago Man, K-T Man, and the Future of Behavioral Law and Economics*, 56 Vand. L. Rev. 1663, 1725 (2003).

of legal frameworks is thus questionable.[167] While legal economists fend off criticism, the enormity of opposition to the behavioral law theory cannot be discounted.[168] For example, even if parties agree to a mutually objective meaning of *fairness*, it is debatable whether commercial actors in a long-term contractual arrangement are willing to continue amicable future relations after a party breaches, particularly due to opportunism.

Scholars melding strict behavioral law theory with economics[169] studies face criticism that they oversimplify, if not over generalize, data concerning human understanding and rationalism in order to elevate them as important scholarly discoveries.[170] Another significant criticism of behavioral theory is the discouragement of empirical data, crucial to developing significant conclusions of the effectiveness of legal rules.[171] Mitchell concludes that:

> "Intelligent predictions of the behavioral effects of alternative legal policies depend on reliable data regarding (i) the relative frequency of rational and nonrational behavior across persons and situations and (ii) the resistance of nonrational behavior to incentives and debiasing mechanisms that may be available through the legal and economic systems. Currently, psychology, behavioral economics, and behavioral law and economics provide only limited answers to these empirical questions because they fail to examine legal decision-making in all its complexity and variety. For instance, recognition of the research on individual and situational differences in rationality discussed here would better inform the legal system on ways in which it could redress cognitive imperfections and irrationality."[172]

[167] Mitchell, Gregory, *Why Law and Economics' Perfect Rationality Should Not Be Traded for Behavioral Law and Economics' Equal Incompetence*, 91 Geo. L. J. 67 (2002) ("[b]ehavioral law and economics treats all legal actors in all situations as if they were equally predisposed to commit errors of judgment and choice").

[168] Rostain, Tanina, *Educating Homo Economicus: Cautionary Notes on the New Behavior And Law and Economics Movement*, 34 Law & Soc'y Rev. 973, 984 (2000) ("[W]e are still a long way from arriving at a broad, predicatively powerful account of human behavior, and….we are not likely ever to achieve it. It is not clear, for one, how easy it is to turn laboratory results into observations about how human beings will behave in "the field"). But *see* Mitchell, Gregory, *Why Law and Economics' Perfect Rationality Should Not Be Traded for Behavioral Law and Economics' Equal Incompetence*, 91 Geo. L. J. 67 (2002): "Law and economics' perfect rationality assumption is drawn from neoclassical microeconomic theory and is refutable as an empirical matter because empirical studies often find participants whose behavior systematically deviates from economic definitions of rationality. Proponents of law and economics acknowledge this descriptive inaccuracy but retain the assumption for lack of a better alternative for prediction and policy analysis."

[169] *See* Rostain, Tanina, *Educating Homo Economicus: Cautionary Notes on the New Behavior and Law and Economics Movement*, 34 Law & Soc'y Rev. 973, 978 (2000) ("People reason poorly about risk, tend to jump too quickly to erroneous conclusions from incomplete information, and are otherwise poor statisticians").

[170] Mitchell, Gregory, *Why Law and Economics' Perfect Rationality Should Not Be Traded for Behavioral Law and Economics' Equal Incompetence*, 91 Geo. L. J. 67, 72 (2002).

[171] Posner, Richard A., *Rational Choice, Behavioral Economics, and the Law*, 50 Stan. L. Rev. 1551, 1575 (1998) (arguing that "experts" can behave irrationally and that behavioral economics implies a "cure" for "cognitive quirks and weakness of will" that thwart rational behavior).

[172] Mitchell, Gregory, *Why Law and Economics' Perfect Rationality Should Not Be Traded for Behavioral Law and Economics' Equal Incompetence*, 91 Geo. L. J. 67, 75 (2002).

Relatedly, tracking deviations from rational thought and behavior through statistical review would presumably show trends of rational thought intermingled with irrational behavior—an endeavor which must account for great statistical volatility.[173]

Practitioners and legal scholars often fail to recognize market implications and, in such situations, sociological research could offer a comparativist useful support. An economist, however, may note the positive, or negative, financial results following an effected contract, the product of a bargaining which may have never occurred unless both parties experienced some degrees of social comfort, or need, to include certain contractual clauses as "protective" mechanisms. The motivations for instituting such provisions could range broadly, whether it be assessing possible agreement breach costs or creating a needed understanding of the roles and expectations of the contracting parties. The positive social effects of the successful contract, such as increased corporate morale or heightened job satisfaction, also cannot be discounted. For these factors, using behavioral law theory as the sole methodological tool to review a comparative commercial law issue, ignoring economics, is not sufficient.

3.3 Socio-economic Hybrid Tool: Relational Contracting

Another objective tool measuring law-in-action within comparative commercial contracting problems is relational contracting. Discrete and long-term contracts are difficult to define, and the expectations and understanding of parties under single or multiple agreements may be unclear. Contractual relationalism involves various contracts or relations which may "relate" in different senses, and degrees.[174] Under Macneil's "relational model," contracts serve as aspects of relationships which, in themselves, are not governed by contractual intentions. Rather, the relations are influenced by social and conduct normatives emerging from and inside that relationship.[175] Contracting parties accept their contracts within such relationship.[176] Accordingly, the parties "relationships" under relational contracts have:

> "the propensity to generate norms, define or inform parties' expectations, provide sources of reassurance, facilitate co-operation, create interdependence (and so on) – – over and above, indeed potentially instead of, what can be gleaned from the express terms of the contract or contracts to which they are parties, and over and above what is

[173] *Id.* at 77 ("Ultimately, the choice of behavioral assumptions to guide policy will depend to some extent on value preferences and unrealistic or untestable assumptions about human nature, because while empirical research can provide better answers than we currently have, it will not provide incontestable or simple answers about legal rationality for prescriptive use").

[174] *See* Eisenberg, Melvin A., *Why there is No Law of Relational Contracts*, 94 NW U LR 805, 813 (2005); Kimel, Dori, *The Choice of Paradigm for Theory of Contract: Reflections on The Relational Model*, 27 Oxford J. Legal Stud. 233, 235 (2007).

[175] Thompson, Robert, B., *Value Creation By Lawyers Within Relational Contracts and in Noisy Environments*, 74 Oregon Law Review 315, 317 (1995) ("Relational contracting recognizes that parties often do not come together as strangers making discrete, self-contained contracts but rather interact in an expectation of an ongoing relationship in which the prospect of future exchanges will shape the parties interactions and the remedies they choose").

[176] Eisenberg, Melvin A., *Why There is No Law of Relational Contracts*, 94 N.W. Univ. Law Rev. 805, 816 (2005).

> provided by the bare legal norms and legal mechanisms that underlie or support these contracts in the relevant jurisdiction."[177]

The relational contract is distinguished from the discrete, single or "one shot" transaction approach, generally isolated from relationship factors amassed through the parties' interaction.[178] Relational contract theory is thus viewed as emphasizing the interdependence of individuals in relationships.[179]

From an economic perspective, using a relational contract methodology raises a problematic situation: it is difficult to predict events in the future, and thus contracting parties are unable to allocate distant payments or obligations which maximize the contractual value.[180] At a point during a long-term contract, for example, the agreement's parties would then necessarily consider renegotiation. Such is the circular reasoning: "if the parties expect to renegotiate, then they cannot bind themselves to a contract, in which case the party whom events throw in the vulnerable position will be at the mercy of the party whom events favor."[181]

Relational contract theorists propose the removal of some contractual provisions, and recognize implied provisions, such as broadening the range of excuses for non-performance.[182] The relationship between the contracting parties thus assumes an integral position, with a legal theorist suggesting that the contract's nature involves pre-conceived notions of the contracting parties overturning conventional wisdom.[183] But allegations that contracts mirror all aspects of

[177] Kimel, Dori, *The Choice of Paradigm for Theory of Contract: Reflections on The Relational Model*, 27 Oxford J. Legal Stud. 233, 235 (2007). *See also* Gordon, R.W., *Macaulay, Macneil, and the Discovery of Solidarity and Power in Contract Law*, Wisc. Law Rev. 565, 569 (1985) (Relational contract parties "treat their contracts more like marriages than like one night stands," noting that relationship contracts involve those that change according to circumstances and signify a "commitment to cooperate").

[178] Kimel, Dori, *The Choice of Paradigm for Theory of Contract: Reflections on the Relational Model*, 27 Oxford J. Legal Stud. 233, 237 (2007).

[179] Macneil, Ian R., *Contracts: Adjustment of Long-Term Economic Relations Under Classical, Neoclassical, and Relational Contract Law*, 72 Nw. U. L. Rev. 854 (1978); *see also* Posner, Eric A., *A Theory of Contract Law under Conditions of Radical Judicial Error*, 94 Nw. U. L. Rev. 749, 751 (2000) (Asserting that under relational theory courts implicitly, or explicitly, accept the parties relational contracting); Kimel, Dori, *The Choice of Paradigm for Theory of Contract: Reflections on The Relational Model*, 27 Oxford J. Legal Stud. 233, 243 (2007); Macauley, Stewart, *Relational Contracts Floating on a Sea of Custom? Thoughts about the Ideas of Ian Macneil and Lisa Bernstein*, 94 Nw. U. L. Rev 775, 800 (2000).

[180] Posner, Eric A., *A Theory Of Contract Law Under Conditions of Radical Judicial Error*, 94 Nw. U. L. Rev. 749, 751 (2000).

[181] *See id.*

[182] *See id.*

[183] Dori Kimel suggests that the contracting parties: "do not *see* the terms of the contract to which they are party as a conclusive list of fixed rights and obligations, but rather as merely a starting point for re-negotiation and adjustment when circumstances change or difficulties arise parties in practice not insisting upon their contractual rights and not taking too seriously the option of litigation, but rather exhibiting the ongoing willingness to make the necessary adjustments in order to continue to co-operate; parties not having very precise or fully articulated aims in entering contractual relations in the first place, but rather merely a vague desire to establish a relationship and "take it from there"; and so on. Armed with this kind of data, the constructive part of the relational argument

human interaction, and that concepts not encapsulated within the contractual rubric are thus invalid, may be challenged as too expansive. Deeming that human and commercial relationships may be "contractualized" has spurred additional debate. Namely, one questions the alternatives to contract: under what framework will certain relationships remain *outside* the ambit of a contract? Moreover, in such relational context, the elements of the parties' interactions that shall be included or excluded (purposefully or otherwise) under an agreement, must be examined.[184]

The balancing act between personal and professional relationships, moving beyond the essential contractual terms, has been proposed to be a "detached code," consisting of

> "a certain stable baseline, comprising of clearly articulated, for the most part enforceable rights and obligations, which can be relied upon to provide at least a modicum of assurance or a safety-net of sorts in case of an unforeseen breakdown of the relationship, and which is relatively immune from being eroded as a result of, say, the on-going desire to co-operate rather than part ways, supererogation, displays of flexibility or gestures of goodwill--indeed all those positive things that can develop around the contractual core and that in the life of the relationship may well become more central and more important and more determinative of the parties' conduct than any or all express terms."[185]

Utilizing a relational contract methodology, without any economic or traditional sociological considerations, does not create a fulsome analytical tool. Relational contracting's valuable law-in-action insights, however, play a string complementary role which should not be ignored.

4 Conclusion: How to use Objective Pluralism, The Comparative Law Bridge

The exploration of common and civil law divides, both in form and substance, demonstrates that black-letter law analysis provides necessary and important insights when analyzing legal concepts implicit in international business transactions. Good faith, as discussed, is a relevant example as to how a legal concept may be treated differently among (and within) legal systems. But black letter analysis should not be the only prism to evaluate legal problems transcending legal systems. Rather, a law-in-action review provides valuable insights into what motivates

here is that theory of contract must systematically reflect this reality; it must bear out such facts, and do away with the largely fictitious vision of contract that emerges from a study of its established, formal rules…." Kimel, Dori, *The Choice of Paradigm for Theory of Contract: Reflections on The Relational Model*, 27 Oxford J. Legal Stud. 233, 253 (2007).

[184] Eisenberg warns that this tendency to contractualize all relationships "obscures critical differences between economic and affective relationships, between explicit and tacit reciprocity, between relationships that should be enforceable by both law and social norms and relationships that should be enforceable only by social norms, and between relationships that are triggered by promise and relationships that are not." Eisenberg, Melvin A., *Why There Is No Law of Relational Contracts*, 94 N.W. Univ. L. Rev 805, 820 (2000).

[185] Kimel, Dori, *The Choice of Paradigm for Theory of Contract: Reflections on The Relational Model*, 27 Oxford J. Legal Stud. 233, 248 (2007).

business parties and how legal concepts are interpreted in the real world. These issues are particularly relevant to practitioners and business people charged with designing an international transaction and/or drafting relevant agreements. Such areas are also of import to comparative law scholars, needing to discern the true meaning behind words and concepts, precluded from considering a legal issue only on its face.

Objective pluralism entails reviewing a comparative law problem from economic, sociological and, as applicable, relational contracting perspectives. Presenting such multiple vantage points allows a comparativist or practitioner a full palate, with the ability to observe what factors influence law-in-action on a case-by-case basis. But how does one accomplish this task? Engaging in an objective pluralistic approach necessarily involves constructing scientifically-sound surveys or empirical studies to weigh the various social, economic and relational contract considerations.

The legal scholar Lisa Bernstein's extensive law and economics scholarship evidences that carefully-construed surveys and studies, testing black-letter law through a law-in-action viewpoint, yields important insights. Bernstein has analyzed several trades and legal frameworks, all through the lens of formal and informal contract enforcement. For example, Bernstein's significant, in-depth review of the diamond industry discussed relational contracts under a trade context. [186] Her commercially-focused study in that industry concluded that reputation was "an essential business asset whose value will often be reflected in the selection of transactional partners as well as in the transaction price, the transaction structure, and other terms."[187]

Reviewing law and economics scholarship dedicated to investigating the factors shaping the conduct of actors in specific industries reveals the commercial considerations ultimately influencing how contracts are drafted, negotiated and enforced. Important factors such as reputation, otherwise not captured in conventional black-letter law review, provide insights into the strengths, and possible weakness, in studied legal regimes.[188] For example, Bernstein's empirical review of private arbitration systems revealed the striking importance of achieving and maintaining excellent industry reputations, and the value of reputation-based non-legal sanctions.[189]

[186] *See, e.g.*, Bernstein, Lisa, *Opting out of the Legal System: Extralegal Contractual Relations in the Diamond Industry*, 21 J Legal Stud 115 (1992); Bernstein, Lisa, *The Questionable Empirical Basis of Article 2's Incorporation Strategy: A Preliminary Study*, 66 U. Chi. L. Rev. 710 (1999).

[187] Bernstein, Lisa D., *Private Commercial Law in the Cotton Industry: Creating Cooperation through Rules, Norms, and Institutions*, 99 Mich. L. Rev. 1724, 1737 (2001).

[188] *See, e.g.*, Bernstein, Lisa, *Opting out of the Legal System: Extralegal Contractual Relations in the Diamond Industry*, 21 J Legal Stud 115 (1992); Bernstein, Lisa, *The Questionable Empirical Basis of Article 2's Incorporation Strategy: A Preliminary Study*, 66 U. Chi. L. Rev. 710 (1999). Bernstein, Lisa D., *Private Commercial Law in the Cotton Industry: Creating Cooperation through Rules, Norms, and Institutions*, 99 Mich. L. Rev. 1724, 1737 (2001).

[189] *Id.* at 1724. She interviewed a cotton merchant, who noted that "You want to do business where you know people and can depend on what they say about quality, since it is so subtle and so subjective. You are more likely to rely on quality when you know the guy." *Id.* at 1746.

Bernstein's review of the U.S. cotton industry provides an excellent example of relational contracting influences. Her study discussed how the cotton industry opted out of the public legal system, replacing it with a private commercial law mechanism.[190] Contracts in that industry were concluded under privately drafted sets of contract default rules, and made subject to arbitration in one of several merchant tribunals. Based upon her review, which included extensive interviews with industry leaders, arbitration awards were both respected and promptly complied with, and that the industry's private law system kept "transactions costs, error costs, legal system costs, and collection costs" low.[191] These insights assist practitioners when considering private legal system alternatives to the public judicial system. Additionally, before undertaking her empirical study, Bernstein presupposed that the cotton industry arbitration system would be less formalistic and more *pragmatic* than a public judicial fora. Her research revealed that this was not necessarily the case, as industry arbitrators employed formalistic procedures in an adjudicative approach, placing less emphasis on custom and usage, "even when their sense of fairness suggests that additional considerations are relevant or that a contrary result should be reached."[192] Accordingly, these insights assist academics analyzing comparative legal structures—insights which would not have been discovered without an empirical study analyzing "law in action."

Carefully-construed surveys and empirical studies[193] may provide deep insights into possible sociological, economic, relationship and cultural aspects which factor into the construction and operation of a studied legal problem. [194] Presenting inquiries, which allow ample opportunity for explanation, from a broad, yet relevant, societal sampling creates needed points of reference. All the discussed review methods independently do not provide a fulsome picture. As noted, behavior is inconsistent by definition. Relationships influence behavior—but those

[190] Bernstein, Lisa D., *Private Commercial Law in the Cotton Industry: Creating Cooperation through Rules, Norms, and Institutions*, 99 Mich. L. Rev. 1724 (2001).

[191] *Id.* at 1725-1726.

[192] Bernstein, Lisa D., *Private Commercial Law in the Cotton Industry: Creating Cooperation through Rules, Norms, and Institutions*, 99 Mich. L. Rev. 1724, 1737 (2001). She noted that one interviewed arbitrator proposed that: "[w]e look to the contract and then to the trade rules; this is all we have to base it [our decision] on. Other things like custom and the background [of the deal] are infinitely variable so we don't look to them." *Id.*

[193] There is evident tension among many legal scholars who employ purely economic, or wholly sociological, legal review strategies. Ayres, Ian, *Never Confuse Efficiency with a Liver Complaint*, 1997 Wis. L. Rev. 503, 506 & n.12 ("Sociology is bad journalism," statement attributed to an anonymous historian). *See also* Posner, Richard A., *The Sociology of the Sociology of Law: A View from Economics*, 2 Eur. J.L. & Econ. 265, 275 (1995) (criticizing "Law and Sociology" for having no "general theory of human behavior"). Employing strictly social research has spurred criticism in other disciplines, including family law. *See* Ramsey, Sarah H., *Using Social Science Research in Family Law Analysis and Formation: Problems and Prospect*, 3 S. Cal. Interdisc. L. J. 630, 633 (1994) *citing to* Deech, Ruth, *Divorce Law and Empirical Studies*, 106 L. Q. Rev. 229 (1990) ("the influence of the social scientists has led to an apparent reduction in the intellectual challenge and content of the law").

[194] Bernstein, Lisa, *Private Commercial Law in the Cotton Industry: Value Creation Through Rules, Norms, and Institutions*, 99 Mich. L. Rev. 1724 (2001) (Evidencing the interconnection of economic, behavioral and relational contracting issues in one of the scholar's interviews: "Over time a buyer gets the idea that he wants to deal with me not just because of our business relationship, but also because of our personal relationship. So you tell me, when you want to do business who will you call, the guy you like or the guy you don't like").

relationships also admittedly are influenced by economics. An economics-based approach must focus on two independent elements—efficiency and transaction costs—which may often intersect. Economic reviews must also confront the assumption that humans behave rationally in a transaction's decision-making. Rationality in an economic sense also does not take into consideration human indecisiveness, or the value of sociology. Objective pluralism, incorporating all such elements, reveals the problem.

Given the black-letter law divergences among the common and civil legal systems concerning "good faith," a serious study into aspects of that doctrine should be undertaken, providing scholars and practitioners needed law-in-action perspectives to see how striking the actual divide is between both legal traditions within this contractual doctrine.[195] The divergence in the common and civil law interpretations of good faith undermines the arguments of comparativists advocating the strengths of common and civil law systemic convergence, an increasingly popular[196] and hotly contested topic in modern comparative law.[197] With respect to comparative law, convergence refers to "the phenomenon of similar solutions reached by different legal systems from different points of departure."[198] The success of importing legal transplants from one regime to another indicates the possibility of convergence.[199] Scholars agree that within the civil law framework, the laws of individual states, particularly Germany, have influenced European Union law, leading to the EU-wide adoption of certain obligations.[200] Influence should not, however, be misidentified as supporting convergence. For example, Pejovic, encouraged by systemic convergence, has stressed the increasing role of common and

[195] Note that good faith was indirectly analyzed in the context of an empirical study reviewing liquidated damages clauses under the Norwegian and U.S. legal regimes. *See* Canuel, Edward T., Analyzing Norwegian and U.S. Contractual Damages Clauses: A Comparative Approach, published with the University of Oslo Faculty of Law (2009), ISSN 1890-2375.

[196] Nottage, Luke, *Comment on Civil Law and Common Law: Two Different Paths Leading to the Same Goal*, 32 VUWLR 843, 848 (arguing that convergence theorists form "the majority view") (2001)

[197] The statement of noted American comparativist John Henry Merryman indicates the tenor of this scholarly debate, as he stated that: "In some cases the desire for convergence of legal systems merely expresses a yearning for simplicity. It responds to popular discontent with complexity and seeks to impose order where there is untidy diversity. This approach to legal diversity would hardly merit recognition and discussion, since it is little more than an expression of frustration at the fact that the world is complicated, disorderly and uncertain, were it not so firmly rooted in human psychology. It is closely related to an exaggerated demand for certainty in the law." Nottage, Luke, *Comment on Civil Law and Common Law: Two Different Paths Leading to the Same Goal*, 32 VUWLR 843, 849 found at www.upf.pf/IMG/doc/17Nottage.doc (2001) *citing to* Merryman, John Henry, On the Convergence (and Divergence) of the Civil Law and the Common Law in The Loneliness of the Comparative Lawyer and Other Essays in Foreign and Comparative Law 17, 27 (1999).

[198] Mattei, Ugo and Alberto Monti, *Abstract: Comparative Law and Economics* 505,508 (1999) at http://encyclo.findlaw.com/0560book.pdf.

[199] *See id.*

[200] *See* Cordero Moss, Giuditta, *Commercial Contracts Between Consumer Protection and Trade Usages: Some Observations on the Importance of State Contract Law*, in Schulze, R. (ed.), Common Frame of Reference and Existing EC Contract Law, 65, 67 (2008), *citing to* Schlectriem, P., The Functions of General Clauses in Grundmann, Stefan and Denis Mazeaud (eds.), General Clauses and Standards in European Contract Law: Comparative Law, EC law and Contract Law Codification 41, 45, et. seq. (2006) (suggesting that BGB §242's ancillary obligations were codified by Community directives).

civil law harmonization through international treaties, conventions and laws containing elements of both civil and common law, such as the CISG.[201] Another scholar notes, however, that within Europe the opposing views of good faith and fair dealing under the English common law and civil law regimes question the reality of such convergence.[202] Most specifically

> "[i]f a common-law inspired contract is governed by a law from a civil jurisdiction, many of its clauses will not be interpreted literally and the exercise of rights and remedies regulated in the contract will be mitigated, supplemented or corrected by the principle of good faith and fair dealing present, in varying degrees, in the legal family of civil law. If the same contract is governed by English law, most of its clauses will be interpreted and applied literally."[203]

With respect to the import of transnational agreements or conventions buttressing claims of convergence, the scholar suggests that skeptics may find such agreements contain vague principles with inexact content, which question assertions that they demonstrate an actual legal convergence, in practice.[204]

The debate continues, and objective pluralism should be considered when reviewing a comparative commercial law issue. As Aesop suggests, appearances are often deceiving. One must understand the disparities existing in good faith doctrine, examining comparative contractual clauses as written and analyzing how such clauses manifest themselves in practice.

[201] Pejovic, Caslav, *Civil Law and Common Law: Two Different Paths Leading to the Same Goal*, 32 VUWLR 817, 838 (2001) at www.upf.pf/IMG/doc/16Pejovic.doc.

[202] *See, generally,* Cordero Moss, Giuditta, *Commercial Contracts Between Consumer Protection and Trade Usages: Some Observations on the Importance of State Contract Law*, in Schulze, R. (ed.), Common Frame of Reference and Existing EC Contract Law 65 (2008).

[203] Cordero Moss, Giuditta, *Commercial Contracts Between Consumer Protection and Trade Usages: Some Observations on the Importance of State Contract Law*, in Schulze, R. (ed.), Common Frame of Reference and Existing EC Contract Law, 65, 77-78 (2008). Supporting this point, the scholar also provides notes that merger clauses have specific contractual clauses which have different interpretations under English law and civil law. *See id.* at 79.

[204] *See id.* For example, it is noted that the CISG is silent on the issue of good faith as a duty between contracting parties. *See id.* at 83. Compare with Pejovic, Caslav, *Civil Law and Common Law: Two Different Paths Leading to the Same Goal*, 32 VUWLR 817, 839-840 (2001): "The differences which exist between civil law and common law should not be exaggerated. It is also important to note that differences on many issues exist both among civil law and among common law countries. The differences between civil law and common law systems are more in styles of argumentation and methodology than in the content of legal norms. By using different means, both civil law and common law are aimed at the same goal and similar results are often obtained by different reasoning. The fact that common law and civil law, despite the use of different means arrive at the same or similar solutions is not surprising, as the subject-matter of the legal regulation and the basic values in both legal systems are more or less the same."