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INTERPRETATION OF SHARE AND BUSINESS ACQUISITION CONTRACTS

**A Study of Anglo-American Concepts and Practices Influencing Share and Business
Acquisitions, of Compatibility with Nordic Law and of Possible Effects on
Interpretation of Contracts Governed by Nordic Law**

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DOCTORAL DISSERTATION

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ABSTRACT

This dissertation discusses contract interpretation based on a certain kind of contracting and contracts. It is submitted that sales and purchases of businesses ('transactions'), regardless of whether transactions involve shares, assets or combinations of these, set a different framework for contract interpretation than many other contractual relationships. The transaction market is heavily influenced by how contracting and contracts are made in the United Kingdom and in the United States and contracts are often drafted in the English language. This has led to a situation where detailed written contracts are used in transactions, including in the Nordic countries, and the contracts typically include common law terminology and English expressions with a certain legal meaning under common law, even when the contracts are governed by Nordic law. These features can be seen in contracts involving domestic as well as cross-border transactions. The analyses of contract interpretation are based on the above mentioned cornerstones, namely the particularities of contracting and contracts in transactions and the use of common law terminology and English expressions in those contracts. Common law is discussed based on how it is perceived in the United Kingdom and the United States, only, and Nordic law is discussed based on the situation in Denmark, Finland, Norway and Sweden, so Iceland is not included.

The main method used can be described as belonging to the field of legal dogmatics, which requires both interpretation and systematization. The dissertation includes analyses of contract law in the chosen common law and Nordic jurisdictions and the analyses focus on contract law relevant for transactions. The systematization requirement is met by analyzing the underlying legal concepts of typical terminology and expressions used in a special form of contracts, namely transaction contracts. Secondly, this dissertation also employs a method of a more comparative nature, as English and American terminology and concepts including use of the English language are scrutinized based on their common law meaning, but are thereafter compared with similar concepts that exist or may be construed according to Nordic law.

The conclusions based on the research are several. With regard to how the particularities of transactions may affect contract interpretation, the conclusion is that a form of contextual, objective interpretation method is preferred in terms of these highly detailed written contracts. The contextual method is suggested to be employed particularly with regard to the written contract, while a more restrictive approach is taken to using pre-contractual statements and actions in the interpretation. It is concluded that the written contract is by far the most important interpretation source. When the parties have agreed upon a transaction in a written contract, that contract has been described as a result of a complex process – a process during which several actions take place at the same time and where those actions including statements and drafts exchanged should be analyzed not only based on their contents, but also with due consideration for the fact that actions, statements and drafts are affected by the negotiation positions and strategies of the parties. The written contract is held to be even more important in cross-border transactions as here the contract establishes the

parties' mutual intention regardless of their possible different understandings of general contract law.

An objective interpretation method is defended, although this does not give a sufficient answer as to how common law terminology and other expressions in English should be interpreted in relation to contracts governed by Nordic law. When the dissertation deals with common law terminology and other expressions, the conclusion is that it is possible and they should be interpreted based on Nordic law. The interpretation may require some extra effort in order to understand how terminology and expressions are in general used in transaction contracts, but an objective interpretation should be employed based on how the governing law understands those same terminology and expressions.

When contract interpretation based on Nordic law does not provide a solution or when the parties have made a choice to use terminology or other expressions according to their common law meaning, it is submitted that Nordic courts including arbitrators should be allowed to have recourse to common law and common law practice. This acceptance is due to the fact that the whole transaction market is heavily influenced by the English and American ways of contracting and drafting contracts. However, this influence has not been regarded as so consciously employed that it would mean that the Nordic legal community has accepted the common law understanding of terminology and expressions when these are used in contracts governed by Nordic law.

It is also concluded that when common law is used, it is imperative to acknowledge that English and American contract law are not identical. Therefore, whenever common law is referred to, the decision has to explain why English or American law is chosen and thereafter such choice has to be consistently implemented.

FOREWORD

In April 2018 I was asked to speak about my dissertation at a seminar at the University of Helsinki. In that connection I wanted to explain why, at my age and with a background in private practice, I had engaged in such a challenging academic project as studies for a doctoral degree in law. Amongst the general reasons I mentioned was that combining academic research with practical experience gives some added value, as the angle of approach is somewhat different depending on your background. As to the subject matter of my dissertation, I explained that I had found over the years that Nordic academic research on contract law focusing on company acquisitions was scarce.

In all fairness, more personal reasons also affected my decision. I have always had a passion for the whole world of mergers and acquisitions. They are comprehensive, challenging projects and the influence of the Anglo-American way of contracting and drafting contracts adds to the challenge. I have had questions as to the consequences of us in the Nordic countries using the Anglo-American way of contracting and drafting contracts. Any legal practitioner obviously has to do their homework in the sense that nothing should be directly copied without some analysis of the meaning and relevance of using foreign terminology and practices. However, an in-depth analysis is rare in practice for mundane reasons such as lack of time.

These were some of the reasons why I decided to take a step aside and engage in academic work. Despite a readiness to change my professional life, in the early stage of studies I did not realize how much I would have to change my way of thinking and use of experience in order to meet the academic requirements for a doctoral dissertation. In this metamorphosis the guidance and support of my supervisor, Professor Johan Bärlund, has been invaluable. During the whole process I have learnt not only to appreciate Johan as an academic and a teacher, but my appreciation goes far beyond that. His patience and encouragement have been of vital importance when finalizing my task. Thank you Johan!

I also want to thank Professor Emeritus Lars Gorton and Professor Hans Henrik Edlund for valuable comments in their capacity as my two pre-examiners. Additionally, I want to thank Professor Mads Bryde Andersen, who kindly agreed to act as my opponent. His works have been important in my own studies, as is reflected by the fact that I have frequently used his works as references in my dissertation.

The dissertation is drafted in English due to the fact that it is the most common language used in mergers and acquisitions. English is not my mother tongue and therefore having Christopher Goddard backing me up, reviewing and commenting on the text, has been immensely important. I am very appreciative of all his work.

I want to express my gratitude for the grants I received at the beginning of my studies, when I had left my daily work. These grants from Eugen Schaumans fond administered by Stiftelsen för Åbo

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Finally, I want to thank my family and friends who have encouraged me during the process. A very warm and special thank you goes to my sons, Jonas and Jesper. They have selflessly been rooting for me and helped me out in a number of ways. I hope that in pursuing their second academic degrees they will find their own areas which they are passionate about.

This dissertation is dedicated to my father, Harry Wilkman, who passed away in July 2018. He always believed in me.

Helsinki in September 2018

Nina Wilkman

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1 INTRODUCTION

1.1 Are there sufficient reasons for an academic study of mergers and acquisitions?

Mergers and acquisitions often have widespread effects on societies at large and are therefore not isolated projects concerning only the parties and targets involved. The effects may appear, for example, in matters related to employment,¹ the functioning of the markets in which the targeted business is carried out,² and the environment. When considering the more general effects of mergers and acquisitions, it should be recognized that the economic interests involved are substantial. According to a report published by *Mergermarket*,³ the total value of cross-border mergers and acquisitions in 2014 was USD 1,399.7 billion. It is hard to imagine how, except for temporary effects of general slow-downs in the economy or protectionist obstacles created by political decision-makers, the global merger and acquisition market would substantially decrease in the long-term perspective, as businesses have to survive and thrive in a globalized economy.⁴ Looking at earlier development of the market, it may be noted that according to one calculation, the value of the global mergers and acquisitions market increased by approximately 70 % between 1987 and 2014.⁵ Considering the importance for – and the economic impact on – societies, studying mergers and acquisitions is certainly of general interest.

Mergers between companies and acquisitions of companies and businesses, that is, transactions⁶ where the ownership and/or the influence over companies and businesses shift, take place regardless of national borders.⁷ There are many common features in the way mergers and acquisitions are carried out irrespective of the differences between jurisdictions and their respective

¹ For example, after having bought Nokia's devices and services business in 2014, Microsoft decided in July 2015 to close down a research center in the town of Salo in Finland, an important employer locally. This action was part of Microsoft's overall restructuring of its phone hardware business, where up to 7,800 employees in Finland, the USA and in China were to be laid off. The stock exchange release can be found at www.microsoft.com.

² For example, when Outokumpu bought ThyssenKrupp's Inoxum business in 2012, the transaction was approved by the European Commission subject to divestment of certain Inoxum businesses (Termo assets and VDM, which were sold to ThyssenKrupp in exchange for a certain Outokumpu loan note), which was carried out in 2013. Stock exchange releases are to be found at www.outokumpu.com.

³ Mergermarket 2014, at 1.

⁴ The financial crisis starting in 2008/2009 affected most economies of the western world, but some nations managed to recover sooner than others. Although the crisis also affected the mergers and acquisition market over some years, the situation has changed again. For example, developments in Sweden led to the assertion of a "strong recovery" of private mergers and acquisitions in 2014, with the number of deals up by 18 %. See Vinge, 2015, at 6.

⁵ Ploskonka, 2015, at 113. Calculated based on information presented in the World Investment Report, 2015.

⁶ In the following the term 'transaction' is used interchangeably with 'acquisition' and 'mergers and acquisitions'. 'Mergers' often refers to transactions regulated by company law. See subchapter 1.2.3 on what kind of transactions are dealt with in this dissertation.

⁷ This is especially true for smaller countries. For example, see information from a survey by KPMG on the Finnish mergers and acquisitions market involving Finnish targets. The survey noted that, of the largest 15 acquisitions in 2013, in 5 cases the buyer was a US company or there was a US party to a joint venture acquiring the target in question. KPMG, 2015, at 11. During 2014, in two deals the buyer was from the UK. KPMG, 2015, at 12.

legal systems and irrespective of whether the transactions are cross-border or not. The documentation furthermore shows many similarities and is often based on how the documentation is drafted in the United Kingdom (UK) and/or in the United States (USA).⁸ This tendency of applying the English and/or the US way of drafting is one reason why detailed merger and acquisition contracts have become typical in the Nordic countries.⁹ A substantial part of the terminology used in transactions that in one way or another involve the Nordic countries derives from common law jurisdictions, but is often used with little or no debate as to what the meaning is under Nordic law¹⁰ and the contract pattern seems to be taken as a given, especially when the contract is drafted in the English language.

When the transaction is of a cross-border nature, that is, with targets located in different jurisdictions and/or the parties being from different jurisdictions, detailed contracts give the parties a comprehensive framework laying out the rights and obligations of the parties for the total deal. A comprehensive contract may be seen as ensuring that the parties have the same understanding of the particulars of the transaction. This presumes that the contract has been drafted under due observation of applicable national and international rules and regulations and that drafting has been carefully done in order to express the intention of the parties. It seems, however, that general contract law raises little concern amongst parties negotiating transactions, whether cross-border or not.¹¹ One reason might be that many of the nationally enacted laws and governing contract principles in the different countries and the international legal framework have not been prepared with cross-border or even domestic business acquisition contracts as the primary concern. Thus, the parties may find it more reliable to have recourse to detailed written contracts in complicated business acquisitions rather than to rely on general contract law.¹²

The question remains, though, whether there are reasons enough to carry out an academic study of contract law and especially interpretation of contracts based on the particularities of business acquisitions. In general, academic studies of contract law with comparative elements are not lacking, but works focusing on the dynamics and particulars of business acquisitions – and especially cross-border ones – are scarce. The reasons might be, just to mention a few, that the same general interpretation principles apply to acquisition contracts and there are no novelties in discussing specifically business acquisition contracts or that there is too big a risk of the academic focus shifting to over-practical and *in casu*-based discussions. However, interpretation of contracts is not done in isolation, so that – even if interpretation is based on generally acceptable methods,

⁸ In Sweden a résumé of the development of acquisition contracts may be found in an article written by Axel Calissendorff and Gotthard Calissendorff. See Calissendorff and Calissendorff, 1999.

⁹ See e.g. Egholm Hansen and Lundgren, 2014, at 37; Calissendorff and Calissendorff, 1999, at 75–76 and Flodgren and Runesson, 2015, at 47.

¹⁰ See, for discussion on the use of foreign legal concepts in Nordic contract law in general, Tomas Lindholm's presentation at 38. Nordiska Juristmötet, Lindholm, 2008.

¹¹ This is not necessarily typical only of acquisitions. See Atiyah and Smith, 2005, at 22–23.

¹² Mika Hemmo suggests that one reason for detailed contracts may also be that the parties want to override national law or at least circumscribe its relevance and use other norms as legal sources. Hemmo, 2005, at 488. Giuditta Cordero-Moss has suggested as a reason for the parties using very detailed contracts that they want the contracts to be so comprehensive that there is no need to "... look to external sources." Cordero-Moss, 2016, at 1304.

rules and principles – the factual circumstances, including the setting of the contractual relationship, have an impact on interpretation. Therefore, in my opinion, it is justifiable to carry out an academic study of interpretation of business acquisition contracts, where the characteristics of acquisitions as extensive projects give a different framework for contract interpretation than many other cases, ranging from the initial steps for initiating an acquisition, through preparations by seller and buyer, negotiations, likely examination of the target, possible preliminary agreements, the possible detailed written contract to finalization of the transaction. Furthermore, the widespread use of common law practices and common law terminology, even when the contract is governed by Nordic law, gives a different basis for discussing and analyzing what effect this approach to contracting and contracts should bear on interpretation.¹³ This matter is especially conspicuous in cross-border business acquisitions, where parties may have quite different views on the meaning and consequences of contracting and also as to how contracts should be interpreted. The challenges are further accentuated by the fact that so many of these contracts are drafted in the English language.

1.2 Scope of research and research questions

1.2.1 General focus

The focus of this research is to discuss the interpretation of acquisition contracts. As indicated above, the analyses are based on two important cornerstones, that is, the particularities of how acquisitions are carried out – including typical provisions appearing in such contracts – and the use of common law terminology, including use of the English language in contracts governed by Nordic law. The basis for the whole research is the fact that Anglo-American practices have strongly influenced the acquisition market¹⁴ including the Nordic market.

From a legal perspective, the importance of these characteristics is that the UK and the USA represent legal systems other than the Nordic system. Differences appear, for example, with regard to the sources of contract law and to how contract law evolves, with regard to the historical origin and meaning of terminology used in contracts, and with regard to contract interpretation in general including the interrelation between the written contract and other circumstances. It is therefore necessary as a starting point to analyze general contract law in order to identify what kind of differences and similarities may have an impact on the interpretation of acquisition contracts. These analyses will be limited to the extent that the discussion will focus on a few fundamental principles,

¹³ The international finance and insurance markets are also heavily influenced by Anglo-American practices including documentation, but based on my own experience the governing law is more often agreed to be English law than one of the Nordic laws, even when one of the parties is from a Nordic country. The maritime/shipping industry is another sector which has been heavily influenced by Anglo-American practices. In this dissertation some court cases from the finance and the maritime industries have been referred to.

¹⁴ Acknowledging at the same time that the expression ‘Anglo-American’ does not mean that English and US law and practice are identical. I have also noticed differences in drafting style in the sense that contracts drafted by American lawyers tend to be even more extensive than contracts drafted by English lawyers.

which I found relevant when discussing the process of contracting and contracts in business acquisitions. Additionally, comments will be made along the line on challenges when the acquisition is of a cross-border nature.

In all jurisdictions discussed in this dissertation, contracting is based on the freedom of contract principle, which means that the parties have quite extensive possibilities to freely agree upon their rights and obligations. This principle includes the freedom to negotiate and decide whether to enter into a contract or not, to freely agree upon the contents of the contract and to choose whom to contract with.¹⁵ Contract law is quite an elusive area of law and it is hard to formulate precise rules applicable to all kinds of contractual relationships. Therefore, detailed written contracts, which focus on the particularities of the individual transaction, may enhance the predictability of the outcome of a possible dispute. The other benefit of detailed written contracts is that the parties may create their own legal framework for their relationship, obviously subject to applicable rules and principles.¹⁶ This is of utmost importance in cross-border transactions if the parties represent different legal families and therefore do not share the same basic understanding of contract law in general.

As already noted, many elements in how acquisition processes are carried out and how transactions are documented are similar, regardless of where and which jurisdictions the transactions concern. It is thus essential in any research to identify these typical elements. This is especially important when analyzing and comparing contract interpretation in different jurisdictions, as interpretation will be shown also to be affected by the commercial setting and the factual circumstances, that is, the particularities of business acquisitions may affect the choice of interpretation methods and rules and indeed affect interpretation in general.

When the transaction involves a written contract – which is here submitted to be market practice/trade usage – interpretation will start with reviewing and analyzing the contract. Typically, these acquisition contracts embody a vast amount of common law terminology, even when they are governed by Nordic law. In order to discuss and analyze the challenges in such a set-up, here will be taken a few common law concepts which are often used in contracts, that is, conditions, warranties and representations. From an acquisition point of view contract terms including these common law concepts are very important and are therefore justified to be taken as examples of what the implications may be when two different legal systems meet in a contractual relationship. The way these concepts are used in acquisitions and acquisition contracts is another

¹⁵ Taxell, 1987, at 32; Hov and Høgberg, 2009, at 36; Woxholth, 2014, at 26; Adlercreutz and Gorton, I, 2011, at 27; Gomard, Godsk Pedersen and Ørgaard, 2009, at 14–15; Canuel, 2009, at 38–39 and Atiyah, 1979.

¹⁶ This opinion is not only my own but is shared by well-esteemed legal scholars. See e.g. Bryde Andersen, 2015, at 65–68, where he discusses the status of a contract based on how it may be regarded as a legal source and Lehrberg, 2014, at 169–171, who suggests with regard to a contract and non-mandatory law that the parties' contractual relationship is regulated primarily by the contract if the law in question is non-mandatory.

aspect which has to be considered, as the functionality of contract terms is an essential part of solving challenges in interpretation.

Another consequence of using the Anglo-American approach to drafting and contract models is that many contracts are drafted in the English language. This is not necessarily the native language of the business people and their advisors engaged in mergers and acquisitions representing the Nordic countries, and laws enacted in the Nordic countries are not in English, but in the local languages.¹⁷ Simple linguistic translations are not sufficient when analyzing foreign terminology or foreign wording and trying to transplant them into another legal system.¹⁸ For example, the understanding and use in general contract law of the concepts good faith, bad faith, loyalty, fairness, fair dealing and honest business practices vary. Some of these concepts are used in all the jurisdictions under discussion in this dissertation, but some are used only in one of the legal families but they could nevertheless be compared with other differently denominated concepts, as the concepts used in another legal family might bear a close resemblance.¹⁹ Additionally, when using terminology and expressions in English the parties should also recognize the difference between whether the translation is or should be based on English or US law.²⁰

The above mentions market practice/trade usage. Another matter to be discussed is whether the impact of the Anglo-American approach to contracting and contracts is of such a nature that some form of international market practice/trade usage has been established with regard to acquisitions, and especially cross-border transactions. If so, what impact should it have on the interpretation of these contracts?

1.2.2 Legal families discussed

Many aspects and issues need to be analyzed when the question concerns interpretation of business acquisition contracts which are so heavily influenced by Anglo-American practices. Therefore, in

¹⁷ For further discussion on challenges with language and translations, see e.g. Husa, 2003, at 236–242 and Bogdan, 2013, at 36–37.

¹⁸ See e.g. Mattila, 1999, at 110–112, pointing out that there may be difficulties even within the same language, as legal concepts are not always easily translated into ordinary language, which is accentuated when foreign language is used. He mentions as an example the common law understanding of equity. Mattila also mentions jurisprudence as an example of difficulties when comparing different legal systems: in this case he referred to the differences between the English and French systems.

¹⁹ For example, the loyalty principle is used in the Nordic countries, but not in the common law countries. It is quite common that in an international context the loyalty principle is compared with good faith, or good faith and fair dealing. See comments e.g. by Lehtinen, 2006, at 80. See also Flodgren and Runesson, 2015, at 44, who also put good faith and fair dealing as comparable to the duty of loyalty, as well as Giertsen, 2014, at 11.

²⁰ See e.g. Mattila, 2002, at 478, noting differences between the English and US legal languages. Heikki E.S. Mattila also suggests that it is often easier to translate US legal terminology into Finnish, because i.a. the terminology is closer to Finnish terminology. Mattila, 2002, at 468.

order to keep the discussions and analyses as perspicuous as possible, the jurisdictions have been grouped into two legal families, that is, the common law countries and the Nordic countries.²¹

Limiting the presentation to only two jurisdictions representing the common law system is due to the fact that it is above all the English and the US business and legal communities that have established the framework for contracting on mergers and acquisitions. The UK²² is an important representative of the common law system, as the basic common law doctrines and rules were developed in English law. However, today much of the merger and acquisition practice is developed in the USA, which justifies taking the USA as the other representative of the common law system.²³ Furthermore, England and the USA shared the same common law system and practice for several hundred years, but after the independence of the USA and especially during the 1800s the USA tended to take its own course.²⁴ It will also be shown in this dissertation that the UK and the USA have not made identical choices in their implementation of common law theories, nor have the contractual frameworks evolved in an identical manner.²⁵ The common law family is obviously larger than the UK and the USA.²⁶ Therefore, it is important to bear in mind throughout this dissertation that when referring to common law and common law jurisdictions such references only include the UK and the USA, and that possible differences as to other common law jurisdictions have not been accounted for. The words ‘English law’ are used, although these words actually refer only to the laws of England and Wales, which form a common jurisdiction.²⁷ With regard to the USA, the expressions ‘US contract law’, ‘American contract law’ and ‘American law’ are used frequently. Using these words has been regarded an acceptable method of discussing the

²¹ Legal systems are generally divided into different groups of legal families in comparative law. Although the divisions seem to vary somewhat, typically e.g. the common law countries are identified as one separate group. On the different forms of classifications and challenges in classification in general see Malmström, 1969, at 129–149.

²² The UK consists of several jurisdictions i.e. England and Wales, Scotland and Northern Ireland. Bankowski and MacCormick, 1991, at 359. It should be noted that Scotland is often described as a mixed jurisdiction with both common and civil law elements. Bugg, 2010, at 6.

²³ It has sometimes been claimed that contract law in the USA is actually a mixture of common law and civil law, as the legal codification of the US legal system is more extensive than in the UK. See e.g. Burnham, 2002, at 49 and Carlsson, 2004, at 18 and 21.

²⁴ Burnham, 2002, at 42–43. See also Mattila, 2002, at 465, where he points out that there are differences in English and US legal terminology, although classic common law is similar in both countries.

²⁵ As to basic differences in the legal systems between the UK and the USA, see e.g. discussions by P.S. Atiyah and Robert S. Summers. They suggest, e.g., that legal reasoning regarding rules in general, statutes and case law is more formal in England (they referred to England and not the UK) than in the USA. This conclusion may be found in Atiyah and Summers, 1987, at 409, but it permeates their whole discussion throughout the book in question. Atiyah and Summers held that even though there is a mix of formal legal reasoning and substantive reasoning in the US system, the substantive part is “relatively” larger in the USA. Atiyah and Summers, 1987, at 410.

²⁶ States such as Canada (excluding Quebec), India, Australia and New Zealand have adopted the common law system, but they have implemented the system in their own manner, although greatly influenced by English common law. See e.g. Zweigert and Kötz/Weir, 2011, at 218–237, which describes the expansion of English common law into other jurisdictions. However, to include these other common law jurisdictions would simply have expanded the scope of this dissertation too far.

²⁷ For further explanation as to the different jurisdictions in the UK see e.g. Bugg, 2010, at 5–6. An example of how the law can have different effects in different countries is the Unfair Contract Terms Act 1977, of which parts apply to England, Wales and Northern Ireland, parts to Scotland and parts to the UK in its entirety. For further information on the Act and its implications see Furmston, 2012, at 233–255.

legal situation in the USA, although contract law is state-based law even when based on similar statutory acts and principles.²⁸

Common-law approaches to contracting are the basis for the transactions discussed here, but the implications are analyzed from a Nordic legal perspective. Even though larger European legal systems such as the German one have influenced the Nordic legal system, the Nordic countries have developed their own legal framework and traditions. The Nordic countries are in general not regarded as pure civil-law countries, but rather as a sub-group of the civil law system.²⁹ For the purposes of this dissertation it is not decisive whether the Nordic countries are regarded as pure civil law countries or not, but rather that they are not perceived as being part of the common law system.³⁰ ‘Nordic law’ is used throughout the dissertation, but in fact reference is made only to Danish, Finnish, Norwegian and Swedish law. Iceland is part of the Nordic family, but due to language barriers which make it impossible for me to analyze the original texts of Icelandic laws and court practice, Iceland has not independently been part of this research. I also prefer to use the words ‘Nordic law’ instead of ‘Scandinavian law’ because ‘Scandinavia’ is and has sometimes been used to describe only certain states and certain geographical areas of the Nordic countries, although Scandinavian law has been used in the legal context to describe the form of legal system prevailing in the Nordic countries.³¹ Even though the term ‘Nordic law’ is used, it has to be acknowledged that there are differences also between the Nordic countries as to the application of

²⁸ Knapp, 1996, at 201.

²⁹ Zweigert and Kötz/Weir, 2011, at 277. Zweigert and Kötz were of the opinion that the legal systems of Denmark, Finland, Iceland, Norway and Sweden could not be allocated to the common law system, as the history of the Nordic systems has developed quite independently of English law, which is the basis for common law, and as there is a gap between the Nordic systems and the common law system in the use of finding law, the strong emphasis of court decisions in the common law countries and the role of the Anglo-American judge. Nor did Zweigert and Kötz regard Nordic laws as being part of the pure civil law system, as Roman law has had less influence on Nordic laws in comparison e.g. with Germany, as the Nordic countries have not enacted large, comprehensive civil codes as in Germany and France, and as the Nordic countries have their own styles and close interrelationships, but Zweigert and Kötz rather saw the Nordic countries as a special legal family within the civil law system. See also Bogdan, 2013, at 76, who draws the conclusion – after having discussed different opinions and presentations on legal families – that “The Nordic legal systems in Denmark, Finland, Iceland, Norway and Sweden are ordinarily classified as belonging to the Continental European family of law.” ... “It is impossible to determine with scientific precision which of these authors is right, as the relationships between legal systems are not rooted in any biological reality, but instead often exist primarily in the eyes of the beholder and depend on i.a. the degree of details of the division. ...” “Nordic law can certainly be placed in the Continental family in spite of it having certain special features such as that the Nordic legal systems usually are more pragmatically oriented than German and French law..., that they lack codifications similar to the German *Bürgerliches Gesetzbuch* or the French *Code civil*, and that they are not influenced by Roman law to the same degree as French and German law.” See also Husa, Nuotio and Pihlajamäki, 2007, at 8, where they discuss the differences between Nordic law and Germanic Law, although they also note that “Nevertheless, the Nordic legal family is closer to continental law than to common law, although it must be borne in mind that European integration has brought these law groups closer together.” See further Lando, 2009, at 78, who represented that Nordic law in general has been influenced by German law and especially Danish law.

³⁰ It has also been suggested that e.g. the Swedish system has features both of civil law and of common law, as court precedents have been regarded as playing a more important role than they would have done in civil law countries. Peczenik and Bergholz, 1991, at 311. See also Gomard, 1961, at 33, who thought that the question whether the legal system in the Nordic countries was based on civil or common law is not meaningful. However, his opinion was criticized by Jacob W.F. Sundberg, Sundberg, 1969, at 198. Sundberg was a strong defender of the position that Nordic law (or as Sundberg preferred: Scandinavian law) belonged to the civil law family. Sundberg, 1969, at 204.

³¹ As to the geographical identification of Scandinavia, see e.g. Bernitz, 2007, at 15. It may well be that Scandinavian law is more widely used internationally, as e.g. Ulf Bernitz claims, Bernitz, 2007, at 15–16, but nor is Nordic law inappropriate either, as also stated by Bernitz. It may also be noted that ‘Nordic law’ was used throughout the article by Husa, Nuotio and Pihlajamäki, 2007.

law. A thorough analysis of these differences has not been made, but the differences have been pointed out where relevant for the research questions.

1.2.3 Basic transactions and contracts discussed

The acquisitions discussed in the dissertation will be acquisitions of businesses based on written contracts between business entities of equal bargaining power. The discussion on contract law is inevitably influenced by the assumption that business parties of equal strength have executed the final contract. That creates a different starting point for this discussion compared to a discussion where parties would be acting as private individuals or where one of the parties would be in a substantially stronger bargaining position. Additionally, the assumption is that the parties have agreed on some form of purchase price. It is also assumed that the written contract includes a valid governing law provision covering both substantive and procedural matters.

Furthermore, the acquisitions are assumed to be share deals (which include transactions involving less than a majority of the shares, but leading to a controlling influence in the target and transactions involving a majority or all of the shares of the target), asset deals or combinations including both shares and assets.³² The term ‘shares’ refers to shares in the equity of corporate entities but in whatever form the acquisition is carried out in the assumption is that control over the business will be transferred from the seller to the buyer. ‘Asset deals’ means acquisitions where the target forms an entirety which is sufficient for the continuation of a business. The relevance of this description is that when acquiring shares or assets forming a business entirety, the target is often more complex and more variable than for example a target covering certain equipment.

In the dissertation mention is often made of cross-border transactions. This means that the parties and/or the targets reside and/or carry on business activities in different jurisdictions or that several of these elements are present. Cross-border transactions are often more complex as processes and the documentation is often even more comprehensive and detailed than is the case in purely domestic transactions. However, detailed contracts are typical of business acquisitions in general, whether of a cross-border nature or not. Furthermore, the widespread use of English and US-based documentation has influenced the Nordic market to the extent that even though a cross-border transaction in fact only concerns the Nordic jurisdictions and even if Nordic law has been agreed to be the applicable law, common law terminology and the English language are often used in the documentation.

It is common to refer to ‘mergers and acquisitions’ when discussing transactions where the ownership and/or influence over businesses shift. This expression, however, includes a broad scale of transactions of which I would like to distinguish mergers. The term ‘merger’ is often translated

³² The term “business acquisitions” is used within this dissertation to cover both share and/or asset transactions.

into a company law concept in the Nordic countries, whereby two or more companies transfer their businesses to a new company (combination merger) or whereby one or more companies transfer their businesses into an existing company (absorption merger), which remains in existence.³³ The term ‘merger’ is in all fairness also used in a broader sense in other fields of law. As an example, Council Regulation (EC) No 139/2004 on the control of concentrations between undertakings (the EC Merger Regulation) applies not only to mergers but also to acquisitions and joint ventures referred to as ‘concentrations’ in the Regulation.³⁴ With regard to my own research it has been important to focus on the contractual elements of a transaction and therefore transactions carried out in the form of mergers based on provisions in company law have not been analyzed, as that would have required a much broader analysis of company law aspects.

In order to keep the focus on contractual law issues, I decided not to analyze acquisitions of publicly listed companies. These would for the most part be carried out in the form of mandatory or voluntary public tender or exchange offers and which might or might not have been preceded by gradually building up a shareholding. The merger alternative is clearly also an option for publicly listed companies. It is typical that acquisitions of publicly traded companies are heavily regulated, so that public mergers and acquisitions would require presentations of extensive regulations but would not necessarily add much to the contract law analysis as such.³⁵ Publicly listed companies do carry out acquisitions based on private agreements, where the size of the deals could be such that the securities market regulations would not become applicable, except for certain parts, such as the rules and regulations on disclosure obligations. Contract law and contract interpretation dealt

³³ See definitions of mergers in Denmark in the Danish Act on Public and Private Limited Liability Companies (Act No 322 of 11 April 2011, as amended), Part 15 Merger and division (*spaltning*), §236; in Finland, the Limited Liability Companies Act (624/2006 as amended) Part 5 Changes in Company Structure and the Dissolution of the Company, Chapter 16 Merger, §1 and 2; in Norway, the Public Limited Liability Companies Act and the Private Limited Liability Companies Act (No. 45, June 13, 1997 and No 44, June 13, 1997, as amended), Chapters 13 Merger, §13(1) and 13(2); in Sweden Limited Liability Companies Act (2005:551 as amended), Chapter 23, §1 and 2. In the UK equivalent terms are found in the Companies Act 2006, Part 27, Chapter 2 Merger §904. Denmark, Finland, Sweden and the UK have as EU Member States had to take due notice of the continuing harmonization of company law. Norway also adheres to company law directives based on the fact that the country is a party to the EEA Agreement. The concept of mergers in company law can be found e.g. in Directive 2005/56/EC of the European Parliament and of the Council (26 October 2005) on cross-border mergers of limited liability companies. As to the USA, mergers would be subject to the law of the state of incorporation of the companies in question and as an example may be taken the Delaware Code, which in Title 8 on Corporations and more specifically in Chapter 1 General Corporation Law, subchapter IX Merger, Consolidation or Conversions §251 deals with mergers or consolidations of domestic corporations and in §252 deals with mergers or consolidations of domestic and foreign corporations. However, federal statutes and rules must also be complied with if the merger involves securities. These Acts include separate provisions on mergers between parent companies and subsidiaries.

³⁴ The EC Merger Regulation applies not only to the EU Member States, but to all EEA member states and thus also to Iceland and Norway.

³⁵ All jurisdictions have their own enacted securities market acts, and public stock exchanges have published their own rules and regulations, and there might be separate institutions giving recommendations and statements in relation to public takeovers. Furthermore, company law aspects also need to be borne in mind. Actors in the USA must take into consideration the federal regime as well as state-specific regulations. A listing of relevant legislation, rules and standards is not given here, because it is assumed that lawyers in general are well familiar with the fact that public mergers and acquisitions are heavily regulated. EU Member States must also take into consideration Directive 2004/25/EC of the European Parliament and of the Council of 21 April 2004 on takeover bids.

with in this dissertation are of a general nature and will thus for the most part also be applicable to transactions involving publicly listed companies.

The research will not focus on any specific business sector and thus specific legislation and regulation relating to certain business areas, such as the finance industry or the telecommunications industry, will not be discussed. Nor will legislation restricting foreign investments in a country be discussed.

1.2.4 Main legal area and use of certain terminology

The dissertation deals with the law of contract and thus inherently with a part of the law of obligations.³⁶ The systematization in itself is not crucial here, but it does explain why certain aspects of mergers and acquisitions are not dealt with, for example taxation and competition law matters, as they are generally classified as public law and not private law as the law of contract. Nor is tort law dealt with in general, as tort law is not primarily based on private agreements, although it forms part of the law of obligations.³⁷ However, tort law is relevant in common law jurisdictions even in contractual relationships and it will be referred to, for example, in order to show alternative means of recourse for parties claiming breach of contract. General contract law is described in various terms by legal authors, but broadly general contract law has been perceived as dealing with questions about entry into and validity of contracts, about establishing the rights and obligations of the parties, that is, interpretation of contracts and enforcement issues related thereto in case of breach.³⁸ In this dissertation contract interpretation is discussed based on the assumption that a valid, written contract is entered into by the parties and consequently issues in relation to entry into contracts (except for relevant issues connected with negotiations) and enforcement issues will not be major areas for discussion.

Some legal scholars prefer to discuss contract law using the term ‘law of contracts’ instead of ‘law of contract.’ The law of contract deals with all kinds of contracts, while the law of contracts divides the discussion into general contract law and special contract law, which deals with some specific contracts. Such specific contracts as consumer contracts, employment contracts and real estate contracts are governed by specific rules and regulations, but the categorization may also be based

³⁶ It is well recognized in all jurisdictions which are the focus of this dissertation that the law of contract forms part of the law of obligations. See e.g. Adlercreutz and Gorton, I, 2011, at 30; Lehrberg, 2014B, at 94; Gomard, Godsk Pedersen and Ørgaard, 2009, at 23; Hagstrøm and Aarbakke, 2004, at 28; Woxholth, 2014, at 33; Hemmo, I, 2007, at 3; Atiyah and Smith, 2005, at 1–3 and Farnsworth, 1963, at 119.

³⁷ Harpwood, 2000, at 1 and 5 and Law, 1996, at 239–241. In Europe, the book *Principles of European Tort Law* has been published by the European Group on Tort Law. These principles are so-called soft law. The aim of the group and of the principles is to “contribute to the enhancement and harmonization of tort law in Europe.” It has also been suggested, e.g. regarding Sweden, that tort laws are not based on the same concept as tort laws in the common law countries, but at the same time it has been admitted that in comparative studies it is common that ‘tort’ is used. Flodgren and Runesson, 2015, at 36.

³⁸ See e.g. Gomard, Godsk Pedersen and Ørgaard, 2009, at 17; Halila and Hemmo, 2008, at 2; Hov and Høgberg, 2009, at 22–23; Adlercreutz and Gorton, I, 2011, at 36; Atiyah and Smith, 2005, at 29–30 and Knapp, 1996, at 201–202.

on the fact that certain parts of contract law are more important than others.³⁹ I submit in this dissertation that business acquisition contracts are the end-product of sometimes quite extensive processes and that these contracts are drafted in a certain way and contain certain typical provisions.⁴⁰ Based on that notion, these contracts could be regarded as a special category of contracts.⁴¹ Certainly, the particularities of acquisitions are of utmost importance when analyzing how contracts should be interpreted, but that analysis will be carried out based on general contract law, which is applicable not only to business acquisition contracts but also to other contracts, especially other commercial contracts.⁴² The basis for general contract law is the same for all contractual relationships, although the weight of different rules and principles differs depending on the nature of the contractual relationship. Therefore, I have preferred to use ‘contract law’ or the ‘law of contract’ instead of ‘law of contracts’.

Very few contracts would not give rise to divergent interpretation solutions regardless of how carefully drafted and agreed they may be. Furthermore, there might be gaps in the agreements contained in a written contract. When contracts are to be interpreted by ordinary or arbitration courts, a fair number of legal scholars advocate a model where interpretation is divided into two different phases: ‘interpretation’ and ‘construction’. In the Nordic countries, the process whereby the content of a contract is established in order to provide a basis for determining the legal consequences is often defined as interpretation.⁴³ Construing or supplementing a contract is used to describe situations when the contents of the contract are not sufficient or, in some cases when the contents do not seem reasonable.⁴⁴ Axel Adlercreutz submitted, for example, that interpretation

³⁹ Halila and Hemmo, 2008, at 5–14; Hellner, Hager and Persson, 2015, at 23–26; Hov and Høgberg, 2009, at 24–32; and Bryde Andersen, 2004, at 17, who – with reference to certain other Danish legal scholars (Ussing, Arendorff, Kruse) – said that the question arises as to whether it is worthwhile trying to categorize and systematically divide contract law based on the different types of contracts and he also submitted that Danish law in general has not adopted that approach. Bryde Andersen also refers e.g. to Vinding Kruse (A.Vinding Kruse, Købsretten, 1987) as a good example of a scholar who deals, according to Vinding Kruse’s own statement, with the “most important” contract types i.e. lease contracts, loans, depository contracts, gifts and similar, employment contracts, purchase contracts for goods, purchase contracts for real property, different kinds of security contracts and insurance contracts (Vinding Kruse, 1987, at 23–38). With regard to the UK, see e.g. Atiyah and Smith, 2005, at 2–3, where Atiyah claims that although it has not formally been accepted in England that contracts should be treated differently based on categorization of contracts, categorization might in practice have an effect on how the contracts in question are dealt with. See, on the other hand, Stone, 2013, at 16–19, who defended the use of the concept ‘law of contract’. In the USA, without further discussion about the different nuances, restatements on contract law are actually named ‘Restatement of the Law of Contracts and Restatement, Second, of the Law of Contracts’, but the latter states (page 2) that the Restatement “does not deal with special rules governing particular types of contracts.” As such special rules are mentioned rules governing relations between principal and agent, partnership agreements, modified rules if a governmental agency is a party as well as the law of capacity, which are said to be mentioned just briefly.

⁴⁰ These elements are even more conspicuous in cross-border transactions.

⁴¹ Ola Åhman actually defended the position that business acquisitions should be regarded as a special category of contracts. Åhman, 1990, at 479.

⁴² See e.g. Richard Stone, who – when discussing whether the UK has a law of contract or law of contracts based on different kinds of contracts, asserted that “... there is a sufficient body of general rules and principles that apply to all (or virtually all) contracts to say that there is a ‘law of contract.’” Stone, 2013, at 16 and with regard to the general discussion at 16–19. Among Nordic scholars may be mentioned Jan Ramberg and Christina Ramberg, who – when discussing the law of obligations – note that even if there are different kinds of contracts, it is correct to refer to general contract law. Ramberg and Ramberg, 2016, at 17–18.

⁴³ Lehrberg, 2014, at 19; Høgberg, 2006, at 73; Hemmo I, 2007, at 656 and Gomard, Godsk Pedersen and Ørgaard, 2009, p. 263.

⁴⁴ Lehrberg 2014, at 20–21; Høgberg, 2006, at 73; Hemmo I, 2007, at 658 and Gomard, Godsk Pedersen and Ørgaard, 2009, at 263–264.

concentrates on the specific case, what the contract states and other data as to what the parties meant and understood, whilst construction includes the implementation of legal rules and/or customs, which are connected with the type of agreement in question. However, he also mentioned that construction could be carried out based on the special circumstances of the case such as the presumption of the parties, which cannot be regarded as content of the agreement.⁴⁵ Bert Lehrberg defended the identification and use of two separate processes, which he summarized as ‘interpretation’ – referring to the situation where the aim is to understand what the contract means including the views of the parties on entry into the agreement – and ‘construction’ as being the method to use when there are issues for which the contract does not provide a solution.⁴⁶ In Norway,⁴⁷ in Denmark⁴⁸ and in Finland⁴⁹ similar discussions have taken place. As to the common law countries dealt with herein, it can be noted that in the USA the preference amongst legal scholars has been to distinguish between interpretation and construction, whereas their English colleagues seem to have taken a more lenient approach.⁵⁰ I have nevertheless chosen to refer to ‘interpretation’ of contracts throughout this dissertation. In my opinion, a judge or an arbitrator in a dispute has to start with the written contract, but when interpretation of the contract is not sufficient, the judge or arbitrator will have to analyze other circumstances and sources affecting interpretation. Therefore, whether the judge needs to interpret or construe/supplement the contract is not so important for the end result.⁵¹

When discussing contract law the two words ‘contract’ and ‘agreement’ are frequently used. The words ‘contract’ and ‘agreement’ have been given separate meanings in the common law countries,⁵² but not in the Nordic countries, where for example the Nordic Contract Acts do not

⁴⁵ Adlercreutz, II, 1996, at 11–12.

⁴⁶ Lehrberg, 2006, at 20–21.

⁴⁷ Hov and Høgberg, 2009, at 265–266.

⁴⁸ Bryde Andersen, 2005, at 320–322.

⁴⁹ Hemmo, I, 2007, at 657–660.

⁵⁰ See e.g. Patterson, 1964, at 833, discussing the different concepts and their meaning, noting that in interpretation one aims at “... ascertaining the meaning or meanings of symbolic expressions used by the parties to a contract or of their expression in the formative stage of arriving at the creation of one or more legally obligatory promises.” As to construction, Patterson stated that construction is “... a process by which legal consequences are made to follow from the terms of the contract and its more or less immediate context, and from a legal policy or policies that are applicable to the situations”. See also Patterson, 1964, at 835–836, where he suggested that interpretation and construction may be applicable simultaneously and that in construction the surrounding circumstances or transactional circumstances can be taken into account, but in interpretation such circumstances are often notable only in part because of the parol evidence rule. See further, Corbin, 3, 1951, at 7–8, where Corbin drew a distinction by saying that interpretation is often used with regard to language and its symbols, but construction is meant as interpreting the words of a contract and determining its legal operation. Corbin also noted that when a court construes a contract its decision is “... affected by events subsequent to its making and not foreseen by the parties...” One further element is to be introduced as Corbin also described a process he referred to as implication. With regard to the English situation and the more lenient approach whether to use interpretation or construction, see e.g., Macdonald and Atkins, 2013, at 150–151 and Stone, 2013, at 236, who said in connection with discussing exemption clauses that “... the wording of the clause must be examined to see if it is apt to apply to the situation that has arisen. This is called the rule of ‘construction’, but might equally well be called the rule of ‘interpretation.’”

⁵¹ This kind of standpoint also seems to be taken by Jan Ramberg and Christina Ramberg. For further reference see Ramberg and Ramberg, 2014, at 143. See also the previous edition from 2010, at 147–148.

⁵² As to common law definitions, in the USA the terms ‘contract’ and ‘agreement’ respectively have been defined in the Restatement, Second, of the Law of Contracts. The definition of a contract in §1 is: “A contract is a promise or a set of promises for the breach of which the law gives a remedy, or the performance of which the law in some way recognizes as a duty.” §3 of the Restatement, Second, of the Law of Contracts includes a separate definition of

define these words separately. Some Nordic legal scholars use a division, but mostly for practical purposes, and general contract law may be considered to involve all kinds of agreements and contracts.⁵³ In this dissertation the word ‘agreement’ is used to reflect different kinds of understandings between the parties whilst the word ‘contract’ is used for final written contracts executed by the parties. Here, the word ‘contract’ includes both the body text of the contract and schedules attached thereto.

As the assumption in this dissertation is that the typical contract includes a governing law provision, private international law/conflict of laws will not be analyzed, although this would otherwise have been very interesting with the cross-border aspect being an element of the discussions in this dissertation.⁵⁴

1.2.5 The research questions

The purpose of the research and answering the research questions is to enhance knowledge of contract law in the different jurisdictions and how contract law affects detailed and heavily negotiated contracts. The choice to focus on business acquisition contracts will raise questions as to how the functional environment and the factual circumstances have or should have an impact on contract interpretation. By providing information and discussing these matters I want to reach out

agreement (and bargain) according to which “An agreement is a manifestation of mutual assent on the part of two or more persons. A bargain is an agreement to exchange promises or to exchange a promise for a performance or to exchange performances.” Another definition can be found in §1-201 of the UCC “‘Contract’, as distinguished from ‘agreement’, means the total legal obligation that results from the parties’ agreement as determined by [the Uniform Commercial Code] as supplemented by any other applicable laws.” The Code states that “‘Agreement’, as distinguished from ‘contract’, means the bargain of the parties in fact, as found in their language or inferred from other circumstances, including course of performance, course of dealing, or usage of trade as provided in Section 1-303.” See also Perillo, 2004, at 26, where he claimed that “Usually an essential prerequisite to the formation of a contract is an agreement: a mutual manifestation of assent to the same terms.” As to English law, the situation is not as clear-cut, though some legal scholars seem to prefer a difference in use. See e.g. Macdonald and Atkins, 2013, at 6, who represented that “Broadly, a contract is a legally enforceable agreement giving rise to obligations for the parties to it. However, not all agreements are legally binding contracts. For example, social and domestic agreements are generally presumed to lack any intention to create legal relations, and no contract will be found in those situations, unless there is very clear evidence of an intention to create legal relations between the parties...”. The impression is that in the UK as well as the USA the term ‘agreement’ includes understandings which might not include consideration and thus would not be regarded as contracts in a formal sense.

⁵³ The terms used in the Nordic languages are *kontrakt* and *avtal* in Swedish, just one word *sopimus* in Finnish, *aftale* and *kontrakt* in Danish, and *avtale* and *kontrakt* in Norwegian. In Swedish, *kontrakt* has sometimes been used to describe special kinds of contracts, see Ramberg and Ramberg, 2014, at 17–18. See further Adlercreutz and Gorton, I, 2011, at 25, who said they would use *kontrakt* to describe written contracts. In Norway it seems that the two terms are often used interchangeably. See Woxholth, 2014, at 35.

⁵⁴ “Conflict of law” is more often used in the common law countries, while the Nordic countries more often use the expression “private international law”. See e.g. Bogdan, 2012, at 20. For example in the USA there is a Restatement (Second) of Conflict of Laws (1971) and a third one is under way. Conflict of law can be a problem, as indeed has been seen in many disputes. In the EU the need for uniform conflict of law rules was recognized and led to a set of rules in 2008: Regulation of the European Parliament and of the Council No 593/2008 of 17 June 2008 on the law applicable to contractual obligations (Rome I), (OJL 177/6 4.7.2008). These rules allow the parties to decide which national law should apply to a contract, but if the contract is silent on this issue the regulation contains rules as how to decide which law should be applicable. Another aspect – just as important – is the enforcement of judgments; the EU, Switzerland, Iceland and Norway entered into a new Lugano Convention, enacted by the EU in 2009, replacing the old convention of 1988. This convention provides for the recognition and enforcement of judgments in civil and commercial matters. Another very important convention in this respect is the Convention on Recognition and Enforcement of Foreign Arbitral Awards, adopted in 1958 by the United Nations (UN), entering into force in 1959 and referred to as the New York Convention. When involved in a dispute, it is vital always to check which countries have ratified the convention in question.

to legal scholars and add to the discussion on what aspects should be considered in contract interpretation. Business acquisitions – especially cross-border acquisitions – often follow a fairly standardized process and my own contribution will be to present some views on what the impact should be of these processes preceding final acquisition contracts, when a final contract has been entered into. Written contracts in business acquisitions often follow a certain pattern including typical terminology and they are often drafted in the English language – even in some cases when they relate to purely domestic transactions. These are other aspects which will have to be considered when reviewing the interpretation of such written contracts. By answering the research questions, I also want to provide arguments for lawyers facing interpretation issues related to these kinds of transactions, whether as judges, arbitrators, practitioners or legislators.

Based on the above, I have summarized my main research questions as follows:

1. What parts of general contract law are of special interest for parties negotiating business acquisitions?
2. What is the typical process for carrying out business acquisitions and what matters are typically agreed upon in such contracts?
3. What relevance do and should the particularities of business acquisitions have in contract interpretation?
4. What should be the impact of the use of English and/or US common law terminology when interpreting business acquisition contracts governed by Nordic law?
5. What are the challenges when using the English language in business acquisition contracts governed by Nordic law?
6. Do or should cross-border elements have an impact on the answers to the questions set out above?
7. Is there some established international trade usage which could effectively resolve the questions set out in 3–6 above?

1.3 Methods and sources

1.3.1 Methods used

Once the research questions have been identified, the next question is how to proceed in a consistent and systematic manner to answer those questions. This is the essence of how the concept of legal

method is used here,⁵⁵ that is, to describe how the research has been done and how the answers have been reached. Clearly, it is important in all scientific research to describe how conclusions have been reached,⁵⁶ otherwise the research and the conclusions are not open for academic validation through evaluation and criticism (positive or negative).⁵⁷ Furthermore, as there is no single correct definition of legal method it is also important to describe the method employed, especially with regard to this dissertation since the methods I have used are interwoven.⁵⁸

The main method used in the research may be classified as belonging to the field of legal dogmatics as understood in the Nordic countries. Legal dogmatics has traditionally been described as having two main features: 1. Interpretation of existing law, and 2. Systematization of the law.⁵⁹

With regard to the requirement of interpreting existing law, this may be found in this dissertation in the descriptions and analyses of prevailing contract law in the different jurisdictions. In the Nordic countries we are used to scrutinizing legislation and other authoritative legal sources when analyzing many areas of law. With regard to contract law, that kind of scrutiny would not be sufficient, as general principles developed in doctrine and in court practice play an immensely important role in the Nordic countries.⁶⁰ In that respect a more systematic approach in analyzing contract law is necessary in order to grasp the full effect of how contract law affects contractual relationships established in business acquisitions.⁶¹ However, general contractual principles are

⁵⁵ See Aarnio, 2011A, at 12, where he mentioned that when method is discussed, the concept ‘method’ is seldom defined; Hirvonen, 2011, at 7, noted that there is no generally defined and standardized institution of method. Strömholm, 1996, at 411, pointed out that ‘method’ is used in various ways, as sometimes it is used to describe legal method as different in relation to other disciplines and sometimes to describe special methods such as teleological method, concept jurisprudence, eclectic method, and so on. Similar comments were made by Ari Hirvonen, who defined methodology in a limited sense (how information is gathered about law, how information is analyzed and how conclusions are produced) and in an expansive sense (except for the matters just mentioned, it also includes questions in relation to epistemology, ontology and different other effects of research): Hirvonen, 2011, at 9–10. It has also been pointed out that when e.g. the debate is whether legal method as a science is a different matter from science on legal sources, it depends on how the two sciences are described, as both are used in various ways: Helgesen, 1997, at 17. It has furthermore been asserted that the aims of scientific methods are often to identify the means usable in order to find the answer to questions set within the respective science or field of action: Helgesen, 1997, at 18. See also Ross, 1971, at 129, who suggested that defining a methodological ideology cannot be done with the same precision as e.g. with regard to the sources of law, but rather one could talk about a method style. Jan Hellner noted the existence of different method theories which are more or less incompatible with each other. According to Hellner this also meant that scientific acceptance depends on which of these method theories is embraced. Hellner, 2001, at 33.

⁵⁶ For example, Juha Häyhä has suggested that use of a method is part of the process of understanding and evaluating what a single researcher has accomplished. Häyhä, 1997, at 26.

⁵⁷ Jan Hellner described requirements for an acceptable research methodology as amongst others: intellectual honesty, systematic work, availability of results for examination by other scholars and novelty of presentation: Hellner, 2001, at 32.

⁵⁸ See e.g. Hirvonen, 2011, at 9, who mentioned that pluralism with regard to methods may be regarded as positive, although it may lead to difficulties in grasping which methods have actually been used.

⁵⁹ See e.g. Aarnio, 1997, at 36–37, who in fact used the words ‘legal rules’ at that time. See also Peczenik, 1995, at 312.

⁶⁰ See Rudanko, 2014, at 1015 as to the importance of general theories in contract law. On the other hand, it has been asserted that in Finnish jurisprudence general theories are assigned a more important role than in the other Nordic countries. See Letto-Vanamo, 2009, at 401 and at 406. See also Alf Ross, who held that law is valid and efficient when the courts implement the law. Ross, 1971, at 47.

⁶¹ Ari Hirvonen describes ‘systematic interpretation’ as a process where not only the text of different Acts are analyzed, but such analysis also takes into consideration other legal norms, general theories of the legal field in question, dogmatic theories, the logic and systematics of the legal system and the legal system in its entirety. Hirvonen, 2011, at 39. Bert Lehrberg refers to a systematic perspective when discussing how courts should act in situations where authoritative legal sources are not available. Lehrberg, 2014B, at 106–107. Lehrberg identified as authoritative legal

abstract by nature and from a theoretical point of view these discussions may be classified as a combination of philosophical and legal thinking or perhaps even more a reflection of the governing social order in society.⁶² It is probably inevitable that this has to be the case, as it is utopian to think that single pieces of legislation or other authoritative legal sources could cover all kinds of contractual relationships and acceptable behavior in society.⁶³ Additionally from that perspective reviewing court decisions forms an important part of understanding contract law, as these decisions show how general principles have materialized in practice.

For the sake of completeness, it may be noted that legal rules have generally been perceived as norms which are applied or not.⁶⁴ This is the approach taken originally by Dworkin, who also asserted that rules give a particular answer to a particular question.⁶⁵ Another way of describing rules has been proposed by P.S. Atiyah and Robert S. Summers, who defined a rule as "... a norm which applies to a class of cases."⁶⁶

Defining rules as norms which have to be applied or not is as such a good starting point for systematization, but even if such rules are set out in statutory acts, they may still have to be interpreted for different reasons. The wording of statutory acts might include concepts which do not have a distinct definition, but which are dependent on the factual circumstances.⁶⁷ This may also be seen as a more general problem in relation to language, whether used in rules or principles, as language is always subject to some interpretation.⁶⁸ Furthermore, if the rules do not allow any kind of flexibility, their relevance for a larger amount of cases would be minimal. It would not be in accordance with the Nordic legal tradition to legislate about the whole spectra of possible activities in society. P.S. Atiyah and Robert E. Summers also maintain that when comparing the

sources Acts, preparatory works in relation thereto (to some extent) and court precedents. Lehrberg, 2014B, at 106 and at 110. As supplementary legal sources he mentions doctrine, trade usage, custom, etc. Lehrberg, 2014B, at 111.

⁶² See e.g. Zacharias Votinius, who combined a discussion about philosophical theories and contract law. Votinius defended an Aristotelian approach to contracts with friendship and justice as a valuable element in contractual relations and that contracts perceived and based on the promise model do not recognize the social aspects. Votinius, 2004, at 27–34, at 249–272 and at 275. Contractual principles may also be seen as a reflection of the governing economic, political and legal order in a society, where the state wants to protect or support certain interests and behavior and on the other hand wants to discourage and prohibit other interests or behavior. This may also be described as the principles reflecting the governing legal policy. See e.g. Taxell, 1987, at 20–22.

⁶³ During the 19th century the exegetic school held that it would be possible to decide all legal issues and individual cases by direct recourse to and implementation of laws and Acts with no need for interpretation and if the laws and Acts did not cover every aspect, they would be supplemented by implementing the aims of the legislator. For some critical observation on this school, see e.g. Peczenik, 1995, at 43–44.

⁶⁴ Bärlund, 2015, at 87.

⁶⁵ Elliot and Quinn, 2012, at 632.

⁶⁶ Atiyah and Summers, 1987, at 71.

⁶⁷ For example, §36 of the Nordic Contract Acts, which all include wording where 'unreasonableness' is to be used when applying the section in question.

⁶⁸ See e.g. Aarnio, 2011B, at 59, where he reasoned about the fact that all language has to be put into context and more specifically that "There are no single expressions for which the meaning is unambiguous and *given in advance*." Aarnio pointed out that there have to be reasons when interpreting questions in relation to values, morals and law. Otherwise, the interpretation would be totally arbitrary. Aarnio, 2011B, at 61.

English and the US systems, flexible rules are more typical of the US system, where substantive reasons play a more important role.⁶⁹

Legal principles on the other hand both in the Nordic countries and under English law, do not have the same on-off character as rules. Legal principles have been described as guidelines giving reasons for argumentation in one direction or another, but they do not “dictate the decision.”⁷⁰ Legal principles have also been described by saying that a legal principle is “... applied to a greater or less extent and it is considered to have a dimension of weight.”⁷¹

The question of legal sources, their hierarchy and the interrelation between sources may be used in different respects,⁷² but in this dissertation the doctrine of legal sources is perceived as being part of the method used. I have had no ambition to become engaged in a discussion about which method to use when dividing legal sources into different categories, but I have accepted the traditional concepts of legal sources in the different jurisdictions and in that sense my presentation is hermeneutic. Legal sources are often presented according to a hierarchical model. It has been said that Aleksander Peczenik was the first in the Nordic countries to categorize legal sources by using their binding force.⁷³ Aulis Aarnio may be taken as an example of someone who divided legal sources into three categories based on Peczenik’s original model.⁷⁴ Aarnio described the differences between sources as that the neglect of strongly binding sources renders a decision illegal, which is not the case for weakly binding sources,⁷⁵ while with regard to allowable sources, Aarnio found that such use rather increases the credibility of an interpretation or a decision.⁷⁶

Opinion in the Nordic countries is fairly unanimous as to what could be regarded as legal sources,⁷⁷ but the hierarchical model has been criticized as – amongst other things – being too static, although

⁶⁹ Atiyah and Summers, 1987, at 75. The scholars made this comment based on having identified rules as ‘hard and fast’ or ‘flexible.’ Atiyah and Summers, 1987, at 71.

⁷⁰ Elliott and Quinn, 2012, at 632.

⁷¹ Bärlund, 2015, at 87.

⁷² An earlier footnote recorded that it has been suggested that the doctrine of legal sources may be seen as part of – e.g. – legal methodology, jurisprudence, law and philosophy, law and sociology and law and history. Helgesen, 1997, at 17. Alf Ross was also mentioned as one of the legal scholars who used the doctrine of legal sources restrictively to encompass how the courts identify legal rules which Ross holds to be part of methodology. Helgesen, 1997, at 17–18. Stig Strömholm, on the other hand, emphasized that in discussing legal sources it was necessary to divide the discussion into principles about legal sources as such i.e. how to work with them and the sources of different rules. Strömholm, 1996, at 318–321.

⁷³ Aarnio, 2011B, at 147.

⁷⁴ Aarnio, 2011B, at 150–151. Aarnio drew the divisions according to the following: “1. Strongly binding sources of law (a. Norms external to national law i.e. binding parts of European law, norms of the European Convention on Human Rights, certain precedents of the European Court of Justice, certain precedents of the European Court of Human Rights; b. Norms of national law i.e. fundamental rights of the Finnish Constitution. Statutes and lower-level norms given by virtue of laws (etc.), international treaties incorporated into national law, system arguments. C. National custom). 2. Weakly binding sources of law (d. The intention of the legislator, e. Precedent.) and 3. Permitted sources of law (a. Practical arguments (economical, historical, social, etc.), b. Ethical and moral arguments, c. General legal principles, d. Standpoints presented by the doctrinal study of law (prevailing opinion), e. Comparative arguments and f. Others).”

⁷⁵ Aarnio, 2011A, at 69.

⁷⁶ Aarnio, 2011A, at 70.

⁷⁷ The interrelationship between legal sources has been the focus of much debate between legal scholars. Discussion in the Nordic countries has featured some views that are far from mainstream views. For example, Mads Bryde Andersen defined legal sources somewhat unconventionally when describing existing law as law that exists in an

it is still used.⁷⁸ With regard to contract law, there are some divergent opinions as to whether the contract in itself may be regarded as an authoritative legal source or not. For example, Aleksander Peczenik submitted that contracts should be given authoritative status in legal argumentation, if so required by law or other regulations.⁷⁹ With this statement he proposed that a source that is a contract should *prima facie* be taken into consideration and it may be set aside only if there are other legal arguments which give the same retort and which are more important.⁸⁰ Mads Bryde Andersen also held that a contract is an authoritative legal source, as a contract may be seen as identifying a number of legal rules defined and applicable to the contract parties.⁸¹ On the other hand, Stig Strömholm held that contracts might be added to the list of legal sources, but he did not include contracts as such and also noted that he had reservations in this regard, although unfortunately he did not elaborate on those reservations in that connection.⁸² Torstein Eckhoff also seemed more reluctant to include contracts as a legal source. He held contracts to be ‘facts’ and not a part of the legal sources, as he explained that contracts normally are not relevant for evaluating general legal issues.⁸³ Raimo Siltala, on the other hand, submitted that contracts or – as he called them – private contracts in fact supplement legislation. He added that when legal subjects have private autonomy in the shape of being entitled to agree upon their rights and obligations in relation to other legal subjects based on legislation, then a parallel may be drawn between legislation and contracts.⁸⁴

If a strongly system-oriented approach is taken, the fact that legal sources in principle pertain to all kinds of contracts could be seen as an argument against listing private contracts as authoritative legal sources. For example, mandatory law is decisive for all kinds of contracts and contracts should not be drafted against such laws, although the applicable mandatory law differs depending on the nature of the contract. Similarly, dispositive law and court precedents would be applicable in principle to all contractual relationships falling within their particular scope, although the legal sources in question are not as strong as enacted law and the parties may – with regard to dispositive law – contract otherwise and they do not even have to recognize court precedents, as there is always the possibility to claim that a particular contractual relationship and situation is different from the one appearing in a specific court precedent. If, on the other hand, an approach is taken where it is

authoritative form either in a document issued by a suitably qualified authority or in an opinion issued by a suitably qualified institution. See Bryde Andersen, 2002, at 132. See also Jan Hellner, who criticized the traditional hierarchy of legal sources, as he found that the interrelationship depends on the legal system and the field of law in question. See Hellner, 2001, at 25.

⁷⁸ Raimo Siltala is an example of a legal scholar quite critical of the hierarchical model as presented by Aleksander Peczenik and Aulis Arnio due to, but not only due to, its static nature. See Siltala, 2004, at 379, although Siltala also admitted that the model is partly useful. Jan Hellner is another scholar who has been quite critical of this model. Hellner, 2001, at 25–26.

⁷⁹ Peczenik, 1995, at 214.

⁸⁰ Peczenik, 1995, at 219.

⁸¹ Bryde Andersen, 2002, at 153.

⁸² Strömholm, 1996, at 321. With regard to the contract and the Nordic Sale of Goods Acts, Stig Strömholm has pointed out that the way §3 of the Nordic Sale of Goods Acts is drafted indicates a certain rank between the dispositive rules i.e. the contract comes first and thereafter whatever may have been regarded as having been agreed between them including possible trade usage or other custom. Strömholm, 1996, at 267.

⁸³ Eckhoff, 1993, at 20.

⁸⁴ Siltala, 2004, at 406.

more relevant how legal sources are applied, the reasoning may be different as the contract forms the foundation of the relationship between the parties and sets out their ‘private’ law. This is more in line with how I see contracts and their function in terms of legal sources used in contract interpretation. The hierarchical model explains the interrelation between the different legal sources, but in terms of interpretation of contracts legal sources are often affected by each other and in fact are used in a kind of symbiosis.

When studying prevailing contract law in the common law jurisdictions, the emphasis on the different sources will have to be somewhat different. The primary legal sources in the UK and in the USA are statutory acts, if these exist, governing the legal area in question. However, contract law as a legal discipline has foremost been developed in common law, where court precedents are of utmost importance.⁸⁵ Both countries still adhere to the *stare decisis* doctrine, which may also be termed the doctrine of precedents.⁸⁶ There are some differences between these two jurisdictions and it has been said that the prejudice in favor of earlier court practice is stricter in the UK.⁸⁷ This difference may partly be due to the fact that the USA operates a dual system with a federal government and separate state governments, a duality that runs through the court system with separate federal and state courts.⁸⁸ However, there are legislative Acts which to some extent have influenced general contract law in these countries as well. In the USA, the Uniform Commercial Code (UCC)⁸⁹ has been said to reflect many generally acceptable principles and is referred to from time to time or used analogically, even though not directly applicable to the case at hand.⁹⁰ It is nevertheless a challenge to generalize US contract law, as contract law is a state-based field of

⁸⁵ Atiyah and Smith, 2005, at 24–25 and Knapp, 1996, at 201–202. Knapp, however, also recognized that general contract law has been influenced by certain statutes of which in commercial transactions the UCC and its Art. 2 has had most influence, Knapp, 1996, at 201–203. See also Elliott and Quinn, 2012, at 27–31. On page 27, they asserted that even if judges have traditionally seen themselves as “... declaring or finding rather than creating law ... there are several areas in which they clearly do make law.” They further asserted that contract and tort law are areas of law where case law is decisive and even if Acts have been implemented, these Acts generally follow principles set out in judicial decisions.

⁸⁶ See as to an explanation about English law e.g. Elliott and Quinn, 2012, at 14, where they said that “In deciding a case, a judge must follow any decision that has been made by a higher court in a case with similar facts. The rules concerning which courts are bound by which are known as the rules of judicial precedent, or *stare decisis*. As well as being bound by the decisions of courts above them, some courts must also follow their own previous decisions; they are said to be bound by themselves.” With regard to the situation in the USA see e.g. Fletcher and Sheppard, 2005, at 64, where the translation of *stare decisis* was described as “letting prior cases stand as binding precedents.” See also at 65, where Fletcher and Sheppard explain how *stare decisis* could be technically defined as “The principle of binding precedent applies both to a single court and to all of the courts that are within the appellate jurisdictions of that court.” They mention as an example a decision by the US Supreme Court on a federal matter, which would be binding not only upon the Supreme Court itself, but also upon all other state and federal courts in the USA. See further Burnham, 2002, at 65, who mentions that the binding effect of court decisions may be vertical in the sense that lower courts have to follow the decisions of higher courts, but there may also be horizontal *stare decisis* cases, where the same court is bound by its decisions in later cases, though Burnham said that horizontal binding effect is more flexible than the vertical. Burnham asserted that “It is not unusual that a court would sometimes overrule its own precedent.”

⁸⁷ Atiyah and Summers, 1987, at 133. See also Burnham, 2002, at 65, footnote 153.

⁸⁸ Sager, 1996, at 26–40, who in general described and discussed authority between federal and state institutions.

⁸⁹ The UCC is one of the so-called uniform laws prepared by the National Conference of Commissioners on Uniform State Law, established in 1892, and the American Law Institute. Uniform laws have to be enacted by the separate states in order to become applicable in the state in question. The UCC is updated from time to time.

⁹⁰ See e.g. Farnsworth, I, 2004, at 28. See also Restatement, Second, of the Law of Contracts, at 2, which states that “The profound impact of the Code (authors’ comment – ‘the Code’ means the UCC) on the law of contracts has sometimes resulted in the statement of rules applicable to contracts generally that are derived by analogy from rules laid down in the Code for contracts for the sale of goods.”

law.⁹¹ English law also has legislative Acts relating to contract law, such as the Sale of Goods Act 1979⁹² and the Unfair Contract Terms Act 1977.⁹³ When reviewing court decisions in both common law countries, there is one important aspect to be borne in mind and that is that only the *ratio decidendi* part of the judgment is binding as a precedent, whilst the *obiter dicta* part reflects other statements, even though such statements are often taken into consideration in later cases.⁹⁴ The challenge when reviewing court decisions is that, regardless of this theoretical division, decisions do not always clearly reflect what should be regarded as the *ratio decidendi* part and what should be seen as the *obiter dicta* part and thus some interpretation might be necessary. In practice the lower courts may furthermore distinguish their decisions in subsequent cases and refrain from using precedents by finding that the facts of a later case significantly differ from the facts of a precedent.⁹⁵

The second requirement for research meeting the criteria of legal dogmatics is systematization.⁹⁶ Systematization in this dissertation is based on a profound analysis of certain, typical terminology and wording used in business acquisition contracts. This terminology has been discussed based on the underlying legal concepts. Systematization and analyses of certain concepts and principles of contract law have also been carried out by consistently keeping in focus the entirety of business acquisitions and contracts thereto related.⁹⁷ In legal reasoning, not only are legal sources relevant, but also the factual circumstances.⁹⁸ In this dissertation business acquisitions as a special form of contracting have been decisive and the discussion has been expanded to include transactions of a cross-border nature. The aim in other words has been to analyze certain contract law terminology and expressions taking into account the underlying legal concepts from the perspective of a certain type of contracting and contracts and how this totality affects the interpretation of such contracts.

⁹¹ Knapp, 1996, at 201 and Farnsworth, I, 2004, at 69–70.

⁹² This Act is not applicable to the sale of shares, but may be applicable to the sale of assets. See e.g. Knight, 1997, p. 134.

⁹³ Hereinafter referred to as ‘UCTA’. When discussing business acquisition contracts the relevance of UCTA is applicable to so called exemption clauses and misrepresentations. The Misrepresentation Act 1967 makes direct reference to the reasonableness test provided for in the UCTA. See further subsection 4.4.3.

⁹⁴ The *ratio decidendi* part of the judgment contains the reasons necessary for the judgment such as facts and applicable law. The *obiter dicta* part reflects other statements and reasoning which are not necessary as part of the reasoning for the judgment. For further information on English judgments see e.g. Elliott and Quinn, 2012, at 13–15 and for further information on judgments in the USA see e.g. Burnham, 2002, at 67 where he discusses the *obiter dictum* part of judgments and at 66–72 in general the reasoning methods of courts in case law. See also Summers, 1997, at 383–387, dealing with New York courts.

⁹⁵ Elliott and Quinn, 2012, at 24 and Hughes, 1996, at 19.

⁹⁶ As to systematization, e.g. Juha Häyhä has stated that one of the roles of jurisprudence is to build a sensible entirety out of legal source material used and thus make material used more comprehensible. Häyhä, 1997, at 19.

⁹⁷ Peczenik, 1995, at 204, where he asserted that legal as well as factual reasons are legally relevant. However, Aleksander Peczenik also emphasized that different legal sources e.g. Acts, Bills and similar authoritative sources are the presumption for all argumentation in legal reasoning and only very strong factual circumstances and deep argumentation may put them aside. Peczenik, 1995, at 206.

⁹⁸ Aulis Aarnio described e.g. general doctrines as a ‘toolbox’ for lawyers carrying out law in practice. Aarnio, 2011B, at 17. Bert Lehrberg claimed that in order to better understand the function of legal rules, a researcher may look for information about the reality where the rules are applied. Lehrberg, 2014B, at 204. See also comments by Mårten Knuts, who submitted that good legal dogmatics is tuned to changes in the reality. Knuts, 2010, at 29.

Employing a method belonging to the field of legal dogmatics does not mean that no other methods may be utilized. This dissertation focuses on business acquisition contracts and how terminology – as well as contracting in general – is understood in the different legal families. That as such indicates that the dissertation includes comparative elements.⁹⁹ Comparative law can be described as a science in itself, as a legal discipline and/or as a method.¹⁰⁰ The question whether comparative law is a legal science or an “independent” legal discipline is not discussed here, but elements of comparative law methods are applied in this dissertation.¹⁰¹

Views differ on what should be included in a comparative presentation and it has also been said that there is no firm set of rules as to what comparative method is.¹⁰² Comparing different legal systems or part of them certainly enhances the level of knowledge, but it is not sufficient to describe the essence of comparative law.¹⁰³ A comparative study should also include analysis of the differences, similarities and utilization of such analysis for whatever purpose a study is done.¹⁰⁴

⁹⁹ Ari Hirvonen has described that one way of carrying out the interpretation requirement of legal dogmatics is by comparing the text of statutory acts to the law of some other country. Hirvonen, 2011, at 39. In this dissertation and especially as the question is of contract law, statutory acts bear less relevance, but the method as such is employed as contract law is compared between the different legal families.

¹⁰⁰ Watson, 1978, at 317–318 and at 321 and Husa, 2013, at 29, where he explains that in comparative law theory comparative law itself is discussed as a science and in comparative studies different legal systems or their parts are examined. Bogdan, 2003, at 22–23, where he suggests that it might be easier to regard comparative law as a science when the questions studied are of high enough theoretical ground, but he also notices that such kind of study is very close to general jurisprudence, which might encompass questions as to whether legal rules from countries with different social systems are comparable at all. In this work Bogdan concentrated on method and recognized that comparative law relates to some other field of law as well. See Bogdan, 2013, at 8–11. See also Zweigert and Kötz/Weir, 2011, at 2 where they argue that “Thus ‘comparative law’ is the comparison of the different legal systems of the world.” This broad definition is well developed throughout the book and e.g. at 4–5 they discuss comparative law as ‘macro comparison’ and ‘micro comparison’. They also held that “The primary aim of comparative law, as of all sciences, is knowledge.” Zweigert and Kötz/Weir, 2011, at 15. See further Lando, 2009, at 187–188, who – like many other Nordic scholars – maintains that comparative law may be pursued on a macro- and on a micro- level, but he also notes that the borderline is not absolute.

¹⁰¹ See Hill, 1989, at 113, where he contended that it is quite fruitless to discuss whether comparative law is a method, a science or an academic discipline, adding that “If it is accepted that comparative law has some merits, the label one attaches to it is largely of matter of indifference.” See further Palmer, 2005, at 290 where the conclusion was that “...there is a sliding scale of methods and the best approach will always be adapted in terms of the specific purposes of the research, the subjective abilities of the researcher, and the affordability of the costs.” It is also worth noting that it has been claimed that the approach in the USA is quite cynical with regard to comparative law. Canuel, 2009, at 8.

¹⁰² Strömholm, 1971, at 252. See also, Strömholm, 1972, at 464, where on the one hand he claimed that it is impossible to give a comprehensive answer to the question whether comparative law has its own method or not (based on the diversity of studies using material from different legal systems in their research), but later on where he also asserted (at 464–465) that comparative law has its own method with regard to qualified comparative law, where the essence is to compare legal phenomena with due consideration of their historical context, their relation to the history of ideas, sociological, economic and general social context, where the aim is not only to enhance our knowledge and to compare, but just as much to qualify the aim and answer the questions posed. Another way of describing comparative methods has been suggested by Bogdan, 2003, at 23, who said that maybe one should rather talk about comparative methods instead of a comparative method. See also Lando, 2009, at 203–212, who described different ways of carrying out a comparative study. Comparative law has also been described by scholars advocating Proactive Comparative Law. Ewoud Hondius has defined Proactive Comparative Law as “... making accessible one’s own legal system to a foreign audience.” However, he also noted that a description only is not sufficient, but real comparative work has to be carried out. See, Hondius, 2007, at 144.

¹⁰³ Zweigert and Kötz/Weir, 2011, at 6, where they note that comparative law is not only “descriptive comparative law”, but should include reflections and conclusions. See further, 2011, at 43–44. See also e.g. Husa, 2013 at 59–60 and Bogdan, 2013, at 6.

¹⁰⁴ As to elements necessary for a comparative study see e.g. Zweigert and Kötz/Wier, 2011, at 43–47 and Bogdan, 2013, at 5–6.

The fact that contracting in the Nordic countries has been heavily influenced by the Anglo-American way of carrying out and documenting business acquisitions was one of the reasons why the dissertation is based on discussing the research questions based on situations in the UK, in the USA and in the Nordic jurisdictions. From a legal perspective, the important notion is that these countries represent different legal systems, which also appears when analyzing contract law. Therefore, when analyzing the underlying legal concepts behind the terminology as well as other wordings and expressions typically used in business acquisition contracts, the aim has been to see whether there are similar concepts and perceptions of concepts in the respective jurisdictions or whether similar concepts may be construed based on the governing law, which here is Nordic law.

Using comparative law as a method is challenging in many respects. Indeed, this has also become apparent during my research. One of the main challenges is that it is hard from someone from a different legal system to fully understand and grasp even contemporary legal issues which have a certain historical background and which are influenced by culture and other general circumstances in society. In order to gain a deep understanding one should also understand different opinions within the respective countries. It would be presumptuous to state that the method used here is comparative, because in my opinion that would have required more extensive presentations of how, for example, historical and cultural issues have affected development of the law in the different jurisdictions. However, at an early stage I had to limit such presentations to a minimum, for the mundane reason that the dissertation would otherwise become too extensive.¹⁰⁵

The question of contract law from an international – that is, a non-national – perspective has in fact been given some consideration in this dissertation, but it has not played a major role in the analyses. As such, practice pertaining to the acquisition market has developed internationally over decades and even though many Nordic acquisition disputes are dealt with in confidential arbitration proceedings, it is likely that the Nordic courts will also increasingly have to deal with cross-border matters where the relevance of common law practices will have to be considered.¹⁰⁶ The need to take into consideration international aspects is not typical only for the acquisition market: indeed, there is a lot of ‘borrowing’ of rules and concepts between one country and another in other areas of law as well. This kind of ‘borrowing’ is extensively discussed when legal scholars debate the concept of legal transplants.¹⁰⁷ This dissertation does not deal with legal transplants as such, as the

¹⁰⁵ Herbert Jacobson contends that a problem with understanding foreign law is that even the legal language contains notions and ideas, the origin of which are not legal. Jacobson, 2012–2013, at 334. He also emphasizes that common for comparative studies is an ambition to understand, but that such understanding is not only related to researching history, but to understand the thinking behind and reflected in historical presentations. Jacobson, 2012–2013, at 357. He concludes that it is difficult for a foreign lawyer to penetrate another country’s legal system and form of argumentation, which he called “legal culture”. Jacobson, 2012–2013, at 360.

¹⁰⁶ In Continental Europe the question of the impact of the common law tradition might have advanced somewhat further, but even so the approach amongst the courts might still vary. For example regarding Germany it has been said that “... the German courts are increasingly prone to recognize the growing significance of English legal culture and the English language in legal practice.” See, Janssen and Schulze, 2010, at 36.

¹⁰⁷ It has been claimed that comparative law as a practical study is about legal transplants. Watson, 1978, at 317–318. Legal transplants as a borrowing of systems or rules have several dimensions. The formal implementation of legal transplants is just part of the issue, but another issue is to what extent have imported laws, customary law and court

borrowing of concepts from common law countries by other countries with regard to acquisitions is not regarded as a very conscious act, nor has it been done in a systematic manner, but it rather appears from individual acquisition contracts.

1.3.2 Comments on sources

Parties to a business acquisition contract would have to take into account in their contracting a fair number of rules and regulations in the jurisdictions which the transaction covers, for example laws on employment and competition. An interesting observation, though, is that there are very few statutory provisions, that is, provisions in enacted legislation on general contract law that would be mandatory¹⁰⁸ and of manifest importance to this kind of written commercial contracts. This observation is not so surprising concerning common law jurisdictions where it is mainly the courts that develop contract law.¹⁰⁹ However, even in the Nordic countries, where legislation covers many areas of law, legislation on general contract law is quite scarce. The Nordic countries have enacted legislation on certain legal actions – legislative acts which in English are referred to as ‘Contract Acts’¹¹⁰ – but only certain sections of these Acts are mandatory. On the other hand, mergers and acquisitions are in general realized based on written contracts, where the parties agree in detail on their rights and obligations and on other aspects of the transactions. The written contract is a most valuable tool for interpretation of these kinds of contractual relationships. The alternative of

practice actually been used. It has also been claimed that “... the way in which the law was initially transplanted and received is a more important determinant of legality than the supply of a particular legal family.” Berkowitz, Pistor and Richard, 2003, at 192. The same authors also made a “cautious suggestion” that “... legal borrowing should take place either from a country with a similar legal heritage, or substantial investments should be made in legal information and training prior to adoption of a law, so that domestic agents can enhance their familiarity with the imported law and make an informed decision about how to adapt the law to local conditions.” Berkowitz, Pistor and Richard, 2003, at 192.

¹⁰⁸ In the common law countries, rules which may be overturned or contracted out of by the parties are often referred to as ‘default rules’. See e.g. Farnsworth, I, 2004, at 64–65.

¹⁰⁹ See e.g. Atiyah and Smith, 2005, at 24 and Knapp, 1996, at 201.

¹¹⁰ The Nordic Contract Acts are for the most part very similar, which is why they are dealt with as a block. For example, rules on invalidity of contracts and supplementing contracts may be found in §28–36 of all the Nordic Contract Acts, while rules on how agreements emerge are addressed in §1 of the same Acts, though such rules are not exclusive. The Nordic Contract Acts do not in themselves contain comprehensive provisions on contract interpretation. The Contracts Acts were accepted in the different countries as follows: Sweden (June 11, 1915), Denmark (May 8, 1917), Norway (May 31, 1918) and Finland (June 13, 1929). These acts have subsequently been modified. Finland as an entity first formed part of the Swedish kingdom until 1809, then becoming the Grand Duchy of Finland as part of Russia. Not until December 6, 1917 did Finland become a sovereign state. This is the reason why the Finnish Act was passed later than in the other countries. The English translation of the Nordic Contract Acts is not entirely correct. The name of the Finnish Contract Act is actually directly translated “Law on Juristic Acts pertaining to Property Law” (228/1929, as amended) and the Swedish Act is “Law on Contracts and Other Juristic Act pertaining to Property Law” (1915:218, as amended). The Norwegian Act has a slightly different name in Norwegian i.e. “Law on Concluding Contracts, on Authorization/Powers of Attorneys and on Invalid Declarations of Intent” (4/1918, as amended) and the Danish Act is “Act on Contracts and Other Juristic Acts pertaining to Property” (1917, now LBK nr 781/1996). The names indicate that acts other than agreements are also governed by the Acts and that an agreement is a juristic or legal act. We can find some differences between the Contract Acts e.g. the Norwegian Act (§37) and the Danish Act (§38a – 38d) include stipulations regarding contracts between businesses and consumers.

agreeing upon such transactions based on oral contracts is utterly theoretical,¹¹¹ and especially if the transaction involves several jurisdictions.

In terms of enacted legislation relevant for business acquisition contracts governed by Nordic law, it should be noted that different opinions have been presented as to whether the Nordic Sale of Goods Acts,¹¹² especially the rules on defectiveness, are applicable to business transfer transactions, that involve a transfer of business either in the form of asset transfers or in the form of transfer of shares. Whilst opinion seems to be fairly unanimous that the Sale of Goods Acts are applicable to business acquisitions in the form of asset deals, criticism has been presented of the applicability of the Sale of Goods Acts to share deals. With regard to transfer of shares and the applicability of the Nordic Sale of Goods Acts, the debate has focused on whether the Acts on Promissory Notes should rather be applicable to share sales.¹¹³ Further, in these discussions opinions have been presented that what should have an impact on whether the Sale of Goods Acts should be applicable instead is whether 100 %, over 50 % or a minority stake in the shares of a company are sold. These discussions will not be covered in detail here, because I concur with the opinion defended by a number of well-esteemed Nordic scholars, namely that the Sale of Goods

¹¹¹ Even though business acquisitions are normally agreed in written contracts, it has to be noted that there are no formal requirements in the UK, the USA or in the Nordic countries that an agreement must be evidenced by a document in writing. See e.g. Lynge Andersen, 2014, at 27; Woxholth, 2014, at 34–35; Williston, 1924, at 10–11 and Stone, 2013 at 32–33. There are exceptions to this rule in the sense that certain acts must in some jurisdictions be evidenced in written documents e.g. sale and purchase of land (Finnish Code of Real Estate 540/1995, 2:1(1) and Swedish Real Property Code 1970:944, 4:1). See further Adlercreutz and Gorton, I, 2011, at 53–56; Hemmo I, 2007, at 180–203; Woxholth, 2014, at 28–29; Bryde Andersen, 2003, at 191 and Clausen, Edlund and Ørgaard, 2012, at 14. In the USA (§2.201 of the UCC) contracts with or above a certain monetary value have to be in writing, as presented by McKendrick, 2013, at 62 and Carlson, 2004, at 140, but also certain other contracts have to be made in writing e.g. suretyship contracts and contracts to buy land and contracts which cannot be performed within one year after being made. Relevant provisions are found in the Statute of Frauds. See e.g. presentations by Burnham, 2002, at 385 and Knapp, 1996, at 211–212. In the UK, e.g. sale and purchase of land (Law of Property (Miscellaneous Provisions) Act 1989) also requires written form; Stone, 2013, at 31. Clearly all such requirements would have to be adhered to if the business acquisition takes the form of an asset transfer, whilst in a sale of shares presumably all assets of the target company would be transferred automatically. Excepted are transactions carried out as a combination of asset sales and share sales e.g. real estate might be transferred to a separate real estate company of the buyer. A written contract in business acquisitions is in practice a necessity for several reasons. For example, in assets transactions, in order to identify what assets and liabilities are transferred and in share deals in some cases in order for the purchaser to register as the new owner. If acquisitions are carried out, e.g., in the form of corporate mergers or public take-over bids, the documentation would not necessarily consist of a written contract, but may be substituted by other written documents required for the specific form of transaction.

¹¹² Danish Sale of Goods Act (*Købeloven*: Consolidation Act number 237 of March 28. 2003. as amended); Finnish Sale of Goods Act (*Kauppalaki*; 355/1987, as amended), Norwegian Sale of Goods Act (*Lov om kjøp*; 1988-05-13 nr 27, as amended) and Swedish Sale of Goods Act (*Köplagen* 1990:931, as amended)

¹¹³ Robert Liljeström referred e.g. to the Finnish (HE 93/1986, at 48) and Swedish (svenska prop. 1988/89:76) Bills amending the, at that time, prevailing Sale of Goods Acts. Liljeström asserted that these Sale of Goods Acts were not to govern all kinds of goods, but the special character and other norms could lead to deviation from the Acts and that this was especially the case with regard to shares and other securities. Liljeström claimed that in some types of business acquisitions regulated by company law and security law, the Sale of Goods Acts are not applicable at all. Liljeström, 1999, at 418–419. Liljeström emphasized the fact that business acquisitions are more than just the assets and liabilities of the target, but the target is an economic entity, which changes all the time. That was one of the reasons why he found that the Sale of Goods Acts are ill-fitted for these types of transaction, but he also did not prefer the Promissory Act, as suggested by some other scholars. Liljeström, 1999, at 442–443. In Finland, a strong advocate for the Promissory Acts being the preferred choice in the case of sale of shares and faults has been Petri Mäntysaari. See e.g. his conclusions in his doctoral thesis: Mäntysaari, 1998, at 259. In Sweden, on the other hand, Ole Åhman has been of the opinion that the Sale of Goods Act should apply to share deals, when the sale and purchase leads to the seller losing a decisive influence in the target company and the ownership of the majority of the capital in the target company changes. In other cases of share deals, Åhman holds that in the case of defective goods the Promissory Act should be applicable. Åhman, 1990, at 482–482.

Acts are applicable to business acquisitions carried out outside the stock exchange and regardless of whether the acquisitions are in the form of asset transfers or share transfers.¹¹⁴ I would like to make one additional comment, though, as a reason for use of the Sale of Goods Acts, which is that Section 80 of the Finnish, Norwegian and Swedish Sale of Goods Acts and Section 19 of the Danish Sale of Goods Act actually refer to the dividends of shares being sold. I see the wording of these Sections as confirming that shares were regarded as goods by legislators, which is a further argument for using the Sale of Goods Acts in private business acquisitions.¹¹⁵ The applicability of the Sale of Goods Acts to business acquisition contracts may not be paramount, but in these Acts are embedded some basics of contract law and they therefore cannot be ignored even when discussing complicated business acquisitions.

Contract law in the form of case law is challenging with regard to the Nordic countries. As such I suggest that even in the Nordic countries it is necessary to review case law, as the courts in fact develop the extent of application of statutory acts and contract law.¹¹⁶ While courts apply statutory acts, sometimes quite extensively, they develop contract law in cases where statutory acts are obsolete and/or where statutory acts do not cover the issues for one reason or another.¹¹⁷ The courts use analogies and in that sense develop contemporary contract law.¹¹⁸ A fair amount of case law in the Nordic countries deals with contract law, but in terms of business acquisitions and business acquisition contracts many of these disputes are handled in confidential arbitration proceedings.¹¹⁹ In the Nordic countries the possibilities to appeal arbitral awards are limited and publicly available information on such decisions is scarce. Nevertheless, by using general contract law and case law on contract issues, it has been possible to discuss their relevance with regard to business acquisitions, including cross-border acquisitions.

Court precedents of the common law countries play a significant role in contract law. Finding the relevant court decisions when analyzing contract law is potentially an immense task. However, some valuable tools are available. In the USA Restatements have been issued in several fields of

¹¹⁴ For further reference to this subject and contemporary views see e.g. Hultmark, 1992, at 84–89 and Håstad, 2003, at 29–30 (Swedish aspects). Wilhelmsson, Sevón, Koskelo, 2006, at 9–10 (Finnish aspects). See further, Egholm Hansen and Lundgren, 2014, at 272, who however also had some critical remarks, Schans Christensen, 1998, at 192–195, who based on §19 of the Danish Sale of Goods Act found it clear that it applies to share sales, but who also advocated that it applies in the case of asset sales; and Ussing, 1967, at 6 (Danish aspects). Buskerud Christoffersen, 2008, at 75–116, (Norwegian aspects). See also Sacklén, 1993, at 815, who emphasized that in Sweden several public court decisions confirm that the deficiency rules of the Sale of Goods Act apply not only to share deals, e.g. NJA 1976.341, but also to asset deals e.g. NJA 1991.808. As to court practice in the other Nordic countries, see e.g. in Finland, KKO 2001:35, in Denmark, U 1959.473 H (asset transaction) and in Norway, Rt. 2002.1110.

¹¹⁵ The only exception I would make, but which is actually not relevant for this dissertation, is when shares are transferred over the stock exchange as more or less commodities and not as part of a larger business transaction summarized in separate documentation. This view is actually taken for granted by many legal scholars.

¹¹⁶ In the Nordic countries, the courts often also refer to works of well-esteemed legal scholars. Bryde Andersen and Runesson, 2015, at 29.

¹¹⁷ Aulis Aarnio has e.g. referred to statutory gaps –when the resolution cannot be based on statute even if expansively interpreted – and gaps in law, when no statute or ‘traditional’ law is applicable. Aarnio, 1991, at 131.

¹¹⁸ See e.g. description by Bert Lehrberg on different forms of analogies, also as to how the courts employ such methods. Lehrberg, 2014B, at 144–145.

¹¹⁹ Ulf Bernitz made the same comment with regard to commercial transactions in general. Bernitz, 2007, at 23.

law, including contract law. The Restatement of the Law of Contracts 1932¹²⁰ and the Restatement, Second, of the Law of Contracts 1981¹²¹ are often referred to in court practice, but the Restatements are not issued by the authorities and are thus regarded as of a secondary nature.¹²² The Restatements set out the prevailing rules, but they further contain explanatory notes and court decisions. The Restatements are based on court precedents and with input from judges, legal scholars and practicing lawyers they state what the principles are and they aim to set rules on how, for example, contracts should be understood and interpreted, what consequences or remedies breach of contract could lead to. Regardless of the Restatements, there is still a need to follow up on more contemporary cases as contract law evolves. Choosing the relevant court cases is challenging with regard to the USA and therefore cases have been chosen which have been commented on by several legal scholars and/or which are of immediate interest for the legal issues discussed herein. The other challenge with regard to contract law in the USA is that it is state law, although the Restatements and the UCC are of utmost importance. A comprehensive review of relevant case law in all the states has not been done, but examples from different states have been taken.

The relevant English cases have been somewhat easier to identify, as the UK does not have the same kind of dual system with separate state and federal courts as in the USA. On the other hand, a similar comprehensive framework as the Restatements does not exist in the UK, although several treatises give a good understanding of what contract law – and contract interpretation – means under English law. Nevertheless, the use of court cases both with regard to English law and US law is fairly limited. Describing common law terminology and principles based on court precedents would be proper in presentations of contract law, but this dissertation has been drafted based on Nordic standards, and descriptions of court precedent have therefore been widely substituted by the use of treatises and other writings by legal scholars.

In order to keep the dissertation focused on the particularities of business acquisitions, I have reviewed an immense amount of business acquisition contracts, domestic and cross-border, which I have myself been involved in as a negotiator, as a legal counsel or as an arbitrator. These contracts are not part of this dissertation for reasons of confidentiality, but they affected my choice as to what parts of acquisition contracts would be of such importance and of such relevance that they were worth scrutinizing in a dissertation. As I have not been able to refer to these contracts, I have taken as examples in my reasoning other templates found in some publicly available contract models.¹²³ These model business acquisition contracts have been used to exemplify certain provisions and concepts often used in business acquisition contracts. I also interviewed a number of in-house

¹²⁰ Hereinafter referred to as “Restatement (First).”

¹²¹ Hereinafter referred to as “Restatement (Second).”

¹²² These Restatements are published by the American Law Institute, an independent, private organization, which amongst other things has published restatements on different aspects of law since its foundation.

¹²³ For example ICC Model Share Purchase Agreement, 2004, Warren’s Forms of Agreements, Volume 2, 2007 and Share Purchases Practice Manual, 2000.

colleagues and attorneys in private practice. This was helpful in making an educated choice on which contract terms to mainly concentrate on, but the interviews were not structured so that they could have been used as an empirical part of the research.

As explained above, the focus has been on the respective legal families and international contract law has been referred to from time to time, but not scrutinized in detail. National laws may be influenced by trends and agreements among the international community.¹²⁴ Individual states may have bound themselves to different treaties, which might have a direct impact on national laws and regulations. For example, Denmark, Finland and Sweden, as well as the UK at the time of preparing this dissertation, are Member States of the European Union (EU). As a result, certain decisions of the EU become directly or – after certain legislative measures have been taken in the respective countries – binding on the Member States.¹²⁵ The effect of the planned exit from the EU by the UK has not been discussed, as the negotiations have not been finalized at the time of drafting this dissertation. Norway is not a member state of the EU, but it is a member of the European Economic Area (EEA) and has access to the European market.¹²⁶ Several agreements are extant between Norway and the EU, but the effect on the legal matter of interpretation of contracts is not of such magnitude that it justifies a scrutiny of such agreements. However, it should be noted that Norway has ratified the Lugano Convention of 2007.¹²⁷ Business acquisitions may be affected by EU or international law and principles, but there is no general legal framework for commercial contract law. The closest resemblance to this is the Principles of European Contract

¹²⁴ Even the tight Nordic co-operation within contract law legislation has been influenced by international work. The Nordic countries had e.g. prepared advanced drafts for a new sale of goods act, when they decided to wait for what would happen with the work that the United Nations Commission on International Trade Law (UNCITRAL) was then carrying out, i.e. preparation of a convention on international sale of goods. Prior to the Nordic countries passing their new acts on sale of goods, the United Nations Convention on Contracts for the International Sale of Goods (CISG) was approved on April 11, 1980. See also NU 1984:5, at 35–37. Finland, Sweden, Norway and Denmark signed the CISG on May 26, 1981, but made public already at that stage that some reservations would be made e.g. how contracts are entered into and also as to exclude pure Nordic trade. The reservation (art. 94) is still in force, but the Nordic countries have different processes pending that would in fact abolish their reservation as to concluding agreements (Part II, reservation according to art. 92). It is also worth noting that Denmark did not enact a new Sale of Goods Act at the same time as the other Nordic countries meaning that the original Danish Act is basically still valid, although some changes have been made to the Act.

¹²⁵ So called EU ‘regulations’ are directly binding upon and enforceable in the Member States. So called EU ‘directives’ require local legislative measures and might give room for the Member States within certain boundaries to implement their own local rules. However, if directives are not implemented within a given timeframe, the matter may be taken to the Court of Justice of the European Union (CJEU). In other words it is still relevant to know the local laws and rules to be sure what possible deviations from directives there might be, if these are allowed. An EU ‘decision’ is binding in its entirety. Decisions on different matters by the CJEU would have to be complied with and the CJEU could in fact be placed above the Nordic and English courts. Norway is not a member state of the EU, but it is a member of the EEA, which amongst other things regulates how EU law is implemented in Norway.

¹²⁶ The EEA agreement i.e. the Agreement on the European Economic Area, which entered into force on January 1, 1994, and which has been adhered to by the EU Member States and the European Free Trade Association (EFTA) States: Iceland, Liechtenstein, and Norway. There is an inclusion of EU legislation according to a certain procedure as more specifically set out in the agreement. More information on the specifics may be found e.g. on the EFTA website.

¹²⁷ The Lugano Convention of 2007 was entered into between the EU, Norway, Switzerland and Iceland. Denmark is mentioned separately, although it is an EU Member State, as the Lugano Convention deals with jurisdiction, recognition and enforcements of judgments in civil and commercial matters based on the Brussels I Regulation, which Denmark opted out from originally. The Lugano Convention entered into force between the EU and Norway on January 1, 2010.

Law¹²⁸ and the Principles, Definitions and Model Rules of European Private Law, the Draft Common Frame of Reference.¹²⁹ These, however, have no mandatory status and are still to prove their importance in purely commercial contractual relationships. Another source, for example, is the United Nations Convention on the International Sales of Goods (Vienna 1980) (CISG) as far as the USA and the Nordic countries are concerned. The UNIDROIT Principles of International Commercial Contracts¹³⁰ are not mandatory, but might – just as in the case of the PECL and DCFR – influence laws and regulations and/or might be reflected in prevailing contractual principles and/or affect interpretation of contracts, as indeed can also be found in some court decisions.¹³¹ With regard to the CISG,¹³² it has to be duly noted that the UK has not ratified the convention and therefore, if referring to the convention, the parties should scrutinize the convention and which state has actually ratified it. Furthermore, the convention does not apply to the sale of shares and it may also otherwise be excluded by the parties to the contract. The International Chamber of Commerce has done a tremendous job in providing standard principles and rules, such as Incoterms, Uniform Customs and Practice for Documentary Credits, Model Commercial Agency Contract, Model Distributorship, but these are of less relevance for the issues dealt with in this dissertation.

It is of course also important in this kind of research to review what other, relevant academic studies have been done. With regard to dissertations in the Nordic countries dealing with business acquisition contracts I have identified two, that is, Christina Ramberg's (at that time Hultmark) dissertation¹³³ and Margrethe Buskerud Christoffersen's dissertation.¹³⁴ In particular, Buskerud

¹²⁸ Principles of European Contract Law published in 2000 and 2003. Referred to hereinafter as 'PECL'.

¹²⁹ Principles, Definitions and Model Rules of European Private Law, Draft Common Frame of Reference, published in 2009. Referred to hereinafter as 'DCFR'.

¹³⁰ The UNIDROIT Principles were first agreed in 1994 and somewhat amended in 2004 and in 2010; a fourth edition of the principles was published in 2016. These principles represent the result of a truly international harmonization project, to which representatives from the legal profession from the five different continents have contributed. This work, according to the UNIDROIT Principles, started in 1971, but the actual working group was not established until 1980. It is also important to note that Art. 6 of the Preamble states that the Principles may be used "to interpret and supplement domestic law". In addition, the aim is, according to the Preamble, to be a resource for legislators, domestic as well as international, and to be a guide when drafting contracts, as it is claimed that the terminology used in the Principles is neutral i.e. free from legal system-specific expressions and they identify the issues that are important to include in a contract (Art. 8). These principles become applicable as such, if the parties to a contract so agree. In other words the Principles are by no means mandatory, but are of a non-authoritative nature.

¹³¹ See e.g. the Norwegian Supreme Court decisions in Rt. 2008. 969.

¹³² Part I, Sphere of Application and General Provisions, Chapter II General Provisions and more specifically Art. 7 (1) states that "In the Interpretation of this Convention, regard is to be had to its international character and to the need to promote uniformity in its application and the observance of good faith in international trade". The Explanatory Note by the UNCITRAL Secretariat on the UN CISG says with regard to this article, that "... When this (author's comment: disputes) occurs, all parties, including domestic courts and arbitral tribunals, are admonished to observe its (author's comment: the convention) international character and to promote uniformity in its application and the observance of good faith in international trade. In particular, when a question concerning a matter governed by this Convention is not expressly settled in it, the question is to be settled in conformity with the general principles on which the Convention is based. Only in the absence of such principles should the matter be settled in conformity with the law applicable by virtue of the rules of private international law." The reference to good faith will be discussed later in this dissertation.

¹³³ The thesis dealt with breaches of sale of shares and was published in 1992 under the title "Kontraktsbrott vid Köp av Aktie."

¹³⁴ The thesis dealt with the purchase and sale of businesses and was published in 2008 under the title "Kjøp og Salg av Virksomhet."

Christoffersen's dissertation is of interest, as even if concentrating on how the Norwegian Sale of Goods Act is applicable to different aspects of business acquisition contracts, it also contains some observations on the contemporary business acquisition market including Anglo-American influence.

Buskerud Christoffersen's dissertation was actually a result of a Norwegian research project at the University of Oslo titled "Anglo-American Contract Models and Norwegian or other Civil Law Governing Law."¹³⁵ The project, which took place between February 2, 2004 and June 30, 2011 and which was headed by Giuditta Cordero-Moss, resulted in other doctoral theses as well, for example, one by Edward T. Canuel,¹³⁶ who analyzed contractual damages. Canuel's subject matter is not the focus of this dissertation, but his dissertation is interesting as it reflects a US lawyer's perception of the differences between the common law system and the Norwegian law system on damages. As to Denmark, one doctoral dissertation has recently been published by Alex Fomcenco, who has focused on what kind of structure to use in business acquisitions (merger, division, business transfer, majority takeover) in public transactions and is therefore of less interest for this dissertation.¹³⁷

In the Nordic countries there are certainly other relevant dissertations dealing with business acquisitions, but not analyzing transactions from a primary contract-law point of view.¹³⁸ In relation to this dissertation, with its focus on contract law and business acquisitions including cross-border transactions, it is worth noticing that an increasing number of dissertations tend to focus on specific kinds of international commercial contracts.¹³⁹

Dissertations from common law countries have not been used, because – considering the challenges with studying common law in general – I felt more comfortable relying upon books and writings of more established legal scholars.

It should furthermore be noted that in this dissertation not only works of well-esteemed legal scholars have been used when discussing business acquisitions, but also writings of practitioners and works with a more practical approach to business acquisitions. These writings and practical

¹³⁵ The project also resulted in several other theses, although not doctoral dissertations, e.g. Henrik Wærsted Bjørnstad's thesis on "Entire Agreement Clauses"; Tor Sandsbraaten's thesis on "Begrepene "conditions", "warranties", "representations" og "covenants" – Behovet for og konsekvensene av å bruke begrepene og deres opprinnelige funksjoner etter engelsk rett i kontrakter regulert av norsk rett; Lars Ole Sikkeland's thesis: "(No) Material Adverse Change Clauses – Norwegian Law with a Comparative Aspect".

¹³⁶ His thesis dealt with contractual damages: "Analyzing Norwegian and U.S. Contractual Damages Clauses", was defended at the University of Oslo in 2009, and the book was published the same year.

¹³⁷ The thesis is: "Mergers & Acquisitions Counseling and Choice of Method", the dissertation was submitted to Aalborg University in Denmark in 2015 and published in 2016.

¹³⁸ Robert Sivenius has listed a few Swedish dissertations published 1991–2010 (including Hultmark's dissertation, which has been used in my own research). See Sivenius, 2012, at 54.

¹³⁹ For example, in Finland Tuomas Lehtinen's doctoral thesis "Kansainvälisen kaupan liikesopimus ja remburssi" (presented at Turku University and published in 2006) is interesting in the sense that the analysis is clearly focused on international commercial contracts, but with no particular focus on mergers and acquisitions. Another doctoral thesis presented at the IPR University Center of Helsinki University and published in 2011 is Petra Sund-Norrgård's "Lojalitet i licensavtal", which has a clear focus on commercial licensing contracts and with a fair amount of comparative elements between the USA and the Nordic countries.

books are included due to the fact that academic research focusing on acquisition of businesses is limited and furthermore the whole process in connection with business acquisitions has its own elements which have to be considered when answering the research questions.

1.4 Dissertation outline

Chapter 2 will discuss, on the one hand, contract law relevant for business acquisitions in the different jurisdictions and, on the other hand, contracting and contracts typical of business acquisitions. Some comments will be made on how cross-border elements may influence these matters. That Chapter will therefore present the legal and functional frameworks for the acquisitions discussed in this dissertation.

The next Chapter, Chapter 3, will focus on general interpretation issues and include some observations on methods, principles and rules governing contract interpretation in general. The applicability of these methods, principles and rules to business acquisition contracts will be discussed in more detail as well as some challenges in connection with the interpretation of cross-border acquisition contracts. The Chapter will also include some observations on how parties may try to use the contract to steer interpretation.

In the following Chapter, Chapter 4, the discussion will go into more detailed analysis of common law terminology typically used in business acquisition contracts and whether equivalent terminology is available – or can be construed – under Nordic law. The focus will be on conditions, warranties and representations.

In Chapter 5 the discussion will partly still include an analysis of the use of conditions, warranties and representations in business acquisitions, but the discussion will be expanded to include other typically-used expressions, use of the English language, trade usage, and how the cross-border element may affect interpretation.

Chapter 6 will consist of a short summarization of the research results and further some recommendations will be made.

2 THE LEGAL AND FUNCTIONAL ENVIRONMENT OF BUSINESS ACQUISITIONS

2.1 Introduction

The aim of the discussion in this Chapter is to establish the frameworks within which business acquisitions – the focus of this dissertation – are carried out. In this context, framework is to be understood as the general legal environment relevant for acquisitions and typical elements appearing in a vast number of transactions. Even without the cross-border element, it is representative of business acquisitions that they are quite extensive and complex transactions both with regard to the contracting process and with regard to the documentation comprising the agreements between the parties. It is therefore imperative to understand the legal fundamentals of the whole contracting process up to and including realization of the transaction, as liability issues may arise due to contracting and the actions of – and statements by – the parties during the process. These in turn may have an effect on the interpretation of the final contract.

The legal fundamentals of relevance for transactions may lead to surprises for parties representing jurisdictions with different legal and cultural backgrounds. Parties representing the UK or the USA and the Nordic jurisdictions respectively have to acknowledge that, despite some similarities in how contract law is perceived in the different jurisdictions, there are also some profound differences. The first part of this Chapter therefore discusses these similarities and differences based on contractual principles which affect contracting and contracts, but which may also be seen as representative of how law in general is perceived in these jurisdictions. The first part will include comments on how these principles, whether of general authority or not and whether confirmed in legislation or not, will affect contracting and contracts involving business acquisitions. Furthermore, some system-based differences between the legal families are introduced. Contract interpretation is mentioned from time to time, but a comprehensive discussion on contract interpretation will be carried out in the following Chapter.

The second part of this Chapter will discuss the functional environment of business acquisitions by describing how business acquisitions are typically carried out and what kind of legal issues may arise during these processes. Business acquisition processes are quite universal and may be divided into four main phases: pre-acquisition, negotiation, acquisition and post-acquisition. It is somewhat arbitrary which actions and documents belong to which phase but the division used here is based on a legal, transaction-focused approach and employed merely as a practical tool to exemplify what kind of issues should be considered during the different phases.¹⁴⁰ There are other ways of describing the process and there are variations depending on whether the focus is more on,

¹⁴⁰ The transaction process could be even more legally-focused. See, e.g., the division made by Egholm Hansen and Lundgren, 2014, at 39, who used eight phases: preparations, introductory phase, first negotiations, examination, final negotiations, fulfillment of conditions precedent, closing, and integration.

for example, strategic issues than on legal issues.¹⁴¹ However, the conduct of business acquisitions does not as such show significant differences between jurisdictions.

2.2 The legal environment of business acquisitions

2.2.1 Freedom of contract – an important principle in the common law and Nordic jurisdictions

Parties from the countries discussed in this dissertation have an important thing in common, which is that all the countries have accepted market economy as their basic economic system. Therefore, the parties have at least some similar experience of how it is to conduct business including negotiating and agreeing commercial contracts within the parameters set by that system, although there are differences in how the market economy has been implemented in the different legal families.

Market economy has often been explained by recourse to the theory of economic liberalism, which emphasizes a market order based on private contracts and individualism.¹⁴² This theory and thoughts related thereto have influenced legal discussions on contract law and led to a very strong emphasis on the freedom of contract principle as the fundamental principle for all contracting.¹⁴³ The freedom of contract principle was based on the view that the parties knew best what was beneficial for them and the role of the state and of official entities was to provide the means to enforce contracts, not to interfere with them.¹⁴⁴ Freedom of contract according to contemporary law means that the parties have the freedom to negotiate and decide whether to enter into a contract or not, to freely agree upon the contents of the contract and to choose whom to contract with.¹⁴⁵

The freedom of contract principle is a fundamental contractual principle in all countries,¹⁴⁶ but it is nevertheless limited by statutes and regulations, by factual circumstances such as economic

¹⁴¹ See e.g. Sivenius, 2012, at 105–119, who divided the process into three different phases; strategy, transaction, and integration. See also DePhampilis, 2010, at 134–135, who divided the process into ten phases: building the business plan, building the acquisition plan, search, screen, first contact, negotiations, integration plan, closing, interpretation, and evaluation. See further e.g. Lauriala, 2011, at 39, who divided the process into seven phases: defining the strategy, screening the targets, defining synergies and the value of the target, planning the transaction structure, the negotiation process, due diligence, implement, adjustment, and follow-up of the transaction.

¹⁴² See e.g. Stone, 2011, at 6; Furmston, 2012, at 13 and Farnsworth, I, 2004, at 7–8 and at 23–24.

¹⁴³ These principles were discussed already during the 17th century by the school of natural law with its emphasis on the rights of the individual, but under completely different economic and sociological surroundings than today. See e.g. Wilhelmsson, 2008, at 1–2.

¹⁴⁴ See e.g. Whittaker, Chitty I, 2012, at 21–27; Peel and Treitel, 2015 at 3–4; Furmston, 2012, at 13 and Chen-Wishart, 2012, at 11. For a brief summary of the development of the freedom of contract principle in the Nordic countries, see a summary presentation by Nybergh, 1997, at 27–52.

¹⁴⁵ Taxell, 1987, at 32; Hov and Høgberg, 2009, at 36; Woxholth, 2014, at 26 and Adlercreutz and Gorton, I, 2011, at 27. It has been said that Danske Lov from 1683 confirmed the freedom of contract and *pacta sunt servanda* principles. See Gomard, Godsk Pedersen and Ørgaard, 2009, at 14–15. With regard to the USA see e.g. Canuel, 2009, at 38–40 and with regard to the UK see e.g. Atiyah and Smith, 2005, at 16–20.

¹⁴⁶ The freedom of contract principle has also met some resistance over the years even in the USA. This development has been described e.g. by David E. Bernstein, who in an article reviewed and described how the US Supreme Court during the 19th century to the 20th century dealt with different aspects of freedom of contract, which was actually referred to as liberty of contract. Bernstein described the matter from the perspective of how the US Constitution had

realities, *ordre public*, other contractual principles – and the list could continue.¹⁴⁷ It has on the other hand also been claimed that there is a trend in the opposite direction from restricting freedom, that is, a trend towards a stronger defense of contractual freedom again.¹⁴⁸

The freedom of contract principle has often been explained by the will theory which puts the will of the promisor to be bound by his promise as expressed to another party as the primary element and not how that will was expressed to and relied on by the other party.¹⁴⁹ The will theory was closely connected to the English doctrine of exchange and consideration. The doctrine of consideration is very old¹⁵⁰ and has been the focus of interest of considerable legal research and debate, but the essence of the doctrine is that a contract should include some kind of exchange of goods, services, promise to act or refrain from action, or a similar undertaking of a reciprocal nature.¹⁵¹ In the USA, the Restatement (Second) actually includes a definition of what is meant by

been interpreted by the courts. See Bernstein, 2008. His conclusion was that “In general, however, freedom of contract is almost entirely unprotected under modern constitutional law.” Bernstein, 2008, at 8. As to the Nordic countries, some scholars have not regarded the freedom of contract principle as being as important as before. It may be noted that e.g. Juha Karhu (former Pöyhönen) has not regarded freedom of contract as any longer the basis of the law of obligations. Karhu presented a new structure for the law on property, where freedom is not decisive, but where fundamental rights are the core of the system. Pöyhönen, 2000, at XIV–XV

¹⁴⁷ As to different techniques for limiting contractual freedom, see Atiyah and Smith, 2005, at 6–8, describing three different techniques for limiting freedom of contract. The first is “the procedures for making contract,” in terms of what the courts and the legislative authorities have done by explaining “... the excuses available to defendants beyond the traditional (and relatively narrow) excuses of duress, misrepresentations, and incapacity. ...”. However, it was also noted that this technique has been little used in English law and it was suggested that English law has not recognized any general principle that would regard contracts reached by “exploitative or ‘unconscionable’ behavior” to be unenforceable. The second rule described was in relation to different rules applied when establishing the contents of contracts and more specifically rules that imply terms in certain types of contracts or rules that forbid certain kind of terms or even entire contracts e.g. due to mandatory rules. They suggested that non-mandatory rules, also called default rules, which the parties may agree otherwise, have less impact on freedom of contract. The third rule, mentioned as the “most powerful technique for limiting freedom of contract” is when an entire contract is imposed. As examples they mentioned certain obligations of common carriers and citizens’ obligations to pay taxes.

¹⁴⁸ Atiyah and Smith, 2005, at 16–19 and Farnsworth, I, 2004, at 24.

¹⁴⁹ See e.g. Hemmo, I, 2007, at 16–17 and Mäkelä, 2010, at 43–44. P.S. Atiyah described the will theory during the 19th century as emphasizing “... the importance of free choice and and the voluntary creation of obligations.” Atiyah, 1988, p. 40.

¹⁵⁰ It has e.g. been said that this doctrine goes back as far as the 16th century and that it was based on the concept of *assumpsit* and the fact that only bargains should be enforceable. See e.g. Furmston, 2012, at 98–99. Several legal authors have claimed that many of the concepts and rules still applicable were developed during the 19th century, see e.g. Stone, 2013, at 6 and Collins, 2008, at 3–6.

¹⁵¹ Consideration has not been required to be of ‘proper’ value, market value or any equivalence in value. The only requirement has been that the payment or exchange is such that it should be sufficient, i.e. in order to be regarded as consideration it should have some economic value. See e.g. Stone, 2011, at 92 and Furmston, 2012, at 110–111. This view has not been unchallenged. See e.g. Atiyah, 1989, at 136–137. Consideration has sometimes been categorized as executory, executed and past consideration. See e.g. Furmston, 2012, at 102–105. The question of benefit and detriment as required elements of consideration has been discussed and – to use the words of Richard Stone – “...consideration should be a benefit to the person receiving it, or a detriment to the person giving it. Sometimes both are present.” Stone, 2011, at 90. However, Stone also said that it is rather difficult to see how in practice consideration would only bring benefit to one or only detriment to the other, but in theory that could be the case. If only one requirement is needed, then benefit and detriment can be seen as consequences of promises rather than elements of consideration. Stone, 2011, at 90–91. Michael Furmston was critical of the concept of benefit and detriment, especially the use of detriment, as he held that in a typical modern contract the bargain is made by exchanging promises and the consideration for a party’s promise is the other party’s promise i.e. one may ask what benefit or detriment has arisen at that stage. Furmston, 2012, at 101.

consideration.¹⁵² The reason for not describing and analyzing the doctrine here is that the assumption here is that business acquisitions have been paid for one way or another.¹⁵³

The will theory, with its emphasis on the will of the promisor and not taking into account the interests of the promisee, was eventually criticized and an alternative was presented in the shape of the reliance theory. English legal scholars have in a number of ways described this theory,¹⁵⁴ which has gained some support under English law. The case law is not clear-cut, though, as support for reliance theory may be seen as reflected in the decision in *Crabb v. Arun District Council*¹⁵⁵ while reluctance to use reliance theory has been said to be confirmed in, for example, the case – actually preliminary hearings – of *Baird Textile Holdings Ltd v Marks and Spencer plc*.¹⁵⁶

In the USA the principles of exchange and consideration, which have been closely linked to the will theory, certainly had strong support, but the question of the reliance element in contracting became an important element of the discussions at an early stage.¹⁵⁷ Acceptance of the reliance theory in US contract law may be seen as confirmed in the Restatement (Second), which stipulates that a promise “...which the promisor should reasonably expect to induce reliance or forbearance” by other persons and which has that effect is binding, if “injustice” cannot be avoided unless the promise is enforced.¹⁵⁸ The reliance aspect has evidently been given an important position in this definition.

Notwithstanding the above, the freedom of contract principle is still very much a fundamental principle both in the UK and in the USA. Indeed, it has been claimed that the freedom of contract principle permeates the whole US legal system, which leads to the assumption that parties may freely agree upon their contractual terms.¹⁵⁹

¹⁵² §71 of the Restatement (Second): “(1) To constitute consideration, a performance or a return promise must be bargained for. (2) A performance or return promise is bargained for if it is sought by the promisor in exchange for his promise and is given by the promisee in exchange for that promise. (3) The performance may consist of a. An act other than a promise, or b. A forbearance, or c. The creation, modification, or destruction of a legal relation. The performance of a return promise may be given to the promisor or to some other person. It may be given by the promisee or by some other person.”

¹⁵³ See subchapter 1.2.3.

¹⁵⁴ See e.g. Stone, 2011, at 89, where he described the reliance doctrine as follows: “...it is actions, and reliance on those actions, that creates obligations, rather than an exchange of promises (as under the classical doctrine of consideration).” See also Hugh Collins who said that the courts seem to require four basic elements when using the reliance theory i.e. “i) deliberate encouragement of reliance via a promise or some other express or implied undertaking, ii) proof that the other party has in fact relied upon such undertaking by acting to his detriment, iii) detrimental reliance was reasonable in that case, and iv) review of whether it would be unfair or unconscionable to permit someone to back on the original promise or undertaking.” Collins, 2008, at 75.

¹⁵⁵ [1976] 3 All ER 865, [1976] CH

¹⁵⁶ [2001] EWCA Civ 274 [2002] 1 All ER (Comm) 737

¹⁵⁷ Corbin, 1, 1950, at 2–3.

¹⁵⁸ §90 (1) of the Restatement (Second): “A promise, which the promisor should reasonably expect to induce reliance or forbearance on the part of the promisee or a third person and which does induce such action or forbearance is binding if injustice can be avoided only by enforcement of the promise. The remedy granted for breach may be limited as justice required.”

¹⁵⁹ See e.g. Canuel, 2009, at 38–39 and Farnsworth, I, 2004, at 25.

The freedom of contract principle also had wide support in the Nordic countries. Nevertheless, during the 19th century, with the industrialization of society bringing new dimensions into contractual relationships, legal discussion started to focus on the need to protect the “weaker” party, for example in the relation between employers and employees. A similar development had of course taken place in the common law countries.¹⁶⁰ This trend in legal discussions has in the Nordic countries sometimes been described as a development towards “social contract law” or “collectivistic contract law.”¹⁶¹ However, similarly to the development in the common law countries, the will and reliance theories and principles¹⁶² influenced Nordic contract law and it has been submitted that, for example, the Nordic Contract Acts codified the movement from a strong will theory-based contractual system to a system where the reliance aspect was given a more fundamental role.¹⁶³ Discussions in the Nordic countries about the different theories evolved from will and reliance theories to actually discussing a combination of both, which led to the introduction of the so-called declaratory theory. This theory has been said to focus on the actual contents of documents and statements submitted in contract interpretation, although from an objective perspective.¹⁶⁴ This theory gained and still has support in other Nordic countries as well,¹⁶⁵ but none of these theories are applied in their purest form any longer.¹⁶⁶

The theoretical differences between the three theories – will, reliance and declaratory – are hardly of paramount interest for business parties negotiating business acquisitions. In cross-border business acquisitions the parties will nevertheless have to recognize that the emphasis on the will and reliance aspect varies between countries, especially with regard to English law, where the reliance aspect is somewhat more debated. I suggest, on the other hand, that in order to operate a functioning market for business acquisitions, whether domestic or cross-border, both will and reliance aspects are important.¹⁶⁷ The parties must have the freedom to choose whether they want to conclude a transaction or not, but when they have in some externally noticeable manner expressed their intention to become legally bound by the agreement and that expression is in a form that the other party objectively had reason to rely upon that intention and understood that an agreement has been reached, then the parties are in principle bound by their agreement. In order for that agreement to be enforceable an additional requirement should be that the parties have

¹⁶⁰ See e.g. Atiyah and Smith, 2005, at 11, on the issue of the industrialization of the western world leading to new requirements for regulating economic life.

¹⁶¹ Thomas Wilhelmsson has played an important part in policing this theory of contract law. See his own comments on the development at large in Wilhelmsson 2008, at 9–14.

¹⁶² Note that opinions have also been expressed that the will theory and the reliance theory are not necessarily each other’s opposites. See e.g. Karhu and Tolonen, 2012, at 87.

¹⁶³ Grönfors, 1992–1993, at 268.

¹⁶⁴ Bryde Andersen, 2005, at 45.

¹⁶⁵ Grönfors, 1993, at 22–23 and Bryde Andersen, 2005, at 50. In Finland, on the other hand, Mika Hemmo questioned whether the declaratory theory actually has an independent character. Hemmo, I, 2007, at 18, footnote 7.

¹⁶⁶ It has also been said with regard to Norwegian contract law that the basic theory today is a combination of the reliance theory and the declaratory theory. See Hov and Høgberg, 2009, at 81.

¹⁶⁷ Juha Mäkelä maintained *inter alia* that according to the reliance theory freedom of contract is also important and that the reliance theory as a matter of fact strongly supports the interests of exchange. Mäkelä, 2010, at 45.

agreed upon the contents of the agreement.¹⁶⁸ That having been said, I will repeat over and over again that comprehensive written contracts are important in business acquisitions. This is, amongst other things, due to the characteristics of business acquisitions as complex contractual relationships and in certain cross-border transactions additionally due to the challenges that arise when parties represent different legal systems.

Furthermore, the freedom to negotiate and to agree upon the contents of the contract enhances the willingness of the parties to become engaged in cost- and risk-filled projects, and which is in the interest of a functioning business acquisition market. On the level of principle, freedom of contract does not in itself preclude requiring that the parties should act in an honest and decent manner during the whole process, including contracting.

As noted in Chapter 1, parties engaged in business acquisitions often show little interest in general contract law. What the parties may not realize is that they take for granted certain norms guiding their actions and behavior, which as a matter of fact correspond to contractual principles being part of general contract law. A typical example is the freedom of contract principle discussed just above. It was also said in Chapter 1 that the meanings of contractual principles are to be found in discussions by and between legal scholars and in court decisions and the argumentation in such decisions. That is an aspect to be noted in cross-border business acquisitions, as even though the principle has the same name its effect is not necessarily the same in different jurisdictions. The freedom of contract principle is not absolute and not only may other rules affect the parties' freedom,¹⁶⁹ but also other contractual principles may affect the scope of freedom of contract, which will be discussed just below.

2.2.2 Good faith, loyalty and fairness – divergent views between the common law and Nordic jurisdictions

While freedom of contract and the binding force of contracts as principles are generally accepted in the common law and Nordic jurisdictions, acceptance of other contractual principles does not show the same level of similarity. General contractual principles such as good faith, loyalty and fairness are widely recognized as fundamental principles of society and of the legal system in the Nordic countries. The freedom of contract principle may also still be regarded as a fundamental

¹⁶⁸ Mika Hemmo has held that an agreement is at least made when the parties have come to a mutual understanding about committing themselves to the agreement and about the contents of the agreement. He has further said that a party's commitment to making the agreement has to be expressed to the other party, but that this need not necessarily happen in the form of offer and acceptance. Hemmo I, 2007, at 98. See also Jan Ramberg and Christina Ramberg who argue, when discussing how the pre-requisites for a binding agreement should be analyzed, that three aspects should be taken into consideration when considering whether an agreement is enforceable or not, i.e.: (i) a party's willingness to be bound; (ii) the statement of will i.e. how the will has been communicated to others and (iii) reliance by the other party i.e. how the other party has understood the statement. Ramberg and Ramberg, 2014, at 74.

¹⁶⁹ For example, competition law may limit freedom and actually force a party with a dominant market position into certain contracts. See e.g. Restatement of Nordic Contract Law, 2016, at 70.

principle of Nordic contract law, but the other principles just mentioned have shaped the concept of freedom of contract.

The approach to principles of good faith, loyalty and fairness is different in the common law countries. For example, in the English system the concept of fairness in contract law has often been tied to fairness in a procedural sense. Misrepresentation and fraud have been mentioned as fairness-related reasons for interfering with contracts.¹⁷⁰ However, it has also been claimed that in practice substantive fairness is present in many cases.¹⁷¹ The courts may reach what could be regarded as a ‘fair’ outcome of a dispute by recourse to interpretation of contracts. For example, a court may imply terms or even refuse certain remedies, but they may also take recourse to equitable principles.¹⁷² The issue of fairness will be reverted to when discussing contract interpretation more generally in order to see how it may have influenced the decisions of English courts. In the USA fairness has also been connected to procedural regularity and court cases.¹⁷³ In contract interpretation the Restatement (Second) does not refer to fairness as a principle as such, but it refers to reasonableness when establishing the meaning of the wording of a contract and this could be relevant in case there is an ambiguity in the wording or where there has been some other mistake which is to be taken into consideration.¹⁷⁴ Loyalty as a principle is not known in common law, but the closest resemblance to loyalty is the concept of good faith.

The problem with general contractual principles is to understand what they mean in different situations. In subchapter 1.3.1 it was noted that general legal principles may be used in argumentation and that their importance depends on the circumstances. Any definition of good faith, loyalty and fairness would – in order to be applicable to different kinds of situation – be vague to say the very least. Even the internationally widely-used concept ‘good faith’ is difficult to define and may have different meanings depending on the circumstances. Robert E. Summer, for example, submitted that good faith does not have a general meaning of its own, but it excludes different forms of bad faith.¹⁷⁵ The concept of ‘bad faith’ also appears in the UNIDROIT Principles

¹⁷⁰ Atiyah and Smith, 2005, at 297 and McDonald and Atkins, 2014, at 403. The English legal system has generally been influenced by the concept of fairness e.g. in protecting the weaker party in other relationships e.g. employment, consumer contracts and similar cases, but it has also been claimed that as a result of the concern for fairness other action has also been taken governing all contracting parties e.g. UCTA. See Atiyah and Smith, 2005, at 13–16.

¹⁷¹ Atiyah and Smith, 2005, at 297.

¹⁷² McDonald and Atkins, 2014, at 404. As to equitable remedies see e.g. Whittaker, Chitty I, 2012, at 48.

¹⁷³ When e.g. George P. Fletcher and Steven Sheppard discussed fairness in the US system, they began with the fact that the US Constitution does not include anything about ‘fair’ or ‘fairness’, but they argued that “... the requirement of a fair trial has become a standard element of due process under the Fourteenth Amendment.” Fletcher and Sheppard, 2005, at 51. Steven J. Burton contended that fairness in contract law is to be considered in relation to “...doctrines of unconscionability, mistake, duress, fraud and the like.” Burton, 2009, at 185. He also referred to the *contra proferentem* rule. Burton, 2009, at 187.

¹⁷⁴ §203(a) of the Restatement (Second). See also Burton, 2009, at 183–184.

¹⁷⁵ Summers, 1968, at 196. Summers further divided bad faith into four categories: bad faith in negotiations and formation of contract e.g. continuing negotiations without a serious intent to conclude a contract or entering into a contract without intent to perform under it; bad faith in the performance of a contract e.g. interfering with or failing to cooperate in relation to the other party’s performance; bad faith in raising and resolving disputes e.g. creating disputes (Summers used the words ‘conjure up’) and bad faith in taking remedial action e.g. abuse of power to terminate. Summers 1968, at 220–252.

as a concept for unacceptable behavior during negotiations.¹⁷⁶ As such, defining bad faith may be just as difficult as defining good faith, since in both cases the concepts are highly abstract.

A somewhat more creative approach to analyzing good faith was taken by John Wightman, who identified and described three different dimensions of good faith. Wightman named the first of these ‘core good faith’, which he described as a “minimum standard of honesty” when entering into a contract. As examples of core good faith he mentioned “honesty in fact” as appearing in the UCC and with regard to English law he referred to the rule on misrepresentation.¹⁷⁷ This kind of good faith could also be described as a general requirement for honest and decent behavior in any contractual relationship, whether of a personal or of a business nature. The second form of good faith Wightman identified was ‘contextual good faith’, which he described as originating from the “reasonable expectations of the parties” and which is based on norms generally observed in the type of contractual environment the parties are engaged in. As examples of contextual good faith Wightman mentioned “the observance of reasonable standards of fair dealing in the trade” as stipulated in the UCC.¹⁷⁸ Wightman emphasized that contextual good faith depends upon the understanding and practice in the commercial sector within which the parties are operating.¹⁷⁹ Wightman said that contextual good faith “... is discharged by a number of doctrines” under English law.¹⁸⁰ He furthermore claimed that contextual good faith is not in conflict with the freedom of contract principle, as the idea behind this concept is only to realize “...the tacit understanding of the parties at the time of entering the contract.”, but he also noted that parties may always agree otherwise.¹⁸¹ I think this, again, is a requirement for a certain honest and decent standard of behavior by the parties when entering into a contract and that the parties may rely upon each other’s sincerity to perform under the contract. The extent of this requirement is evidently dependent on what kind of contract is at stake. The third category of good faith Wightman identified was “normative good faith”, which he described as good faith imposed on the parties by “contractual justice”.¹⁸² Wightman mentioned as an example the good faith and fair dealing imposed on parties by the Restatement (Second) and with regard to English law he mentioned

¹⁷⁶ Art. 2.1.15 of the UNIDROIT Principles states *inter alia* that bad faith means to engage in or continue negotiations when there is no intention to reach an agreement. The article reads as follows: “(1) A party is free to negotiate and is not liable for failure to reach an agreement. (2) However, a party who negotiates or breaks off negotiations in bad faith is liable for the losses caused to the other party. (3) It is bad faith, in particular, for a party to enter into or continue negotiations when intending not to reach an agreement with the other party.” Comment 1 on freedom of negotiation clearly states that as a rule parties are free to decide “...when and with whom to enter into negotiations...” aiming at a contract, but additionally the parties are free to decide “...how and for how long to proceed with their efforts to reach an agreement.” Comment 2 on liability for negotiating in bad faith refers to actions being acceptable only if they are in congruence with the principle of good faith and fair dealing referred to in Art. 1.7 of the Principles.

¹⁷⁷ See Wightman, 1999, at 42. As a matter of fact misrepresentation is also widely recognized in the USA.

¹⁷⁸ §2-103(1)(b) of the UCC states that in the case of a merchant in sale of goods ‘good faith’ also includes reasonable standards of fair dealing in the trade.

¹⁷⁹ Wightman, 1999, at 42–43.

¹⁸⁰ Wightman, 1999, at 43. Wightman mentioned implied terms as an example.

¹⁸¹ Wightman, 1999, at 44.

¹⁸² Wightman, 1999, at 45.

legislation on unfair terms in consumer contracts.¹⁸³ Wightman held contextual good faith to be well-suited for commercial contracts and normative good faith for personal contracts.¹⁸⁴

On the other hand, both contextual and normative good faith have an impact even on business parties' actions in the USA and in the Nordic countries. This is based on the fact that good faith has been defined in both the Restatement (Second) – which is not a binding source but which can be held to comprise generally accepted contract law – and in the UCC, which has led to mostly uniform enacted legislation in the subject matter in the different states. In Section 1-201 (20) of the UCC good faith is described as 'honesty in fact' and additional language is to be found in Section 2-103 (1) (b), which deals with business parties (the term used in the UCC is actually 'merchant'), as good faith is further defined to include "... the observance of reasonable commercial standards of fair dealing in the trade."¹⁸⁵ Section 205 of the Restatement (Second) imposes a duty of good faith and fair dealing in the performance and enforcement of every contract.¹⁸⁶ In the Nordic countries good faith also appears in different forms within the legislation.¹⁸⁷ The Nordic Contracts Act refers to a similar concept in Section 33, which contains a stipulation about 'honor and good faith',¹⁸⁸ while Section 33 of the Finnish, Norwegian and Swedish Sale of Goods Act allows a buyer the right to claim that goods sold are defective, even if he has not inspected the goods after delivery or given notice (Sections 31 and 32), provided that the seller has acted in bad faith/in conflict with good faith and honesty/ or been grossly negligent.¹⁸⁹ Neither of these Acts define *per se* what is meant by good faith or honesty, but again that is more a reflection of the fact that it is next to impossible to define the concept so that it would comprise all relevant situations. However, good faith, or loyalty as is more often referred to in the Nordic countries, is also an accepted general contractual principle. It may further be noted that good faith is an important part of the UNIDROIT Principles in general and for example Article 1.7 of those Principles provides that the parties must act "... in accordance with good faith and fair dealing in international trade."¹⁹⁰

¹⁸³ Wightman 1999, at 45.

¹⁸⁴ Wightman, 1999, at 48 and at 52.

¹⁸⁵ Further, see Summers, 1968, at 198 where he pointed out that good faith is not only relevant in contractual matters, but relates to other doctrines like implied promise, custom and usage, fraud, negligence and estoppel.

¹⁸⁶ §205 of the Restatement (Second) states that "Every contract imposes upon each party a duty of good faith and fair dealing in its performance and its enforcement."

¹⁸⁷ For example in the Swedish Act on Good Faith Acquisition of Movables (1986:796) and in the Finnish Consumer Protection Act (38/1978). Loyalty (good faith) is not as a general principle included in the Nordic Sale of Goods Act, but it is mentioned specifically in the Norwegian Sale of Goods Act with regard to international sales and the CISG (§88 of the Norwegian Act in question).

¹⁸⁸ §33 of the Finnish Contract Acts stipulates that "A transaction that would otherwise be binding shall not be enforceable if it was entered into under circumstances that would make it incompatible with honor and good faith for anyone knowing of those circumstances to invoke the transaction and the person to whom the transaction was directed must be presumed to have known of the circumstances." (Unofficial English text of the Finnish Contract Act). The other Nordic Contract Acts state the same, although the wording is slightly different and e.g. the Danish Contract Act speaks of general honor and not specifically about good faith, but this may be regarded as more of a semantic issue and not really a substantive difference in relation to the other Contract Acts. However, this section has been claimed not to have been much used after §36 was included in the Nordic Contract Acts and generally has been less used in contracts between equally strong parties. See e.g. Bryde Andersen, 2005, at 412–415.

¹⁸⁹ The wording of this section varies somewhat but in essence the same goal appears in all these Sale of Goods Acts.

¹⁹⁰ Art. 1.7(1) and furthermore Comment 1 to Art. 1.7 states that "... good faith and fair dealing may be considered to be one of the fundamental ideas underlying the Principles."

In the UK good faith has been met with skepticism, but English law has been influenced by the good faith concept, for example in the consumer sector regarding misleading statements and the duty to disclose information, as well as by European regulations and directives on commercial agents.¹⁹¹ Good faith as a general contractual principle has not been regarded as existing in English law, although some later court decisions might be interpreted so that an implied duty of good faith might exist under some circumstances.¹⁹² The courts have means of dealing with unacceptable behavior and this has sometimes been described as English law providing a piecemeal solution of the good faith doctrine.¹⁹³

Typically, cross-border business acquisition contracts are preceded by quite extensive negotiations. Therefore, it is important to note that neither English law¹⁹⁴ nor US law¹⁹⁵ recognize a general principle of good faith in negotiations. The acceptance of good faith shows differences between English law and US law in terms of performance and enforcement of contracts, but additionally there is one other feature of US contract law which differs from English contract law and that is the US doctrine of unconscionability. The UCC has established certain rules for when a contract will be regarded as unconscionable and where the court could declare a contract or part of as unenforceable¹⁹⁶ and the Restatement (Second) also includes a provision on unconscionable contracts or terms.¹⁹⁷ However, the concept ‘unconscionable’ is still not precisely defined, which is not surprising as it is just as hard to give a comprehensive definition of this concept as it is to comprehensively define good faith. The unconscionability theory has been presented as mainly applying to transactions involving consumers, but it has been applied in some commercial contractual relationships as well.¹⁹⁸

As noted above, English law does not recognize any general principle of good faith in negotiations. The decisive case confirming the absence of a general pre-contractual obligation to negotiate in

¹⁹¹ In 2013 a new Consumer Directive entered into force and the Member States had two years to adapt their internal legislation to the same. In the UK a new Consumer Rights Act was enacted in 2015. See also the Commercial Agents (Council Directives) Regulations (1993).

¹⁹² Peel and Treitel, 2015, at 252–253. See also Atiyah and Smith, 2005, at 20: “... the principle that contracting parties must act in good faith, are gaining new supporters.”

¹⁹³ See statement by Bingham, LJ, in *Interfoto Picture Library Ltd v Stiletto Visual Programmes Ltd*. [1989] QB 433, where he found (at 439) that “English law ... has developed piecemeal solutions in response to demonstrated problems of unfairness.”

¹⁹⁴ Collins, 2008, at 181.

¹⁹⁵ Summers, 2000, at 134.

¹⁹⁶ §2-302 (1) of the UCC provides that “If a court as a matter of law finds the contract or any clause of the contract to have been unconscionable at the time it was made the court may refuse to enforce the contract, or it may enforce the remainder of the contract without the unconscionable clause, or it may so limit the application of any unconscionable clause as to avoid any unconscionable result.”

¹⁹⁷ §208 of the Restatement (Second) provides that “If a contract or term thereof is unconscionable at the time the contract is made a court may refuse to enforce the contract, or may enforce the remainder of the contract without the unconscionable term, or may so limit the application of any unconscionable terms as to avoid any unconscionable result.”

¹⁹⁸ Perillo, 2003, at 386. See also Knapp, 1996, at 220, who referred to the decision in *Construction Associates, Inc. v. Fargo Water Equipment Co.*, 446 N.W.2d 237 (N.D.1989), where the defendant’s disclaimer of warranty and limitation of liability were held to be ineffective, as there would otherwise have been no effective remedy for defects in the subject matter.

good faith under English law has been held to be *Walford v. Miles* from 1992.¹⁹⁹ In *Walford v Miles* an agreement which contained a statement that the parties were to negotiate in good faith was not upheld and it was established that the courts in England do not recognize an obligation to negotiate in good faith. Lord Ackner said *inter alia* in the judgment that “A duty to negotiate in good faith is as unworkable in practice as it is inherently inconsistent with the positions of a negotiating party.” and “In my judgment while negotiations are in existence either party is entitled to withdraw from those negotiations, at any time and for any reason.”²⁰⁰ This traditional view seems to have prevailed over the years.²⁰¹ It should be duly noted, though, that in *Walford v Miles*, there was no firm time limit for the obligation to negotiate in good faith. Later case law shows that if the parties have been more specific in their wording and also agreed upon a set time limit, a good faith obligation may be enforceable. In other words, English courts have approved good faith obligations during negotiations if such agreements have been quite specific including a set time limit.²⁰² For example, in connection with commenting on the *Walford v Miles* case, Ewan McKendrick has submitted that “... a distinction should be drawn between an express obligation to negotiate in good faith (which is enforceable) and an implied obligation (which is not).”²⁰³ However, in general McKendrick had a restrictive approach to the term good faith as such.²⁰⁴ Furthermore, Hugh Collins has been quite critical of the principle of good faith in negotiations, which, as noted, has not been accepted as a general principle in English law unless the parties have specifically agreed thereto.²⁰⁵

The importance of the wording regarding a possible good faith obligation has been evidenced for example in *Petromec Inc. v Petroleo Brasileiro SA Petrobras*,²⁰⁶ where an express commitment to negotiate in good faith during a set time limit was upheld. Longmore, LJ, stated “It would be a

¹⁹⁹ *Walford and others v. Miles and another* [1992] 2 A.C. 128; [1992] 2 W.L.R.174. The defendants, the Miles, had decided to sell their company. The parties had in principle agreed on the sale and the plaintiffs, the Walfords, sent a letter on March 18, 1987 to the Miles outlining the agreement the parties had reached. In the letter the plaintiffs stated that they had promised to provide a letter of comfort from their bank confirming their ability to finance the transactions and the letter continued to set out that in return for such letter (by a certain date) the defendants were to terminate negotiations with any third party in order to enable the Walfords to purchase the company. On March 18th the bank provided such letter and on March 25th the Miles confirmed their willingness to sell the company, subject to contract. On March 30th another letter was sent to the Walfords informing them that the Miles had decided to sell their company to a third person. The plaintiffs brought an action against the Miles and claimed damages, because of a) loss of opportunity to purchase the company and b) damages for misrepresentation by the defendants as they had continued to negotiate with a third party. The Miles’ commitment not to negotiate with a third party was not limited time-wise. The Walfords claimed that this collateral contract obligated the Miles to continue to negotiate in good faith. The House of Lords dismissed the appeal, but in the decision explained why the lock-out agreement was regarded as unenforceable. One of the main reasons was that it did not have a set time limit. The lock-in agreement, i.e. an alleged obligation to negotiate in good faith only with the plaintiffs, again was not accepted as it was regarded as too uncertain to be enforced and based on the principle that there is no duty to negotiate in good faith.

²⁰⁰ *Ibid.* at judgment 2, i.e. Lord Ackner’s opinion.

²⁰¹ See e.g. L.J. Mummery’s statement in *Cobbe v Yeomans Row Management Ltd* [2006] EWCA Civ 1139, [2006] 1 W.L.R. 2964 confirming that there is no general duty to negotiate in good faith.

²⁰² See Lewison, 2004, at 272–273 and Peel and Treitel, 2015, at 66.

²⁰³ McKendrick, 2012, at 503, where he referred not only to *Walford v. Miles* but also to *Petromec Inc v. Petroleo Brasileiro SA Petrobras* [2005] EWCA Civ 891 [2006] 1 Lloyd’s Rep 121 and the fact that the Court of Appeal upheld a clause to negotiate in good faith. The statements of the court were made *obiter*.

²⁰⁴ McKendrick, 2012, at 515, emphasized that the question is not only about recognizing the doctrine of good faith, but also about its form, noting that the courts should only recognize good faith when convinced that the harm that it will do i.e. the uncertainty that it will bring, is “outweighed by the advantages” of the doctrine of good faith.

²⁰⁵ Collins, 2008, at 180–181.

²⁰⁶ [2005] EWCA Div 891, [2006] 1 Lloyd’s rep. 121

strong thing to declare unenforceable a clause into which the parties have deliberately and expressly entered...” He also referred to the fact that the clause in question was not a bare agreement to negotiate and that the complex agreement was drafted by certain solicitors (author’s comment: the well-known Linklaters & Paines at that time). In other words in this case there was an express agreement to negotiate in good faith about a specific issue, that is, costs, and there was also a firm time limit for the obligation, which might have made it easier for the court to accept the contract. This case is often referred to when discussing whether the English system is showing more willingness to accept a good faith element in the parties’ relations, at least after a contract has been entered into. On the other hand, the case also shows the fact that good faith agreements and the impact thereof will be heavily dependent on the factual circumstances.²⁰⁷ That good faith is not part of English contractual principles with regard to negotiations has also been confirmed, although not on the highest level, in the fairly recent decision by the Court of Appeal in *Mid Essex Hospital Services NHS Trust v Compass Group UK & Ireland Ltd (t/a Medirest)*.²⁰⁸

The question of good faith in the USA has in general been perceived differently than in the UK, in terms of performance of contractual obligations, but as already noted, a general duty of good faith or good faith and fair dealing in negotiations has not been regarded to exist.²⁰⁹ Such a duty may nevertheless be imposed due to undertakings to negotiate in good faith in preliminary agreements.²¹⁰ For example, in Delaware preliminary agreements – including an obligation to negotiate in good faith – may be found to be enforceable, as was confirmed in *SIGA Technologies, Inc. v. Pharmathene, Inc.*²¹¹ This decision seems to strengthen the concept of good faith in the

²⁰⁷ Longmore, LJ, stated e.g.: “... The traditional objections to enforcing an obligation to negotiate in good faith are (1) that the obligation is an agreement to agree and thus too uncertain to enforce, (2) that it is difficult, if not impossible, to say whether, if negotiations are brought to an end, the termination is brought about in good or in bad faith, and (3) that, since it can never be known whether good faith negotiations would have produced an agreement at all or what the terms of any agreement would have been if it would not have reached, it is impossible to assess any loss caused by breach of the obligation...” Longmore, LJ, explained why in this specific case only objection (2) could be relevant, but also referred to the decision of the House of Lords in *Walford v Miles*, which he said was binding upon their decision. However, the particulars of the cases were different. Longmore acknowledged this and said that “... The main distinction between that case (author’s comment: *Walford v Miles*) and this was that in that case there was no concluded agreement at all since everything was ‘subject to contract’; there was, moreover, no express agreement to negotiate in good faith. There were negotiations for the sale of a business in the course of which the defendant prospective vendor agreed not to negotiate with any third party and to negotiate only with the claimant prospective purchaser. All the negotiations were subject to contract and the House of Lords held that the ‘lock-out agreement’ was unenforceable because there was no provision saying how long it was to last. The claimants sought to resolve this difficulty by asserting that it was an implied term of the agreement that, while the defendant wanted to sell the business, they would negotiate in good faith with the claimants. The House of Lords held that it was impossible to imply such a term since it was unworkable in practice and inherently inconsistent with the position of a party negotiating ‘subject to contract’. The lock-out agreement was therefore too uncertain to be enforceable... Accordingly, a bare agreement to negotiate has no legal content.” Longmore, LJ, emphasized that in the case at hand a certain clause (clause 12.3) of one of the agreements was not only an agreement to negotiate, but it was an express obligation which was part of a complex agreement drafted by sophisticated lawyers.

²⁰⁸ [2013] EWCA Civ 200; in this decision Jackson, LJ, of the Court of Appeal stated that the obligation under the contract of good faith was in relation to two specified aims set out in a specific clause and that no good faith obligation applied to any other aspects.

²⁰⁹ Summers, 2000, at 135–136, but at the same time noting that there are situations where the good faith obligation is applicable even during the negotiation stage.

²¹⁰ See Summers, 2000, at 135, footnote 190.

²¹¹ 2013 WL 2303303 (Del.Supr. May 24, 2013). The Delaware Supreme Court decided that a letter of intent in that case was an enforceable contract and gave the claimant the right to recover full contract damages. The text of the letter of intent in question was that “The parties will negotiate in good faith with the intention of executing a definitive

USA, but one has to bear in mind that other courts might have taken a different view. It has also been asserted that after preliminary agreements have been entered into, and depending on their wording, there might exist an obligation of ‘good faith’ or ‘fair dealing’ to continue the negotiations in order to conclude the final contract.²¹² However, the case law is diversified and varies between the states.

In the Nordic countries, good faith may be seen as a cornerstone of all contracting including performance and enforcement of contracts, even though it seems that Nordic legal scholars during recent decades have been more interested in discussing the so called loyalty principle. This loyalty principle is nevertheless often compared with good faith or good faith and fair dealing in an international context,²¹³ although these concepts may theoretically be held each to have their own dimensions.

From a business acquisition perspective it is relevant to notice that the loyalty principle has been seen as reflected in other obligations such as disclosure and information obligations, obligations to give notice of complaint, cooperation obligations and a general requirement for honest business practice.²¹⁴ However, it is just as important to note with regard to business acquisitions that not only has this loyalty principle materialized in different kinds of obligations, but this same principle has been given a more expansive meaning. In broad terms, the principle means that one party is obliged to take into account the other party’s interests; the parties are not allowed to use their rights in a way that is out of proportion when the other party’s interests are taken into account, and one party might have to accept adjustment of an agreement to the benefit of the other party.²¹⁵ Additionally, the parties are expected to act loyally even during negotiations.²¹⁶ It has also been held that the loyalty obligation might be seen as emanating gradually or becoming stronger during the negotiations leading up to the contract.²¹⁷ However, parties of equal strength may be expected to look out for their own interests. The parties may still make a ‘good deal’ from their own

License Agreement in accordance with the terms set forth in the License Agreement Terms Sheet.” The letter of intent as such had been marked on every page ‘non-binding terms’. The License Agreement Terms Sheet was very detailed and the party trying to walk away tried, according to the court, to change material terms, which was not regarded as in line with the good faith obligation under the letter of intent. See further Perillo, 2004, at 35.

²¹² See e.g. Farnsworth, who used the term ‘fair dealing’ with regard to some preliminary agreements, Farnsworth, 1987, at 285–286. See also Schwartz and Scott, 2007, at 664, where they said that if the parties have made a preliminary agreement and agreed upon certain terms, but left other terms open, the parties should negotiate in ‘good faith’ on the open terms. They described this statement as an “emerging rule”.

²¹³ Lehtinen, 2006, at 80; Flodgren and Runesson, 2015, at 44 and Giertsen, 2014, at 11.

²¹⁴ For example Johan Bärlund analyzed the concept of giving notice of complaints based upon other principles such as the loyalty principle, Bärlund, 2002, at 487–496. See also Ämmälä, 1994, at 25–29, who described the loyalty obligation as containing many different aspects and situations e.g. co-operation obligations and information obligations. The co-operation aspect, which can be seen as part of the loyalty principle, is confirmed in §50 of the Finnish, Swedish and Norwegian Sale of Goods Acts, which requires that a buyer must reasonably cooperate in order for the seller to be able to fulfill the contract.

²¹⁵ Munukka, 2007, at 12 and at 459 and Simonsen, 1997, at 160–161.

²¹⁶ See e.g. Häyhä, 1996, at 315, where he discussed the loyalty principle in relation to general contract law and accepted the pre-contractual loyalty aspect saying e.g. that the loyalty principle has been regarded as having an impact even before a binding contract has emerged, especially with regard to disclosure matters. On the other hand a somewhat more reserved opinion has been proposed by Christina Ramberg, namely that the starting point is that there is no general loyalty obligation during negotiations, but there are exceptions. Ramberg, 2013, at 523.

²¹⁷ Bryde Andersen, 2005, at 115–116; Munukka, 2007, at 422 and Hemmo, I, 2007, at 211.

perspective and in that sense they have freedom to negotiate, but they should not totally ignore or unduly suppress the interests and rights of the other party.²¹⁸

The loyalty principle has not necessarily always explicitly been referred to in Nordic court decisions, but it may be seen as reflected in some decisions, although those decisions might refer to good business practice and honest behavior including justifiable or reasonable reliance upon the actions and statements of the negotiating parties.²¹⁹ Another noteworthy comment is that the strength of the loyalty principle and its application in different cases show differences between the Nordic countries.²²⁰

As already noted, in the Nordic countries considerable interest has been shown by legal scholars towards the so called loyalty principle, whether discussed as a loyalty obligation or as a part of the fairness principle; indeed, the loyalty principle has received wide recognition as a general contractual principle.²²¹ There are similarities between the principle of fairness and the concept of loyalty: for example, Jori Munukka used the requirement of loyalty to comprise nearby concepts such as fairness and misuse of legal rights added to by the loyalty obligation.²²² Good faith and

²¹⁸ von Herten, 1983, at 229; Ramberg and Ramberg, 2014, at 67; Taxell, 1972 at 80; Pöyhönen, 1988, at 19; Häyhä, 1996, at 315; Wilhelmsson, 2008, at 25; Sund-Norrgård, 2011; Munukka, 2007; Hultmark, 1992, at 104; Ramberg and Ramberg, 2010, at 37; Hagström, 2011, at 77–79; Buskerud Christoffersen, 2008, at 37–38 and at 128; Hemmo, I, 2007, at 211 and Bryde Andersen, 2005, at 116.

²¹⁹ The Danish Supreme Court mentioned different aspects in its decision in U 1981.300 H, where the court applied i.a. the loyalty principle when it decided whether or not a surety possessor had to give up a surety and instead receive a bank guarantee; the Finnish Supreme Court has identified aspects to be considered as not misleading another party, justified reliance based on the other party's actions or statements, see KKO 1999:48 and KKO 2009:45. The duty of loyalty was not explicitly mentioned in either case, but was mentioned in KKO 1993:130 and in KKO 2007:72; the Norwegian Supreme Court has actually mentioned the duty of loyalty e.g. in Rt. 2014.100, see also Rt. 1998.946; Different aspects have also been considered by the Swedish Supreme Court. For example in NJA 1978.147, where the parties had reached an oral agreement about certain premises which were to be remodeled or renovated to meet the needs of the party who was going to establish a grocery store there and after remodeling/renovation was going to lease or purchase the premises. The financial conditions were not agreed upon. The party remodeling claimed damages based on the *culpa in contrahendo* principle. The Supreme Court regarded the oral agreement as having caused an obligation for the parties to cooperate and take into consideration each other's interest. In other words a duty of loyalty was found. Another Swedish case is NJA 1990.745, where a company had an option to conclude a final license agreement on certain rights to a vacuum pump and where the company started to negotiate with an entrepreneur about the right to distribute such pumps. The company and the entrepreneur started to cooperate prior to the company having obtained the final license right for distribution of the pumps aiming at concluding a final exclusive distribution contract, once the final license contract had been entered into by the company. Even though the final license contract was entered into, the company did not conclude a final distribution contract with the other party, who claimed damages based on *dolus* or *culpa in contrahendo*. The Supreme Court did not find that a binding document or even a letter of intent existed regarding a final contract. The Supreme Court found that the negotiations had gone so far that the company had a certain obligation on the company's behalf to take into consideration the other party's interest. In other words it may be understood that the court regarded a certain loyalty obligation as having emerged at that point in time. The Supreme Court found that at a certain point in the negotiations, both parties must have realized that there were many uncertain factors affecting the possibility of a final written contract. The company should have informed the other party immediately when certain circumstances had appeared which made a final contract not acceptable, but their delay in informing – considering that during such delay the other party did not incur any costs – did not justify responsibility for damages.

²²⁰ Jori Munukka has e.g. claimed that the duty of loyalty is often referred to by Norwegian courts and in literature and that it is also quite common that reference is made to the duty of loyalty in Denmark and Finland, while in Swedish the courts do not refer to the duty of loyalty as often, especially not the Swedish Supreme court. However, Munukka also notes that the duty of loyalty is accepted by all the Nordic countries. Munukka, 2015, at 208 and at 215.

²²¹ Sund-Norrgård, 2011, at 58; Hov and Høgberg, 2009, at 41–42; Gomard, 2006, at 48 and Munukka, 2007, at 61.

²²² Munukka, 2007, at 73. It may also be noted that Jori Munukka asserted that the contractual loyalty principle may be seen as a fundamental principle and criminal sanctions as giving an additional defense for actions that are detrimental to society. See Munukka, 2007, at 87

loyalty as part of general contract law can be seen as part of the general fairness principle permeating Nordic contract law. It is, however, not only a question of contract law, as the whole concept of justice and fairness permeated the Nordic legal system at an early stage and may be regarded as one of the bases for the Nordic welfare state.²²³

Fairness has been perceived quite broadly in the Nordic countries and it is not mainly used in a procedural sense as in the common law countries.²²⁴ Fairness appears in legislation, although not necessarily denominated as such. For example, when legal acts are regarded as unfair the Nordic Contract Acts provide remedies based on the concept of an act being ‘unreasonable’, as further stipulated in Section 36 of the Nordic Contract Act. This could be compared with the US doctrine of unconscionable contracts. Section 36 of the Finnish, Norwegian and Swedish Contract Act mentions specifically that due consideration should be given to the position of the parties when evaluating the unreasonableness of a legal act. When evaluating the position of the parties, their professionalism and economic strength as well as to what extent freedom of contract is actually prevailing, have been mentioned as elements which should be considered.²²⁵ These are important aspects when considering business acquisitions between equally strong parties and having recourse to Section 36 in such transactions would not be an easy task.²²⁶

²²³ Mononen, 2001, at 66. Mononen made a deep analysis about the different nuances and structures of justice. He asserted that an important part of the justice concept is the principle of protecting the weaker party and that the concept has had an impact on all sectors of activity including the business sector with established requirements as to good trade custom/practice.

²²⁴ Thomas Wilhelmsson summarized elements of the fairness concept as follows:

- A party should not be able to obtain unjust enrichment at the expense of the other party.
- A party should not be able to reserve rights that would unduly endanger the basic social security of the other party.
- The weaker party to an agreement should not be put in a situation of depending on the stronger party’s absolute discretion.
- The freedom of the weaker party should not be circumscribed for an unjustifiably long time or materially by an agreement.
- An agreement should not unjustifiably interfere with the privacy of a party.
- An agreed remedy may not be unduly severe in relation to the nature of the contractual breach.
- The stronger party should not be given too broad rights to free itself from the consequences of contractual breach.
- There is no right to unjustifiably weaken the possibilities of a party to obtain legal protection.
- The parties cannot be treated differently in an agreement based on a manner which is not generally acceptable.

Wilhelmsson did not claim that these are the only guidelines, but they give an indication as to how fairness can be perceived. Wilhelmsson, 2008, at 217. The above is a free translation of the text in Finnish.

Juha Karhu (former Pöyhönen) actually gave the fairness principle a *prima facie* status in contract interpretation. Pöyhönen, 1988, at 245–246.

²²⁵ See e.g. Hemmo, II, 2012, at 64–71 and Bruserud, 2015B, at 71. See further the Finnish Government Bill (HE 247/1981) at 14 which states that “... The knowledge and skill of the parties and the economic relations are circumstances that shall be taken into account. In case the parties, who are economically independent of each other and have the capacity to bear responsibility, have had time to familiarize themselves with the matter and enter into a contract, a material imbalance should be existing before an intervention based on the general adjustment clause.”

²²⁶ See Mads Bryde Andersen, 2005, at 440, asserting restrictive use of §36 in commercial contractual relationships under Danish law. See also Lyng Andersen, 2014, at 260 and at 264, who concurred with Bryde Andersen’s opinion as to limited use in purely commercial relationships, but also stated that it is not *per se* excluded. As to Norway see e.g. Giertsen, 2014, at 230–231, who made similar comments i.e. §36 may be applied even to contracts between commercial parties, but the threshold for application is high. Johan Gierten also pointed out that the position of professional parties may vary substantially and that also has an effect on whether the section would be applied or not. As to Sweden, see e.g. Munukka, 2007, at 55 and at 58, who said that §36 has been applied less in commercial contractual relationships, but Jori Munukka made a remark that especially §36 has had an impact on the general perception of a loyalty obligation in contractual relationships. See also Herman Bruserud who noted that in terms of commercial dealings between professional parties, application of §36 in case of changed circumstances is not a very realistic option. Bruserud, 2015B, at 74. The Finnish Supreme Court (KKO 2008:77) in its decision in a commercial

As already noted, the UNIDROIT Principles use the concept ‘bad faith’ instead of good faith when stipulating about negotiations. As to other international conventions, the CISG, which has not been ratified by the UK, only deals with ‘good faith’ in connection with the interpretation of the Convention.²²⁷ The European PECL contains a provision on a general principle of good faith and fair dealing in contracts.²²⁸ This may be seen as an indication of the diversified approach to good faith in different European states.

Good faith, loyalty, fairness and similar concepts are vague and discussions are often highly theoretical. One has to review case law and even so the contents of abstract principles when set in court practice will be heavily dependent on the factual circumstances in each case. The parties to domestic and cross-border acquisitions should nevertheless acknowledge the existence and the possible impact of these principles on their contracting and on the possible final, written contract.²²⁹

2.2.3 Doctrines affecting the *pacta sunt servanda* principle

The binding force of agreements that is the *pacta sunt servanda* principle is recognized in the different jurisdictions.²³⁰ The principle is not absolute and, as discussed above, the courts both in the USA and in the Nordic countries may adjust or refrain from enforcing contracts,²³¹ although the courts may be less inclined to do so when the question is about commercial contracts between business parties. From a business acquisition perspective the *pacta sunt servanda* principle is important, as it ensures that the parties may rely upon their contracts, which thus in turn increases the willingness of the parties to become engaged in sometimes very expensive and demanding transactions.

The *pacta sunt servanda* principle has, however, been affected by a development towards perceiving agreements and contracts not so much as one-off transactions but rather as relational and even emerging gradually. The traditional concepts of agreements and contracts have been criticized as being too rigid and not appreciating the need for subsequent changes unless the means for changes have been agreed in the contract by the parties. The idea of contracts as processes has

case referred to §36, although the matter was about the annulment of an arbitral award. Situations where one of the commercial parties is heavily dependent on the other e.g. the other party is a major client and other clients of the same caliber are hard to find, have been used as examples where §36 might apply. On the other hand, see e.g. Wilhelmsson, 2008, at 129–130, where he described several cases where the Finnish Supreme Court has rejected application of §36 when the parties have been regarded as being of equal strength e.g. KKO 1985 II 36, KKO 1986 II 97, KKO 1993:68 and KKO 2001:27.

²²⁷ CISG, Chapter II Art. 7 (1), which states in connection with interpretation of the convention that such interpretation should promote uniformity and the observance of good faith in international trade.

²²⁸ PECL, Chapter 1, §2, Art. 1:201(1) (formerly Art. 1:106 (1)) provides that “Each party must act in accordance with good faith and fair dealing.”

²²⁹ See e.g. comment by Giuditta Cordero-Moss, i.a. that the “duty of loyalty (or principle of good faith)” may have a material impact on contracts governed by e.g. Norwegian law. Cordero-Moss, 2016, at 1317.

²³⁰ Farnsworth, II, 2004, at 584; Treitel, 2014, at 1 and Restatement of Nordic Contract Law, 2016, at 69–70.

²³¹ See previous subchapter.

been presented by the Relational Theory of Contract School,²³² as well as by Nordic scholars wanting to abolish the common law adverse positioning of parties to one where the co-operative aspects are put in a primary position or where reliance and fairness are introduced as primary elements of contracting and contracts.²³³

With regard to the binding force of agreements, the Law and Economics school has on the other hand asserted that contracts should be enforceable as long as they reflect the parties' intention of being bound by their agreements at the time of concluding them.²³⁴ This may be seen as a rather opportunistic approach, but one has to bear in mind that the driving force for Law and Economics is to enhance efficiency.²³⁵ In the name of efficiency,²³⁶ at least some Law and Economics scholars have maintained that breach of contract is not as such a despicable act but acceptable subject to the breach resulting in lower costs and compensation than continuing the contract.²³⁷ As such, it has been claimed that US contract law in general is more prone to accept the 'efficient breach' theory, thus in fact modifying the *pacta sunt servanda* principle.²³⁸ These kinds of views might be of more interest if the discussion were focused on long-term contracts with a duration of several years, but the Law and Economics school has as a matter of fact focused very much on discrete contracts. Ian Macneil criticized the school of Law and Economics and its focus on discrete contracts as model contracts covering all contracts.²³⁹ Macneil contended that the Law and Economics school does not take into account the "...co-operative, relational phenomena" typical of many contracts.²⁴⁰

Business acquisition contracts are nevertheless – in comparison with long-term contracts – more discrete, as the main performance takes place at signing or at closing. The rights and obligations

²³² The school was based on initial comments by Karl Llewellyn and followed up by Stewart Macauley and Ian Macneil. Macneil was focused on the relationship between the parties and not so much on the contract as a one-off transaction, where courts and arbitrators afterwards have to interpret a contract based on the situation at the time of concluding the contract. He defended contracts as developing cooperative relations or – as it has also been described – as relational contracting. The relational contract theory has mainly been discussed and developed regarding long-term contracts, although the theory does not *per se* exclude discrete i.e. short term (punctual) contracts. See e.g. Macneil and Campbell, 2001/2010, at 9–27.

²³³ See e.g. Zacharias Votinius, 2004, who in general advocated for the parties being 'friends' rather than 'enemies'. See also Pöyhönen, 1988, at 193, who put fairness in a *prima facie* position in contractual relationships. See further Pöyhönen, 2000, at 140–144 and at 159–184, where he elaborated on the different elements of agreements as processes regarding which he emphasized four elements necessary when evaluating them i.e. the functional environment, the overall arrangement, the parties, and risk positions connected to the arrangement. Also note comment by Jori Munukka, that one reason why the loyalty obligation has become more respected in the Nordic countries is a trend to see contractual relationships more as relations than as promises. Munukka, 2007, at 464.

²³⁴ Cooter and Ulen, 2000, at 188.

²³⁵ Efficiency has been defined in many ways e.g. the Pareto form of efficiency, which has also been developed into something called the Kaldor-Hicks form of efficiency. See Posner, 2014, at 34. See also as to definitions Cooter and Ulen, 2000, at 12, describing Pareto efficiency as "A particular situation is said to be Pareto efficient if it is impossible to change it so as to make at least one person better off (in his own estimation) without making another person worse off (again, in his own estimation)." Cooter and Ulen, 2000, at 43–44 described the Kaldor-Hicks form of efficiency, which in their opinion is an improvement on the Pareto form of efficiency, as "This is an attempt to surmount the restriction of the Pareto criterion that only those changes are recommended in which at least one person is made better off and no one is made worse off. That criterion requires that gainers explicitly compensate losers in any change. If there is no explicit payment, losers can veto any change. This has clear disadvantages as a guide to public policy."

²³⁶ This form of efficiency focuses on the transaction costs, which were an integral part of Coase theory. This theory has many dimensions and has been described in a number of ways, see e.g. Cooter and Ulen, 2000, at 82–98.

²³⁷ See e.g. Cooter and Ulen, 2000, at 238.

²³⁸ See e.g. Carlson, 2004, at 153.

²³⁹ Macneil and Campbell, 2001/2010, at 29–30.

²⁴⁰ Macneil and Campbell, 2001/2010, at 29.

of the parties customarily survive signing and closing and additional undertakings such as payment of purchase price and non-compete obligations might be in force after signing or closing. Such rights and obligations have in fact been paid for and they are part of the totality of the deal and so are not in that sense independent obligations. The parties may be assumed to perform their obligations as set out in the contract, where they have had the possibility of taking into account that the circumstances under which they have agreed may change. Inability to rely upon contracts would put the whole functioning of the merger and acquisition market at risk.

Relational Contract Theory and Law and Economics theory bear more relevance when reviewing possible, long-term contracts made in connection with business acquisition contracts, for example service, supply or shareholders' contracts. However, these contracts are often quite independent of the actual business acquisition contract as to duration and future performance and thus are not the focus of this dissertation. Transaction costs do affect decisions of parties in the process of contracting business acquisitions, but their impact and thereto related theories of Law and Economics have not been in the focus here.

Looking at more mainstream or traditional contract law theories and doctrines affecting the *pacta sunt servanda* principle, it seems that such theories and doctrines actually are influenced by fairness and reasonableness aspects, although this might not have been explicitly said or acknowledged. If enforcement of a contract becomes too onerous due to changed circumstances, or the whole contract and its enforcement is based on mistakes, several doctrines become applicable and affect the *pacta sunt servanda* principle. In the common law countries the binding force of contracts is influenced *inter alia* by the doctrine of frustration, by the doctrines of impossibility and impracticability and by the doctrine of mistake. The applicability of these doctrines varies between the two common law countries²⁴¹ and in any case these doctrines are merely mentioned, as the doctrine of mistake is more relevant when discussing business acquisitions. The other doctrines have rarely been applied in either of the common law jurisdictions in terms of the kind of contracts discussed in this dissertation.²⁴²

In the common law jurisdictions mistake may lead to avoidance of the *pacta sunt servanda* principle. Under English law a contract may be void or voidable due to the mistake of one or both parties. Richard Stone described the different forms of mistake as follows: Common mistake (for

²⁴¹ Treitel, 2014, at 7 and Knapp, 1996, at 222. In the US this is generally referred to as the doctrine of frustration and the doctrine of impracticability. See Farnsworth, II, 2004, at 585–586 and Knapp, 1996, at 222–223. The doctrine of impracticability is less harsh than the doctrine of impossibility. See Farnsworth, II, 2004, at 636–637. It should also be noted that the doctrine of impracticability has been reflected in the Restatement (Second). §261 of the Restatement (Second) refers to “discharge by supervening impracticability”, which may be compared with frustration of purpose, which is stipulated for in §265 which refers to “discharge by supervening frustration.” §2–615 (a) of the UCC contains explicit language as to the possibility of discharge by impracticability. English law recognizes impossibility as a doctrine, but it does not always mean that the contract would be discharged. See Treitel, 2014, at 69. The doctrine of impracticability is even to a much lesser degree accepted under English law. See Treitel, 2014, at 274–283, explaining why impracticability is not generally a “ground for discharge,” but he also describes situations where the doctrine may be applied. Treitel, 2014, at 283–303.

²⁴² Treitel, 2014, at 312–313 and at 343.

example “subject matter did not exist at the time of the contract,” “performance is physically impossible or will be essentially different from what was agreed”), mutual mistake (“parties seem to be in agreement, but are in fact not”) and unilateral mistake (“one party takes advantage of the other’s mistake – unlikely to apply to ‘face-to-face’ contracts except in exceptional circumstances”).²⁴³ Richard Stone also noted that mistake is closely related to questions of offer and acceptance, misrepresentation and frustration.²⁴⁴ When the question is about a mistake made by only one party with regard to the contractual terms, that mistake may bear an impact providing the other party knew about it.²⁴⁵ The English approach in general is restrictive in terms of taking into account the conduct of the parties after a contract has been concluded.²⁴⁶ For example, in *James Miller and Partners Ltd v Whitworth Street Estates (Manchester) Ltd*, the House of Lords held that subsequent conduct after the contract has been entered into would not be reviewed unless the conduct amounted to a variation of the contract or gave the right to estoppel.²⁴⁷

In the USA, Section 151 of the Restatement (Second) defines mistake as “... a belief that is not in accord with the facts.” Mistake by both parties regarding some basic assumptions may make a contract voidable if it has a “material effect on the agreed exchange of performances.”²⁴⁸ Even mistake by one party may make a contract voidable, but the mistake should in that case lead to a situation where enforcement of the contract would be unconscionable, or the other party had reason to know of the mistake or his fault caused the mistake.²⁴⁹ A party may nevertheless be regarded as bearing the risk for a mistake, whether mutual or unilateral, for example due to a contract, due to his own negligence or it may be allocated to him by the court based on a reasonableness consideration.²⁵⁰ Notwithstanding these doctrines, the *pacta sunt servanda* principle is very strong²⁵¹

In the Nordic countries, the Nordic Contract Acts deal with the question of mistake in Section 32, which is a fairly technical provision. Section 32 basically provides that a statement of intent or

²⁴³ Stone, 2011, at 296.

²⁴⁴ Stone, 2011, at 294.

²⁴⁵ Beale, Chitty I, 2012, at 526–534. Beale also discussed unilateral mistakes which the other party should have known about, but the situation is by no means clear under English law. See *Chartbrook Ltd v Persimmon Homes Ltd* [2009] 1 AC 1101 and *Daventry District Council v. Daventry and District Housing Ltd* [2011] EWCA Civ 1153, [2012] 1 W.L.R. 1333.

²⁴⁶ Lewison, 2004, at 89 and 91, who asserted that in general a court cannot take into account the subsequent conduct of the parties to interpret a written agreement, but this is not applicable if the agreement is only partly written, where subsequent conduct may be examined to find out what the full terms are.

²⁴⁷ [1979] A.C. 583. Lord Reid commented: “I must say that I had thought it now well settled that it is not legitimate to use as an aid in the construction of the contract anything which the parties said or did after it was made. Otherwise one might have the result that a contract meant one thing the day it was signed, but by reason of subsequent events meant something different a month or a year later.”

²⁴⁸ §152 (1) of the Restatement (Second) says that “Where a mistake of both parties at the time of contract was made as to a basic assumption on which the contract was made had a material effect on the agreed exchange of performances, the contract is voidable by the adversely affected party unless he bears the risk of the mistake under the rule stated in §154.”

²⁴⁹ §153 of the Restatement (Second).

²⁵⁰ §154 of the Restatement (Second).

²⁵¹ Farnsworth, II, 2004, at 584, where he i.a. said that “... with the general rule that duties imposed by contract are absolute.”

will is not binding if there is a misprint or other clerical error which makes the statement different from what the person intended and the recipient knew or should have known of the mistake. The Section further deals specifically with errors in statements forwarded by telegram or orally through a messenger, in which cases the giver of the statement must notify the recipient of the error after he becomes aware of it, with the risk of the statement otherwise becoming binding provided the recipient is in good faith.²⁵² In other words this Section deals with different kinds of technical explanation or statement mistakes. In order for the mistake to lead to invalidity it is required that it is actually the mistake by the giver and that the result is different from what was intended (objectively) and the recipient when receiving the statement was in fact in some kind of bad faith (knew or should have known of the mistake). If the mistake is due to the error of a third person transmitting the statement, then there is an obligation to act on behalf of the giver of the statement when he becomes aware of it. However, in this case even the good faith of the recipient would not help, unless of course the original giver of the statement does not give notice about the mistake. The question of mistake is much wider than has been regulated in Section 32, as we have the whole issue of mistake in relation to the motives or intention of the parties.²⁵³

In the Nordic countries, if a substantial change has occurred in the circumstances in general, one could refer to the unreasonableness aspects provided for in Section 36 of the Nordic Contract Acts, but reference might also be made to the doctrine of failed assumptions especially in Sweden, Denmark and Norway or by reference to general fairness aspects. These justifications are often interwoven and there are not necessarily very sharp borders. Section 36 specifically states that contracts may also be adjusted on the basis of subsequent circumstances. As the parties presumably bear the risk of possible changes in the environment affecting their contractual relationship, this also means that possible changes in the environment and effects on their contract will not be relevant for a judge, unless those changes are of a material nature and they were not foreseeable. It should further be noted that changes might have an impact not only in cases where these were due to changed circumstances after the contract was entered into, but the consequences might appear after the contract was entered into, although the circumstances existed already at the date of entry into the contract.²⁵⁴ Using the rules and principles regarding changed circumstances should be done with utmost care in business acquisitions. During negotiations and even during the performance

²⁵² The wording of the section in the respective Nordic Contract Acts may be found in Appendix 1, at 262–263 of the book *The Nordic Contracts Act*, 2015.

²⁵³ See e.g. Grönfors, 1984, at 197, maintaining that the question of mistakes in practice is often less the question of wrong writing or wrong utterance, but a question of what the party actually meant. (If a party meant something other than what is stated in the contract or what he said to the other party, he has to prove it and the evidence would be analyzed based on an objective approach. In this connection the reasonable reliance of the other party would be taken into account as well as the other party's possible bad faith.). See also Lehrberg, 1989, p. 109, asserting that the question of mistake with regard to legislation should be analyzed based on the doctrine of failed assumptions. The Nordic Contract Acts further in §40 provides for situations where notices by parties due to failure by postal, telegraphic or similar means of delivery are delayed and that such delays shall not be held in prejudice against such party. The wording of the section in the respective Nordic Contract Acts may be found in Appendix 1, at 271–273 of the book *The Nordic Contracts Act*, 2015.

²⁵⁴ Taxell, 1972, at 150.

of business acquisition contracts the circumstances may obviously change, even quite fundamentally. However, business acquisition contracts, especially in a cross-border context, are mostly heavily negotiated and detailed contracts generally reflect a negotiated and agreed risk balance between the parties, which should not be easily deviated from. Furthermore, in acquisitions between equally strong business parties, the parties may be assumed to have the competence to comprehend and analyze the risks involved in concluding acquisition contracts. Parties having signed such a contract have furthermore created mutual expectations that they are going to fulfil their obligations according to the contractual provisions.²⁵⁵

Another theory which could affect the *pacta sunt servanda* principle is the doctrine of failed assumptions,²⁵⁶ which could be compared with the common law doctrine of frustration of purpose. The doctrine of failed assumptions pertains to situations where a party claims that he has entered into the contract under completely different assumptions. The assumptions may be referred to and applied in a number of situations. Assumptions may have an effect on court decisions when courts interpret contracts and assumptions are relevant when analyzing whether a valid contract has actually emerged or not.²⁵⁷ The doctrine of failed assumptions has also been seen as giving more extensive possibilities for the parties to withdraw from an agreement than the invalidity provisions of the Nordic Contracts Act.²⁵⁸ It has been held that assumptions according to the doctrine of failed assumptions do not always have to be consciously made or adopted and it has been described that this theory deals with ignorance, mistakes and changed circumstances.²⁵⁹ Mads Bryde Andersen described the doctrine of failed assumptions as dealing with the question whether there should be consequences if a person giving a promise has done so under the wrong assumptions.²⁶⁰ Bryde Andersen categorized the possible situations into three and when looking at this description it seems to be very near the discussion about how implied terms are discussed in the common law countries, as he referred to statutes, mutual intention, and mistakes at the time of contracting.²⁶¹ Even if resorting to the doctrine of failed assumptions Bryde Andersen maintained that the starting point is that a promise/an agreement is binding and that mistakes are at the risk of the promisor. This goes for mistakes as well as situations where the circumstances change.²⁶²

As to Swedish law, Bert Lehrberg described the requirements for applicability of the doctrine of failed assumptions to be that the assumption must have been material and motivated the person to take the action, the assumption and its importance must have been visible/evident for the recipient

²⁵⁵ Similar comments by e.g. Knapp, 2013, at 343.

²⁵⁶ In Danish *forudsætningslæren*, in Finnish *edellytysoppi*, in Norwegian *forutsetningslæren* and in Swedish *förutsättningsläran*.

²⁵⁷ See e.g. discussion by Jo Hov and Alf Petter Høgberg. Hov and Høgberg, 2009, at 113 and at 426.

²⁵⁸ Lehrberg, 2014, at 247–248. See also NJA 1996:410, where the Swedish Supreme Court stated that the doctrine of failed assumptions may be regarded as complementing contract interpretation and the invalidity provisions of the Contract Act.

²⁵⁹ Lehrberg, 2006, at 200–201 and Lehrberg, 2014, at 249.

²⁶⁰ Bryde Andersen, 2005, at 63.

²⁶¹ Bryde Andersen, 2005, at 64. See subchapter 3.4.1.2 regarding discussion on implied terms.

²⁶² Bryde Andersen, 2005, at 415–416.

of the legal act (must have realized or should have realized the assumption and its importance) and relevance, that is, would the act have been taken if the knowledge had been there? Further, the mistaking party must be in good faith and must not himself have caused it.²⁶³

In Norway the doctrine of failed assumptions has strong support in the legal community, especially with regard to a party in good faith. Jo Hov and Alf Petter Høgberg contended that the following requirements must be met in order for the doctrine of failed assumptions to be applicable, that is, the assumption must be of a casuistic nature, and it must be visible, material and relevant.²⁶⁴ The way to analyze the assumptions would start with first analyzing whether a contract has emerged or not due to failing or mistaken assumptions. Mistaken assumptions should have been existent on entering into the agreement and failed assumptions describes situations where assumptions were correct when entering into the agreement but a later development means that the assumptions are no longer valid.²⁶⁵

The Nordic country taking the most critical approach to the doctrine of failed assumptions and its usefulness today is probably Finland, especially after Section 36 of the Contracts Act was adopted. For example, Thomas Wilhelmsson asserted that the doctrine of failed assumptions has lost some of its practical implications, as the same goals can be achieved by referring to Section 36.²⁶⁶ Mika Hemmo has claimed that the role of the doctrine of failed assumptions is limited as an independent basis for invalidity.²⁶⁷ The Finnish Supreme Court²⁶⁸ has held that a party bears the risk for an assumption which has not been expressly agreed upon when he has not examined the grounds for his assumptions.

Kurt Grönfors has also – with regard to Sweden – said that this theory should be applied rather cautiously when the question is about amending agreed matters.²⁶⁹ The Swedish Supreme Court has noted, for example, that the consequence when applying the doctrine of failed assumptions is partial or total invalidity or passivity.²⁷⁰ It seems that the differences as to the consequences whether a decision is based on the doctrine of failed assumptions or on Section 36 of the Nordic Contract Acts are not all that important.

²⁶³ Lehrberg, 1989, at 177–210, at 247–275 and at 329–372.

²⁶⁴ Hov and Høgberg, 2009, at 114 and at 427–428. They also asserted that the relevance of the assumption is not met, if e.g. a buyer does not profit as much as he thought, as such development would be at the buyer's own risk.

²⁶⁵ See Hov and Høgberg, 2009, at 113–114. Geir Woxholth divided the parties' assumptions into individual and those of a more general nature related to contract interpretation in general, those under §36 of the Norwegian Contract Act and in relation to the doctrine of failed assumptions. In relation to the doctrine, Woxholth mentioned that it is above all the individual assumptions that are relevant and that in these cases, failing assumptions generally lead to the contract ceasing to exist. See Woxholth, 2007, at 397 and at 421–422.

²⁶⁶ Wilhelmsson, 2008, at 137. Another highly critical Finnish legal scholar was Lars Erik Taxell. Taxell, 1972, at 153–154.

²⁶⁷ Hemmo, I, 2007, at 410.

²⁶⁸ KKO 2012:1.

²⁶⁹ Grönfors and Dotevall, 1995, at 210 and Grönfors and Dotevall, 2016, at 247.

²⁷⁰ NJA 1989:614.

Regardless of the doctrine of failed assumptions and Section 36 of the Nordic Contract Acts, it should be duly acknowledged that the presumption in the Nordic countries is that in commercial contracts between business parties the parties bear the risk of possible changes in the circumstances.²⁷¹ This is especially true with regard to changes that might make a contract less favorable than a party originally thought.²⁷² However, this presumption is not without exceptions. For example the Nordic Sale of Goods Acts provides that in case of delay on the seller's part and with regard to the buyer's request for performance, this may lead to a situation where a buyer cannot be successful in his request or possible claims for damages if the seller cannot – due to impossibility – fulfil the contract or if performance would require such sacrifices by the seller which are not reasonable in relation to the buyer's interest in the seller's performance.²⁷³ The wording is subject to interpretation and weighing between the parties' interests and all aspects will not be discussed here. Nevertheless, as a general remark it may be asserted, as has been done by Thomas Wilhelmsson, Leif Sevón and Pauliine Koskelo, that in these cases it is not sufficient that the sale would lead to losses for the seller, but the question is about a “radical” alteration in the economic basis, where the interests of the buyer have also to be taken into account.²⁷⁴ The question still remains, though, as to what amounts to a radical alteration and it is probably inevitable that such analysis would have to be based on the type of sale, the contract in question, and on court practice.

I submit that the essence of the freedom of contract and *pacta sunt servanda* principles should be emphasized in business acquisitions between equally strong business parties. This is based on the assumption that equally strong parties are acting out of their free will in business acquisitions and they should be able to comprehend and analyze the risks involved in concluding acquisition contracts and thus also stand behind their contracts. In general, if there are clear mutual mistakes, misleading or similar unacceptable behavior, these may have an effect on the terms and wording of business acquisition contracts, but otherwise the sanctity of the written contract should not be easily affected by assumptions or subsequent changes. The whole process of negotiating and contracting business acquisitions gives the parties ample possibilities to consider their assumptions, to examine the target, to negotiate and comment on the draft documentation, and to clarify possible ambiguities in connection with the draft documentation. The parties are responsible for ensuring that the contract reflects their intentions and that responsibility should not be limited by possible assumptions. Contracts may in many respects be seen as risk allocation documents and such risk allocation is reflected in the purchase price. It is not an overly harsh requirement that business

²⁷¹ Lindskog, 2015, at 326–327 and Bruserud, 2015B, at 64 and at 69, who rightly points out that the doctrine of failed assumptions and §36 are actually applied in exceptional cases, because in most cases there are no such changes which would justify adjustments.

²⁷² Lindskog, 2015, at 319–322 and Taxell, 1972, at 156.

²⁷³ §23 of the Finnish, Norwegian and Swedish Sale of Goods Act and §24 of the Danish Sale of Goods Act.

²⁷⁴ Wilhelmsson, Sevón and Koskelo, 2006, at 63 and in general at 59–64.

parties of equal strength should also consider possible subsequent changes after signing or closing and put a price on those changes depending on which of the parties bears the risk of that happening.

2.2.4 Systematic difference between contract law in the common law and Nordic jurisdictions

One special feature of contract law in the common law countries should be mentioned for the sake of completeness, although it is not of paramount interest for business acquisitions. This feature is that the common law countries have a dual contract law system, that is, the legal system has been divided into what is called the common law system and the equity system. The common law of contract was developed by judges over several hundred years²⁷⁵ and it has been said that equity was developed as a reaction to common law, because common law had become very rigid and offered just one remedy, in the shape of damages. In courts of equity, remedies other than damages could be awarded, such as specific performance.²⁷⁶ The law of equity, on the other hand, was criticized by common lawyers for example as being too unpredictable and too arbitrary.²⁷⁷ However, equity law also led eventually to the creation of precedents and standards so that by the 19th century equity case law and principles were claimed to have become no less rigid than common law.²⁷⁸ In England the Judicature Acts of 1873–1875 enabled equity courts and common law courts to handle both equity and common law. Nevertheless, the two forms of law, that is, equity and common law are still separate and when these two areas of law are in conflict with each other, equity prevails.²⁷⁹ As the USA shared the same legal system with England for centuries, the development of common law and equity affected both countries. Similarly as in the UK, in the USA it has been said the equity courts were established to “avoid the rigid strictures on relief imposed on common law courts.”²⁸⁰ On the other hand, it has been submitted that the flexibility connected with equitable relief has led to a diversity of awards.²⁸¹ The court system in the USA is different to the one in the UK and the Constitution gave the federal courts authority to ground their decisions based on common law and on equity.²⁸² However, bankruptcy courts are still regarded

²⁷⁵ See e.g. Atiyah and Smith, 2005, at 21, who maintained that “The common law of contract is not the product of any plan or conscious design. The cases on which the core of the law is based were decided one at a time by countless judges acting over an unbroken period stretching back nearly 800 years.” The quotation gives a splendid perspective as to the long way contract law has come from being a totally *ad hoc* based area of law to becoming a relatively well systematized and structured area in English law, although on the same page it was asserted that contract law is still “poorly structured, at least in relative terms.” According to a presentation by Catherine Elliott and Frances Quinn, the English system of common law has been seen as going back as far as the 11th century. Over two centuries the principle of *stare decisis* has been said to have been developed and by about 1250 there was “common law” in the whole of England, which would be applied consistently and was used to predict how the courts might decide in a particular case. Elliott and Quinn, 2012, at 10.

²⁷⁶ When parties took recourse to equity law, they addressed the king instead of – or actually one of – his ministers i.e. the chancellor. By 1474 the chancellor had started to make his own decisions, which eventually led to the establishment of the Court of Chancery. The common law courts only admitted written evidence up to the 16th century, but the chancellor also heard the parties in person. Elliott and Quinn, 2012, at 119.

²⁷⁷ Elliott and Quinn, 2012, at 120.

²⁷⁸ Elliott and Quinn, 2012, at 120–121.

²⁷⁹ Elliott and Quinn, 2012, at 121.

²⁸⁰ Burnham, 2002, at 241.

²⁸¹ Burnham, 2002, at 241.

²⁸² Constitution, Art. III, §2, Clause 1.

as courts of equity and also some of the states in the USA still have separate common law and equity law courts.²⁸³

The dual system of equity and common law may seem of less relevance for business acquisitions between equally strong business parties, but equity law has an impact even on business acquisitions, as equitable remedies are available for parties in contractual relationships. The equitable remedies of most relevance for business acquisitions are in the UK: ‘injunction’ (the defendant is ordered to do or not do something), ‘specific performance’ (a party has to fulfill an agreement), ‘rectification’ (the wording of a document is changed, as the original wording does not express the true intention of the parties thereto) and ‘rescission’ (restores the parties to the position they were in before the contract was signed).²⁸⁴ With regard to the USA, the following are noteworthy: ‘injunction’, ‘reformation/rescission, specific performance’ and ‘restitution’, which is not as such a specific equitable remedy, but closely connected thereto.²⁸⁵ Restitution has been described as a remedy for total breach of contract, whereby the injured party has the right to cancel the contract and also claim other remedies.²⁸⁶ With regard to restitution under English law, P.S. Atiyah has said that: “The law of restitution deals, on the face of it, with a heterogeneous collection of cases which themselves seem to have little more in common than the fact that one person is held obliged to restore or pay for some benefit, his liability is contractual, but if he has not done so, his liability is restitutionary.”²⁸⁷

The systematic difference relating to the duality in the UK and the USA concerning equity and common law is not exactly matched in the Nordic countries. The application of Nordic law has from time to time been described as pragmatic,²⁸⁸ where reasonableness and fairness are fundamental parts of contract law. It is tempting to compare the equity side of contract law with these basics. However, it should be noted that equity in the common law countries has also been

²⁸³ Such states are Delaware (the Chancery Court is an equity court), Mississippi, New Jersey, South Carolina and Tennessee.

²⁸⁴ Elliott and Quinn, 2012, at 122.

²⁸⁵ Burnham, 2002, at 241 and Perillo, 2004, at 621.

²⁸⁶ Perillo, 2004, at 623.

²⁸⁷ Atiyah, 1989, at 49. See also Stone, 2011 at 14–15, discussing civil liability based upon contract, tort and restitution, “The third element in the law of obligations – restitution – has been recognized much more recently as a separate head. The aim of the law of restitution is to prevent “unjust enrichment”. Thus, where a person has been paid money as a result of a mistake, the law of restitution provides the means by which it may be recovered. There is no need for the situation to involve an exchange transaction, as in contract, or for the behavior of the person who has been unjustly enriched to fall below an accepted standard, as in tort. Restitution has links with contract, however, in that it is not infrequently used in situations where the parties have been attempting to make a contract, but this has for some reason failed.”

²⁸⁸ Bryde Andersen and Runesson, 2015, at 16 and Bogdan, 2012, at 18, footnote 14, who described the reason for Nordic pragmatism as an “aversion towards conceptualism.” By pragmatism may be understood different matters and e.g. Jukka Mähönen has described pragmatism as including three basic principles; contextualism, anti-foundationalism, and focus on aim, Mähönen, 2002, at 259. Mähönen found that in legal pragmatism the aim is to find the best result from a current and future perspective. Mähönen, 2002, at 260. He further emphasized that in legal decision-making, the law has to be complemented by taking into account economic, psychological, philosophical and historical aspects. Mähönen, 2002, at 264 and at 266–267. See also Letto-Vanamo, 2009, at 400–401, who points out that Finnish research on prevailing law is highly theoretical, much focused on concepts and principles, which is not done to the same extent in the other Nordic countries and that the positions in the other Nordic countries may from a Finnish point of view sometimes seem very pragmatic.

identified as a specific set of legal principles²⁸⁹ and that equity should not be understood as being or implying a general concept of fairness.²⁹⁰ Furthermore, as just described, the application of equity or common law may lead to different remedies in the case of disputes and indeed separate equity courts still exist in the USA. It would therefore not be correct to compare these two branches of contract law with the Nordic general contractual principles of reasonableness and fairness. In terms of remedies classified as equitable remedies in the common law countries, similar remedies exist in the Nordic countries. For example, specific performance and injunctions²⁹¹ are applicable remedies. However, specific performance is not an exception but could rather be described as a general remedy based on contract law.²⁹² Furthermore, rescission is one form of cancellation of contract,²⁹³ which is also possible under Nordic law.

2.2.5 Pre-requisites for enforceable agreements

As noted in Chapter 1, business acquisitions are finalized by parties entering into written contracts, but such transactions are often preceded by extensive negotiations. Negotiations may raise questions as to when the parties have actually reached a conclusive agreement. Therefore, it is necessary to comment on contemporary views as to how enforceable agreements are perceived to come into existence, regardless of whether a comprehensive written contract is involved or not.

In the UK it has been held that the requirements for an enforceable agreement to come into existence are that there has to be intent by the parties to create a legal relationship, there should be consideration (exchange of/for something) and there should be an offer and a matching acceptance.²⁹⁴ English courts have, however, also recognized that there are agreements which are not necessarily made by an exchange of offer and acceptance.²⁹⁵ Furthermore, in English practice the presumption is that a transaction between commercial parties, involves intent to create legal

²⁸⁹ Elliott and Quinn, 2012, at 121.

²⁹⁰ Fletcher and Sheppard, 2005, at 52.

²⁹¹ For example, a seller concerned that a buyer may try to avoid his payment obligations by hiding property could ask for an injunction by a court. Such measures have been regulated in the Judiciary Codes in the Nordic countries. Finland – Chapter 7 of the Judiciary Code (1.1.1734/4, as amended); Sweden – Part II, Chapter 15 of the Judiciary Code (1942:740, as amended); Denmark – Part IV of the Administration of Justice Act (1101 of 22 September 2017); Norway – Part VII of the Act relating to mediation and procedures in civil disputes (2005 – 06 – 17 – 90).

²⁹² Specific performance in the Nordic countries is not very controversial, as it is a consequence of the parties being obliged to perform under a contract. See e.g. Bryde Andersen, 2005, at 107–111; Hemmo, II, 2011, at 193; Hagstrøm and Aarbakke, 2004, at 362 and Ramberg and Ramberg, 2016, at 225–226. Mika Hemmo has suggested that specific performance is regarded in Finland as part of general doctrines. Hemmo, II, 2011, at 195. As to the applicability of this statement to all the Nordic countries, see e.g. Restatement of Nordic Contract Law, 2016, at 260. A party's right to claim specific performance has been described in §8-6, at 259 of the Restatement of Nordic Contract Law, 2016, as existing except when "(a) performance would be illegal or impossible, (b) performance would cause the seller unreasonable expense or effort in relation to the buyer's interest in having the contract performed, or (c) performance involves a considerable amount of work of a personal character." A party seeking specific performance needs a decision from a court or a preliminary intervention by the executing authorities. See e.g. Hagstrøm and Aarbakke, 2004, at 373.

²⁹³ Cancellation is further discussed in Chapter 4.

²⁹⁴ Stone, 2013, at 34 and Macdonald and Atkins, 2014, at 8–9.

²⁹⁵ Macdonald and Atkins, 2014, at 8–9.

relations.²⁹⁶ If commercial parties want to avoid this presumption, they should include in their exchange of drafts, correspondence and the like the words ‘subject to contract’. This text would give a strong indication to the courts that the intention was not to create a legally binding and enforceable contract at that stage. However, it might not be sufficient, if the parties in fact can be regarded as having entered into a binding contract by their own actions.²⁹⁷ With regard to the pre-requisites for an enforceable agreement to come into existence, similar elements to those in the UK may be found in the USA, although the Restatement (Second) and the UCC use different terminology and have different definitions for contracts and agreements.²⁹⁸ The definitions focus on promises, bargains and mutual assents, but in fact the pre-requisites are similar to those in the UK, that is, intent to create a legal relationship, consideration (exchange of/for something) and existence of an offer and an acceptance (may be referred to as mutual assents). It has also been recognized that not all contracts are made in the form of offer and acceptance.²⁹⁹

In the common law countries – when the parties have negotiated and a party claims that the parties have reached an agreement – not only may the pre-requisites above be of relevance, but there are also other elements which a court would contemplate. If the agreement is too vague or incomplete to the extent that agreements on essential matters cannot be found, an agreement would not be regarded as existing.³⁰⁰ However, even if an agreement has been regarded as indefinite, sometimes a collateral contract may be found or an agreement may be enforceable even under lack of consideration by recourse to the doctrine of promissory estoppel.³⁰¹ If pre-contractual statements are regarded as promises which can be acted upon, such statements may be regarded as amounting to collateral contracts, which would lead to a situation where contractual remedies in the form of

²⁹⁶ Stone, 2013, at 146; McKendrick, 2012, at 282–283 and Macdonald and Atkins, 2014, at 84.

²⁹⁷ Lewison, 1979, at 455. See also Macdonald and Atkins, 2014, at 45–46, they discuss a recent court case: *RTS Flexible Systems Ltd v Molkerei Alois Müller GmbH & Co KG* [2010] UKSC 14; [2010] 1 WLR 753, where the Supreme Court found an agreement to exist regardless of a ‘subject to contract’ clause. The same case has been commented on by Richard Stone, Stone 2013, at 148, who drew the conclusion that “In other words, the language used by the parties has to be looked at in the context of their overall relationship.”

²⁹⁸ The definitions of contract and agreement in the USA are described in subchapter 1.2 4.

²⁹⁹ Perillo, 2004, at 26 and Knapp, 1996, at 210.

³⁰⁰ See e.g. Stone, 2013, at 35, noting that when the court attempts to find an agreement, the crucial point is whether it is “possible to identify the terms sufficiently that the contract is enforceable.” See also, Farnsworth, I, 2004, at 200–201, discussing definitiveness as a requirement for an enforceable contract and mentioning as examples that as “... contract law protects the promisee’s expectation interest “when calculating the damages a court “... must determine the scope of that promise with some precision.” Terms might be implied by courts, but courts would not do so if the agreement is not definitive enough. E. Allan Farnsworth discussed this problem in connection with preliminary agreements which the parties have stated as binding. Farnsworth, I, 2004, at 248–249. With regard to agreements where some terms have been left open to be decided upon later, which actually may also be the case with letters of intent, Farnsworth contended that the courts will be more likely to supply a term if the term is not so important. Farnsworth, I, 2004, at 433. The UCC includes gap fillers in Art. 2 regarding terms such as price, delivery and time for performance. These provisions may be used e.g. if the parties have left terms to be agreed later.

³⁰¹ Promissory estoppel has been said to “... provide a remedy for many promises or agreements that fail the test of enforceability under many traditional contract doctrines, including indefiniteness...” Perillo, 2004, at 253–254. As an example of where promissory estoppel was used with regard to an indefinite agreement, Perillo mentioned *Wheeler v. White* 398 S.W.2d 93 (Tex. 1965), where a loan arrangement was held to be too vague and indefinite to be enforced, but by applying promissory estoppel remedies were allowed. Perillo, 2004, at 267. See also Stone, 2013, at 120 stating that English law “... can be viewed as supporting the view that it is simply an ‘exception’ (author’s comment: promissory estoppel) to the general doctrine of consideration and does not strike at its roots.”

damages would be available.³⁰² One of the cases often referred to when discussing collateral contracts in English law is *Esso Petroleum Co Ltd v Mardon*,³⁰³ which was about the negotiations for a lease agreement on a petrol station. During the negotiations a representative of Esso had given the potential lessee an estimate of the potential likely output, which proved to be incorrect. The court held it to be a warranty under a collateral contract and thus awarded damages. Furthermore, in *Evans & Son (Portsmouth) Ltd v Andreas Merzario Ltd*³⁰⁴ the court found that there was a collateral contract.³⁰⁵ Similarly, in the USA collateral contracts may arise due to actionable promises. Promises were already described above based on Section 90(1) of the Restatement (Second).³⁰⁶ The form of enforcement would be an action in promissory estoppel.³⁰⁷ Collateral contracts could be implied based on this Section, but it has also been said that the collateral contract rule is no longer widely used in the USA, although it has sometimes been employed.³⁰⁸ The use of collateral contracts may not be common in business acquisitions, especially if the transaction is carried out by business parties of equal strength. In such transactions the parties may be presumed to enjoy fairly wide freedom to negotiate the totality of the deal without having to be overly cautious about unknowingly having created sub-agreements during the course of negotiations

The traditional explanation in the Nordic countries as to when an enforceable agreement³⁰⁹ has been reached has been based on the Nordic Contract Acts, although the Acts do not as such contain specific definitions of what is meant by an agreement or a contract. Chapter 1 of the Acts deals

³⁰² Furmston, 2012, at 175. Richard Stone pointed out that the courts have often used the concept of a collateral contract in order to avoid the doctrine of privity. Stone, 2013, at 175. The definition Richard Stone used was “A collateral contract generally takes the form of a unilateral contract under which one party says ‘if you enter into contract X, I will promise you Y’. The consideration for the promise is the entering into contract.” Stone, 2013, at 174. In other words, promises regarding the future would be regarded as part of collateral contracts, which has also been confirmed by other legal scholars. Another way of describing such contracts appears in Peel and Treitel 2015, at 434, where it was said that collateral contracts might arise provided two conditions are met i.e. the relevant statement “... must have been intended to have contractual effect...” and “... there must be some indication that the parties intended the statement to take effect as a collateral contract and not simply as a term in the main contract.”

³⁰³ [1976] QB 801; [1976] 2 All ER 5

³⁰⁴ [1976] 2 All ER 930; [1976] 1 WLR 1078

³⁰⁵ The case dealt with a shipping contract, but there was also an oral contract. The shipping contract was made on standard terms allowing the forwarding agents freedom in the manner of transport of the goods, but the shipping agent had told the owners of the goods to be shipped that the goods would not be shipped on deck. The owners were allowed to prove this oral agreement and the majority of the Court of Appeal held that the contract was partly oral, partly written and partly created by conduct. In other words a collateral contract was allowed as evidence.

³⁰⁶ See subchapter 2.2.1.

³⁰⁷ Joseph M. Perillo has given some examples of what this means e.g. that “... a statement of intent to take future actions is not sufficient, nor is a precatory remark. Similarly, an estimate is not generally sufficient. It is possible, however, to base a promissory estoppel claim on an implied promise, but general courts are not receptive to finding such implied promises.” Perillo, 2004, at 255. With regard to reliance and the question of definitive and substantial character, Perillo noted that the substantial requirement is actually a quantitative factor and he further emphasized that reliance must be foreseeable. Perillo, 2004, at 255. Perillo commented on the injustice requirement by noting that some courts have found that it is sufficient that reliance is “detrimental in the consideration sense”, but that others have insisted that reliance actually causes injury to the promisee. The requirements for creating promissory estoppel are that there has to be a promise, the promise must be of a nature that the promisor should “reasonably anticipate” that the promise will lead to the other party taking action or the contrary i.e. not taking action, and reliance must be definite and substantial in character. Enforcement of such a promise will be carried out only if injustice cannot otherwise be avoided. See Perillo 2004, at 255–256. For example, Hugh Collins used this section when referring to the use of promissory estoppel in the US legal system as based on a reliance model. Collins, 2008, at 77.

³⁰⁸ Perillo, 2004, at 133. Perillo discussed the question whether collateral contracts had an impact on whether contracts should be regarded as totally integrated or not. One of the cases referred to was *Lee v Joseph E. Seagram & Sons*, 552 F.2d 447 (2d Cir.1977).

³⁰⁹ A reminder to the reader that unilateral contracts and agreements are not dealt with in this dissertation.

with the conclusion of agreements and the mechanism pertaining to offer and acceptance and the congruence between them, which have been regarded as the main requisites when deciding whether an agreement has actually emerged or not. It has also been said that the Nordic Contract Acts are based on the promise principle.³¹⁰ It is, however, commonly accepted in the Nordic countries that the Contract Acts do not exhaustively define the way an agreement comes into existence. Moreover, legal scholars are fairly unanimous in their opinion that an enforceable agreement may emerge even though it is not possible to precisely identify an offer and a matching acceptance.³¹¹ The parties might, for example, have agreed how the final contract should be entered into by signing a preliminary agreement, which contains provisions as to when the contract will be regarded as having been concluded.³¹² An agreement may also emerge due to the acts or acceptance in silence by parties.³¹³

The traditional understanding of agreements as perceived in all jurisdictions, that is, the need for a matching offer and acceptance, is of less relevance for business acquisitions. The complexity of the business acquisition process is such that it is seldom possible afterwards to find a final congruous offer and acceptance or statements showing the final intention of the parties and/or justifiable reliance of the parties. The negotiation phase includes numerous people representing the parties and a variety of statements and drafts are passed back and forth between the parties. Creation of offer and acceptance could be regarded as quite artificial given that the different opinions and statements expressed during the negotiation process are influenced by the totality of the deal and by the positions of the parties, that is, opinions and statements are or should be part of the strategic positioning of the parties during negotiations.³¹⁴ The one area where the rules on offer and acceptances could bear relevance is when the acquisition process is carried out as a so-called controlled auction. The bids submitted to the seller should be conditional on the risk of the bid, if it could be accepted as such by the seller, being regarded as a binding bid leading to an enforceable agreement.³¹⁵

As described above, collateral contracts as a construction in the common law countries in fact may lead to a situation where the negotiating parties have agreed upon an enforceable agreement with regard to some specific issues. This alternative may be compared with the discussion in the Nordic countries about agreements having emerged during negotiations, even though such agreements

³¹⁰ The promise principle in this regard is to be understood as that a person is bound by his promise or as it is identified in the Nordic Contract Act an 'offer' and an 'acceptance', even though it has not yet been accepted. See e.g. Giertsen, 2014, at 42; Grönfors and Dotevall, 1995, at 52 and 2016, at 56; Vahlén, 1960, at 120 and Wrede, 1949, at 16–19.

³¹¹ von Hertzen, 1983, at 44–46; Hemmo I, 2007, at 98–100 and at 129; Adlercreutz and Gorton, I, 2011, at 53–56 and at 78; Gomard, Godsk Pedersen and Ørgaard, 2009, at 18–19; Woxholth, 2014 at 81–89; Hansen and Ulfbeck, 2014, at 53–63; Iversen, Nørgaard, Wegener and Ørgaard, 1997, at 121–125; Vahlén, 1964, at 367; Taxell, 1972, at 133 and Bernitz, 2013, at 75.

³¹² Ramberg and Ramberg, 2014, at 88–89 and Adlercreutz and Gorton, I, 2011 at 53–54.

³¹³ Hemmo, I, 2007, at 131–137; Adlercreutz and Gorton, I, 2011, at 77–78; Lyng Andersen, 2014, at 28–34 and Woxholth, 2014, at 88–89.

³¹⁴ See e.g. Bryde Andersen, 2005, at 177.

³¹⁵ See e.g. Egholm Hansen and Lundgren, 2014, at 122.

have not been finalized in written contracts. Interest has not been focused on situations where the parties have agreed on the procedure of negotiations including when a binding agreement is to be regarded as having emerged, but rather on situations where the parties have not made any such kind of agreement. Kurt Grönfors used the term ‘negotiation-agreements’ for agreements which were the result of real negotiations between the parties and he submitted that these kinds of agreements are typical of larger business matters, where the economic value is substantial and negotiations have continued for a long time.³¹⁶ This description is well-suited for many business acquisition contracts. Kurt Grönfors discussed these types of agreements based on a time axis, where a possible agreement may have emerged depending on what stage of the negotiations the parties are at.³¹⁷ Grönfors defended a form of gradual locking of the negotiations. Grönfors was highly specific about how to decide when the threshold was met for being obliged either to finalize the negotiations and the agreement or to pay damages. He took as an example a situation where 10-15% of an agreement remains subject to negotiations and thought that it would be unreasonable (he referred to Section 36 of the Swedish Contract Act) if a party could renegotiate the whole agreement. He maintained that in such cases the parties would be obliged to finalize the negotiations, unless some special reasons exist why this would not be the case.³¹⁸

As commendable as this attempt to find a concrete solution is, it seems to be an oversimplification of what the consequences should be if the parties have been negotiating for some time and have perhaps come to an agreement on some points. As Jon Kihlman rightly pointed out,³¹⁹ this kind of solution does not take into account what kind of matters are outstanding, that is, whether they are of a material nature or not. For example, Kurt Grönfors did not find even the purchase price to be *essentialia negotii* as a general rule, as he asserted that if everything else is agreed but the purchase price, there is still a binding agreement.³²⁰ The applicability of this last opinion to business acquisitions must be questioned. Determining the purchase price in a business acquisition is one of the most important elements of the transaction. Even if, as Grönfors pointed out, the Finnish, Norwegian and Swedish Sale of Goods Acts include a Section³²¹ on how the purchase price should be determined, nevertheless the contents of that Section are vague. The price, according to this Section, should be reasonable, which is to be determined taking into account the quality and properties of the goods, but also the fair market value at the time of making the contract as well as other circumstances. To find a reasonable price considering the quality/properties of the target and the fair market value at the time of concluding the contract is often a next to impossible task in most private sales and certainly subject to a diversity of opinions. The purchase price in a business acquisition is often determined based on some set formula in the contract or it may even be a firm price, but the purchase price does not necessarily only reflect the value of the target sold, as

³¹⁶ Grönfors, 1993, at 65.

³¹⁷ Grönfors, 1993, at 75.

³¹⁸ Grönfors, 1993, at 75–76.

³¹⁹ Kihlman, 2007, at 255–256.

³²⁰ Grönfors, 1993, at 76.

³²¹ §45 of the Acts in question.

important elements are the other rights and obligations of the parties to the contract. Furthermore, in an asset sale and purchase transaction, the purchase price is normally dependent on what kind of assets and liabilities are transferred and the final purchase price is often dependent on variations in the value of the assets and liabilities between two agreed dates. There has to be a final agreement not only upon the assets and liabilities to be transferred, but also how such components are valued and by whom.³²²

As already mentioned, a flaw in the model discussed by Kurt Grönfors is that it does not deal with the importance of the issues outstanding. Perhaps Grönfors took it for granted that material terms have to be agreed upon before an enforceable agreement may be regarded as existing, but he did not clearly say so. Kurt Grönfors certainly encountered criticism from amongst others Gotthard Calissendorff. Calissendorff raised the question of the importance of the outstanding issue, for example if the price was not settled, and held that the theory of gradually emerging agreements was not a good theory for business contracts. Calissendorff referred to acquisition contracts,³²³ where the matter of relevance is often very practical in terms of questions such as how far have the negotiations actually proceeded, what are the outstanding issues, have the parties started to act in a way that may be regarded as starting to fulfil an agreement, although no final agreement is signed? Gotthard Calissendorff also mentioned that many business acquisition contracts are subject to approval by the board of directors, which is often mentioned even in the first contract drafts, which is another reason why the Grönfors model of a gradual locking of negotiations is not suitable.³²⁴

Critical comments as to the Grönfors' model were further submitted by Jon Kihlman, as he found that the important question is when a party becomes bound and not about binding appearing gradually in the sense that you are more or less bound.³²⁵ This appears to be a very important aspect when discussing business acquisitions, especially cross-border acquisitions. From a practical point of view, a precise date for when an agreement becomes binding is needed, because that will have an effect on several issues, for example, transfer of risk and how statements during negotiations, including common law misrepresentations, are to be dealt with. Furthermore, having

³²² As to different kinds of purchase price see e.g. Doepel, Fogelholm, Karanko, Saanio and Wilkman, 2011, at 357–361 and with regard to valuations see e.g. Niemelä, 2011, at 71–77; Hultmark, 1992, at 43–47 and Sivenius, 2012, at 221–243. See also Egholm Hansen and Lundgren, 2014, at 178–196 and Buskerud Christoffersen, 2008, at 64–71.

³²³ Calissendorff, 1993–1994, at 237–240 based on the first edition of Grönfors book published in 1993.

³²⁴ Calissendorff, 1993–1994, at 238.

³²⁵ Kihlman, 2007, at 248. Jon Kihlman divided the contracting phase into five parts, which he described as the first part giving total freedom to the parties to negotiate and to abort negotiations. The second part he described as not always being present but when present it may lead to the negotiations having proceeded so far that the parties are obliged to act loyally and breach of such loyalty obligation – *culpa in contrahendo* – may lead to liability to compensate the other party's costs such party has suffered due to the breach of loyalty i.e. the so called negative contract interest. As an example he mentioned when one party let the other party believe that there will be a contract, although the first party has no intention to conclude such an agreement and he referred to NJA 1990.745. The third part is when an agreement becomes binding, when a party may not unilaterally abort negotiations – if they have not been aborted before – but has to complete the obligations under such agreement. If the agreement is silent or when a certain matter is not or will not be finally agreed, then non-mandatory law will have to be applied. The fourth part – not always present – is when the parties specify issues which have not yet been agreed upon. The parties thus limit recourse to non-mandatory law. The fifth part is fulfillment of the agreement, which sometimes starts even before the agreement is completed or even before the agreement has been entered into. Kihlman, 2007, at 249.

a floating time for when an agreement has been reached, an issue that furthermore probably would be litigated and leave the situation open for a long period of time, would lead to an uncertain situation not only for the parties involved, but additionally for the target and other stakeholders such as employees. It would also put restrictions on the conduct of the business of the target, as the seller and the target could not ignore that an agreement not recorded in a final written contract may be held to be binding or that the terms and conditions of that agreement might lead to remedies based on action taken during the dispute over the existence of a contract. Theoretically there is no reason why business acquisition agreements may not also be concluded based on verbal agreements and on action taken by the parties, even during negotiations.³²⁶ However, considering the complexity of most acquisitions, where different elements form an important part of the entirety, accepting that binding agreements as a rule could emerge during negotiations would in most cases seriously impede the parties' right to consider all the aspects of a transaction and their right to negotiate as good a deal as possible for themselves.

Nevertheless, an enforceable agreement may arise, although the agreement has not been set out in a final written contract. When the parties have a divergent opinion as to whether they in fact have reached an enforceable agreement, their intention is clearly important, as well as whether the agreements are specific enough to actually be enforceable and whether the parties have agreed upon the material terms of their agreement. Jon Kihlman discussed whether material terms are those which are necessary in order for an agreement to exist, whether materiality should be seen in relation to how much has been agreed (the Grönfors model), whether materiality could be seen in relation to cancelling a contract based on the Sale of Goods Acts, or whether materiality could be judged based on article 19 of the CISG.³²⁷ Kihlman advocated that open issues should be judged based on materiality as understood when contemplating whether or not there is a right of cancellation under the Swedish Sale of Goods Act.³²⁸ If the open issues are of such a material nature that a party would have the right to cancel the contract, then no enforceable agreement has emerged.³²⁹ Kihlman defended this solution by saying that if the parties were so far ahead in their contractual relationship, it would be inappropriate that either party should have the right to change their opinion and refuse to enter into a contract.³³⁰

Cancellation of contracts under Nordic contract law requires a highly material – or perhaps it could be called serious – breach. Therefore, this model still leaves open quite a wide range of issues which may not have been agreed upon and where the parties would still be forced to enter into a contract. That is also the reason why I am hesitant to accept this kind of solution as a general, applicable model for business acquisitions. Certainly, if the negotiations in a business acquisition have been taken so far that only minor issues remain open – such as notification periods or how

³²⁶ See discussion earlier in this subchapter about different ways of concluding binding agreements.

³²⁷ Kihlman, 2006, at 254.

³²⁸ Kihlman, 2007, at 259.

³²⁹ Kihlman, 2007, at 257.

³³⁰ Kihlman, 2007, at 257.

the contract may be amended – and a party refers to such clauses in order to obstruct the negotiations, then that party could and should incur liability. In such a case the open issue(s) could be regarded as being of such minor importance that a party refraining from entering into a final contract would be regarded as having breached the general duty of good faith and loyalty in the Nordic countries and in the common law countries a court may find a misrepresentation in the sense that a party has continued to negotiate with no intention of actually entering into a final contract. I find that the issues which could remain open in business acquisitions – and which may have so little impact that the parties would be forced to carry out the transaction and/or pay damages – are extremely limited. Furthermore, parties negotiating business acquisitions may leave open issues to the very last minute prior to entering into the contract. This might not only be a strategic decision, but it may also be due to the fact that there is outstanding information to be retrieved from due diligence. The importance of open issues may clearly be judged separately, but they should also be judged based on the entirety of the transaction. In my opinion it would be simply too intrusive on the parties' rights to force them to carry out a business acquisition based on an authority having decided that the parties have reached sufficient agreement.

Agreements emerging during negotiations have also been discussed by other Nordic legal scholars after Kurt Grönfors. Peter Møgelvang-Hansen, for example, maintained that if a negotiated term in itself can be regarded as a binding promise, it might be binding, although other elements of the document seem to contradict this. This could be compared with the common law concept of collateral contracts. Møgelvang-Hansen, however, also emphasized that interpretation has to take into account all the facts of the case in question.³³¹ Norwegian scholars and court practice seem to indicate that Norway has taken a positive attitude towards agreements emerging during negotiations. For example, Kai Krüger asserted that an agreement might be regarded as having emerged if the parties have agreed upon the essential matters, but he also emphasized that the situation is based on the facts in the case at hand and what could be regarded as customary within the field in question.³³² As to other Norwegian scholars, Johan Giertsen seemed to concur with that opinion³³³ and Giuditta Cordero-Moss has also presented that the Norwegian position is closer to accepting that agreements may emerge during negotiations.³³⁴ Two cases are often referred to as confirming that position in Norway. The first is Rt. 1998.946, where the Norwegian Supreme Court held that all material terms in the agreement were agreed upon and even if the agreement was not signed and even if the parties had not agreed upon all matters, there was a binding agreement between the parties. This case was about a business acquisition but the important notion is that the parties had agreed upon the terms, although not finalized in a comprehensive written document.³³⁵

³³¹ Møgelvang-Hansen, 2011, at 242.

³³² Krüger, 1989 at 44. See further Rt. 1998.946, where a binding agreement was regarded as having emerged when the essential terms had been agreed upon.

³³³ See Giertsen 2014, at 72.

³³⁴ Cordero-Moss, 2007, at 139.

³³⁵ The case was about the sale of shares in a wine agent company and whether a final agreement had been concluded or not. The seller asserted that the negotiation situation, the importance of the contract and the complexity of the

The second court case is Rt. 2011.410, where the question was about a lease agreement concerning business premises. The Court found that there was a binding agreement, as the parties had agreed upon all material terms and there was a final draft contract.³³⁶

In Finland, Juha Karhu (former Juha Pöyhönen) has been strongly in favor of enforceable agreements emerging gradually. He has emphasized the cooperative aspect of contracting and contracts in introducing as the ‘prototype’ or model for obligations not the traditional sale and purchase contract but projects in the form of joint undertakings in a broad sense.³³⁷ Karhu explained that, by taking projects in the form of processes, the whole question of what has taken place before and after a contract has been entered into is no longer as important and it is possible, if the contract is mute upon an issue, to take into consideration more general principles such as reliance and openness and the parties’ possibilities to prepare themselves for changes.³³⁸ Juha Karhu held that by using projects as the prototype, a constant change of circumstances is the starting point.³³⁹ Certainly, Juha Karhu’s opinion on viewing projects as the prototype for discussing obligations is interesting from the perspective that business acquisitions as such are as a matter of fact often extensive projects, starting from the initial negotiations, actual negotiations, entry into written contracts and post actions. Nevertheless, the need for firm dates of when a business acquisition has become legally binding upon the parties and possible other stakeholders is in my opinion still paramount.

Moreover, I see the strongest objection to a general acceptance of agreements emerging during negotiations in business acquisitions is with regard to interpretation of an emerged agreement in the case of a dispute. When a judge has to interpret such agreements it should be taken into consideration that the starting point in all jurisdictions is that the written contract –if one has been entered into – is the basic interpretation document, although other aspects may have an influence. These may range from mandatory laws and regulations to factual circumstances and trade usage.³⁴⁰

contractual relationship were such that the parties could not become bound before a final and signed contract existed (at 957). Nevertheless, the Norwegian Supreme Court stated that freedom of form of contract applies to complicated agreements between commercial parties and that verbal agreements are also binding unless otherwise stated in the Acts, the contract or presumed by the parties. The Supreme Court noted that in several other decisions the court had found the existence of a binding agreement provided that the parties have agreed upon all essential matters in an agreement based on a concrete evaluation of the situation: this even when not all issues have been agreed and a signed contract does not exist (at 958). The court found that the sellers should at an early stage of the negotiations have made clear that all and everything should be agreed upon and that until then they had the right either to reject or accept the negotiations. The court further found that this condition was not visible to the buyer (at 958). Johan Giertsen discussing this decision found that the important matter was that in practice the parties were in agreement on a negotiated and a comprehensive agreement based on a draft contract. The parties knew their rights and obligations and the loyalty principle in such a case requires a party to make a condition if he or she seeks full freedom to reject or accept. See Giertsen, 2014, at 77.

³³⁶ The court also found that the defendant had realized that the plaintiff was about to take on costs in remodeling the premises in line with the defendant’s wishes. The court found that the defendant should have stated if the intention was not to be bound before absolutely all issues were solved. For further comments, see Giertsen, 2014, at 77–78.

³³⁷ Pöyhönen, 2000, at 140–159.

³³⁸ Pöyhönen, 2000, at 147–148.

³³⁹ Pöyhönen, 2000, at 156.

³⁴⁰ Leirberg, 2014, at 36–37 and at 39–40; Hemmo I, 2007, at 567–568; Bryde Andersen, 2005, at 320; Woxholth, 2014, at 379–380; Ramberg and Ramberg, 2014, at 24–25; Lewison, 2004, at 17–18 and at 47–48 and Burton, 2009, at 8–9.

Factual circumstances and trade usage may relate to the question what should be the impact of due diligence, preliminary agreements, the negotiation process and the typical kind of contracts used in such transactions. It would be extremely difficult to duly and correctly identify and interpret the interrelation between all actions, statements and agreements in a complex business acquisition, if they have not been consolidated into a comprehensive written contract.³⁴¹ It would be even more challenging if the transaction is cross-border and involves parties from different jurisdictions. Furthermore, typical matters appearing in business acquisition contracts such as warranties – including disclosures against warranties and limitation of liability contract provisions – are heavily negotiated and may often be finalized as part of the totality of the deal just prior to signing the contract. These contract provisions are part of the risk allocation between the parties and are taken into account in the purchase price in one form or another. Interfering with negotiations and the totality of the deal would seldom give the parties the justice they deserve. Additionally, in all jurisdictions, the starting point is that a written contract and its wording reflect the mutual intention of the parties, although it may be proven in individual cases that this is not actually the situation.³⁴² A written contract setting out all the rights and obligations of the parties is the only way of ensuring that the intention of the parties as to the totality of the deal is duly observed. Creating agreements based on negotiations only under observation of different statements, drafts and actions would seriously impede the parties' right to freedom of contract. Such freedom is especially important in complex cross-border business acquisitions, where the parties have to contemplate a multitude of details as part of the totality of the transaction and decide whether the transaction is worthwhile carrying out or not.

2.2.6 Pre-contractual liability stemming from negotiations only

Despite the skeptical standpoint above on agreements emerging during business acquisition negotiations, this does not preclude the possibility that the parties may incur liability due to doing or refraining from acts during the negotiation phase. In this regard, the two legal families have quite different approaches as to when and how liability could be incurred during this phase.

As already submitted, neither of the common law countries acknowledges a general principle of good faith in negotiations. The reluctance to accept pre-contractual liability in the English and US systems can be explained partly by the lack of this concept of a general duty of good faith in negotiations.³⁴³ However, not even under English law are the parties free to do absolutely as they

³⁴¹ See also comment by Gotthard Calissendorff as to negotiating a larger agreement complex, where it is typical that separate groups of people – e.g. technical, legal, economic or commercial - negotiate separate parts of the deal and where such groups seldom include persons having the right to bind a party conclusively and therefore it should in general be acceptable that parties before the final contract still may require changes or supplements e.g. to warranties (Calissendorff actually used the word 'guarantees'). Calissendorff, 1993–1994, at 238.

³⁴² Lehrberg, 2014, at 45–46; Adlercreutz and Gorton, II, 2010, at 59–60; Hemmo I, 2007, at 585; Taxell, 1997, at 71; Woxholth, 2014, at 39; Gomard, Godsk Pedersen and Ørgaard, 2009, at 263; McKendrick, 2013, at 159 and Burton, 2009, at 1.

³⁴³ Collins, 2008, at 181 and Farnsworth, 1987, at 217–294. See also Cartwright, 2008, at 25.

please without taking into consideration how their actions may be perceived by the other party. One form of action relating to negotiations only is based on the concept of misrepresentation, although misrepresentations are often discussed in connection with concluded contracts. Misrepresentations are defined in English law as incorrect/untrue statements of fact, and nowadays also statements of law, which another party has justifiably relied upon and which have induced that other party to enter into a contract, not to enter into a contract, or to take some other action to his detriment.³⁴⁴ Actions may be based on fraudulent or negligent misrepresentation. If fraud in a non-criminal sense³⁴⁵ is claimed, the requirement is that a false representation is made knowingly or without believing that the representation is actually true or recklessly in the sense that the representor does not care whether the representation is true or not; here, damages would be based on the tort of deceit.³⁴⁶ In such cases damages would be assessed based on the principle that the innocent party should be put into the same situation as if his actions based on the misrepresentation had not taken place, that is, a form of reliance interest.³⁴⁷ However, in order to be awarded such damages, the innocent party must not only show fraud but must also prove that the misrepresentation caused or at least materially contributed to the damage caused, that is, causality is required.³⁴⁸ The other type of misrepresentation, which may be actionable based on common law and even if no contract is actually entered into, is the so called negligent misrepresentation. Negligence according to common law is present when a “representation is made carelessly and in breach of a duty owed by the representor to the representee to take reasonable care that the representation is accurate.”³⁴⁹ The same type of requirements exists as to assessment of damages

³⁴⁴ Peel and Treitel, 2015, at 414, noting that inducement as a necessary element of misrepresentation may relate to a party refraining “...from doing something bearing on his material interests.” See further footnote 124 on the same page, referring to negligence based on common law and the fact that a contract is not entered into due to such misrepresentation. See also McKendrick, 2013, at 226, explaining as to the element of inducement in misrepresentation that “A representation is a statement of fact which induces the other party to enter into a contract or *otherwise act to his detriment*.” [text in italics by the author] and Chen-Wishart, 2012, at 203–204, asserting that if no contract is entered into the party who relied on the misrepresentation has recourse to a common law tort action based on fraudulent or negligent misrepresentation or an equitable action for innocent misrepresentation.

³⁴⁵ When discussing fraud in this dissertation the question is not about fraud as a criminal offense, but non-criminal fraud as understood in tort law in the UK and the USA. See e.g. Harpwood, 2000, at 5. As to the USA, the Restatement (Second) includes a Chapter titled “Statute of Frauds,” which pertains to certain ‘classes of contracts’ as further defined in §110. Many states have enacted their own Statute of Frauds, but practice varies between the states and they may often be interpreted restrictively. See e.g. Farnsworth, II, 2004, at 106–107.

³⁴⁶ See e.g. McKendrick, 2013, at 231–232 and at 239. See also Cartwright, 2008, at 24, explaining the tort of deceit: “a claimant can recover damages if he can show that the defendant fraudulently made a false representation to him, with the intention that he act on it; and that he did act on it and suffered losses.” He referred to *Bradford Third Equitable Benefit Building Society v Bowers* [1941] 2 All E.R. 205, 211.

³⁴⁷ See e.g. McKendrick, 2013, at 239 and Macdonald and Atkins, 2014, at 302

³⁴⁸ See e.g. Harpwood, 2000, at 149.

³⁴⁹ Treitel, 1995, at 319. It should also be noted that the requirements for these actions are quite harsh. In the case of negligent misrepresentation acted upon in a tort action, it is not sufficient that there is negligent behavior on the part of the representor, but a further requirement is that the representor owes the representee a duty of care. See e.g. Macdonald, Atkins, 2014, at 303. See also the decision in *Box v Midland Bank Ltd* [1979] 2 Lloyd’s Rep.391; [1981] 1 Lloyd’s Rep. 434, where a bank manager let a loan applicant understand that approval of the loan application was more or less a formality. The applicant overdrafted his loan facilities. The loan application was subsequently denied and the applicant claimed damages. In the decision it was held that the bank manager owed a duty not to mislead by giving careless advice regarding approval of the loan application. See also Peel and Treitel, 2015, at 422, discussing ‘duty owed’ as “it must be reasonably foreseeable by the representor that the representee will rely on the statement; there must be sufficient ‘proximity’ between the parties; and it must be just and reasonable for the law to impose the duty.” See also Harpwood, 2000, at 23 and Beale, Chitty I, 2012, at 592–594, describing how tort actions for misrepresentation include checking whether the representor owed a duty of care, and whether he could foresee that the

mentioned above with regard to fraudulent misrepresentation, but there is a difference to the extent that damages may be reduced if the representee is also for some reason at fault.³⁵⁰ Furthermore, damages may not be too remote.³⁵¹ Damages are thus based on the tort of negligence and not on the tort of deceit.³⁵² In the case of innocent misrepresentations, which have been described as being “neither fraudulent nor negligent,”³⁵³ if no contract is made then these misrepresentations would not give the right to damages based on common law. In the preceding subchapter was discussed the concept of collateral contracts, where statements made by one party during negotiations may be regarded as actionable promises. As Richard Stone has pointed out, the advantage of collateral contracts is that the statements made are not limited to statements of past or present facts, which is the case with misrepresentations.³⁵⁴

Nevertheless, a party in a business acquisition situation may claim having been misled during the negotiations or induced by the other party’s statements to continue the negotiations and led to believe that there is an agreement. A party who wants to pursue such a claim could have recourse to the rules on misrepresentation and a successful claim could give the right to assert liability for damages. The case law is scarce, but it seems hard to impose pre-contractual liability under English law, even when the question is about an alleged misrepresentation or the construction of collateral contracts. Except for the constructions just mentioned, liability may occur under exceptional circumstances such as situations of duress or undue influence in connection with entering into a contract, certain situations or reliance in the course of negotiations and equitable remedies such as restitution.³⁵⁵

In practice, pre-contractual liability has often been litigated based on the existence of some preliminary agreements and the question has often arisen regarding their binding or non-binding nature. Some UK cases have been about the relationship between preliminary agreements and the good faith principle. The landmark case of *Walford v Miles*,³⁵⁶ which was noted above, established that the courts in the UK do not recognize an open-ended obligation to negotiate in good faith. On the other hand, and as was also seen, in the later decision of *Petromec Inc. v Petroleo Brasileiro*

other party would act on the basis of the representation. A landmark case with regard to negligent misrepresentation in tort is *Hedley Byrne & Co Ltd v Heller & Partners Ltd* [1964] A.C. 465. John Cartwright, 2008B, at 94 referred with regard to the duty of care to *Gran Gelato Ltd v Richcliff (Group) Ltd* [1992] Ch 560; [1992] 2 W.L.R. 867.

³⁵⁰ See e.g. McKendrick, 2013, at 239 and Macdonald and Atkins, 2014, at 303.

³⁵¹ See e.g. Beale, Chitty I, 2012, at 605.

³⁵² See e.g. McKendrick, 2013, at 239.

³⁵³ See e.g. Beale, Chitty I, 2012, at 627.

³⁵⁴ Stone, 2011, at 187 and Adams and Brownsword, 2007, at 158–159, discussing non-contractual misrepresentation prior to the Misrepresentation Act 1967 and the possibility of using the collateral concept in order to claim that a representation actually amounted to a warranty and thus claiming damages for breach of a collateral contract (and warranty).

³⁵⁵ See e.g. as to unjust enrichment *British Steel Corp v Cleveland Bridge and Engineering Co. Ltd* [1984] 1 All ER 504, QBD 100, 101, where a letter of intent was sent to the claimant about the defendant’s intent to place an order “pending the preparation and issuing to you of the official form of subcontract.” Although no formal contract was agreed and the court held that there was no contract, the claimant was able to obtain restitution due to having acted at the request of the defendant.

³⁵⁶ [1992] 2 W.L.R.174;[1992] 2 AC 128

*SA Petrobas*³⁵⁷ an express commitment to negotiate in good faith during a set time limit was upheld. Based on that decision, the conclusion to be drawn is that preliminary agreements which are specific enough – including a set time-limit for a good faith obligation – may be accepted by English courts. It was also held that any reasoning on preliminary agreements, agreements to negotiate and good faith issues will be heavily dependent on the factual circumstances. With regard to pre-contractual obligations in general, Hugh Collins advocated something he called “a duty to negotiate with care,” but he was as such critical of a general principle of good faith in negotiations.³⁵⁸

Even though good faith in negotiations does not exist as a principle in the USA, E. Allan Farnsworth asserted that pre-contractual liability has been imposed by the courts more often than before, although there is no general doctrine on pre-contractual liability.³⁵⁹ Farnsworth mentioned examples of cases where pre-contractual liability has been found. These included cases where unjust enrichment has resulted from negotiations, where there has been misrepresentation during negotiations – example: entering into negotiations or continuing with negotiations with no serious intent to reach agreement – or where specific promises have been made during negotiations, such as to promise something in order to induce the other party to continue negotiating.³⁶⁰ Farnsworth claimed that the duty to make restitution of benefits during negotiations is one of the most fundamental grounds for pre-contractual liability, but also that courts have seldom found misrepresentation in failed negotiations.³⁶¹ Farnsworth may be regarded as representing a fairly traditional view on the concept of pre-contractual liability. This traditional view has been criticized, for example, by Alan Schwartz and Robert E. Scott, who in 2007 said that “Courts actually make some form of agreement a necessary condition to a promisee’s recovery.”³⁶² Schwartz and Scott had analyzed 105 disputes covering the period 1999 – 2003 concerning recovery for pre-contractual reliance.³⁶³

³⁵⁷ [2005] EWCA Div 891, [2006] 1 Lloyd’s rep. 121

³⁵⁸ Collins, 2008, at 180–181.

³⁵⁹ Farnsworth, 1987, at 222.

³⁶⁰ Farnsworth, 1987, at 222 and at 229–239. Note: Farnsworth maintained that misrepresentation as a basis for pre-contractual liability has not been popular with claimants, Farnsworth, 1987, at 233. See further Robert Summers, 1968, at 257, explaining that bad faith in negotiations may lead to recovery based in tort, in quasi-contract or in some other theory. Two possible ‘negotiation’ torts are negotiating without serious intent to contract and withdrawing a negotiating proposal after foreseeably inducing another to rely on it.

³⁶¹ Farnsworth identified these categories and their use, as described in Farnsworth, 1987, at 222–239. With regard to a specific promise Farnsworth noted that it has frequently been used. He referred to the decision of the Supreme Court of Wisconsin, *Hoffman v. Red Owl Stores, Inc* (26 Wis.2d 683, 133 N.W. 2d 267 (1965) which could be seen as opening a broader interpretation of pre-contractual liability, but as Farnsworth said this decision has not really lived up to such expectation. Farnsworth, 1987, at 236–238. Note also that this court case was at time expected to have far-reaching consequences, as described by e.g. Robert Summers, 1968, at 225. However, Schwartz and Scott pointed out that *Hoffman v. Red Owl Stores, Inc*. has not been followed in its own or any other jurisdictions, Schwartz and Scott, 2007, at 670. Whether the situation has changed since 2006 has not been checked in connection with this dissertation. See also Summers, 1968, at 258, where he further discussed the relation between bad faith in negotiations and tort liability as another option for getting recovery.

³⁶² Schwartz and Scott, 2007, at 668.

³⁶³ Schwartz and Scott, 2007, at 671–673.

Pre-contractual liability may in theory also arise in the USA due to misrepresentations.³⁶⁴ Misrepresentation is extensively dealt with in the Restatement (Second)³⁶⁵ and most often misrepresentation is alleged when a contract has been entered into and a claimant wants to rescind the contract or claim damages.³⁶⁶ Misrepresentation may, however, also be claimed in situations where no final contract has been entered into, but the success of a claim in such cases would heavily depend on the factual circumstances taken as a whole. In *RAA Management, LLC v. Savage Sports Holdings, Inc.*,³⁶⁷ the Supreme Court of Delaware dismissed a claim based on fraudulent misrepresentation during the pre-contractual stage. The dismissal should be seen in the light of the very express non-reliance language and non-waiver provisions in a confidentiality agreement entered into by the parties. The confidentiality agreement was a binding contract and included some highly specific provisions on non-reliance and waiver of any representations. This case on the other hand shows that during negotiations, even if they do not lead to a final contract regarding the main subject, liability may be claimed based on pre-contractual actions.

It is furthermore worth noticing that in the USA the Restatement (Second) stipulates in Section 26 on preliminary negotiations that willingness to enter into a ‘bargain’ is not an offer if the other person knew or had reason to know that the intention was not to conclude a ‘bargain’ until there was a further manifestation of assent.³⁶⁸ Even though this Section could be further dissected as to the different elements in it, it still gives a strong indication that statements during negotiations are not easily regarded as the same as making binding commitments.

With regard to pre-contractual liability in the Nordic countries, the starting point is that the parties may negotiate freely and there is no general legal rule, for example in the Nordic Contract Acts, imposing pre-contractual liability for negotiations only.³⁶⁹ A fairly general perception in the Nordic countries seems to be that negotiations as such do not entail that the parties would be forced to enter into a contract and there is as such no single statute stipulating general pre-contractual liability in case no contract is formed.³⁷⁰ The parties’ pre-contractual behavior and statements may

³⁶⁴ See Kessler and Fine, 1963–1964, at 448–449. In their article they compared the civil law concepts of *culpa in contrahendo*, bargaining in good faith and freedom of contract with concepts in the common law countries. At 448–449 they concluded that even though terms like *culpa in contrahendo* or good faith are not used in the same sense in common law countries as in civil law countries, there are signs of changes due to “increased duty to disclose, the concept of estoppel, the notion of an implied subsidiary promise, the colorful doctrine of “instinct with an obligation.”

³⁶⁵ §159–164 of the Restatement (Second).

³⁶⁶ See comment by E. Allan Farnsworth above about the fact that courts have seldom found misrepresentation if the negotiations have not been successful. Farnsworth, 1998, at 235.

³⁶⁷ No. 577, 2011 (Del. May 18, 2012)

³⁶⁸ The text of the section in question: “§26 Preliminary Negotiations – A manifestation of willingness to enter into a bargain is not an offer if the person to whom it is addressed knows or has reason to know that the person making it does not intend to conclude a bargain until he has made a further manifestation of assent.”

³⁶⁹ The question of pre-contractual liability has been regulated in areas such as Acts on public procurement. If a contract has been entered into, pre-contractual liability may also be found due to provisions in the Nordic Sales of Goods Act, consumer regulation and of course the pre-contractual phase is relevant when discussing the consequences of duress, fraud etc. further dealt with in Chapter 3 of the Nordic Contract Acts. See Ramberg and Ramberg, 2014, at 67 and Bryde Andersen, 2003, at 57 and 2002, at 101.

³⁷⁰ See Ramberg and Ramberg, 2014, at 67, where they say that there is no general obligation to conclude an agreement when the parties initiate negotiations. However, they also noted that negotiations should be carried out in accordance with good business morals. See also Bryde Andersen, 2003, at 57.

nevertheless lead to liability and of course also increase the possibility of the pre-negotiation phase being used when interpreting a contract and evaluating the consequences thereof.³⁷¹ The parties may not be forced to enter into a contract due to initiating negotiations, but they are expected to act loyally during negotiations.³⁷² The freedom of contract principle does not preclude possible liability due to negotiations only.³⁷³ Nevertheless, opinion amongst Nordic legal scholars is fairly unanimous that pre-contractual liability is not as strong as contractual liability.³⁷⁴ The practice may differ somewhat between the Nordic countries and, for a full assessment of the risk of liability in individual cases, court practice should be analyzed.

Possible liability and liability for damages purely based on negotiations has often been analyzed in the grey zone between tort law and contract law based on the principle of *culpa in contrahendo*.³⁷⁵ Soili Nystén-Haarala has described *culpa in contrahendo* in Nordic law as “breaking reliance before a contract is concluded.”³⁷⁶ The risk of damages based on negotiations only and not on a contract would normally require that one party has misled the other party, intentionally or negligently.³⁷⁷ *Culpa in contrahendo* has been claimed in cases regarding invalidity of contracts, but also in cases when a party has broken off negotiations. The parties may in principle freely abort negotiations, but liability may be imposed if a party continues or even starts negotiations with no

³⁷¹ Ramberg and Ramberg, 2014, at 67; Hemmo, I, 2007 at 207; Hagstrøm, 2011, at 96; Gomard and Iversen, 2012, at 263 and Krüger, 1989, at 23.

³⁷² See also e.g. Finnish Supreme Court decision (KKO 1999:48) where the question was primarily about whether the defendant had not complied with certain standard competitive bidding principles which had been drawn up for the particular field of business and which the defendant had stated as governing the process and the amount of damage the plaintiff was allowed to claim. The reason why this case is mentioned here is that in this decision (author’s comment: could probably be regarded as *obiter dicta*) the court stated (in Finnish) i.a. that “Contract negotiations may not be carried out in a manner which misleads a party or otherwise leads to damages for the other party. A party whose trust has been breached or whose founded reliance due to negotiations has been harmed, should have the right to compensation because of breach of contract. Compensation is affected by the nature of the breach and by how far the parties have advanced in making the contract.” Regardless of the substance, it is no exaggeration to say that the general principles in relation to reliance and non-acceptance of misleading behavior in contract negotiations were confirmed. On the other hand, this decision does not appear to preclude the parties to negotiations from looking out for their own interests as long as they do not cross the line of what is regarded as unacceptable.

³⁷³ See Finnish Supreme Court decision (KKO 2009:45). In this case the negotiations had lasted for a long time and then abruptly been terminated by the defendant. The court found that the plaintiff had justifiably relied on thinking that a contract was going to be entered into. The court stated that in principle negotiations do not bind the parties and the parties may in general withdraw from negotiations without harmful consequences, but also i.a. that “Negotiations may not be conducted dishonestly or in a manner so that the other party is misled and suffers unnecessary costs or damages.” (Translation from Finnish to English by the author). The court continued by stating that this is especially the case in situations where a party intentionally or negligently creates justifiable reliance in the other party that a contract will be made and based on that reliance the other party has taken preparatory or other action. The court added that in such cases unjustifiable withdrawal from the negotiations may lead to damages according to the principles for breach of contract. In this case damages were awarded. See also Simonsen, 1997, at 129.

³⁷⁴ Ämmälä, 1993, at 27.

³⁷⁵ The term was introduced by Rudolf von Ihering, but has acquired its own nuance in the Nordic countries. Ramberg and Ramberg, 2014, at 67; Hemmo, I, 2007, at 205–207; Hagstrøm, 2011, at 96; Gomard and Iversen, 2012, at 187; Bryde Andersen, 2005, at 117, who however emphasized that such liability is more of an exception because the parties generally have the freedom to negotiate; von Hertzen, 1983, who dealt with aborted negotiations in general and the liability they might lead to. See also Runesson, 1996, at 307, who summarized *culpa in contrahendo* as a comprehensive term for different kinds of reprehensible conduct when concluding contracts. Hans Henrik Edlund, on the other hand, has taken the view that pre-contractual liability should actually in most cases be judged based on contractual liability, as during negotiations the parties in fact agree upon different matters and the negotiations are carried out in relation to a contract. Edlund, 2012, at 589–591.

³⁷⁶ Nystén-Haarala, 1998, at 122.

³⁷⁷ See e.g. Ramberg and Ramberg, 2014, at 67 and Gomard and Iversen, 2012, at 263.

intention of concluding a contract or in other cases where a party acts contrary to good business practice.³⁷⁸ This may be explained by the widely accepted principle of loyalty/good faith that also governs negotiations. Some court practice deals with pre-contractual liability when no contract has been entered into. These cases often refer to situations where a party has aborted negotiations, for example, when the question is whether one party has misled the other party as to whether they have actually agreed on the subject matter and when one party has allegedly given the other party reason to believe that a contract will actually emerge.³⁷⁹

The relevance of the pre-contractual phase and Nordic courts' inclination to consider it are affected by several quite practical factors. These include, for example, the form of negotiations, whether any kind of proper or improper inducement has been offered, how long the negotiations lasted, whether due diligence has been carried out, the position of the parties and whether the parties agreed anything about the negotiation phase.³⁸⁰ It has, on the other hand, been claimed that, for example in Norway, there is no decision by the Norwegian Supreme Court taking a general standpoint on damage liability for pre-contractual acts. However, the situation is evolving and the opinion seems to be that under the right circumstances such a judgment should be rendered.³⁸¹ There are also Danish court cases dealing with pre-contractual liability, although in general it has been held that such liability is an exception rather than the rule.³⁸² However, statements on what is required from the negotiating parties have been included in decisions, for example, by the Finnish Supreme Court³⁸³ and by the Swedish Supreme Court.³⁸⁴ See also a case where the Finnish Supreme Court held that even though there was no binding agreement as such, even though the

³⁷⁸ Hemmo, I, 2007, at 208–209; Ramberg and Ramberg, 2014, at 68; von Hertzen, 1983, at 8; Bryde Andersen, 2005, at 116–117 and Krüger, 1989, at 28.

³⁷⁹ In the Norwegian case Rt. 1981.462 regarding the liability of a municipality in connection with a housing project and whether the actions of the municipality had actually caused the other party justifiably to believe that the municipality would participate in the project, the majority of the members of the Supreme Court held that no justifiable expectations existed. The decision was not unanimous. See also NJA 1963.105, where the Swedish Supreme Court held that one party was obliged to reimburse the costs of the other party, because the first party should have made clear to the other party that no agreement was in place and that there was a risk that such agreement would not be concluded. In another case, NJA 1990.745, the Swedish Supreme Court held that one party had given the other party reasons to believe that this other party would become the distributor of the first party. The first party should earlier have informed the other party – the presumptive distributor – that the first party had decided not to hire him. No damages were awarded, as there was no damage. See also the Norwegian case Rt. 1984.624 regarding whether an agreement had in fact been concluded during lengthy negotiations. Kai Krüger found, when commenting on this case, that the judgment may be read to allow a possibility that a party may be obliged to continue negotiations if there are no special circumstances and there is no immediate urgency e.g. timewise to conclude the transaction that justifies withdrawal from the negotiations. He was, however, doubtful that this would be the correct conclusion. Krüger, 1989, at 30.

³⁸⁰ See e.g. Hemmo I, 2007, at 208–209, where he divided the different situations giving rise to liability into three: long lasting negotiations, inappropriate negotiation proceedings, and different forms of agreement regarding the contents of the negotiations. Mika Hemmo noted that when evaluating pre-contractual behavior and statements it has been suggested e.g. that account should be taken of how close to the final agreement statements are made and whether such statements really merely refer to one party's aims or actually reflect the mutual intention of the parties. See also Simonsen, 1997, at 162–164.

³⁸¹ See e.g. Simonsen, 1997, at 115 and Woxholth, 2014, at 159 and at 162. Woxholth referred, e.g., to Norwegian Supreme Court decision Rt. 1998.761, where even if pre-contractual liability was not found, the court held (at 772) that negative contract interest may be based on blameworthy conduct during negotiations and mentioned disloyalty, fraud, deception or similar matters as examples.

³⁸² See e.g. Gomard and Iversen, 2012, at 262–264.

³⁸³ See e.g. KKO 1999:48, as described in earlier footnote.

³⁸⁴ See e.g. NJA 1990.745, as described in earlier footnote.

parties in a lease agreement negotiation had agreed upon the price and the time of the lease, but they did find that the party not finalizing the transaction had to pay damages due to the fact that the other party had rightfully expected an agreement to emerge.³⁸⁵

Pre-contractual liability in cross-border transactions, that is, when there are parties from different legal systems, is a challenging issue in many respects. Parties have different views on what is allowed or not allowed during negotiations. When the parties are from the common law countries and the Nordic countries respectively, there is a fundamentally different view on what liability may arise due to negotiations only, if no written contract is concluded. As to the parties' behavior and likelihood of incurring liability, one could try to find answers within international business law. The CISG does not deal with negotiations or pre-contractual liability in general. The UNIDROIT Principles deal with negotiations in relation to 'bad faith'.³⁸⁶ With regard to Europe, the PECL contains a provision on a general principle of good faith and fair dealing in contracts, but not specifically in relation to negotiations. It may also be noted that there is a duty of disclosure according to the DCFR³⁸⁷ and failure of disclosure may incur liability for loss even if no contract is concluded.³⁸⁸ The conventions and principles mentioned are not applicable to all jurisdictions and nor are they mandatory.

The issue of pre-contractual liability in cross-border business acquisitions relates to acknowledging the complexity in general of business acquisition negotiations and, especially, when the negotiations involve parties from different legal families. The complexity appears on different levels. Firstly, it is typical that simultaneously several processes are going on, that is, due diligence, drafting of contracts, negotiations including exchange of statements and drafts, face to face negotiations, and others. Moreover, these different processes are often carried out by different people and often in different countries. From a legal perspective, communication between these groups is imperative in the sense that information may have an impact on a party's decision to continue or withdraw from the negotiations. Having an established form and routine for communication would make it easier to show, for example, that a party had reasons to abort negotiations. Secondly, a complex and diversified process involving a large number of people also makes it quite difficult to afterwards judge whether there were, for example, separately actionable promises which under common law could be regarded as collateral contracts. This would have to be assessed not only based on the contents of those promises, but also based on by whom and under what authority those promises were made. The same comment may be made with regard to matters such as the common law concept of misrepresentation. Thirdly, the Nordic loyalty principle embraces the whole process, but to identify where the loyalty obligation was not adhered to in a

³⁸⁵ KKO 2009:45.

³⁸⁶ Earlier reference was made to the fact that even with regard to negotiations, the parties' right to freely negotiate is not unlimited, as in negotiations such right must not conflict with the general principle of good faith and fair dealing referred to in Art.1.7 is governing. This is stated in Comment 2 to Art. 2.1.15.

³⁸⁷ Art. II – 3:101.

³⁸⁸ Art. II – 3:109 (3).

complex and diversified cross-border acquisition process is hard, to say the very least. These arguments are, however, rather an indication of the difficulties in identifying and assessing pre-contractual liability, but they do not in themselves exclude the possibility of such liability even in cross-border business acquisitions. As there is no national or international set of legal rules which would comprehensively cover all aspects of cross-border business acquisition negotiations, the parties may, instead of relying upon vague concepts and the possibility of liability, rather agree upon how the negotiations are to be carried out and when a contract is regarded as having been reached. This would enhance predictability for the parties and assist the judge or arbitrator in a possible dispute.

2.2.7 Taking disputes to court – differences between judicial systems

In business acquisitions efforts and costs are invested in the pre-contractual stage, typically comprising due diligence, confidentiality agreements, preliminary agreements, if any, as well as negotiating and drafting comprehensive written contracts. When the parties have agreed and entered into a written contract regarding the transaction in question, they may be confident that the agreement is unambiguous and self-explanatory. Nevertheless, when a dispute emerges and a judge or arbitrator has to interpret the contract, that confidence may be proven ill-founded. There are very few contracts which are so unambiguous and self-explanatory that they could not be argued to have different meanings. Business acquisitions as extensive processes and business acquisition contracts as complex documents make them prone to differences of opinion as to what has been done and what has been agreed.

When disputes arise the parties are often inclined to negotiate and try to settle the disputes between themselves rather than to take the dispute to court or arbitration. The costs in litigation and arbitration are substantial, it takes time including management time, the future relationship between the parties might be damaged, the reputation of the parties might be impaired and there might be a certain concern for the risk of the court or the arbitrator not having the relevant experience of business acquisitions and contracts related thereto; a risk which would be less with separately appointed arbitrators, where their competence as to the subject matter would be evaluated before their appointment. Sometimes, however, “feelings” also play an important role when parties decide whether to take a matter to court or not. One of the basic assumptions in Law and Economics is that people are rational, although it is admitted that this is not always the case,³⁸⁹ but at least in my own experience even in large transactions where the economic interests are substantial, negotiators and decision-makers do not always behave rationally.³⁹⁰ This also goes to the situation when a

³⁸⁹ Posner, 2014, at 3–4 and at 17.

³⁹⁰ See further Sevenius, 2012, at 481–491 discussing psychological and cultural aspects connected with business acquisitions.

dispute has arisen, as a person might feel “cheated” with or without cause and this might affect the choice how to deal with the dispute.

Even though the parties to a business acquisition try to find an amicable solution to a dispute, every so often disputes will be taken to court or arbitration. With regard to taking a dispute to court, the parties will have to acknowledge the particular court system, as there are differences not only between, but actually also within the legal families. The USA operates a dual system with a federal government and separate state governments. This duality runs through the court system with separate federal and state courts.³⁹¹ Some subject matters are exclusively to be dealt with by federal courts,³⁹² but federal courts also have jurisdiction, if the parties are from different states and the claim is above a certain value, although the courts will in such cases have to apply whatever state law is the governing law.³⁹³ Additionally in many cases a plaintiff may elect to take the matter either to a state or federal court.³⁹⁴ Therefore, disputes in the USA over business acquisitions may, depending on the circumstances, be taken either to a federal or a state court. The parties may obviously also agree that any disputes shall be decided upon in arbitration. The doctrine of precedents in the USA is affected by this dual system, which is evidenced by the fact that state courts are not bound by decisions by out-of-state courts, although such decisions may have high persuasive authority, especially if the states have similar laws as, for example, in the case of laws based on uniform statutes.³⁹⁵ A similar duality in the court system does not exist in the English court system or in the Nordic countries. However, both in the UK and in the Nordic countries different kinds of court deal with different kinds of matter, but there are also differences between the Nordic court systems.³⁹⁶

An additional difference to be mentioned, although of less relevance for business acquisition, is a special feature of the judicial and legislative system in the USA, where the courts have the authority to review the laws and acts of officials. The courts have the right to nullify even statutory acts if they are against the constitution (judicial review). This applies to the state courts as well as to the federal courts, although as to state courts only with regard to state laws.³⁹⁷ In this respect there is a clear difference from the English system, as acts enacted by the English Parliament cannot be diverged from by the courts, that is, the courts do not have any right, in contrast to their US

³⁹¹ Sager, 1996, at 26–40, who in general described and discussed the authority between federal and state institutions.

³⁹² Carlsson, 2004, at 45–47. Carlsson also dealt with federal territorial jurisdiction, Carlsson, 2004, at 47–49. See further Burnham, 2002, at 249–256, who described the challenges with the dual judicial system and jurisdictional issues between state and federal courts.

³⁹³ Hughes, 1996, at 13–14.

³⁹⁴ Sager, 1996, at 35.

³⁹⁵ Fletcher and Sheppard, 2005, at 452 and Macneil and Gudel, 2001, at 94.

³⁹⁶ Although the Nordic countries have a similar court system based on three different instances, with the Supreme Courts having the highest authority with regard to civil matters such as contractual issues, there is one difference, as only Sweden and Finland have Supreme Administrative Courts, which deal with administrative matters.

³⁹⁷ For example in 1803 the US Supreme Court found in *Marbury v. Madison* (5 US (1 Cranch 137 (1803))) that a certain enacted law was against the Constitution. Atiyah and Summers, 1987, at 45. See also Atiyah and Summers, 1987, at 43–44, explaining standards when deciding upon the validity of rules.

colleagues, to review whether statutes are constitutional or not.³⁹⁸ Statutes may change common law, but common law cannot overrule or change statutes.³⁹⁹

In both legal families statutory acts are regarded as primary legal sources, if statutory acts govern the legal area in question and provided that the statutes contain mandatory stipulations. However, as noted above, contract law as a legal discipline has in the common law countries foremost been developed in common law and court precedents are immensely important.⁴⁰⁰ There are some differences between these two jurisdictions and it has been said that the prejudice in favor of earlier court practice is stricter in the UK.⁴⁰¹ As explained in Chapter 1, the Nordic countries have all enacted similar Contract Acts, which were the result of successful legislative co-operation between those countries and all the Nordic countries acknowledge written statute law as the pre-eminent legal source. However, as also seen, the Nordic Contract Acts are mandatory only with regard to some Sections of the Acts and therefore doctrine and court practice play an important role in contract law in the Nordic countries.⁴⁰² With regard to court practice the situation is different from the common law countries, as the Nordic countries do not recognize the binding force of higher court decisions, in the sense that other courts are not legally bound to follow those decisions. Nevertheless, the role of the courts and especially the Supreme Courts is important when interpreting statutory acts which do not deal with some specific matter or are ambiguous in their wording and when giving concrete dimensions to general contractual principles. In that respect the Supreme Courts set certain precedents. Even if these precedents are not *a priori* binding, the lower Nordic courts would in practice certainly scrutinize previous Supreme Court decisions before deciding upon a matter in a dispute of a similar nature and if they decide otherwise, it would be prudent to explain their decision, for example by referring to the factual circumstances in the specific case.⁴⁰³ If the Restatements are held to have high persuasive authority in the USA, it could

³⁹⁸ Atiyah and Summers, 1987, at 46–47, suggesting that even if the English courts cannot question the validity of statutes, they may in fact in different cases interpret statutes in such a way that it affects their contents. Atiyah and Summers also recognized that their view is not necessarily accepted by all English lawyers, maintaining that the “validity of legislation never depends on its contents, except with regard to subordinate legislation.” Atiyah and Summers, 1987, at 47.

³⁹⁹ Elliott and Quinn, 2012, at 2–6 and at 9–12.

⁴⁰⁰ Atiyah and Smith, 2005, at 24–25 and Knapp, 1996, at 201–202. Knapp, however, also recognized that general contract law has been influenced by certain statutes, in particular the UCC and its Art. 2 in commercial transactions. Knapp, 1996, at 201–203. See also Elliott and Quinn, 2012, at 27–31. A slight difference is also apparent between jurisdictions in the way courts use the works of legal scholars. The USA seems to apply a lower threshold to refer to such works, while in the UK the courts seems to do so less, perhaps because the doctrine of precedents is so strong and judges would rather refer to case law instead.

⁴⁰¹ Atiyah and Summers, 1987, at 133. See also Burnham, 2002, at 65, footnote 153.

⁴⁰² In the Nordic countries, the courts often refer to works of well-esteemed legal scholars. Bryde Andersen and Runesson, 2015, at 29.

⁴⁰³ The website of the Finnish Supreme Court sets out the following information about precedents: “Under the Finnish legal system a judicial precedent is not binding. Courts of appeal and even district courts may depart from earlier decisions made by the Supreme Courts, for example, when the social circumstances have considerably changed. In practice, however, precedents of the Supreme Court are followed in cases arising after the precedent has been created and involving a similar point of law.” This information had been updated April 18, 2016 and was still available on the website on March 21, 2017. Nordic legal scholars have obviously commented on the relevance of Supreme Court decisions. For example, Pekka Timonen asserted that in general Supreme Court decisions should be followed, unless there is a particular reason not to do so. However, he emphasized that there is no absolute rule in this regard. Timonen, 1987, at 94–95. See also Krüger, 1989, at 505, who also observed that even if Norwegian Supreme Court rulings are not binding as such, they play a key role. Kai Krüger especially emphasized the argumentation of Supreme Court

on the other hand be claimed that the decisions of the Nordic Supreme Courts have high persuasive authority in the Nordic countries.

Nordic courts do not have the right of judicial review as presented above with regard to the USA. However, statutory acts may also be applied in cases or situations not exactly defined in the statutes in question, which would be done based on reasoning by analogy. The Supreme Courts are bound by their own decisions and statements, but they might subsequently change their statements in similar matters.⁴⁰⁴ As in the common law countries, the part of the decision of the Supreme Courts which contains a form of authority has been described as the “... essential elements that define the use of a precedent in subsequent cases,” which could be described as the *ratio decidendi*. The other elements are *obiter dicta*.⁴⁰⁵ In practice, it may not always be easy to draw a clear line between the different parts in a decision. It has furthermore been claimed that even the *obiter dicta* part may include important guidelines with regard to the future.⁴⁰⁶

There are of course more differences. For example, common law proceedings are carried out based on the adversarial system, while in the Nordic countries the judges would play a more active role. Furthermore, the system with jury trials in the USA does not have an exact equivalent in the UK or in the Nordic countries.

2.3 The functional environment of business acquisitions

2.3.1 The particularities of business acquisitions

As noted in Chapter 1, one of the questions to be answered is what relevance do and should the particularities of business acquisitions have in contract interpretation. The descriptions and discussions in the following will focus on typical elements appearing in a number of transactions. Thereby the functional framework will be established in order subsequently to determine whether the particularities are of such a nature that they should – or should not – have an impact on interpretation of business acquisition contracts.

rulings in contract interpretation cases, as few written legal sources are available as to contract interpretation. See also Peczenik, 1995, at 232, who maintained that decisions of the highest courts, including the Swedish Supreme Court, ought to be followed as authoritative reasons in cases which are substantially similar. Peczenik noted that precedents are not legally binding, but should be referred to as authority reasons in legal reasoning. Peczenik, 1995, at 239. As to the situation in Denmark, Alf Ross said that although Supreme Court decisions are not formally legally binding, they should be respected to a great extent in order to protect the rule of law and order. Ross, 1971, at 102. See also a summary presentation of the Nordic situation by Mads Bryde Andersen and Eric Runesson to the effect that Supreme Court decisions in the Nordic countries play an important part, even if they are not formally binding, adding that if Supreme Court decisions do not exist in a particular area, decisions of other higher courts may be referred to. Bryde Andersen and Runesson, 2015, at 25–27.

⁴⁰⁴ Bryde Andersen and Runesson, 2015, at 26.

⁴⁰⁵ Aarnio, 2011B, at 159; Peczenik, 1995, at 233 and Helgesen, 1997, at 163.

⁴⁰⁶ Helgesen, 1997, at 172.

Business acquisitions as processes are often extensive and involve a number of people in different roles. These processes are even more demanding when the transaction is of a cross-border nature, as legal and cultural issues may affect communication and understanding between the people involved and there are different rules and regulations to consider in the different jurisdictions. Nevertheless, the processes as such are from a legal and practical point of view not all that different. The two main forms of processes used in the sale and purchase of companies and businesses are controlled auctions⁴⁰⁷ and private sales.⁴⁰⁸ The chosen process for a particular transaction obviously depends not only on legal considerations, but also on other matters, such as the reasons for the transaction and what the parties want to achieve.⁴⁰⁹ These processes will be described on a general level in the following, but otherwise in order to keep the discussion structured the different elements have been described and analyzed based on the division referred to in subchapter 2.1, that is, the pre-acquisition phase, the negotiation phase, the acquisition phase and the post-acquisition phase.

2.3.2 Different ways of carrying out transactions

2.3.2.1 *Controlled auctions*

Controlled auctions are seller-driven processes, where the seller usually hires a financial advisor to take care of most of the practicalities in connection with the auction. The auction is normally closed in the sense that it is based on invitation and subject to confidentiality. The process varies and here are described what I have regarded to be quite typical elements based on my own experience.⁴¹⁰

At the beginning of the process the financial advisor would send out so called teasers, also called flyers, that is, brief descriptions of the target – but without disclosing the identity of the target – to prospective bidders. Teasers are customarily vague in their wording and do not amount to offers in the traditional contractual sense,⁴¹¹ but are rather just invitations to make offers.

⁴⁰⁷ Sometimes the term ‘structured’ auction is used instead of ‘controlled’ auction. The auction process has been described in more detail e.g. by Stilton, 2015, at 9–26; Fisher, 2000, at 2.261–2.274; Sevenius, 2011, at 135–151 and Doepel, Fogelholm, Karanko, Saanio and Wilkman, 2011, at 335–336.

⁴⁰⁸ Private sales may be subject to security laws and regulations if a share offering is addressed to a large enough number of investors.

⁴⁰⁹ The reasons might be, e.g., to acquire greater market share, to add a new product line, to divest a non-core business or to diversify the ownership base. The initiative might come from the parties themselves but might also come from outside, e.g., banks financing a company which is required to divest some part of its business in order to strengthen company finances. The competition authorities might require a company to sell off a certain part of a business in connection with the acquisition of another company in order to obtain clearance for the original acquisition. Listed companies might become the target of a take-over – willingly or unwillingly. See e.g. Sivenius, 2012, at 77–90; DePhampilis, 2010, at 6–13 and Buskerud Christoffersen, 2008, at 31–34.

⁴¹⁰ See e.g. Egholm Hansen and Lundgren, 2014, at 124–125, asserting that there are no set guidelines as to how an auction should be carried out; they also describe elements which are typically included in such a process.

⁴¹¹ See e.g. comment by Perillo, 2004, at 36–37. A somewhat more complicated situation may arise if invitations to bid are very specific, so that on some occasions e.g. US courts have declared invitations to bid to be offers because of

Bidders having signed the proposed confidentiality agreement would be provided with an information memorandum prepared *inter alia* by the financial advisor, the management of the target, and other experts.⁴¹² Sometimes in addition to the information memorandum a vendor's due diligence report or reports⁴¹³ are provided to the bidders.⁴¹⁴ It is quite common that the seller does not want to warrant his vendor due diligence report, but bidders would have to verify the information therein. Bidders would also often be allowed to carry out further due diligence based on their own requirements. In some cases, and especially with regard to environmental reports, if relevant, the advisor having carried out the investigation regarding the subject matter might be required to give a so-called reliance letter. A reliance letter basically gives the right to rely upon a report to another party than the party that originally ordered the report. It is therefore of more interest when the discussion concerns liability between the advisors and the parties.

The following stage in a controlled auction is usually that the bidders are invited to make their first bid, which is often referred to as an indicative bid. These bids would customarily include language to the effect that they are not binding or at least subject to a number of conditions, which are important to include in order for a bidder not to be regarded as having made a binding offer.⁴¹⁵ Thereafter the sellers would choose the bidders who would be allowed to conduct a due diligence, if that is allowed and needed, and finally the bidders would make their final bid, including comments on a draft purchase agreement. The "final" bid would often still include some preconditions, which would have to be fulfilled in order for the transaction to materialize.

Alternatively, the bidders might have been requested to comment on the draft purchase agreement even when submitting their indicative bids. By receiving such comments sellers would know whether or not the bidders have requirements which the sellers would not be willing to accept and/or the sellers would get a first indication of how difficult negotiations regarding the contract could be with different bidders.

Advocates of auction processes often claim that this form of selling a business gives a better opportunity for the seller to obtain a higher price for the target.⁴¹⁶ The ambition is to create a

the "unusual language contained in the invitations," see Perillo, 2004, at 42 and footnote 76 referring to e.g. *Short v. Sun Newspapers*, 300 N.W.2d 781 (Minn.1980) and *Gulf Oil Corporation v. Clark County*, 94 Nev. 116, 575 P2d 1332 (Nev. 1978).

⁴¹² Information memoranda contain information on targets and relevant markets and are comparable to prospectuses in public offerings, although information memoranda are normally not quite as elaborate.

⁴¹³ The seller (in person and/or external experts) then carries out a due diligence of the target to be sold. Vendor's due diligence reports generally cover various areas in relation to the target; information about assets and liabilities and other relevant information about the target. Depending on the business, the report might include legal, financial, environmental, human resources and similar issues. For further information see Sevenius 2013, at 106–111.

⁴¹⁴ The advantage of vendor's due diligence reports from the seller's perspective is that bids eventually submitted by bidders might be more comparable since the bidders have the same basic data about the target. See e.g. Ann-Christine Schmidt, who concluded that a vendor due diligence is equal to a more efficient acquisition process. Schmidt, 2008, at 48.

⁴¹⁵ See e.g. Egholm Hansen and Lundgren, 2014, at 122, who discussed the theoretical possibility that such bids under some circumstances could be binding based on the Nordic Contract Acts. They also recommended that a bid be conditional and stated not to be legally binding.

⁴¹⁶ See e.g. Stilton, 2015, at 10; Fisher, 2000, at 2.261 and Buskerud Christoffersen, 2008, at 55.

competitive situation with several bidders seriously interested in the target, trying to outmatch each other in price or otherwise.⁴¹⁷ The drawback with the auction process is, amongst others, that it is costly, it takes more time and there is a greater risk that it becomes public that the target is for sale, regardless of possible confidentiality agreements.⁴¹⁸ It makes sense to use this kind of process in transactions where the enterprise value is of some considerable amount.⁴¹⁹

The seller and his advisors steer this form of acquisition process. The question could therefore be asked whether the fact that it is a seller-driven process could or should have an impact on liability issues in relation to negotiations and whether it could furthermore have an effect on interpretation of the contract entered into between the seller and the ultimate buyer. In practical terms, for example, the information memoranda and vendor due diligence reports could be seen as influencing bidders in their decision-making on whether to continue the process or not and what kind of contract terms to accept. On the other hand, extensive exclusion language as to liability for the information provided would customarily be included in both the information memoranda and the vendor due diligence reports, but whether such limitation language is sufficient is another issue. Furthermore, bidders might be encouraged or required to verify such information. Exemption language would afterwards have to be judged based on what the final contract states regarding the relationship between the seller and the ultimate buyer. Competing negotiations may also raise liability issues if the competing bidders are not made aware of the fact that several “final” negotiations are going on at the same time.

2.3.2.2 Private sales

It might be more efficient, including more cost-efficient, to negotiate on the basis of a private sale without multiple buyer candidates. This is especially true if the target is a smaller business / company / group of companies with a fairly low enterprise value or if the parties know each other well and there is a serious interest to join forces or the parties have a mutual interest in selling and buying respectively.⁴²⁰ In a private sale the parties would typically at the beginning of the process enter into a confidentiality agreement. Additionally, some kind of preliminary agreement might be entered into, which would deal with different aspects of the negotiations and the proposed transactions.⁴²¹ In comparison with the auction process and the customary use of information memoranda, this phase might be compensated in private sales by a buyer’s due diligence, including a data room exercise. The advantage of a private sale from a seller’s perspective is that the seller

⁴¹⁷ See e.g. Egholm Hansen and Lundgren, 2014, at 119.

⁴¹⁸ Fisher, 2000, at 2.263.

⁴¹⁹ Stilton, 2015, at 10.

⁴²⁰ See also Robert Sevenius, who preferred to discuss the alternative method to an auction process as a process initiated by the buyer. Sevenius, 2012, at 121. Even though that might often be the case i.e. that acquisitions are carried out based upon a buyer’s initiative, here the alternative of a private sale is used to describe that the process is more directly conducted between the seller and the potential buyer; recognizing also that by definition a private sale could include several potential buyers with whom the seller at least initially would negotiate with.

⁴²¹ See discussion in subchapter 2.3.4.3.

and the target just have to focus on one party or a consortium instead of having to provide information to, and negotiate with, multiple prospective buyers. It might also be easier to keep the process strictly confidential and the transaction costs reasonable.⁴²² However the risk is that, if the negotiations are not successful, a lot of time and money has been spent in vain.

As to legal concerns in private sales, these are similar to those already raised in the presentation of controlled auctions, as the basic elements are similar, that is, confidentiality agreements, due diligence, negotiations and, if the negotiations are successful, entering into a contract. Additionally, preliminary agreements may have been entered into. The difference in comparison with controlled auctions is that private sales are not necessarily as seller-driven as auction processes. Both parties often have more possibilities to influence the contracting and the contract in a private sale. This obviously depends on their bargaining position and whether for example the seller is more or less forced to sell or not. However, the fact that the buyer has wider possibilities to influence the contracting in a private sale also means that there are fewer legal concerns about the seller's liability due to his and his advisors' strong influence on the contracting.

2.3.3 The pre-acquisition phase including initial negotiations

During the pre-acquisition phase the parties should identify the rationale for the acquisition, prepare their own studies based on available information, foresee possible problems in the acquisition process – for example whether there are common interests for the acquisitions and whether there are likely hurdles to reaching an agreement – and the buyer should not to forget to consider the integration process, that is, what happens after the acquisition.⁴²³ When the preparations have been carried out diligently and professionally, the parties have a more educated view on what kind of issues are important and the parties become engaged in the actual acquisition process based on realistic assumptions.

In addition to practical consequences, the question is, though, whether such preparatory work could have any legal implications. Even assuming that the pre-acquisition phase is carried out without

⁴²² Doepel, Fogelholm, Karanko, Saanio and Wilkman, 2011, at 337 and Egholm Hansen and Lundgren, 2014, at 55–56.

⁴²³ See e.g. DePamphilis, 2010, at 133, asserting that “A planning-based acquisition process consists of both a business plan and a merger-acquisition plan, which drive all subsequent phases of the acquisition process.” He further (at 134–135) illustrated the acquisition process by dividing it into two main sets of activities; pre- and post-purchase decision activities. DePamphilis' work contains a highly structured approach to what are crucial elements in a successful acquisition, but unfortunately not all acquisitions are carried out in such a structured way based on my own experience. See also DePamphilis, 2010, at 6–13, discussing different motives for engaging in mergers and acquisitions. A vast choice of literature is available on planning successful business acquisitions. See e.g. Lauriala, 2011, at 30–38, discussing different aspects affecting the seller's and the buyer's choice as to business acquisitions and further at 39, suggesting that a buyer's strategy should be in place and the buyer should make sure that the acquisition supports its business and strengthens the strategy by implementing the chosen strategy. Planning could be further divided as to identifying, surveying the target, and determining the target's economic / financial position. See also Bäck, Karsio, Markula and Palmu, 2009, at 27–28, presenting the process from the buyer's perspective; For other presentations see e.g. Knabe, 1989, at 14–15 and Stilton, 2015, at 9, mentioning matters which are part of the actions of the parties in lieu of a sale/purchase, although not elaborating on these issues.

any contact between the seller and the buyer, but the acquisition process has later on continued, at least two aspects are of interest in relation to contract interpretation. First, could or should the information gathered and the internal material prepared by a party be of relevance, for example when assessing the parties' presumptions on entering into the transaction? Based on the discussion above on the doctrine of failed assumptions in the Nordic countries, it seems that unless such information – which has to be relevant and substantial – has been shared with the other party, it is not of relevance as such. Secondly, subject to being able to prove the availability of knowledge as appearing in the prepared material and analyses, is it possible that such knowledge will have an effect on contract interpretation including possible disclosure / examination obligations of the parties in relation, for example, to representations and/or warranties given by the parties?⁴²⁴ In controlled auctions the questions are somewhat different, as information contained in teasers, information memoranda and possible vendor due diligence reports has unquestionably come to the knowledge of the prospective bidders. This information is usually subject to limitation language and the information is customarily to be verified during the process, wherefore the impact as a starting point is limited.

The pre-acquisition phase and the negotiation phase are interwoven in many respects, for example in relation to the structure of the deal. There should be no misunderstanding as to the diversity of transaction structures utilized, especially in international transactions. Many issues affect the choice of structure and a few will be mentioned. One major issue to consider is competition/anti-trust matters.⁴²⁵ The buyer may have to obtain approvals from the competition authorities or there is a standstill period before the buyer can actually take over the target, which leads to deferred closing, that is, the transaction will be carried out in two phases. Such a structure with separate signing and closing raises more concerns about the risk and the liabilities of the parties between signing and closing and about the possibility that closing may not take place. Professional parties are used to considering these issues and would agree upon them in the written contract. The second very important issue is taxes. The parties should have reviewed the structuring at an early stage, but tax might be an issue negotiated for some time, as the seller and the buyer might have conflicting interests in this regard.⁴²⁶ In the EU the tax laws have been largely harmonized, which

⁴²⁴ These questions are not analyzed separately but are discussed in terms of contract interpretation and the intention of the parties, use of pre-contractual material as well as of warranties and representations. See Chapters 3 and 4.

⁴²⁵ Relevant questions to be contemplated by the parties are e.g. can the parties carry out the transaction without interference from the competition/anti-trust authorities or is there a risk that the transaction cannot be carried through without an off-set such as selling off some of the buyer's previous or now to be purchased businesses? Competition /anti-trust law filings in acquisitions might also lead to the need to carry out the transaction in two different stages i.e. a separate signing of the contract and a separate closing (another term frequently used, especially by English lawyers, is completion) of the deal. In general see e.g. Knight, 1997, at 31–42. (New regulation might be in place since the book was written, but it shows in general the issues to consider). See also DePamphilis, 2010, at 56–67.

⁴²⁶ For example, when contemplating structuring a transaction as an asset or share deal a buyer might prefer an asset deal, which might enable the buyer to depreciate acquired assets. On the other hand tax losses might not be transferable in an asset deal. An asset deal might be less attractive to a seller, who might be left with residual liabilities in the company from which the assets have been sold, unless the company operates other businesses as well. Transfer taxes might be incurred in both cases, depending on the jurisdictions. Besides, a subsequent sale by the buyer might give rise to tax consequences, which the buyer would be able to avoid if the original purchase is in the form of an asset purchase. See e.g. Stilton, 2015, at 3–5 and DePamphilis, 2010, at 444–470.

would lead to some similar considerations in Denmark, the UK, Finland and Sweden. The Norwegian situation has to be looked upon separately in order to confirm which tax laws have also been implemented in Norway, as Norway is not a member of the EU but instead a party to the EEA agreement.⁴²⁷

When the parties analyze the structure of the transaction and consider whether it should be an asset or a share sale and purchase, a variety of other implications need to be considered. For example, in asset transactions the parties will have to investigate whether ongoing commercial contracts may be transferred to the buyer without the consent of the other party as a matter of law and whether the seller will still have liability for such contracts to some extent. Even in a share transaction, the parties have to check that there are no change-of-control provisions in commercial contracts that may be triggered if the ownership of the target changes. The position of employees also bears an impact on whether a transaction is carried out as a share deal or an asset deal. In the EU and in Norway asset deals might raise the question whether the employees have the right to be transferred together with the assets or not.⁴²⁸

2.3.4 The negotiation phase

2.3.4.1 *Multitasking*

The negotiation phase puts the parties' multitasking ability to its extreme. They are engaged in negotiating the terms of the proposed acquisition contract, which already involves a number of people, and which includes negotiations, preparation and exchange of statements and draft documentation. This phase might also include preparation and entering into preliminary agreements, carrying out due diligence followed by finalization of the negotiations to be reflected in the actual acquisition contract and ancillary contracts. The original aim of the parties is presumably to conclude a final acquisition contract, but not all negotiations are successful. In these cases the parties will have to consider whether aborted negotiations may lead to liability. Having a well-functioning *modus operandi* is beneficial for a party claiming that he did not at the time of continuing the negotiations have such information which later on made him decide to abort the negotiations. Assessing afterwards whether a party was, for example, justified in aborting

⁴²⁷ See Council Directive 2009/133/EC of 19 October 2009 on the common system of taxation applicable to mergers, divisions, partial divisions, transfers of assets and exchanges or shares concerning companies of different Member States and to the transfer of the registered office of an SE or SCE between the Member States. Another example is Council Directive 2003/49/EC of 3 June 2003 on a common system of taxation applicable to interest and royalty payments made between associated companies of different Member States (as amended) i.e. the so called Interest and Royalty Directive.

⁴²⁸ In acquisition of businesses i.e. businesses regarded as independent entities able to carry on their business also after the sale and purchase, employees of the business have the right to transfer automatically on their current employment terms to the new owner, unless the employees exercise their right to terminate their employment. For further information, see Council Directive 2001/23/EC of 12 March 2001 on the approximation of the laws of the Member States relating to the safeguarding of employees' rights in the event of transfers of undertakings, businesses or parts of undertakings or businesses. According to this directive, transfer of an undertaking is the transfer of an economic entity that retains its identity defined as an organized grouping of resources that has the objective of pursuing an economic activity.

negotiations or whether a party continued negotiations, although having no intention to conclude a final contract, is difficult based on a diversified and complex process.

Negotiations concerning business acquisitions differ somewhat depending on in which form they are carried out. Private sales are – in comparison with controlled auctions – often more flexible as to how the negotiations are carried out. In a controlled auction the seller has normally set out how the transaction process is carried out and normally without any commitment, that is, he would be free to alter the process at any time. However, the seller would still have to observe the guidelines and make sure that he acts accordingly or at least informs all bidders if he changes the guidelines, with the risk of otherwise being claimed to have favored some bidders at the expense of others and thus not to have acted in good faith during the auction. The likelihood that such a claim would be successful is perhaps not so great, as the seller normally would have reserved the right to handle the process in any manner seen fit. Clearly, the risk of the seller in the common law countries is even smaller, as the risk of pre-contractual liability is smaller than in the Nordic countries.

Furthermore, acts and statements by the parties and documents prepared and negotiated during the negotiation phase are also relevant when discussing the impact of the pre-contractual stage on contract interpretation.

2.3.4.2 Due diligence

In most transactions due diligence⁴²⁹ is carried out by the buyer, both in the common law and in the Nordic countries, and regardless of whether the transaction is being carried out via a controlled auction or a private sale. The reasons for carrying out a due diligence are several and vary from transaction to transaction.⁴³⁰ The extent of a due diligence also varies, but based on my own experience it often covers areas such as finance and tax, human resources, environmental issues and general legal matters such as intellectual property rights, contracts, corporate matters, disputes, competition law matters, and real estate. The seller would provide written information, which is customarily gathered in so-called data rooms, physical or electronic.⁴³¹ In addition to the written information provided, a seller might also arrange so-called management presentations where the

⁴²⁹ The history and use of due diligence in a broader perspective has been presented e.g. by Robert Sevenius, Sevenius, 2013, at 35, identifying several contexts involving the term ‘due diligence’: it might refer to the diligence states should show in their mutual relations (the due diligence rule), or it should be shown by individuals when entering into transactions with others (transactional due diligence) and persons might be supposed to act diligently in relation to statutes (compliance due diligence). In this book Sevenius focuses on transactional due diligence.

⁴³⁰ The reasons might be e.g. that the buyer wants information in order to a) confirm assumptions of the target and whether to buy the target or not; b) evaluate the estimated or proposed purchase price; c) find possible risks connected with the target and maybe require specific indemnification in certain matters; d) be able to negotiate a better contract; and e) have relevant information for planning the integration or running of the business after the acquisition is completed. For further elaboration on the reasons see e.g. Stilton, 2008, at 51; Jonsson and Liljegren, 2002, at 32; Blomquist, Blummé, Lumme, Pitkänen and Simonsen, 2001, at 18–20; Lauriala, 2011, at 52 and Lindholm and Hakoranta, 1997, at 91.

⁴³¹ Physical data rooms might be set up outside the seller’s or the target’s premises e.g. in lawyers’ offices, or information might be assembled in so called electronic or virtual data rooms. (Merill Communication LLC is an example of a well-established and much used service provider for secured virtual data room services. For further information, see www.datasite.com.)

buyer candidate would be able to present questions to the management of the target. The buyer might furthermore have access to the management and other representatives of the seller during visits to the target's premises or otherwise and the relevance of information provided in these situations might be an issue. Verbal information provided during management presentations and visits is more likely to be disputed as to whether the buyer had knowledge of an issue prior to entering into the contract or not and whether the seller had provided the buyer with accurate and material information. The buyer might research official registers or, depending on the target, there might be some environmental due diligence including some physical examination, for example drilling of the soil where the business or part of it is conducted. There is a vast amount of literature on due diligence and let it here only be stated that the extent of the due diligence varies depends on the business to be acquired and on risk allocation between the parties.⁴³² The buyer might carry out the investigation with his own resources, but more often he would hire professional advisors to carry out at least some of the work, for example legal, environmental and financial advisors. The responsibility of the work of these professional advisors is a different issue, which will not be discussed separately.

Due diligence is typically carried out prior to execution of the contract, but sometimes due diligence is allowed only after a contract has been signed, for example if a major competitor of the target or of the seller is the prospective buyer. Alternatively, a combination of the two types of examination is allowed and, for example, a complementary due diligence is carried out between signing the contract and closing the transaction if there is a deferred closing and thus the transaction is in fact two-phased. In such cases there would be some condition precedent as to the effect of the subsequent due diligence.⁴³³

Due diligence as a concept goes back to the 1930s USA, where the term was used in connection with public offerings of shares and other securities and the requirement was for a certain level of care by persons within the financial industry preparing the same.⁴³⁴ There is no general obligation in the common law countries to carry out a due diligence prior to acquisition of a private company or of its assets, but the situation is different with regard to public companies and offerings and sales of listed shares.⁴³⁵ One of the reasons for no due diligence requirement existing in common law is that there is no general duty of disclosure, that is, neither party is obliged to disclose matters to the

⁴³² See e.g. Sevenius, 2013; Bäck, Karsio, Markula and Palmu 2009; Blomquist, Blummé, Lumme, Pitkänen and Simonsen 2001; Hagström, 1999; Stilton 2008 and 2015; Whalley and Semler (editors), 2007 and especially Chapter 3 and Bryde Andersen 2004, at 98–102.

⁴³³ For further reference to the meaning and effect of conditions precedent, see subchapters 4.3.1.2 and 5.2.1.

⁴³⁴ The US Securities Act 1933 contained a so called due diligence defense, available to brokers in securities deals.

⁴³⁵ In the UK, the Takeover Code (City Code on Takeovers and Mergers issued by the Panel of Takeovers and Mergers) prescribes how information should be given in the case of public companies. The takeover regulations in the UK and the Nordic countries are based on the EU Directive on Takeover Bids (2004/25/EC). In the USA the basic rules can be found in the Securities Act (1933) and the Securities Exchange Act (1934). It is worth mentioning that public transactions in general are also governed by other regulations issued e.g. by stock exchanges.

other party prior to entering into an acquisition contract.⁴³⁶ There are situations in both countries where liability might arise due to the specific type of contract in question,⁴³⁷ due to the special relationship between the parties and, more relevant in business acquisitions, allegations of misrepresentation, fraud, telling half-truths and similar matters.⁴³⁸ With regard to due diligence and its effect on possible pre-contractual liability, such analysis would rather be based on laws and principles on misrepresentation. The seller might incur liability if his non-disclosure amounts to misrepresentation, but case law is scarce with regard to cases dealing with the effect of misrepresentation when no contract has been entered into.⁴³⁹ If the prospective buyer has actually carried out some kind of examination of the target, this might have an impact on the buyer being able to have recourse to a misrepresentation when a contract has been entered into.⁴⁴⁰

The Nordic countries also have no general legal obligation to carry out a due diligence prior to entering into an acquisition contract. However, it should be noted that certain situations may lead to the buyer having to carry out a due diligence with the risk of otherwise losing the possibility to present claims to the seller. These situations are stipulated in further detail in the Nordic Sale of Goods Acts.⁴⁴¹ The necessity for and consequences of due diligence have been questioned in the Nordic countries by Viggo Hagstrøm.⁴⁴² He claimed that the due diligence concept and the customary follow-up in contracts drafted based on Anglo-American contract models with representations and warranties are ill-suited to Nordic contract law and are not based on the requirements of Nordic contract law.⁴⁴³ One of the arguments proposed by Hagstrøm was that the Nordic Sales of Goods Act and also the Contracts Act extensively deal with the question of information and the division (or allocation) of risk in relation to information not given, received or known. He further referred to the strong tradition of fairness in court decisions.⁴⁴⁴ The relevance of Hagstrøm's opinion could be analyzed based on certain relevant provisions of the Finnish,

⁴³⁶ See e.g. Beale, Chitty I, 2012, at 582 and Perillo, 2004, at 348–353. As to English law this lack of any form of disclosure obligation in normal commercial cases is often referred to the *caveat emptor* principle ('let the buyer beware') being applicable. As to the *caveat emptor* principle and contracts see e.g. McKendrick, 2012, at 341, dealing with issues in relation to the English Sale of Goods Act 1979, which McKendrick held to set a 'floor of rights' for the buyer.

⁴³⁷ An often-mentioned example of such a special contract is the so called *uberrimae fidei* contract or as McKendrick describes them "contracts of the utmost good faith." As examples McKendrick mentioned contracts of insurance, contracts where the fiduciary relationship of the parties might lead to a party having a duty of disclosure; for further information see McKendrick, 2012, at 590–591. Similar examples of exceptions to the non-duty to disclose are given by Beale in Chitty I, 2012, at 582, when discussing misrepresentation.

⁴³⁸ Atiyah and Smith, 2005, at 243; Peel and Treitel, 2015, at 361–373; Chen-Wishart Mindy, 2012, at 211–216; McKendrick, 2013, at 215–225; Collins, 2008, at 198 and Farnsworth, 1987, at 277–279.

⁴³⁹ For example in the US case *RAA Management LLC v Savage Sports Holdings Inc.* 45 A.3d. 107 (Del. 2012), the parties never entered into a final contract, but they had entered into a non-disclosure agreement which was given such force, but the court did not find that any misrepresentation had taken place.

⁴⁴⁰ See discussion in subchapter 5.2.2.3.

⁴⁴¹ §20 of the Finnish, Norwegian and Swedish Sale of Goods Act and §47 of the Danish Sale of Goods Act.

⁴⁴² Hagstrøm, 1999, at 391–399, adding that due diligence might give a 'false assurance' to a buyer. Hagstrøm, 1999, at 397. Hagstrøm ended his contribution by stating that any case of due diligence should be individualized and an assessment carried out as to whether due diligence is necessary in the case. As a more practical point, he criticized the fact that often the youngest and least experienced lawyers are carrying out such examinations. Hagstrøm, 1999, at 391. Based on my own experience, this is no longer always the case, so that more experienced lawyers might be engaged in the due diligence exercise depending of course on the case at hand.

⁴⁴³ Hagstrøm, 1999, at 391.

⁴⁴⁴ Hagstrøm, 1999, at 395.

Norwegian and Swedish Sale of Goods Acts. Hagstrøm referred in particular to Section 18 of these Sale of Goods Acts, which relates to information given by or on behalf of the seller.⁴⁴⁵ These Sections in fact state that goods sold are regarded as defective if they do not correspond to the seller's information and it can be assumed that such information has had an impact on the sale.⁴⁴⁶ These Acts furthermore have several stipulations as to the liability of the seller for information provided⁴⁴⁷ and, as noted just above, certain Sections of the Acts impose an obligation to carry out due diligence with the risk of otherwise forfeiting the right to remedies. General contractual principles such as the loyalty principle applicable in the Nordic countries may also bear an impact on the effect of due diligence and the information provided by the seller.⁴⁴⁸ The fact remains, though, that even if the necessity for due diligence may be questioned, it is very common that due diligence is carried out in connection with business acquisitions.

The legal relevance of due diligence most often become the subject of discussion and dispute when a contract has been entered into, but due diligence may also bear an impact when a judge or an arbitrator considers whether a party had the right to abort negotiations or not or whether the parties had reached an agreement, although no final contract was signed.

2.3.4.3 Preliminary agreements

Preliminary agreements, which might be called letters of intent, memoranda of understanding, heads of agreement or something similar,⁴⁴⁹ are – based on my own experience – mainly used in private sales. These preliminary agreements might be entered into at different stages of the process depending on what the parties want to achieve with them.⁴⁵⁰ Some of these agreements are entered into at a fairly early stage of the negotiations and they might include provisions on the negotiation time-table, due diligence, exclusivity issues (for example the seller is not allowed to negotiate with or accept offers from third parties), confidentiality undertakings or a reference to a separately

⁴⁴⁵ Hagstrøm, 1999, at 396.

⁴⁴⁶ See subchapter 4.3.3.3 below.

⁴⁴⁷ See subchapter 5.2.2.3 below.

⁴⁴⁸ See subchapters 2.2.2 and 2.3.4.2 below.

⁴⁴⁹ See e.g. Wallgren, 1984, at 10, who divided preliminary agreements into i) declarations of intent, under which she also included letters of award; ii) stage/partial (*etapp* in Swedish) agreements, under which she included letter of understanding, memorandum, memorandum of understanding, protocol and preliminary agreement and letter of intent as an overall description, and iii) special undertakings under which she referred to undertakings as confidentiality or secrecy agreements. See also Cordero-Moss, 2007, at 140, asserting that pre-contractual documents are given various names, often used interchangeably. For her own discussion Cordero-Moss used letter of intent, heads of agreement and memoranda of understanding, but noted that the division was for convenience only. Neither of these authors dealt only with business acquisition contracts. As a general comment, it may be said that the name of the different agreements is not of significance, but rather the contents. A letter of intent should rather be in letter form, but just as often they are drafted as normal agreements in the Nordic countries. See further Egholm, Hansen and Lundgren, 2014, at 159–160, suggesting that different kinds of protocol and part agreements may be used when the parties want to confirm that they have a common understanding on some issues. They also argued that such protocols or part agreements are not the final contract, but they may have evidentiary value later on.

⁴⁵⁰ See e.g. Klami-Wetterstein, 2016, at 2–6, presenting different functionalities of preliminary agreements, although not with a focus on business acquisition contracts. See also Egholm Hansen and Lundgren, 2014, at 154–157, discussing different reasons and contents for such preliminary agreements.

agreed confidentiality agreement and finally the purchase price might be included or some basic indications of the purchase price.⁴⁵¹ Confidentiality/non-disclosure agreements are often entered into during the pre-acquisition or negotiation phase. Separate confidentiality agreements are more than mere preliminary agreements, as they customarily contain rights and obligations of the parties to which are attached certain remedies and which are independent of other parts of the transaction and the transaction process and they are mostly binding agreements, which should be complied with as agreed.⁴⁵²

There is a great variety of preliminary agreements and no set form, unless they have to follow a certain form based on mandatory legislation in order to have any binding effect at all, as may be the case in real estate transactions.⁴⁵³ It is not common that all final terms are defined in such documents, which rather excludes them from the category of pre-contracts, but there may also be preliminary agreements signed which in fact confirm certain matters that the parties have already agreed upon.⁴⁵⁴ In general, however, the preliminary aspect of their nature is that they do not yet give an indication as to whether a final transaction will actually occur or not. The parties may also in a preliminary agreement have agreed upon when the final contract is to be regarded as having been concluded.⁴⁵⁵ The legal effects of preliminary agreements are dependent on what the actual contents of the agreements are, that is, what the parties wanted to achieve,⁴⁵⁶ but their effect may also vary depending on whether a final written contract actually is concluded or whether the negotiations for some reason do not lead to a final contract. If no final contract is entered into, a preliminary agreement may still be used as an argument or evidence regarding possible party liability based on negotiations only, including the question whether an agreement has actually been reached, although no final written contract was entered into.

It is not uncommon that disputes arise as to whether a preliminary agreement is binding or not. Several court cases in the common law countries deal with this issue, but here only a few will be mentioned. In the UK in *Mamidoil-Jetoil Greek Petroleum Co S.A. v Okta Crude Oil Refinery*,⁴⁵⁷ Lord Justice Rix held with regard to the principles relevant for judging whether a preliminary agreement has binding force or not that: "...Subject to that; (ii) Where no contract exists, the use of an expression such as 'to be agreed' in relation to an essential term is likely to prevent any contract coming into existence, on the ground of uncertainty. This may be summed up by the

⁴⁵¹ See e.g. Schans Christensen, 1998, at 34; Egholm Hansen and Lundgren, 2014, at 151–153; Sivenius, 2012, at 293 and Stilton, 2015, at 29.

⁴⁵² See e.g. Ramberg and Ramberg, 2016, at 81 and Giertsen, 2014, at 72.

⁴⁵³ Such a requirement is, e.g., presented in §2(8) of the Finnish Real Estate Code (540/1995). See also Cordero-Moss, 2007, at 141.

⁴⁵⁴ See e.g. Cordero-Moss, 2007, at 141–145; Wallgren, 1984, at 40–41 and Egholm Hansen and Lundgren, 2014, at 159–160.

⁴⁵⁵ Ramberg and Ramberg, 2014, at 88–89 and Adlercreutz and Gorton, I, 2011, at 53–54.

⁴⁵⁶ See e.g. Cordero-Moss, 2007, at 140 and Klami-Wetterstein, 2016, at 8, who asserted that a presumption that a letter of intent would be an incomplete agreement is not easily adapted in contemporary contract law, especially not in international commercial relationships.

⁴⁵⁷ (No 1) A.D. [2001] 2 Lloyd's Rep. 76

principle that ‘you cannot agree to agree’. (iii) Similarly, where no contract exists, the absence of agreement on essential terms of the agreement may prevent any contract coming into existence, again on the ground of uncertainty. (iv) However, particularly in commercial dealings between parties who are familiar with the trade in question, and particularly where the parties have acted in the belief that they had a binding contract, the courts are willing to imply terms, where that is possible, to enable the contract to be carried out.”⁴⁵⁸ As to other aspects of preliminary agreements under English law, it seems decisive whether the agreements expressly state that there is no contract until all terms are agreed upon or something similar or when construed by the court it is clear that such agreements were not intended to have binding force.⁴⁵⁹ It should be noted that even if the preliminary agreement includes text like “subject to contract” it is still possible that it will be construed as a binding contract. The heading seems less decisive than other circumstances such as the contents in general.⁴⁶⁰

Content as the decisive element when discussing the effects of preliminary agreements is also widely accepted in the USA. A preliminary agreement may be regarded as binding, but this depends on many factors and also on the state in question.⁴⁶¹ For example, as noted above, under Delaware law preliminary agreements which include obligations to negotiate in good faith would in general be enforceable, as was confirmed in *SIGA Technologies, Inc. v. Pharmathene, Inc.*⁴⁶² However, the case law varies and as an example may be mentioned a case which was decided based on New York state law, that is, *Gorodensky v. Mitsubishi Pulp Sales (MC) Inc.*,⁴⁶³ which was a summary judgment by a US district court. In this case a letter of intent was not found binding and in this decision the focus was on the wording of the letter of intent and the fact that there was no indication that the plaintiff “intended to be bound by it,” the fact that there were also several open matters which needed to be negotiated, and further that the letter of intent dealt with future performance, as a pulp plant was to be built. Other factors were also mentioned such as that ordinarily an agreement of this size, nature and length would be formalized in writing with standard provisions including representations and warranties. The reasoning was based on several earlier court

⁴⁵⁸ For a full description of the principles mentioned, see Lewison, 2004, at 272–273.

⁴⁵⁹ Treitel, Chitty I, 2012, at 248–249.

⁴⁶⁰ Treitel, Chitty I, 2012, at 247.

⁴⁶¹ Perillo, 2004, at 35.

⁴⁶² 2013 WL 2303303 (Del.Supr. May 24, 2013)

⁴⁶³ 92 F. Supp. 2d 249, 254–255 (S.D.N.Y. 2000)

decisions.⁴⁶⁴ However, when a preliminary agreement clearly provides that it is a binding or non-binding agreement, the courts in the USA have in general followed that provision.⁴⁶⁵

The relevance of preliminary agreements in the Nordic countries, whether denominated as letters of intent, memoranda of understanding or something similar, is not based on their heading. The decisive factor in court practice has been the contents of such agreements and consequently what the parties intended with the agreement.⁴⁶⁶ A preliminary agreement might under some circumstances be regarded as a factor which emphasizes or even increases the loyalty obligation of the parties.⁴⁶⁷ Parties signing a preliminary agreement have reason to rely upon one another's sincerity to work towards a final contract,⁴⁶⁸ which however does not mean that the parties are forced to enter into a final contract.⁴⁶⁹ The parties are assumed to negotiate in good faith and try to achieve a final contract.⁴⁷⁰ Some of the provisions in a preliminary agreement might be regarded as independent to the extent that they could be seen as separate undertakings and would be

⁴⁶⁴ Such cases mentioned were *Shann v Dunk*, 84 F.3d 73, 77 (2d Cir.1996) and *Teachers Ins & Annuity Ass'n Tribune Co.*, 670 F.Supp 491, 497 (S.D.N.Y.1987). See also *Arcadian Phosphates, Inc. v. Arcadian Corp.*, 884 F.2d 69 (2d Cir. 1989). With reference to the last two decisions it was found that an agreement is binding if the parties have agreed on all points that require negotiation (including whether to be bound) but agree to memorialize their agreement in a more formal document, when the signing of a more extensive agreement is a 'mere formality'. Also mentioned is another type of 'binding preliminary commitment', where the parties agree on major terms but leave other terms open for further negotiation. In this case the parties are committed to negotiate in good faith to reach a final agreement, although they may not require fulfillment of the transaction covered by the preliminary agreement.

⁴⁶⁵ Farnsworth, I, 2004, at 237.

⁴⁶⁶ Schans Christensen, 1998, at 36–37 and Hov, 2002, at 77. The Finnish Supreme Court found in 1996 (KKO 1996:7) that a document titled 'Letter of Intent' (in Finnish *aiesopimus*) and its first section together with the draft contract of sale were unambiguous. The letter of intent also included a provision on the date by which the contract of sale had to be signed. In the draft contract of sale the essential parts had been exactly defined and there was no disagreement between the parties as to the contents of the terms. The letter of intent had been signed by the relevant persons after due acceptance of the contract. The Supreme Court found that regardless of the heading, the document was to be regarded as a binding pre-contract for the sale of shares. In other words, regardless of the wording of the Finnish heading of the agreement (of a preliminary nature like letter of intent, heads of agreement or similar) the court decided that the agreement was actually a pre-contract binding upon the parties. The Swedish Supreme Court in its decision DT174-95 (NJA 1995:90) stated regarding the binding effect of preliminary agreements that in interpreting a letter of intent (or similar documents – in Swedish *avsiktsförklaring*) the interpretation should be carried out according to customary interpretation principles, where not only the nuances of the document as such are relevant, but also the circumstances when the document was emerging and what can be found with regard to the intention of the parties may bear an impact. The Swedish Supreme Court stated in its decision that the letter in question was an example of documents, when using English terminology is often regarded as a 'letter of comfort', 'letter of intent' or 'letter of awareness', as was used in this case. The court made its decision by reference to two older cases DT46-90 (NJA1990:122) and DT318-92 (NJA 1992:59). Reading through the court's decision it becomes apparent that the heading bore little impact in the decision, but the court looked at the actual wording of the documents and other circumstances when the document was given including drafts sent during the pre-contractual phase and what could be evaluated about the parties' intentions. See also Ramberg and Ramberg, 2010, at 70. With regard to Danish court practice it has been claimed that case law has more often dealt with letters of comfort or that agreements have emerged, although no final written contract has been signed. Egholm Hansen and Lundgren, 2014, at 154–155. As to Norwegian law, Geir Woxholth suggested that if the parties have not said anything about the binding nature of a letter of intent, it has to be interpreted and that one of the questions is whether the parties are somehow obliged to enter into a final contractual relationship. Woxholth, 2014, at 127–128. He further presumed that a letter of intent entered into early in a negotiation does not have any form of promissory effect, unless of course the agreement so says, although it may have a presumptive effect that the parties will act seriously. Woxholth, however, also noted that there is a 'point of no return', where the parties cannot abort in total freedom. Woxholth, 2014, at 129. Aborting may in some cases lead to liability for damages. Woxholth, 2014, at 158–159.

⁴⁶⁷ Ramberg and Ramberg 2010, at 67; Flodgren, 2015, at 126–127; Egholm Hansen and Lundgren, 2014, at 159; Woxholth, 2014, at 163 and Hov, 2002, at 78. Mika Hemmo pointed out that when analyzing whether there is an increased loyalty obligation, the agreement in question has to be analyzed in detail. Hemmo, I, 2007, at 229.

⁴⁶⁸ Hov, 2002, at 77.

⁴⁶⁹ Woxholth, 2014, at 128.

⁴⁷⁰ Klami-Wetterstein, 2016, at 142–143 and Egholm Hansen and Lundgren, 2014, at 157.

enforceable, even if the parties could not be compelled to enter into a final contract. A typical example would be a confidentiality clause and a clause on the governing law and dispute resolution.⁴⁷¹

2.3.5 The acquisition phase and the written contract

Assuming that the negotiations have achieved satisfactory results for both parties, who are in agreement as to the terms under which they are willing to bind themselves to a certain business acquisition, such terms are customarily confirmed in a written contract, if the matter is a sale and purchase outside the public market. Any and all acquisition contracts should be customized in order to reflect the mutual intention of the parties. The need for customizing contracts may also be due to local requirements, for example, the form of transferring shares in a corporation or a limited liability company, matters concerning the specific industry where the target is active, for example the target is active within the military industry so that there might be a need for governmental approvals. The parties may use typical contract terms, but they may also provide their own definitions of terms and conditions, which would have an effect on subsequent interpretation of the contract. If the acquisition is carried out as an asset deal, there might be a need to further clarify the liabilities for ordinary business contracts which are to be transferred to the buyer but the transfer of which is uncertain due to the need for approvals from third parties. These are just a few examples of the kind of issues which the parties need to consider and agree upon. The wording of the contract is imperative, as we will see that in all relevant jurisdictions the wording is where all interpretation starts regardless of what interpretation method is utilized.

Templates are available for business acquisition contracts,⁴⁷² but using them is no automatic guarantee that the contract actually reflects the particulars of the transaction or the intention of the parties. Templates might be useful as checklists of the kind of issues the parties should consider when finalizing the transaction in a written contract. When reviewing these templates it may be noted that there is not one firm set that includes different sections, but templates deal with the same types of matter. It is, for example, quite typical that contracts include provisions such as: 1. Specific information on the parties – which companies are the primary parties to the contract; 2. Background information and what in broad terms is being agreed in the contract; 3. Definitions – different terms, so that they are consistently used and interpreted throughout the contract; 4. The actual purchase and sale – what is being sold/bought; 5. The purchase price and mechanism in relation thereto; 6. The closing mechanism and conditions precedent for carrying out the transaction – if there is a time gap between the actual signing of the contract and the closing of the deal when the ownership is to be transferred; 7. Representations and warranties by the seller; 8. Representations and warranties

⁴⁷¹ Ramberg and Ramberg 2010, at 71.

⁴⁷² See e.g. ICC Model Share Purchase Agreement, 2004; Warren's Forms of Agreements, 2, 2007, Part III, Chapter 8; Share Purchases Practice Manual, 2000, at 4.26 – 4.136; Stilton, 2008, at 473–722. For a list of typical sections in Nordic contracts, see Westin and Lagercrantz, 2014, at 256–283, and Tenhunen and Werner, 2000, at 136–154.

by the purchaser; 9. Indemnification and limitation of liability matters; 10. Special undertakings by the parties including, for example, non-competition and non-solicitation; 11. Miscellaneous provisions, for example, no oral amendments, assignment, entire agreement – sometimes referred to as ‘boilerplate clauses’, but still integral parts of the agreement; 12. Governing law and dispute resolution.⁴⁷³

It may be noted that, even though the term ‘boilerplate clause’ is frequently used by lawyers, there is no strict legal definition of what actually constitutes a boilerplate clause and opinion varies as to what kind of contract clauses are boilerplate. Boilerplate clauses generally mean contract provisions dealing with general contractual and/or interpretation matters and not focusing on the main subject of the contract.⁴⁷⁴ There is a risk with using the term ‘boilerplate’ in cross-border transactions, as the consequences of what transactions lawyers may find to be typical boilerplate clauses may be quite different depending on the jurisdiction and whether such clauses have been separately negotiated or not.

2.3.6 The post-acquisition phase

After the transaction has been closed in the sense that ownership has been transferred to the purchaser and the purchase price has been paid,⁴⁷⁵ the post-acquisition phase begins. The transaction does not end with the signing of the contract or the closing of the transaction as agreed in the written contract. The parties will still have to observe the rights and obligations arising out of the contract. It is, for example, typical that assurances given by the parties in the contract continue to be in force for a certain period after the signing of the contract and the closing of the transaction. Furthermore, in many transactions the final purchase price is not assessed until after the transaction has taken place. It is a matter of taste whether payment of the purchase price, if it

⁴⁷³ Agreeing upon the governing law is especially important if the contract involves a cross-border acquisition.

⁴⁷⁴ See, with regard to the UK, Stilton, 2015, at 137, who described boilerplate clauses as “...a number of clauses which do not have great commercial significance but which the lawyers normally like (for good reason) to see in the agreement...” See also Christou, 2012, at 1, who said that “The term “boilerplate” is most properly used in its widest sense to describe the clauses, common to nearly all commercial contracts, which deal with the way in which the contract itself operates, as opposed to the rights of the parties under the particular transaction that they have agreed upon and embodied in the substantive clauses. ... They are thus a vital part of every contract, without which the substantive rights of the parties embodied in the agreement would have little meaning.” In the USA, Martin D. Fern described boilerplate clauses as “... clauses that are commonly used from one contract to another, regardless of the specific transaction...”. Martin D. Fern also held that many of the clauses state common law contract principles which would be applicable even if they were not included in the contract. Fern, 2008, at XIII-1. See also Stark 2003, at 6, where she said that “Typically, these provisions either restate or override the common law and ...”. Her conclusion as presented at 645 was that “... there is no such thing as boilerplate and that each provision entails important business and legal considerations. One conclusion that might follow from this thesis is that each provision should be thought through and drafted from scratch each time. That’s unrealistic. Carefully crafted precedents give practitioners a running start... The provisions may need to be tailored, but the basic provisions have been vetted.” See comments on boilerplate clauses by Nordic scholars e.g. Bryde Andersen, 2003 at 122–123 and at 132; Gorton, 2009, at 170–188; Wærsted Bjørnstad, 2007, at 2 and Liebkind, 2010, at 159–160.

⁴⁷⁵ The purchase price might be subject to closing accounts, which are actually prepared after the closing of the transaction.

is paid by installments or there is an earn-out mechanism,⁴⁷⁶ is regarded as part of the acquisition or post-acquisition phase or not.

The post-acquisition phase includes possible disputes arising out of the acquisition contract, whether based on given representations and warranties or non-competition provisions or the like. In two-phased deals with separate signing and closing, disputes may also arise, for example regarding whether conditions precedent have been fulfilled or not and whether a party is under an obligation to close a transaction or not.

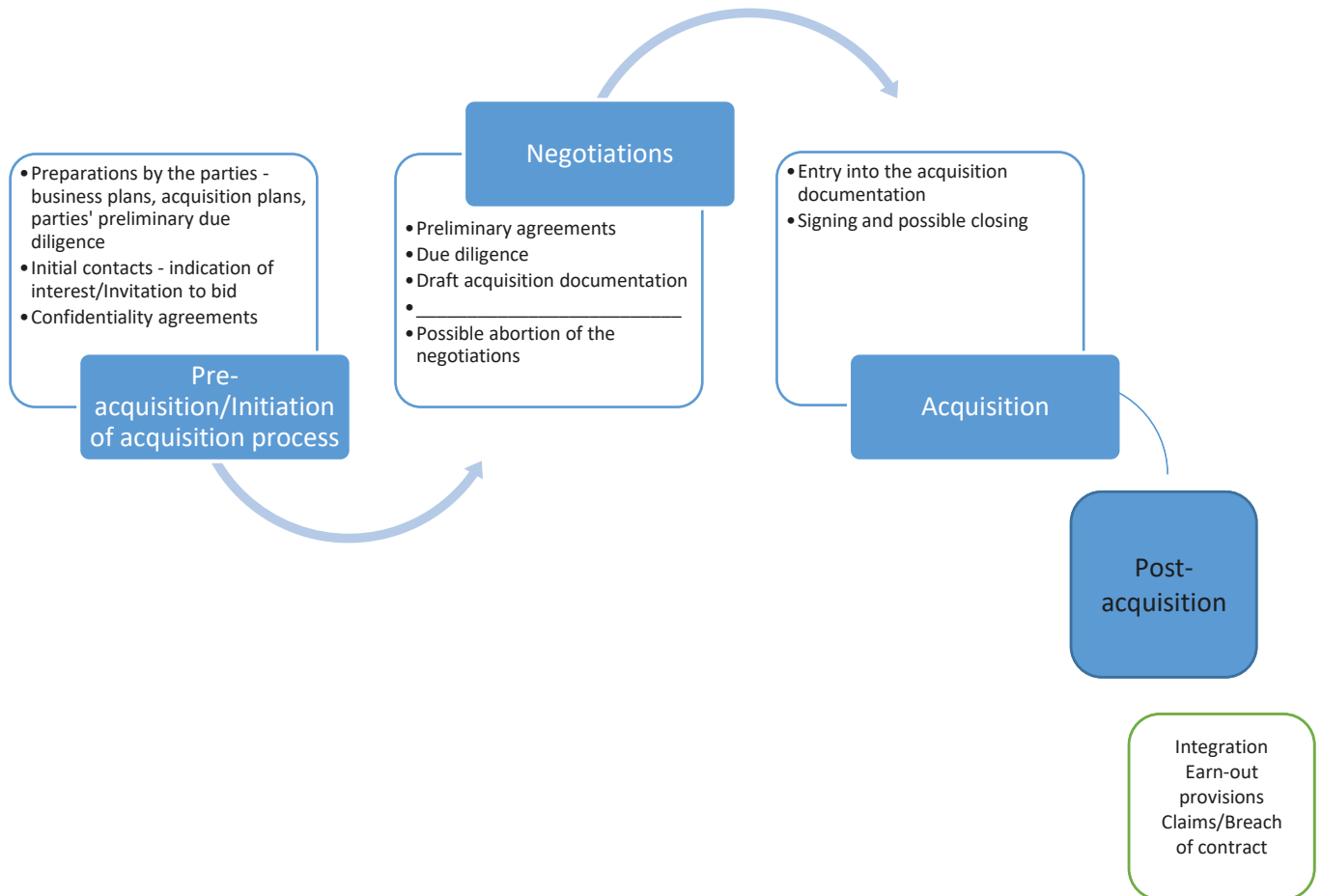
The post-acquisition phase is, however, the phase where interpretation of the business acquisition contract would become most apparent. Interpretation issues might have been discussed and even some provisions might have been included in the written contract, but testing the contents of the contract and the agreements between the parties will normally appear after the parties have signed the contract and closed the transaction.

The transaction is over when disputes have finally been resolved and when all other liabilities and rights of the parties have come to an end.

⁴⁷⁶ Earn-out mechanism means that the seller may receive additional purchase price depending on how the target performs in the future even after ownership has been transferred to the purchaser. See e.g. Schans Christensen, 1998, at 173–177.

2.3.7 Summary of the business acquisition process

The process described above with its different phases and interrelations may be summarized as follows:⁴⁷⁷



⁴⁷⁷ Assuming that the parties reach agreement and enter into a contract. It should also be noted that these interactive elements are not necessarily present in each and every business acquisition and e.g. the use of preliminary agreements varies. Even due diligence is not necessarily always carried out or it might be carried out after the written contract has been entered into.

2.4 Conclusions and open questions

This Chapter has been about identifying the legal and functional frameworks of business acquisitions in order to be able to continue the discussion on what significance the particularities of business acquisitions have or should have in contract interpretation. At the beginning of this Chapter it was submitted that business acquisitions are typically quite extensive and complex transactions both with regard to the contracting process and with regard to the documentation comprising the agreements between the parties. This is regardless of whether the acquisition is of a cross-border nature or not. Another typical feature of business acquisitions has been submitted to be that these transactions are often conducted and documented based on an Anglo-American style.

When the parties become engaged in business acquisitions they have to observe not only the particularities of the transaction, but they also have to recognize that general contract law bears an impact on the process and on the contract. Above it has been noted that even if the legal families are based on different legal systems, in terms of contract law there are also similarities such as acceptance of the freedom of contract and the *pacta sunt servanda* principles. The common law countries are more inclined to emphasize these principles, while in the Nordic countries these principles have been more influenced by the loyalty/good faith principle. In this dissertation, the standpoint has been taken that in business acquisitions the importance of the freedom of contract principle should be accentuated, especially when the question is about equally strong business parties. The freedom to negotiate and to agree upon the contents of the contract enhances the parties' willingness to become engaged in these types of transaction, which is in the interest of a functioning business acquisition market. In cross-border transactions where the parties represent different legal families it is even more important that they can negotiate and agree upon the contents quite freely. It has also been said that business parties may be presumed to look out for their own interests and make due assessment of the risks involved in a business acquisition. On a principle level, however, freedom of contract does not in itself preclude a request that the parties act in an honest and decent manner during the whole process, including contracting. Whether this is termed good faith or loyalty as in the Nordic countries, or whether there are other means of invoking liability due to unacceptable behavior such as misrepresentations, is not decisive. The importance of the combination of the freedom of contract principle and of the requirement for honesty and decency is rather that the parties may expect the other parties not to misuse trust and reliance, not to act in a deceptive manner, but rather to act in a manner which is in conformity with good and sound business practice. That requirement cannot be exactly defined and will therefore always be dependent on the factual circumstances connected with the individual transaction. However, contract law is much more than merely precisely-defined concepts. Thus, the parties will also have to consider general principles in their contracting, but how these principles affect the interpretation of a detailed written contract, which is typical of business acquisitions, is another question which will be reverted to from time to time.

As noted above, parties engaged in business acquisition negotiations will have to observe the possible risk of incurring pre-contractual liability even when no final written contract has been signed. This is regardless of the fact that there is no general good faith principle applicable to negotiations in the common law jurisdictions. Pre-contractual liability may in the common law countries be construed based on the concepts of collateral contracts, where contractual remedies in fact would be available, or based on misrepresentation and similar constructions. Good faith may also be imposed based on enough specific terms of agreement to negotiate in good faith. With the exception of the last mentioned case, that is, agreements to negotiate in good faith, it seems that collateral contracts and misrepresentations have been less utilized in business acquisition disputes.

Pre-contractual liability may more easily be found in the Nordic countries and parties engaged in business acquisitions have to consider this aspect more carefully when they decide to continue or abort negotiations. It may also be noted that when discussing negotiations not only contract law is relevant, but also tort law and – as something in between – damages for *culpa in contrahendo*. The problem of pre-contractual liability in business acquisitions relates to acknowledging the complexity in general of business acquisition negotiations, especially when the negotiations concern cross-border acquisitions. Such complexity makes it more difficult to assess, for example, whether separate actionable promises were made during the course of negotiations (collateral contracts) and whether the parties have continued to negotiate, even though they have no intention to enter into a final contract (negotiate in bad faith or without recognizing the principle of loyalty/good faith). The cross-border element, that is, when there are parties from different legal systems, is challenging regardless of what the governing law is. Parties have different understandings of what is allowed or not allowed during negotiations and how this should actually be taken into account is not easily decided. In the following, liability for negotiations will not be discussed as a standalone phenomenon, but the common law concept of misrepresentation will be reverted to several times in the subsequent discussions, less so the question of collateral contracts.

When the parties have agreed upon a transaction in a written contract, the principle of good faith and fair dealing governs in the USA and in the Nordic countries the parties are also presumed to fulfill their contractual duties under due observation of the loyalty/good faith principle. Under English law good faith is not widely accepted as a general contractual principle, but if the parties have agreed to perform a contract under observation of good faith, that agreement would customarily be upheld.

The dogmatic differences may seem rather big, especially between English law and Nordic law. However, the decisions in individual disputes do not necessarily differ all that much, as the courts may reach similar conclusions, although by using different concepts and different interpretation techniques. In my opinion a strict dogmatic view on matters such as good faith and loyalty or the lack of such concepts is not very useful, as indeed has been shown by the fact that there is no unanimous opinion on how such concepts should actually be defined. Case law also confirms that

the analysis of a situation will be based on an evaluation of all relevant circumstances regardless of the theoretical differences between countries. The question of the weight of different general principles will be reverted to, as it has been asserted that business acquisitions are generally agreed in comprehensive written documentation and therefore the relevant general principles have to be discussed in relation to those kinds of contracts.

Systematic differences such as the duality of equity and common law in the UK and the USA is not exactly matched in the Nordic countries. Equitable remedies are on the other hand available in the Nordic countries and in general Nordic contract law is quite pragmatic and influenced by fairness and reasonableness in the implementation of law in general. These remedies will not be further discussed, as the focus will be on certain concepts of contract law where the relevance of whether they are of an equitable nature or not is not decisive.

The question of duality in the US system with state and federal legislation and courts is not exactly matched in the UK or in the Nordic countries, but on the other hand the effect of EU legislation and court practice is an element which at least for the moment affects the situation in these countries. Furthermore, both the UK and the Nordic countries have courts dealing with specific matters of law. This is, however, also a matter which will not be taken further, but it has been described in order to present different aspects the parties will have to consider when negotiating.

Court practice seems to indicate in all jurisdictions, that pre-contractual liability may more easily be found if the parties are actually regarded as having concluded an agreement, even though the agreement has not been set out in a final written contract. When the parties have a divergent opinion as to whether they in fact have reached agreement, although not finalized in a written contract, their intention is obviously decisive, but also whether the agreements are specific enough to actually be enforceable. The alternative of enforceable agreements emerging during negotiations, as discussed in the Nordic countries, has nevertheless been found to be ill-suited for business acquisitions and in particular cross-border acquisitions. In the Nordic countries, and especially in Norway and to some extent in Denmark, there has been more acceptance even in court practice that agreements have emerged during negotiations. Liability based on negotiations, for example when a party is continuing negotiations with no intention to actually conclude a final contract, is more easily found and accepted, but to force parties to carry out a business acquisition based on an authority having decided that the parties have reached sufficient agreement has here been found to be too intrusive on the parties' rights.

When the whole process in a typical business acquisition has been reviewed, it has become clear that several legal issues may arise during the different phases of the process. These issues may have an impact on the position of the parties regardless of whether a written contract has been entered into or not, or may have an impact on the interpretation of a final written contract when the parties are no longer in agreement with what has been agreed and when third parties have to interpret their agreement. It may be noted that from the pre-acquisition phase including initial

negotiations the questions remain whether information gathered and material prepared by one party is of relevance when assessing such party's presumptions for the transaction and whether such information and material will have an effect on contract interpretation in relation, for example, to representations and warranties given by the other party. The main negotiation phase also gives rise to questions in relation to contract interpretation, for example in relation to due diligence performed or preliminary agreements entered into. The more structured processes, which have been termed controlled auctions, as seller-driven processes have led to the question whether that should have an impact on interpretation of the final contract, especially since it is typical that bidders are provided with a considerable amount of material prepared on behalf of the seller. The same kinds of issues arise in private sales. When a written contract has been concluded, the relationship between the parties is in all legal families regulated by the contract, but what other matters are to be taken into account is a different question. The impact of due diligence carried out during negotiations not leading to the parties agreeing upon the transaction in a final written contract would most likely bear less relevance in the common law jurisdictions in general, as due diligence is governed by the *caveat emptor* principle. Due diligence may, however, also bear an impact in the common law countries in disputes over whether there has been misrepresentation, that is, the seller not having provided correct - or having provided misleading - information or whether the information provided is such that the buyer actually aborts the negotiations based on incorrect reasons. Similarly, in the Nordic jurisdictions the effect of due diligence could be tied to the knowledge of the parties and the actions of the parties during negotiations, which could be one element in the discussion about possible unjustified aborting of negotiations, but which would also be an important element of contract interpretation.

The following Chapters will deal with situations where written contracts have been entered into. Thus the questions left open in this Chapter 2 will be how the actions and behavior by the parties may impact interpretation of the contract and what impact different kinds of pre-contractual statements and drafts should have. The question of the intention of the parties and the relevance of both preliminary agreements and due diligence will also continue to be of interest when a written contract has finally been concluded. Good faith and loyalty are other aspects which are reverted to from time to time. The fact that the business acquisition market in contracting and contracts has adopted many typical common law practices furthermore makes it necessary to contemplate whether common law should have an impact when analyzing interpretation of contracts in domestic and cross-border business acquisitions, even when the contracts include governing law provisions.

3 CONTRACT INTERPRETATION METHODS AND RULES – IMPACT ON THE INTERPRETATION OF BUSINESS ACQUISITION CONTRACTS

3.1 Introduction

In the preceding Chapter we noted that parties negotiating and focusing on the particularities of business acquisitions will have to observe general contract law both with regard to possible consequences arising out of the process itself and with regard to what impact contract law has, for example, on the validity of and interpretation of contracts. The same comment is clearly relevant when discussing contract interpretation in general as one sector of contract law.⁴⁷⁸ It was also noted that some contractual principles are hard to exactly define and as will be seen in the following it is also hard to precisely define interpretation methods and principles.

It was furthermore in the preceding Chapter said that in case of a dispute interpretation will start with the written contract, which is presumed to reflect the mutual intention of the parties. This sounds simple enough, so why has contract interpretation caused a tsunami of textbooks, articles and discussions? First of all, contract interpretation may be discussed on various levels, for example based on (i) underlying theories; such as the will, reliance and declaratory theories; (ii) methods for carrying out contract interpretation such as the objective, the subjective, the literal and the contextual methods or (iii) applicable interpretation rules such as the *contra proferentem* and *de minimis* rules. Systematization of interpretation methods and principles is an essential part of the doctrine, but to find a preferred and comprehensive *modus operandi* is not easy,⁴⁷⁹ as agreements and contracts vary too much and as opinions are diversified on what the different methods mean.

Since one of the issues to be considered in this dissertation is the relevance of the particularities of business acquisitions in contract interpretation, the discussion below will be based on different interpretation methods applicable in general and followed by a brief mention of some other applicable rules and principles. This is the reason why the underlying theories have not been commented on because that would have expanded the discussion too much.

Another important cornerstone of this dissertation is the fact that English and American practices have had a great impact on how business acquisitions are conducted and how written contracts

⁴⁷⁸ See subchapter 1.2.4 as to why ‘interpretation’ is used in this dissertation and the interpretation phase is not divided separately into ‘interpretation’ and ‘construction’ or ‘supplementing’ a contract.

⁴⁷⁹ For example, Lennart Vahlén described the difficulties in trying to comprehensively define interpretation methods other than on a very general level, as interpretation – according to Nordic doctrine – and preparatory legislative work is to comprehensively analyze all the circumstances in connection with entering into agreements. Vahlén, 1960, at 190. Nevertheless, some kind of systematization is needed even according to Vahlén, see Vahlén, 1960, at 249. See also Annola, 2016, at 17, who said that it is not possible to find only one right method of interpretation in the sense that the correct result would be found by using such method technically. Annola emphasized that interpretation problems are highly individual, but on the other hand that interpretation tools may produce presumptions for practical interpretation situations. Annola methodically separated interpretation in different phases as a means of better recognizing matters to take into consideration and circumstances affecting their relevance. See Annola, 2016, at 295. See also Giertsens, 2014, at 114–115 and Hansen and Ulfbeck, 2016, at 65.

pertaining thereto are drafted. Therefore, the discussion below will focus on how interpretation methods, rules and principles are perceived and applied in those jurisdictions and in the Nordic jurisdictions respectively,

Interpreting business acquisition contracts is challenging in many respects. Not only may the parties have different views on the meaning of the words and terminology used, which is even more likely in cross-border transactions, but furthermore the transactions recorded in written contracts may in themselves be complicated and the parties may have different views on whether their agreements have been correctly and/or sufficiently reflected in their written contract. Therefore, the task of the courts is often – regardless of the interpretation method used and regardless of which jurisdiction the individual court represents – to first establish not only the contents of the written contract, but also whether other agreements or other circumstances need to be taken into consideration as the basis for interpretation to be carried out.⁴⁸⁰ In doing so, the courts already at that stage choose which interpretation methods to apply.

Thus, even though the sequence of events in the interpretation of a written contract will start with establishing its contents and possible other binding agreements, the fact that the courts, knowingly or unknowingly, employ certain interpretation methods is the reason why this Chapter will start with a discussion on the different interpretation methods of relevance when interpreting business acquisition contracts. Only thereafter will the discussion move on to analyze the interpretation sources relevant for solving different kind of disputes. At the end of this Chapter, some rules and contract provisions having an effect on contract interpretation – including the interpretation of cross-border business acquisition contracts – will be discussed.

3.2 The main questions which the methods purport to resolve

Interpretation methods and rules in the various jurisdictions have not in general been defined in statutory law, but they have been defined in doctrine and court practice.⁴⁸¹ These definitions have evolved over the years and consequently the underlying material dealing with systematization issues is vast. Different scholars describe interpretation methods and rules in a number of ways, but certain characteristics of the methods discussed here typically appear in such descriptions. However, even if systematization is needed and alternatives have been presented by different

⁴⁸⁰ Vesa Annola, e.g., discussed this phase as part of individualizing the object of interpretation and identifying the sources of interpretation. Annola, 2016, at 18–24. In general this first phase of interpretation is especially important in common law jurisdictions due to the parol evidence rule, which limits recourse to other interpretation sources in case a written contract is found to be totally integrated.

⁴⁸¹ Hansen and Ulfbeck, 2014, at 65–66; Hemmo, I, 2007, at 577–578; Giertsen, 2014, at 114–115 and Lehrberg 2014, at 33. This may be taken as a given in common law countries, where enacted legislation is not a tradition for regulating matters and especially not within the field of contract law, although in the USA the UCC has been mentioned as guiding much of how contract law is employed by e.g. judges.

scholars,⁴⁸² it is apparent that there is no single correct definition of the methods and, perhaps even more important, the methods are very much interwoven and used simultaneously.

When interpreting business acquisition contracts the most relevant methods, in my opinion, are the objective, the subjective, the contextual and the literal interpretation methods.⁴⁸³ Two of the main questions that the objective and subjective interpretation methods deal with are how should the intention of the parties be understood and how should the wording of the contract and possible other sources of interpretation material be interpreted? The third main question of relevance is how the sources of interpretation should be identified. When applying the objective interpretation method with regard to the intention of the parties, the aim is not to try to find the actual intention of the parties, but rather to determine the intention as it appears from the written contract and possible other sources of interpretation.⁴⁸⁴ The subjective interpretation method, on the other hand, may be described as more focused on how the parties have understood the contents of the contract and possible other sources of interpretation and thus this method deals with the actual intention of the parties.⁴⁸⁵ When the question is about interpreting the contents of the sources of interpretation, the objective interpretation method is concerned with what those contents ordinarily mean, while when applying the subjective method interest is focused on how the parties have understood - and what they have intended - the contents of the material to mean.⁴⁸⁶ As to the issue of identifying the interpretation material, both methods start with the written contract, but the objective method has been said to take a more restrictive approach than the subjective theory as to what other sources may be allowed as evidence.⁴⁸⁷

⁴⁸² For example, Annola (Finland), 2016; Lehrberg (Sweden), 2014; Høgberg (Norway) 2006; Bryde Andersen (Denmark) 2005, Chapter 5; Lewison (England) 2004 and Burton (USA) 2009.

⁴⁸³ Amongst Nordic legal scholars, division of methods has also been done in other ways, where objective, subjective, literal and contextual aspects are recognized, but denomination of the methods is different. For example, Alf Petter Høgberg discussed intentional contract interpretation, where the main goal is to find the intention of the parties. Høgberg, 2006, at 97. He also referred to a harmonized interpretation style, where party-related interpretation sources are harmonized or coordinated with legal sources without specific relation to the parties. Høgberg, 2006, at 164. As a third alternative, Høgberg mentioned risk-based interpretation style, which is to be used when it is not possible to construe a legitimate party intention or where underlying law and other interpretation sources do not provide answers as to the disputed items, in which case the disputed matter would be analyzed according to a risk-based method. Høgberg, 2006, at 236. This may be compared with how Vesa Annola divided the different phases of contract interpretation. Annola mentioned intention-based interpretation, where the intention of the parties is determined based on different kinds of material and which as a matter of fact consists of both literal and contextual interpretation. When the intention-based interpretation method is not successful, the other alternative is so-called risk-based interpretation, where policies and other rules have to be used in order to resolve the dispute. Annola, 2016, at 24–32. The intention-based interpretation method may be compared with the party-oriented method used by e.g. Bert Lehrberg and Mika Hemmo. Lehrberg, 2014, at 47 and Hemmo, I, 2007, at 602.

⁴⁸⁴ Lewison, 2004, at 18–28; Collins, 2008, at 228; Burton, 2009, at 26–27, Annola, 2016, at 72; Hansen and Ulfbeck, 2014, at 70 and at 72–73; Høgberg, 2006 at 100–103 and Lehrberg, 2014, at 88.

⁴⁸⁵ Lewison, 2004, at 30–31; Burton, 2009, at 28–34. Annola, 2016, at 72; Høgberg, 2006, at 100; Woxholth, 2014, at 383–384; Adlercreutz and Gorton, II, 2010, at 40 and Bryde Andersen, 2005, at 326.

⁴⁸⁶ Lewison, 2004, at 115–120; Burton, 2009, at 22 and at 28–30; Annola, 2016, at 72; Adlercreutz and Gorton, II, 2010, at 47; Woxholth, 2014, at 390–391 and at 386 and Bryde Andersen; 2005, at 326–327.

⁴⁸⁷ Lewison, 2004, at 56–63; Burton, 2009, at 28 and Annola, 2016, at 75, who suggested that by using the objective interpretation method in this regard material expressing the parties' mutual intention and also material which is not dependent on the parties may be used, while when employing the subjective method material which the parties have unilaterally prepared may also be used.

Both the contextual interpretation method and the literal interpretation method deal with the question of interpreting the wording of the written contract, that is, will the words be interpreted separately - as is typical of a literal interpretation - though not exclusively, or will they be interpreted taking into consideration the contents of the whole contract, which would be typical of the contextual method?⁴⁸⁸ Secondly, both the contextual interpretation method and the literal interpretation method also deal with what factors other than the written contract should be taken into account when interpreting a written contract, where the literal method could be described as focusing just on the written contract whereas the contextual method to some extent allows other sources of interpretation.⁴⁸⁹ When using the contextual or the literal interpretation method, intention is of course also a part of the interpretation, but finding the parties' intention is still based on whether objective or subjective intention is found decisive.

Irrespective of the use of the objective or subjective interpretation method or use of the contextual or literal method, these methods are not used in isolation. For example, when using the contextual interpretation method, it is still relevant to define whether the interpretation is based on the objective or subjective method. Both the interpretation process and the conclusions based on that process could lead to substantially different results depending on which methods are employed. Comprehensive domestic and cross-border business acquisition contracts are rich in words and filled with nuances, with terminology and words which are frequently used in these contracts and the process leading up to the contract might sometimes, but not always, be referred to in the final contract. The intention of the parties, the wording of the contract and the use of pre-contractual statements and documentation are all therefore highly relevant when discussing whether the objective, the subjective, the contextual, the literal or a combination of these methods is most appropriate to use when interpreting domestic and cross-border business acquisition contracts.

3.3 Establishing intention and the meaning of the wording

3.3.1 Applying objective and subjective methods

3.3.1.1 Use of objective and subjective methods in the common law and Nordic jurisdictions

When reviewing the different methods and their use it is imperative to bear in mind that the main goal is to find out what the intention of the parties was when entering into the contract and that intention is presumably to be found in the written contract. Therefore the interpretation of the

⁴⁸⁸ Lewison, 2004, at 141–143 and Burton, 2009, at 40–41.

⁴⁸⁹ Lewison, 2004, at 13 and Burton, 2009, at 17–18, at 40–41 and at 41–51, who discussed as a matter of fact objectivism and not specifically the contextual method as opposed to the literal method. Annola, 2016, at 157–163, about what material can be used when the contextual interpretation method is employed and he divided the material into objective and subjective context interpretation material.

written contract is the point from where any and all interpretation should start regardless of whether the intention is to be found based on an objective or a subjective method.⁴⁹⁰

When analyzing the understanding of how to establish intention and the meaning of the wording in the different jurisdictions, the English situation comes out as fairly straightforward in principle. This is not to say that the task in practice is simple.⁴⁹¹ Nevertheless, there is strong support amongst legal scholars discussing English law for using an objective interpretation method with regard to the intention of the parties and there is great skepticism that subjective - or, as it is frequently called, actual - intention can be objectively found or proved in terms of a dispute.⁴⁹² In *Deutsche Genossenschaftsbank v Burnhope*⁴⁹³ Lord Steyn said that “It is true that the objective of the construction of a contract is to give effect to the intention of the parties. But our law of construction is based on an objective theory. The methodology is not to probe the real intention of the parties but to ascertain the contextual meaning of the relevant contractual language.”⁴⁹⁴ Lord Steyn in other words confirmed that subjective intention is not decisive under English law even though the mutual intention of the parties is in theory to be sought. The same principle was stated in somewhat different words by Lord Hoffman in *Investors Compensation Scheme Ltd v West Bromwich Building Society*, when he summarized contemporary views on contract interpretation under English law in five principles.⁴⁹⁵ Furthermore, under English law the objective interpretation method is also used to interpret the contents and the wording of the interpretation material. The main purpose is therefore not to find out what the words or the language mean/s subjectively, but what those words and language would ordinarily mean to a person who speaks English.⁴⁹⁶ In the fairly recent decision by the English Supreme Court in *Rainy Sky SA v. Kookmin Bank*,⁴⁹⁷ the question of interpretation of the language was addressed and this may be regarded as confirming the objective approach described by Lord Hoffman. The Supreme Court said that the language is to be interpreted in accordance with what a reasonable person – that is, a person who has all the background knowledge which would reasonably have been available to the parties in the situation

⁴⁹⁰ Lewison, 2004, at 18–19; Burton, 2009, at 63; Hemmo I, 2007, at 583; Lehrberg, 2014, at 40; Woxholth, 2014, at 385 and Bryde Andersen, 2005, at 320.

⁴⁹¹ See e.g. Collins, 2008, at 228, who noted that even if the content of a contract is based on an objective test, “... the meaning and implications of this objective test are far from certain.”

⁴⁹² Lewison, 2004, at 5, presenting the fundamental approach under English law as that it does not aim at finding “... the actual intentions of the parties, but for an objective meaning.” See also Chen-Wishart, 2012, at 43 and at 45–46.

⁴⁹³ [1995] 1 W.L.R. 1580; 4 All E.R. 717

⁴⁹⁴ Ibid. at 1587 D. This was presented in Lord Steyn’s dissenting opinion to the subject matter in question. However, his statement of the intention of the parties is quoted by legal scholars when referring to the fact that the actual intention is not what is sought under English law. See e.g. Peel and Treitel, 2015, at 228–229 and Lewison, 2004, at 20, where Lewison further describes the prevailing theory as: “It is therefore more accurate to say that the object of a court of construction is to ascertain the presumed intention of the parties, on the assumption that both parties are reasonable.”

⁴⁹⁵ [1998] 1 W.L.R. 896; [1998] 1 All ER 98

⁴⁹⁶ Ibid. presented in Lord Hoffman’s first principle: “1. Interpretation is the ascertainment of the meaning which the document would convey to a reasonable person having all the background knowledge which would reasonably have been available to the parties in the situation in which they were at the time of the contract.” This statement may also be seen as confirming that the objective intention should be found, not the subjective. See e.g. Lewison, 2004, at 5.

⁴⁹⁷ [2011] UKSC 50; [2011] 1 W.L.R. 2900

in which they are at the time of the contract – would have understood the parties to have meant.⁴⁹⁸ It is fair to say that under English law there have to be special circumstances in order for a deviation from ordinary wording as appearing from the written contract and accepting the parties' subjective understanding of the wording.⁴⁹⁹ When the parties' subjective understanding is decisive, it is actually a question about their mutual understanding, that is, both parties have given the wording a certain meaning.⁵⁰⁰ This having been said, it should not be forgotten that trade, branch and other custom may have an impact on how words are interpreted,⁵⁰¹ which is a relevant point when discussing business acquisition contracts.

In the USA there seem to be more divergent views on whether contract interpretation should be based on an objective or a subjective method. Steven J. Burton maintained with regard to objective theory and intention that this method "...excludes elements that bear only on the parties' states of mind." His comment was made in connection with how the meaning of the parties' intention is determined.⁵⁰² Joseph M. Perillo described the interrelation between the objective approach and the intention of the parties as follows: "...the intention of the parties to a contract or alleged contract is to be ascertained from their words and conduct rather than their unexpressed intentions."⁵⁰³ The Restatement (Second) deals with the question of intention in Section 202(1),⁵⁰⁴ which states that "... if the principal purpose of the parties is ascertainable it is given great weight." Regarding interpretation in general it has, as a matter of fact, been claimed that the Restatement (Second) shows a greater element of subjectivism in contract interpretation than objectivism.⁵⁰⁵ This matter is and was not uncontroversial. For example, Samuel Williston was in favor of an objective interpretation method.⁵⁰⁶ Arthur L. Corbin had more doubts as to the strict objective interpretation method and he analyzed the meaning of words from the perspective of how courts have applied objective theory and said, for example: "They (author's comment: the courts) apply it only when they find in fact that one of the parties understood the words of agreement in harmony with such an interpretation that the other party had reason to know that he did."⁵⁰⁷ E. Allan Farnsworth, with regard to the parties' intention, noted that the subjective element in interpretation is present basically only when the parties have understood the meaning of the contents in the same manner, but other than that the intention of the parties is not to be decided subjectively.⁵⁰⁸

⁴⁹⁸ These statements are found in the Supreme Court judgment at 21 and were issued by Lord Clarke of Stone-cum-Ebony JSC and the other members of the Supreme Court agreed to these statements.

⁴⁹⁹ Guest, Chitty I, 2012, at 942 and at 976–977.

⁵⁰⁰ Guest, Chitty I, 2012, at 977.

⁵⁰¹ Guest, Chitty I, 2012, at 941–942.

⁵⁰² Burton, 2009, at 51.

⁵⁰³ Perillo, 2000, at 427.

⁵⁰⁴ §202 is named "Rules in Aid of Interpretation" and sets out several interpretation rules in addition to the one mentioned above.

⁵⁰⁵ Burton, 2009, at 22.

⁵⁰⁶ See Williston, II, 1924, at 117, where he said e.g. that: "In effect, therefore, it is not the real intent but the intent expressed or apparent in the writing which is sought."

⁵⁰⁷ Corbin, 3, 1951, at 53 and he continued by saying, at 54, that "...but the reason for adopting the meaning of a reasonable person fails, after it has been found as a fact that neither party assented to the words with that meaning."

⁵⁰⁸ Farnsworth, II, 2004, at 285.

As to interpreting the contents of the contract and of the parties' agreements, according to Section 202(3)(a) of the Restatement (Second) the wording, or as it is referred to in that Section the language, is to be interpreted in its "generally prevailing meaning," provided that "different" intention has not been proved.⁵⁰⁹ However, when the parties have given another meaning, then that meaning will prevail.⁵¹⁰ The wording of a contract could also be affected by trade custom, market practice, previous practice between the parties, and similar circumstances,⁵¹¹ but the written contract is supposed to better express the intention of the parties.⁵¹² Section 203(b) of the Restatement (Second) specifically stipulates that express terms are more important than, for example, trade usage.⁵¹³ On the other hand, these stipulations also indicate that the contextual approach forms an important part of the US way of interpreting contracts.

The critical issue is, however, when only one of the parties has attached different meanings to the wording. Section 201 of the Restatement (Second) states that a unilateral meaning may govern provided that i) the person having attached such meaning did not know that the other party had attached another meaning and ii) the other party knew about the meaning attached to the wording by the first party and furthermore that iii) the first party did not have any reason to know about the different meaning attached by the other party and iv) the other party had reason to know about the meaning by the first party.⁵¹⁴ If there is no common different meaning of the wording than what such wording would ordinarily mean, and if the requirements about knowledge or qualified knowledge are not met, then a party is not bound by any special meaning attached to the wording by the other party.⁵¹⁵ Regardless of the Restatement (Second) being used as explaining generally acceptable contract law, there are differences between the states. For example, New York has in general been regarded as in favor of a stricter objective interpretation method, while Texas and California have been regarded as having taken a more subjective approach in contract interpretation.⁵¹⁶ It is therefore hard to label the method applied in the USA as strictly objective or

⁵⁰⁹ See also comment a. to §201 of the Restatement (Second).

⁵¹⁰ §201(1) of the Restatement (Second). See further comment c. that "... the objective of interpretation in the general law of contracts is to carry out the understanding of the parties rather than to impose obligations on them contrary to their understanding: ..." The same comments also states that "...the primary search is for a common meaning of the parties, not a meaning imposed on them by the law."

⁵¹¹ Knapp, 1996, at 214

⁵¹² Burton, 2009, at 58–59, when discussing the standards of preference in interpretation based on §203 (a) of the Restatement (Second).

⁵¹³ §203 (b) runs as follows: "(b) express terms are given greater weight than course of performance, course of dealing, and usage of trade, course of performance is given greater weight than course of dealing or usage of trade, and course of dealing is given greater weight than usage of trade;"

⁵¹⁴ §201(2) (a) and (b) of the Restatement (Second). It may be recalled that the Restatement (Second) generally followed the views of Arthur L. Corbin, who was more inclined to allow e.g. pre-contractual evidence than some other scholars. §201(2) may be interpreted as did Steven Burton, i.e. he explained this form of subjective interpretation as "... the parties' shared mental intentions, or one party's mental intention if the other party knew or should have known of that intention, constitute the meaning of the contract's language." Burton, 2009, at 157. Burton, however, also pointed out that a party's intentions are relevant only if they have been disclosed to the other party and secondly that allowable evidence must show mutual intention. Burton, 2009, at 173.

⁵¹⁵ §201(3) of the Restatement (Second).

⁵¹⁶ With regard to New York law see e.g. *Greenfield v Philles Records*, 98 N.Y.2d 562; 780 N.E. 2d 166 (N.Y.2002) at 569: "The fundamental, neutral percept of contract interpretation is that agreements are construed in accordance with the parties' intent."... and that: "Thus, a written contract that is complete, clear and unambiguous on its face, must be enforced according to the plain meaning of its terms." The last quotation is in essence the plain meaning rule.

subjective. The difficulties in classifying an interpretation method as strictly objective or subjective are actually of a more general nature. For example, Joseph M. Perillo was quite skeptical as to there being a very clear dividing line between objective and subjective interpretation methods and he maintained that “There is no single subjective or objective theory. Rather, there are a variety of different vantage points from which the formation and interpretation of contracts could conceivably be judged.”⁵¹⁷

Following up on Joseph M. Perillo’s statement of there being no single subjective or objective theory, it has been claimed that in the Nordic countries there are also not very exact definitions of what is meant by the objective or the subjective interpretation method.⁵¹⁸ However, it is clear that the aim of contract interpretation in the Nordic countries is to find out and establish what the parties have agreed to or intended to agree to in the contract, so that a contract which is found to express mutual intention is to be interpreted according to that mutual intention.⁵¹⁹ Even if a written contract and its wording are presumed to reflect the mutual intention of the parties, it might be proven in individual cases that this is not so.⁵²⁰ The subjective interpretation method in the Nordic countries also focuses on the actual intention of the parties, not only as appearing, for example, from the wording of the contract.⁵²¹ There are many opinions as to which method is preferable with regard to the parties’ intention. For example, Mads Bryde Andersen has said that the safest interpretation method is the subjective method. He explained this by asserting that if it can be confirmed what the parties intended by a certain wording (mutual intention), then that intention will be the basis for further interpretation.⁵²² However, Bryde Andersen also pointed out that the subjective method

See e.g. Burnham, 2002, at 388. These statements were further referred to in *Beardslee v Inflection Energy LLC*, 25 N.Y.3d 150, 8 N.Y.S.3d 618, 31 N.E.3d 80 (2015). A contemporary Texas case setting out the principles is e.g. *Hooks v Samson Lone Star, Limited Partnership*, 457 S.W.3d 52 (Tex. 2015), where the Texas Supreme Court stated that (at 63): “In construing contracts, courts must ascertain and give effect to the parties’ intention as expressed in the document” and that: “The court attempts to harmonize all contractual provisions by analyzing the provision with reference to the whole contract.” As to California law see e.g. *Intel Corporation v American Guarantee & Liability Insurance Co*, 51 A 3d 442 (Del.2012), where the Delaware Supreme Court applied California Law. In the judgment (at 7) several references were made to the California Civil Code and it was said e.g. that: “Courts generally must interpret a contract so “as to give effect to the mutual intention of the parties as it existed at the time of contracting, so far as the same is ascertainable and lawful” (Footnote 8 includes a reference to the California Civil Code §1636).

⁵¹⁷ Perillo, 2000, at 429.

⁵¹⁸ Annola, 2011/2012, p 176.

⁵¹⁹ See e.g. Hov and Høgberg, 2009, at 249 and at 266 and Annola, 2016, at 15. See also Ramberg and Ramberg, 2014, at 127–128, who suggest that finding mutual intention is often difficult in practice and that it is therefore better to establish the contents of the agreement by using objectively determinable facts. In finding such facts not only is the wording of the written contract decisive. Ramberg and Ramberg, 2014, at 168–169. See further Saarnilehto and Annola, 2012, at 440, to the effect that in practice the wording of a contract is decisive, because showing the intent of the parties is in general difficult and also that the party claiming that the contract does not reflect the parties’ intention has the burden of proof.

⁵²⁰ See e.g. Lehrberg, 2014, at 45–47 and at 52, referring to a general view in the doctrine that if the parties’ mutual intention can be proved that takes precedence over possible other written expressions (*falsa demonstratio non nocet*); Hemmo I, 2007, at 585; Taxell, 1997, at 71; Huser, 1983, at 378–380; Hov and Høgberg, 2009, at 249 and at 266–267; Schans Christensen, 1998, at 152 and Bryde Andersen, 2005, at 323, clarifying the expression *falsa demonstratio non nocet* as also incorporating situations where one party’s intention that has incorrectly been expressed will be corrected, provided the other party is aware of that. See further Giertsen 2014, at 120.

⁵²¹ See e.g. Hov and Høgberg, 2009, at 251, suggesting that this theory in Norwegian law is foremost applied in situations where it is not so important to safeguard the expectations of the other party, mentioning as examples gifts and wills. See also Annola, 2016, at 71.

⁵²² Bryde Andersen, 2005, at 326.

is only useful when the original mutual intention can be proved, regardless of a party contesting it.⁵²³ A similar reasoning has been carried out by Geir Woxholth, who proposed that even if the objective approach might be regarded as governing in the Nordic countries, the subjective approach takes over where the parties had a mutual understanding of the contract at the time of entering into it.⁵²⁴ An even more diversified presentation of the different interpretation methods has been made by Ola Svensson. Svensson said that when the subjective method is not applicable and recourse has to be taken to the objective method, that method is not only concerned with the linguistic meaning of the words but also with other aspects – branch-oriented, norm-oriented, system-oriented and fairness-oriented interpretation.⁵²⁵ Regardless of attempts to define the Nordic interpretation method as either primarily objective or subjective, the subjective element is present even if the interpretation method is of a more objective nature, as the parties' mutual intention would always take precedence over what the wording of a contract reflects objectively.⁵²⁶ Even in commercial relationships, where the interpretation method is likely to take a more objective than subjective course,⁵²⁷ evidence showing a party's actual intention is given importance, at least in order to evaluate justified reliance, fairness and loyalty including good faith aspects in relation to the parties' behavior, including their behavior pre-contractually.⁵²⁸

When the wording of a contract is interpreted, in general the starting point is to interpret the words from what is generally understood by those words.⁵²⁹ However, depending on the situation the words and wording may also be interpreted objectively based on which business the parties are engaged in, local customs or contract practice in relation to the type of contractual relationship involved.⁵³⁰ In that sense the interpretation is primarily objective, but as already noted above, if the parties have attached another meaning to a word than what is ordinarily understood, that meaning would prevail and in that sense the interpretation is subjective. As to other aspects of the subjective theory, Vesa Annola has pointed out that one of the main questions in subjective interpretation is when unilaterally prepared documentation will be allowed as evidencing the subjective or mutual intention of the parties.⁵³¹ However, once the sources of interpretation are identified the interpretation would be neutral.⁵³² Unilateral or subjective meaning of wording could be relevant in some cases, but provided that the other party was aware of such unilateral meaning deviating from ordinary meaning and that this other party did not object or did not say that he is of

⁵²³ Bryde Andersen, 2005, at 327.

⁵²⁴ Woxholth, 2014, at 384.

⁵²⁵ Svensson, 2005, at 462.

⁵²⁶ See e.g. Hov and Høgberg, 2009, at 251. See also NJA 2014.960 and Rt. 2011.1553.

⁵²⁷ The objective preference when interpreting commercial contracts between business parties has been preferred e.g. in Rt. 2002.1155 and Rt. 2002.1159.

⁵²⁸ Norwegian theories and decisions of the Norwegian Supreme Court confirming this tendency have been presented by e.g. Margrete Buskerud Christoffersen. See Buskerud Christoffersen 2008, at 36–37.

⁵²⁹ Lehrberg, 2014, at 105; Bryde Andersen, 2005, at 332; Hov and Høgberg, 2009, at 256 and Hemmo, I, 2007, at 608.

⁵³⁰ Lehrberg, 2014, at 109–111; Bryde Andersen, 2005, at 340–343; Hov and Høgberg, 2009, at 257 and Hemmo, I, 2007, at 591–595 and at 610.

⁵³¹ Annola, 2016, at 75.

⁵³² Annola, 2011/2012, at 177–180.

a different opinion.⁵³³ In practice, therefore, showing such subjective intention and showing that the other party was aware or should have been aware of the divergent opinion as to the meaning is not a simple exercise.

It is hard to define Nordic interpretation as strictly objective or subjective, but rather there is a mixed approach. The primary interpretation method in the Nordic countries is often regarded as being an objective method with regard to contracts between commercial parties.⁵³⁴ In general, however, considering that material other than the final agreement can also be produced and analyzed there are, as Vesa Annola has asserted, also reasons why the interpretation method in fact could be said to be primarily subjective.⁵³⁵

3.3.1.2 Which method is preferable when interpreting business acquisition contracts?

As to the question of intention, most acquisition contracts are drafted either by the legal departments of the parties or by attorneys in private practice; indeed, sometimes even the contract negotiations may be largely handled by such representatives.⁵³⁶ The question has been posed as to the consequences in case a commercial contract reflects rather the intention of the advisors than of the parties.⁵³⁷ If a strict objective method is used this does not matter, unless the question is of mistake, that is, the parties' intention has been wrongfully reflected in the written contract.⁵³⁸ If subjective intention is sought, the contract may have to be rectified in order to meet the parties' actual intention.⁵³⁹

When discussing whose intention such contracts really reflect, including possible consequences, it is just as important to bear in mind that when lawyers from the legal department of a party or lawyers in private practice are drafting the contracts, they would do so based on authorization,

⁵³³ Restatement of Nordic Contract Law, 2016, at 169.

⁵³⁴ As an example may be taken a decision of the Swedish Courts of Appeal, Svea Hovrätt, which in its decision T8566-99 (November 8, 2000) e.g. interpreted the text on a condition regarding due diligence of a business acquisition contract in an objective manner. The question was whether the CEO remaining in his position was a material precondition of the buyer entering into the contract and the court found that no such precondition could be found based on an objective interpretation of the contract in question.

⁵³⁵ Annola, 2011/2012, at 183.

⁵³⁶ Egholm Hansen and Lundgren, 2014, at 53–56.

⁵³⁷ See e.g. Lehtinen, 2007, at 143–169. Lehtinen discussed interpretation of commercial contracts drafted by others and/or negotiated by others than the parties. He discussed situations where the contract does not reflect the common intent of the parties and where the parties do not know what the contract stands for. Lehtinen mentioned the need to use other material which was available when the contract was entered into, and custom, legislation and similar sources when trying to find the parties' intention in such cases and he also emphasized the need for loyalty in commercial relations.

⁵³⁸ This may be seen as that the interpretation is based on an objective standard where the understanding of what the wording normally means or, as is said with regard to English law, how a 'reasonable man' would understand the wording. Furthermore, when an objective method is employed the intention of the parties is assumed to be reflected in the contract and subjective intention is not decisive. However, in the case of mistakes the contract may be corrected, as discussed in the previous subchapter.

⁵³⁹ In both common law jurisdictions the parties are assumed to have read the contract prior to signing it. The interesting question is, though, if they have read but not understood it. If there is a mutual view on what the contract should stand for, it would be possible to rectify the contract, but if only one of the parties has misunderstood the contract, it may very well be that that party will have to take action against their lawyer, as one party's subjective intent is not sufficient to override the contract in most cases.

express or implied, by the party in question.⁵⁴⁰ In other words, the lawyers would be acting as representatives of the parties. Even though the question of representatives, their assignments and liability is not discussed in this dissertation to any greater extent, let it just be briefly proposed that parties are in general *inter partes* responsible for the acts of their authorized representatives, unless of course the representative has exceeded their authority and the other party should have known that.⁵⁴¹ Therefore, when the parties have signed a contract, presumably of their own free will,⁵⁴² they have committed themselves to the undertakings in the contract and created an expectation with the other party that they are going to fulfil their obligations according to the contractual provisions.⁵⁴³ The parties in principle have no control over each other's representatives. This means that if the representatives of the parties have not acted in accordance with the parties' instructions and the contract reflects the representatives' intentions and not those of the parties, then the dispute should rather be dealt with between the respective party and his representatives.⁵⁴⁴

There are cases where the liability of the advisors has been taken to court,⁵⁴⁵ but I have not found any cases in the Nordic countries where a party would have tried to cancel or terminate a contract due to the work of their advisors. Trying to avoid liability due to the work of legal advisors is not an option in the USA, but the "misconduct" of a lawyer would be a case between the client and the attorney.⁵⁴⁶ Using attorneys may bear relevance on how the contract is interpreted in the common law jurisdictions - for example - in an English case, where the question was about a commitment

⁵⁴⁰ The question of authorization and using representatives in negotiations is not discussed in detail, because it would have expanded the dissertation too much. In practice in business acquisitions, if attorneys in private practice are involved, there would be some form of engagement letter or service agreement between the attorney's office and the party in question. If in-house lawyers are carrying out the negotiations and drafting they may be seen as acting based on their position, which does not in itself imply that they would be authorized to finally agree upon the terms and conditions of the transaction.

⁵⁴¹ One other exception may be made, as advisors giving reliance letters with regard to due diligence reports to the other party, not being the original client, create a relationship with the other party and may incur liability based on the fact that the client-customer relationship has been shifted. See further on the question of reliance letters subchapter 2.3.2.1.

⁵⁴² Other issues such as misrepresentation, mistake, coercion and similar circumstances are not considered in this general discussion.

⁵⁴³ See e.g. Knapp, 2015, at 1095, discussing that the presumption when a party signs a written contract is that that party confirms that he is bound by the contract. Knapp noted that this is particularly true if the contract includes language to the effect that the party "has read and understood the terms of the contract," the contract includes an entire agreement provision or a party has not relied on "any promises or representations not contained in writing." Knapp discussed in this connection the relationship between estoppel and the duty to read. He also noted that the duty to read has been defended more broadly as a person assenting to be bound by the contract once he has signed it. Knapp, 2015, at 1097–1099.

⁵⁴⁴ As a side comment it may be noted that should such disputes be between the contract parties, these disputes could develop into highly intriguing processes when the parties would try to find out where communication has gone wrong, considering the vast amount of representatives and advisors that are involved in business acquisitions and especially in cross-border transactions.

⁵⁴⁵ See e.g. Svea Hovrätt (a Swedish Court of Appeal), T 1085-11 (September 27, 2011), where the issue was actually about the impartiality of one of the arbitrators in the original case, but the interesting aspect of the judgment is that it contains information on the arbitral award as to the liability of the advisors. The original claimant had alleged that the advisors had not carried out their due diligence properly, as the advisors had not informed the company and its board about a certain guarantee undertaking. The advisors claimed that they had no liability in this case because the company would have made the acquisition regardless of the guarantee undertaking. The interesting point from the contract law perspective is that the advisor's contract included a limitation of liability clause. The arbitral tribunal found that gross negligence can pierce limitation of liability clauses, but the limitation of liability of the advisors was to be reviewed on the basis of §36 of the Swedish Contract Act and all the circumstances. The arbitrators did not focus on analyzing the nature of the acts of the advisors, but rather focused on the expectations and risks connected with such assignments.

⁵⁴⁶ Knapp, 2015, at 1106–1107.

to negotiate in good faith during a set time limit and where the fact that a certain term had been drafted by a well-esteemed law firm seemed to have had a certain bearing on the interpretation of the term in question. This case, *Petromec Inc v Petroleo Brasileiro SA Petrobras*,⁵⁴⁷ was referred to above and it was mentioned that Longmore, LJ, referred amongst a variety of reasons also to the fact that the term in question was drafted by certain solicitors (author's comment: the well-known Linklaters & Paines as they were called at that time). However, the draftsman may also be seen as representing the party in question and as having acted on his behalf, that is, their actions and skill were reflected upon and borne by the party in question. In general with regard to the question whether the contract reflects the intention of the parties or their advisors, my opinion is that the work of the advisors does not lessen the responsibility of the parties to read and understand what they are committing themselves to. Thus the contract should be held to represent the intention of the parties, unless proved otherwise. Another separate question, which will be reverted to, is whether the knowledge of the representatives may bear relevance in other situations of contract interpretation.

Nevertheless, the question of whose intent is reflected in the contract indicates the difficulties connected with focusing only on the subjective intent of the parties.⁵⁴⁸ If the actual intent is sought and a contract would be regarded as rather reflecting the intent of the advisors, avoiding a contract or having a contract amended on that account, would lead to a situation whereby contracting would lose its meaningfulness as a reliable tool for economic activity. The discussion about whether the contract reflects the intention of the parties or of their legal advisors also emphasizes the need to keep as the starting point that the wording of a written contract reflects the intention of the parties, that is, intention is found by an objective method.

In the USA the expression 'duty to read' is sometimes used. This has been referred to as part of the objective theory of law and means that a party cannot – after having signed a contract and thus 'manifested his assent' – withdraw or require amendments by saying that he has not read or understood the contents.⁵⁴⁹ The common law theory of duty to read includes some qualifications, which means that under certain circumstances the duty may be diverged from.⁵⁵⁰ The assumption under English law is also that the parties are bound by the contract regardless of whether they have read it or not.⁵⁵¹ Without attaching the US aspect of 'duty to read', I think that 'duty to read' is an

⁵⁴⁷ [2005] EWCA Civ 891, [2006] 1 Lloyd's rep. 121

⁵⁴⁸ It may be recalled that under English law subjective intent is completely disregarded, while the situation in the USA and the Nordic countries is somewhat more ambiguous. See discussion in the previous subchapter.

⁵⁴⁹ See e.g. Perillo, 2004, at 392. Charles L. Knapp analyzed this contract law concept based on how it is generally understood and compared it with other concepts such as the duty to bargain in good faith and the duty to mitigate damages. Knapp's conclusions were i.a. that it should be called neither a 'duty' nor a 'conclusive presumption'. Knapp, 2015, at 1108–1109. He summarized that assent by signing a contract effectively means that: "One who knowingly and voluntarily assents to a contract whose terms are contained in a given writing should be held legally responsible for her actions by being held to those terms, in the absence of fraud, mistake, or other excusing cause." Knapp, 2015, at 1112.

⁵⁵⁰ See e.g. Perillo, 2004, at 393–409.

⁵⁵¹ Lewison, 2004, at 47.

excellent expression describing the parties' responsibility to familiarize themselves with their commitments and not, when things get complicated, defend themselves by referring to complexity or not having understood what they have committed themselves to.⁵⁵² I fully acknowledge that it might be quite a theoretical assumption that the parties to business acquisitions would have understood all the finesses involved in the contract documentation, but that does not decrease their responsibility to stand behind a signed and committed contract.⁵⁵³ Otherwise, what would be the relevance of commitments which have been put down in writing, even though such writing as a whole might be complex and difficult to understand? The economic interests involved, the impact that business acquisitions may have on society at large and on other stakeholders such as employees, the need for certainty in agreed complex transactions where the parties have already invested prior to the contract, all are factual circumstances which support the view that the parties should be able to rely on written contracts entered into.⁵⁵⁴ Any functioning market needs predictability as to agreed commitments and a party who has entered into a contract without having fully understood the contents should bear the responsibility.⁵⁵⁵ Complicated contracts – a complexity which often arises in cross-border acquisition contracts – could be seen as rather enhancing the responsibility of the parties to know what they are committing themselves to. The likely scenario that the contracts have been drafted by legal advisors does not lessen the responsibility of the parties to read and understand what they are committing themselves to.

The subjective method has been said to focus more on the actual intention of the parties, but to find the intention of one party overriding mutual intention as evidenced by the written contract is connected with several difficulties in business acquisitions. Firstly, business acquisitions have been shown to be conducted in different phases. These often take place simultaneously. For example, due diligence is carried out at the same time as the contract is being negotiated.⁵⁵⁶ Statements and drafts during the negotiation phase do not necessarily reflect a party's intention at that very moment, but may rather reflect a strategic position taken in order to reach another goal. Secondly, business acquisitions as processes often involve a vast number of people and the different tasks such as due diligence, preparation of drafts, and negotiations might be taken care of by separate groups of representatives and advisors, who in cross-border transactions might carry out their tasks in different countries. Trying to find out afterwards the relevance of each and every statement by a party and each and every draft exchanged during the process would not necessarily lead to a reasonable result.⁵⁵⁷ The draft documentation goes back and forth between the parties.

⁵⁵² Alf Petter Høgberg also submitted that it is not sufficient in a commercial relationship if a party does not read or somehow else ensures what the wording means that such party cannot be freed from responsibility and that he takes the risk that his assumptions have not been met. Høgberg, 2006, at 130–131.

⁵⁵³ See also Knapp, 2015, at 1093–1094.

⁵⁵⁴ See also comments by Alf Petter Høgberg, who discussed situations where the text of the contract is especially important and as such mentioned commercial agreements between professional parties. He referred to several decisions of the Norwegian Supreme Court, where the contents of the contract were presented as the basis for interpretation. Høgberg, 2006, at 129–130.

⁵⁵⁵ Assuming that there has been no misleading or similar non-acceptable or illegal behavior by the parties involved.

⁵⁵⁶ The process and the fact that it is interwoven were discussed in more detail in Chapter 2.

⁵⁵⁷ See e.g. Høgberg, 2006, at 133–134, noting that more negotiators and decision-makers also reduce the factual possibilities to identify the relevant or justified intention of the parties.

The drafts are full of nuances and the parties use their bargaining position to get a good deal, meaning that sometimes utterances during negotiations and drafts include statements and proposals which are by no means definitive, but they have to be put into the context of the negotiating position at the time and analyzed in relation to the aims of the parties with the transaction as a whole. Therefore, in my opinion, some exceptional circumstances would be required to justify why a party's subjective intention, which is not reflected in the written contract, should override the written contents of the contract. In practice, though, in terms of a dispute where it is claimed that a contract does not reflect the parties' mutual intention, the question is whether the parties will be allowed to show that the contract does not reflect their mutual intention by using other interpretation material.⁵⁵⁸

When using an objective interpretation method the importance of the wording of the contract would be stressed and that wording would be interpreted based on what the words ordinarily mean in a legal context. The wording of the contract might also be influenced by the kind of business the parties and/or the targets are involved in, while other technical and trade-related circumstances might lead to the meaning of a word being given a very specific meaning which is fairly far from what the word means in daily life.⁵⁵⁹ Previous practice between the parties in relation to conducting business together might have an impact on how the wording is interpreted, but this is mostly of less relevance in business acquisitions, where it is quite unusual that the parties would have entered into several business acquisition contracts to the extent that a practice may be regarded as having emerged between the two. Exemptions may be found within the private equity industry, where it is not unusual that the same private equity houses meet in several transactions. Nevertheless, their practice would vary, at least to the extent whether a specific private equity house is acting as a seller or a buyer.

Business acquisition contracts show many similarities in structure, although contracts drafted by common law lawyers tend to be more elaborate, and use of terminology regardless of whether they have been drafted by a lawyer from a common law jurisdiction or from a Nordic jurisdiction, due to the fact that the international legal community often employs the Anglo-American way of drafting in these transactions.⁵⁶⁰ If a prevailing market practice exists that is deemed trade usage, this could be used as an argument for why the objective method should be preferred when interpreting a business acquisition contract.⁵⁶¹ A strict objective approach would lead to the contract terms being interpreted according to their ordinary meaning. However, in cross-border business acquisitions, the question remains whose ordinary meaning prevails? If there is no governing law provision in the contract, and even if a contract based on private international law were assessed to be governed by a certain national law, it is still relevant to discuss whether there

⁵⁵⁸ The situation in the different jurisdictions is described in subchapter 3.4.2.

⁵⁵⁹ This was discussed above in subchapter 3.3.1.1.

⁵⁶⁰ See subchapter 3.3.2.1 on the fact that trade usage is a relevant component in contract interpretation in general.

⁵⁶¹ This is based on general observations with regard to all jurisdictions i.e. that even if giving words their ordinary meaning many other aspects may have an impact e.g. trade usage and custom. See subchapters 3.3.1.1 and 3.3.2.1.

is a market practice that should guide interpretation of the wording in question. This matter will be reverted to in Chapter 5.

With regard to the question of subjective and objective interpretation methods, it is important to emphasize that in all business acquisitions it is the responsibility of the parties to ensure that the written contract reflects their intentions. From that perspective on a theoretical level a more objective interpretation method should be preferred, but subjective elements will always be included, for example when the parties have attached special meanings to the wording. Nevertheless, an objective interpretation is preferred, as it emphasizes the responsibility of the parties to use correct wording, terms and language or at least to discuss what they mean, in case of uncertainty as to the meaning of their agreements. Such liability is by no means unreasonable considering that the parties are often assisted by professional advisors and especially if the parties, as assumed herein, are business entities. It is the responsibility of the parties to make sure that their agreements are correctly recorded in the final contract. That responsibility should not be “outsourced” to the courts.

3.3.2 Applying contextual and literal methods

3.3.2.1 *Use of contextual and literal methods in the common law and Nordic jurisdictions*

Under English law the traditional interpretation method was the literal method focusing on the plain meaning of the words as stated within the four corners of the contract.⁵⁶² However, contemporary English law has moved towards a contextual interpretation method, where not only the words are interpreted in relation to the whole of the contract, but where the commercial purpose may also bear an impact on how the contents should be interpreted.⁵⁶³ The development towards a more contextual interpretation method and contemporary views were described, for example, by Lord Wilberforce in *Prenn v Simmonds*, where he said that “The time has long since passed when agreements, even those under seal, were isolated from the matrix of facts in which they were set and interpreted purely on internal linguistic considerations....We must... inquire beyond the language and see what the circumstances were with reference to which the words were used, and the object appearing from those circumstances, which the person using them had in view.”⁵⁶⁴ Lord Wilberforce followed up on his own statement in *Reardon Smith v Hansen-Tangen*,⁵⁶⁵ where he said that “No contracts are made in a vacuum: there is always a setting in which they have to be placed. ... In a commercial contract it is certainly right that the court should know the commercial purpose of the contract and this in turn presupposes knowledge of the genesis of the transaction,

⁵⁶² Stone, 2013, at 203 and Chen-Wishart, 2012, at 388.

⁵⁶³ Lewison, 2004, at 31–39.

⁵⁶⁴ [1971] 1 W.L.R. 1381; [1971] 3 All ER 237

⁵⁶⁵ [1976] 1 W.L.R. 989

the background, the context, the market in which the parties are operating.” Lord Wilberforce’s statements with regard to the background material were subsequently referred to by Lord Hoffman’s statement in *Investors Compensation Scheme Ltd v West Bromwich Building Society* and more specifically in his second principle,⁵⁶⁶ where he described that the background consists of “anything which would have affected the way in which the language of the document would have been understood by a reasonable man.” Lord Hoffman affirmed in his fourth principle that “The meaning which a document (or any other utterance) would convey to a reasonable man is not the same thing as the meaning of its words. The meaning of words is a matter of dictionaries and grammars; the meaning of the document is what the parties using those words against the relevant background would reasonably have been understood to mean. The background may not merely enable the reasonable man to choose between the possible meanings of words which are ambiguous but even (as occasionally happens in ordinary life) to conclude that the parties must, for whatever reason, have used the wrong words or syntax (see *Mannai Investment Co Ltd v Eagle Star Life Assurance Co Ltd* [1997] A.C.749.)”⁵⁶⁷ In this connection it is also relevant to refer to Lord Hoffman’s fifth principle in *Investors Compensation Scheme Ltd v West Bromwich Building Society*, where he affirmed that: “The ‘rule’ that words should be given their ‘natural and ordinary meaning’ reflects the common sense proposition that we do not easily accept that people have made linguistic mistakes, particularly in formal documents.” That statement could, as a matter of fact, be seen as a proposition for a quite literal approach, but Lord Hoffman represented in that same principle that if the language is not correct, the courts should not have to abide by it if it is apparent from the background that the parties could not have intended the wording as it stands.⁵⁶⁸

Lord Hoffman’s statements have been widely discussed and also further clarified, for example in *B.C.C.I. v. Ali*,⁵⁶⁹ where Lord Bingham of Cornhill summarized the principles for interpreting words as follows: “To ascertain the intention of the parties the court reads the terms of the contract as a whole, giving the words used their natural and ordinary meaning in the context of the agreement, the parties’ relationship and all the relevant facts surrounding the transaction so far as

⁵⁶⁶ [1998] 1 All ER 98; [1998] 1 W.L.R. 896, at 913; “2. The background was famously referred to by Lord Wilberforce as the ‘matrix of fact’, but this phrase is, if anything, an understated description of what the background may include. Subject to the requirement that it should have been reasonably available to the parties and to the exception to be mentioned next, it includes absolutely anything which would have affected the way in which the language of the document would have been understood by a reasonable man.” Later, Lord Hoffman qualified his statement about the matrix of fact in *B.C.C.I. v Ali* [2002] 1 A.C. 251 at 39, (dissenting opinion), where he stated with reference to his second principle that “... I did not think it necessary to emphasize that I meant anything which a reasonable man would have regarded as relevant. I was merely saying that there is no conceptual limit to what can be regarded as background.”

⁵⁶⁷ *Ibid.* at 913.

⁵⁶⁸ *Ibid.* at 913. The principle in its entirety states that: “The ‘rule’ that words should be given their ‘natural and ordinary meaning’ reflects the commonsense proposition that we do not easily accept that people have made linguistic mistakes, particularly in formal documents. On the other hand, if one would nevertheless conclude from the background that something must have gone wrong with the language, the law does not require judges to attribute to the parties an intention which they plainly could not have had. Lord Diplock made this point more vigorously when he said in *Antaios Cia Naviera SA v Salen Rederierna AB, The Antaios* [1985] A.C. 191 at 201): “... if detailed semantic and syntactical analysis of words in a commercial contract is going to lead to a conclusion that flouts business common sense, it must be made to yield to business common sense.”

⁵⁶⁹ No 1 [2001] U.K.H.L.8; [2002] 1 A.C.251

known to the parties.”⁵⁷⁰ Nevertheless, as Kim Lewison pointed out, generally the courts would not find against the plain meaning of a word simply because of the context.⁵⁷¹ In that respect one could claim that the literal interpretation method is employed if the method is understood as just looking at the ordinary meaning of the word. However, Kim Lewison also asserted with regard to the meaning of the words: “Thus the correct meaning of words is to be found – not by their derivation or by literal analysis – but by the meaning commonly attached to them by the users of them.”⁵⁷² As to commercial contracts, the trend has been that interpretation leans towards commercially sensible results, which would more likely better reflect the intention (objective) of the parties and one would in such an interpretation refer to a commercially reasonable person.⁵⁷³ For example, the English Supreme Court stated in its judgment in *Rainy Sky SA v. Kookmin Bank*⁵⁷⁴ that a court must consider all relevant surrounding circumstances and if there are two possible constructions, the court may prefer the construction which is “consistent with business common sense” and reject the other.⁵⁷⁵ It should in that connection be emphasized that this statement relates to situations where there are alternative meanings but this statement does not suggest that the court could judge according to its own view on, for example, business sense when the interpretation results in just one option. However, irrespective of the English courts generally preferring a contextual approach, it has also been proposed that the courts’ right to look beyond the four corners of the contract is still quite circumscribed.⁵⁷⁶

The situation seems more diversified in the USA. The contextual approach with regard to the contents of a written contract has as such been confirmed in the Restatement (Second). As already noted above, Section 202(1) comments that the parties’ purpose should be given “great weight,” but that same Section also says that “[w]ords and other conduct are interpreted in the light of all the circumstances...” Furthermore, Section 202(2) of the Restatement (Second) stipulates that: “A writing or writings that form part of the same transaction should be interpreted together as a whole, that is, every term should be interpreted as a part of the whole and not as if isolated from it.”⁵⁷⁷ The Restatement (Second) has furthermore listed other standards which might be used when interpreting the wording of material to be interpreted.⁵⁷⁸ Indeed, Arthur L. Corbin held that the terms of a contract should be interpreted and their “legal effects determined as a whole.”⁵⁷⁹

⁵⁷⁰ Ibid. at 8.

⁵⁷¹ Lewison, 2004, at 195.

⁵⁷² Lewison, 2004, at 119. Note that even though a word or term is given a certain meaning, which preferably should be consistently used, it is possible that the same word or term is given different meanings depending on where and how it appears in a contract. Lewison, 2004, at 194.

⁵⁷³ Lord Steyn’s statement in *Mannai Investment Co Ltd v Eagle Star Life Assurance Co Ltd* [1997] A.C.749 at 771.

⁵⁷⁴ [2011] UKSC 50; [2011] 1 W.L.R. 2900

⁵⁷⁵ These statements are found in the Supreme Court judgment at 21 and were issued by Lord Clarke of Stone-cum-Ebony JSC; the other members of the Supreme Court agreed with such statements.

⁵⁷⁶ McKendrick, 2013, at 159.

⁵⁷⁷ See also e.g. Macneil and Gudel, at 699–701.

⁵⁷⁸ §203 of the Restatement (Second).

⁵⁷⁹ Corbin, 3, 1951, at 100.

There are, however, some differences between the states in how they apply the methods. When reviewing the literal approach it is worthwhile noting what it means in US contract law. Steven J. Burton described the essence of literalism as requiring that interpretation is carried out “[a]ccording to the literal meaning of the directly applicable words used in a contract, without taking into account their context.”⁵⁸⁰ Burton noted that if that method is employed only the words of the contract and the use of dictionaries would be allowed⁵⁸¹ and that “... Literalism does not take into account even the document as a whole, much less sentence or structural ambiguities.”⁵⁸² For the avoidance of doubt, Burton himself did not advocate literalism. Burton also claimed that literalism, even though not often applied by the courts, is more often applied by commercial arbitrators.⁵⁸³ The risk with a very strict literal method, which may lead to neither a subjective nor an objective analysis of the parties’ intentions, was illustrated by Steven J. Burton in his reference to part of the decision⁵⁸⁴ in *Sofran Peachtree City, LLC v. Peachtree City Holdings, LLC*,⁵⁸⁵ which says that “[w]hen the language of a contract is plain and unambiguous, the court must afford it its literal meaning, despite a party’s contention that he understood the contract to mean something else.”⁵⁸⁶ However, Burton asserted that even if the literal interpretation method is allegedly confined to the plain meanings of the words, in fact the interpretation is at least impliedly contextual, as even dictionaries provides different meanings of words, depending on the context in which they are used.⁵⁸⁷ Evidently, some states are more prone to literal interpretation than others, such as the state of New York, but even in New York, the contract should be read as a whole.⁵⁸⁸ Therefore it seems that in general in the USA even if the wording is decisive, as far as the contract is unambiguous, the wording is still in most states looked upon from the point of view of what the whole context would imply.⁵⁸⁹

The interpretation exercise is not always as simple as the above might indicate, because the question of reasonableness and fairness is also a question for US courts. For example, this matter is of relevance when there has been a mistake or there is an ambiguity in the wording of the contract.⁵⁹⁰ The Restatement (Second) states in Section 203 (a) that “... interpretation which gives a reasonable, lawful, and effective meaning to all the terms is preferred to an interpretation which

⁵⁸⁰ Burton, 2009, at 17–18 and at 36–37.

⁵⁸¹ Burton, 2009, at 36.

⁵⁸² Burton, 2009, at 37.

⁵⁸³ Burton, 2009, at 18, where in footnote 48 he justified his statement by referring, e.g., to *O'Donnell v. Twin City Fire Ins. Co.*, 40 F.Supp.2d 68, 72 (D.R.I.1999) and *Elkhart Lake's Road America, Inc. v. Chicago Historic Races, Ltd.*, 158 F.3d 970, 972 (7th Cir.1998).

⁵⁸⁴ Burton, 2009, at 19.

⁵⁸⁵ 550 S.E.2d 429, 432 (Ga.App.2001)

⁵⁸⁶ *Ibid.* at 432.

⁵⁸⁷ Burton, 2009, at 38–41.

⁵⁸⁸ See e.g. *Westmoreland Coal Co. V. Entech, Inc.*, 794 N.E.2d 667, 670 (N.Y.2003). See also Burton, 2009, at 41–42, where he noted that even if states like New York and Pennsylvania are likely to employ a fairly literal interpretation of the contracts, the courts will consider a contract as a whole.

⁵⁸⁹ See e.g. with regard to California law, *Intel Corporation v American Guarantee & Liability Insurance Co*, 51. A 3d 442 (Del. 2012), which was earlier referred to. In this judgment it was said that: “Courts must consider the contract as a whole, rather than analyzing specific provisions in isolation.”

⁵⁹⁰ Burton, 2009, at 182–185.

leaves a part unreasonable, unlawful, or of no effect.” In other words, contract interpretation aims at giving the wording a reasonable and effective meaning.

With regard to material other than the written contract which may be used in contextual interpretation, the parol evidence rule affects availability, although other material may be used to show whether a contract has been validly entered into or not, to show whether a contract is completely integrated or not and with some limitations to show how ambiguities should be interpreted.⁵⁹¹

In the Nordic countries, even though interpretation starts with the words or wording in dispute and therefore starts with a literal exercise,⁵⁹² interpretation is contextual to the extent that the words and the wording would be looked upon as part of the totality of the contract.⁵⁹³ The contextual approach is also dominant in relation to other interpretation sources, because unless the wording is clear and unambiguous and makes sense in the totality of the contract, the parties would – more easily than in the common law jurisdictions – be allowed to provide evidence of other circumstances to be considered when deciding upon the disputed matter.⁵⁹⁴

The contextual method typical of the Nordic countries has been described in various ways, although its applicability has not been questioned. For example, Bert Lehrberg has presented that when applying the contextual method it is actually a question of a successive widening of the context, because context is extensive and hard to grasp.⁵⁹⁵ Lehrberg explained this by the fact that interpretation starts with a literal reading, which often leads to the text having to be put into the linguistic/language context. If the reading exercise does not lead to an acceptable result, the result of such interpretation is put in relation to the contractual situation as a context. If the result is still uncertain, then as an exception even circumstances after entering into the contract may be of relevance.⁵⁹⁶ Lehrberg also mentioned that if the interpretation is still uncertain after these steps, the legal context, that is, mandatory and dispositive rules as well as general suitable principles, may be taken recourse to.⁵⁹⁷ A similar approach, although somewhat differently described, has been taken by Vesa Annola, who termed this kind of general interpretation, where the case-related interpretation material has not led to a firm conclusion and where other general principles will have to be taken into consideration, as the risk allocation interpretation method.⁵⁹⁸ Matti Ilmari Niemi

⁵⁹¹ The parol evidence rule is in detailed discussed in subchapter 3.4.1.3.

⁵⁹² See NJA 2007.35, where the Swedish Supreme Court stated that the wording of the contract is the starting point for determining the contents of the contract (based on the normal linguistic meaning of the text) in a case where the parties have not referred to circumstances in connection with entering into the contract.

⁵⁹³ Lehrberg, 2014, at 113–114, who mentioned that the context also means the setting in that specific sentence, section, chapter and contract documentation as a whole; Huser, 1983, at 496–497; Hemmo, I, 2007, at 609 and Gomard, Godsk Pedersen and Ørgaard, 2009, at 267–268. See also Bryde Andersen, 2005, at 333–334, who suggested the aspect that this is not always a viable option e.g. in the case of poorly drafted contracts.

⁵⁹⁴ Runesson, 2015, at 220.

⁵⁹⁵ Lehrberg, 2104, at 34–35.

⁵⁹⁶ Lehrberg, 2014, at 35.

⁵⁹⁷ Lehrberg, 2014, at 36.

⁵⁹⁸ Annola, 2016, at 25.

has explained that contextualism in general means that the application of concepts and rules is rather to be described as *prima facie*, where the final implication is dependent on different situations and facts, which in fact allows very broad space for legal interpretation.⁵⁹⁹ Alf Petter Høgberg, on the other hand, has pointed out that the wording of a contract may or may not be clear or ambiguous, but the question is really about the relevance of the wording in relation to the dispute at hand.⁶⁰⁰ If the wording seems to be unambiguous, interpretation would be based on a linguistic exercise, but such interpretation has to be put into context.⁶⁰¹ Høgberg also discussed situations where it is not possible to find or construe the reasonable intention of the parties or where the underlying law and possible other material does not resolve the dispute. He noted that in such cases interpretation would have to be risk-based, which he discussed based on assumptions, good faith and loyalty and general interpretation rules.⁶⁰² Mads Bryde Andersen pointed out that even if the presumption is that the wording and the language used are to be interpreted in an ordinary linguistic sense, interpretation would always have to take into consideration the kind of contract involved, supplementing law, actions before and after the contract, custom and of course if the parties intended something which is not in line with how the wording would normally be understood.⁶⁰³

Regardless of the different ways of describing the contextual interpretation method, in a dispute in the Nordic jurisdictions and when the parties have a different view on what has been agreed, the agreements between the parties will be analyzed using a comprehensive method taking into account not only the contract, but also other material, actions and circumstances in order to try to find out what can be regarded as having been agreed, that is, what can be regarded as having been the parties' mutual intention.⁶⁰⁴ The first step would be to interpret the words and terms of the contract, but always put into context, for example, what kind of contract is involved. When that exercise does not lead to a clear decision about the meaning, the next step would be to analyze the respective words and terms in relation to the whole of the contract. If that exercise is not successful, then documentation related thereto and other acceptable sources of interpretation will also be taken into consideration.⁶⁰⁵

3.3.2.2 Which method is preferable when interpreting business acquisition contracts?

First of all, it has been shown that using a contextual or a literal interpretation method does not in itself mean that objective and subjective theories play no role, but even when using one of the two

⁵⁹⁹ Niemi, 2002, at 195–196.

⁶⁰⁰ Høgberg, 2006, at 40–41.

⁶⁰¹ Høgberg, 2006, at 65–66.

⁶⁰² Høgberg, 2006, at 236–332.

⁶⁰³ Bryde Andersen, 2005, at 323–324.

⁶⁰⁴ Annola, 2016, at 16.

⁶⁰⁵ Annola, 2016, at 167–172.

first-mentioned methods, the interpretation will be based on either or both of the two last-mentioned methods.

Literalism has been defined in various ways, but literalism is always present to some extent as contract interpretation starts with the wording of the contract.⁶⁰⁶ It was, however, also established above that even if contract interpretation starts with a literal reading of the contract, in all jurisdictions such reading would be carried out taking into account the whole contract. In other words, giving words and expressions their ordinary legal meaning does not mean that those words and expressions should be analyzed in isolation from the rest of the contents of the contract. This part of the contextual method is of utmost importance when analyzing typical business acquisition contracts. A complex contract such as a business acquisition contract is an entirety where terms and conditions are interlinked and dependent on each other. For example, a section on the seller's warranties or representations and warranties is often linked to a separate section or separate schedule setting out in more detail the liability of the seller in case of a breach of a warranty or a representation.⁶⁰⁷ The seller's warranties may further be qualified by certain disclosures, which may be found in the body contract or in a separate schedule.⁶⁰⁸ The contract may also contain some agreement as to the effect of a possible due diligence carried out by the buyer.⁶⁰⁹ The written contract as the basic interpretation document furthermore customarily includes other schedules and they must be read as a whole in order to fully understand all aspects of the parties' agreements.⁶¹⁰ Sometimes, the written contract contains a provision on how the schedules and body contract are ranked, that is, which document takes precedence over another, but if that has not been done it would be a matter of interpretation where, for example, how detailed they are, how they are connected to each other, especially the body contract, and their relevance and importance for the issue at hand could be taken into consideration.⁶¹¹ Under all circumstances the body contract and

⁶⁰⁶ See previous subchapter.

⁶⁰⁷ See e.g. Stilton, 2008, at 594: Precedent 2, Schedule 6 "Claims procedure and termination and Sellers' safeguards," where in 2 "Limitation of liability – maximum and minimum amounts" it is stated that "Except in any case of fraud, dishonesty or willful non-disclosure: 2.1. the Sellers shall have no liability in damages in respect of any claim by the Buyer (except for claims in respect of any breaches of the Warranties in paragraph 1 of schedule 5) of the Tax Covenant if and"

See also ICC Model Share Purchase Agreement, 2004, at 21, Art. 11 "Limitation of liability for warranty breaches" "The liability of the Seller under this Agreement, except for any liability under Article 13 (Restrictive Covenants) shall not arise unless the liability for damages exceeds [] (in words: []) in which event the Seller shall be liable for the whole liability and not only for the excess over []; and..."

⁶⁰⁸ See e.g. Stilton, 2008, at 594–595: Precedent 2, Schedule 6 "Claims procedure and termination and Sellers' safeguards," Art. 4 "Disclosure Letter" states that: "The Buyer shall not be entitled to bring any claim in respect of any breach of any of the Warranties if and to the extent that such inconsistency has been fairly disclosed in the Disclosure Letter with sufficient details to identify the nature and scope of the matters disclosed."

See also ICC Model Share Purchase Agreement, 2004, at 19, Art. 8 "Warranties", 8.1 "The Seller warrants to the Buyer that as at the date of this Agreement: (a) except as fairly and specifically disclosed in Schedule B, each of the statements set out in Schedule A is true and accurate in all respects; ..."

⁶⁰⁹ For example in ICC Model Share Purchase Agreement, 2004, at 19, Art. 8.3 states that the buyer's investigation and possible knowledge shall not have any impact on his remedies for breach of warranties. Similar language, although even more specific with regard to knowledge i.e. actual, constructive or imputed, is provided by Andrew Stilton in Stilton, 2008, at 594, §3 of schedule 6.

⁶¹⁰ As has been seen by the examples used from the precedents drafted by Andrew Stilton, it is typical of the English drafting style that vital matters are also set out in schedules e.g. warranties, disclosures, conditions and taxes.

⁶¹¹ See e.g. Annola, 2016, at 154–156.

the schedules have to be read as a whole in order to understand all the rights and obligations of the parties and the agreed risk allocation. It is fair to say that in general a contextual approach in reading the words of the contract is allowed in all relevant jurisdictions, but the perspective differs when the discussion turns to a contextual approach meaning that other circumstances than the contract may be taken into account.

Legal scholars have discussed at length what is meant by ambiguous wording,⁶¹² but mostly there is at least a seed of ambiguity when parties take a matter to court. When a contextual interpretation method is used, it is likely that in a dispute regarding ambiguous wording at least some pre-contractual material would be used. The materials and events during the pre-contractual phase might also have to be allowed in order to show the kind of knowledge by the other party of certain matters connected with the target or his assumptions for the deal or to show the assumptions of the parties, provided that in order to bear relevance such assumptions were known to the other party.⁶¹³ However, even if pre-contractual material and events are allowed as evidence, the significance of such evidence would have to be judged based on the specifics of the particular case. The contract is the finalization of what has been said and done during the pre-contractual phase and the parties should bear the responsibility for the contract correctly reflecting their understandings and intentions. Bert Lehrberg described the process well when he discussed the widening of the interpretation material and circumstances gradually expanding.⁶¹⁴

3.4 Determining sources of interpretation

3.4.1 Identifying the contents of the parties' agreements

3.4.1.1 *The written contract and expressly agreed terms*

As noted in the introductory part above, the interpretation process would actually have to start with the courts determining what the interpretation sources are. When determining the interpretation sources, the courts would already at that stage become engaged in some kind of interpretation and would employ the methods discussed above in one form or another. For example, the courts in the common law jurisdictions would have to establish whether a written contract is fully integrated or

⁶¹² Farnsworth, II, 2004, at 319–322 and Lewison, 2004, at 241–255. The question of ambiguity has perhaps been less in special focus of Nordic legal scholars, who have been more concerned with the challenges of linguistic interpretation in general. See e.g. Høgberg, 2006, at 40–66; Hemmo, I, 2007, at 607–620; Lehrberg, 2014, at 99–111 and Bryde Andersen, 2005, at 332–333.

⁶¹³ For example unilaterally prepared material by a party or his advisors may seldom qualify as such, unless the material has been shared with the other party. This is applicable even in situations where a party refers to the doctrine of failed assumptions, although such material may describe what the party has assumed, but it cannot be given any relevance unless the other party has been made aware of the presumptions. See discussion above regarding the doctrine of failed assumptions in subchapter 2.2.5.

⁶¹⁴ Lehrberg, 2014, at 35–36.

not, while the courts in the Nordic countries would on some level have to decide whether the contract is sufficient as an interpretation source for deciding the dispute.

Subchapter 2.3.5 mentioned the kind of matters that are included in business acquisition contracts, although the description was merely an overview of typical matters agreed in such contracts.⁶¹⁵ The overview reflected the fact that business acquisition contracts are often quite complex and extensive documents. By using these kinds of contracts, the parties may comprehensively set out in writing the details of the transaction including the rights and obligations of the parties. These detailed written contracts are the basis on which interpretation of the contracts is carried out in all jurisdictions, as was already observed in subchapter 2.2.5. Therefore, identifying the main interpretation source in business acquisitions is, as a starting point, not overly difficult. As noted above, in business acquisitions the agreements between the parties are seldom narrowed down only to one document, but it is more than likely that a number of schedules are attached to the main body contract. This is especially typical of Anglo-American drafting⁶¹⁶ and is therefore often seen in cross-border business acquisition contracts. In any proper drafting, the schedules would be referred to in the body contract and there would not necessarily be a question of whether they form part of the contract or not, but they could be seen as incorporated as an integral part of the whole contract. However, difficulties may arise when the text in the body contract and the text in the schedules do not correspond with each other, but that issue will not be further discussed here.

When the courts identify the written contract and material related thereto, although written business acquisition contracts are comprehensive, it is still possible that a party may claim that, in addition to the written contract terms, there are oral agreements which have not been included in the written contract. If that is proved to be the case, these oral agreements would be regarded as express terms, since express terms may either have been written down in the contract or they may have otherwise been explicitly agreed by the parties.⁶¹⁷ The difficulty lies in proving the existence of additional oral terms and what those terms contain, when the parties have different opinions.⁶¹⁸ The situation will have to be resolved based on what the contract states. For example, the effect of an entire agreement provision may be relevant, what has been said and at what time during the pre-contractual phase and whether the matter has been to some extent been provided for in the contract.

⁶¹⁵ Such matters mentioned were: 1. Specific information on the parties; 2. Background information and what in broad terms is being agreed in the contract; 3. Definitions; 4. The actual purchase and sale – what is being sold/bought; 5. The purchase price and mechanism in relation to that; 6. The closing mechanism and conditions precedent for carrying the transaction; 7. The representations and warranties of the seller; 8. The representations and warranties of the purchaser; 9. Indemnification and limitation of liability matters; 10. Possible special undertakings of the parties; 11. Miscellaneous provisions; 12. Governing law and dispute resolution.

⁶¹⁶ This is exemplified e.g. by model contracts presented in Stilton, 2015, at 521–779; Share Purchase Practice Manual, 2000, at 4.25–4.169 and Warren's Forms of Agreements, 2, 2007, at 8.69–8.187.

⁶¹⁷ Adlercreutz and Gorton, II, 2010, at 52.

⁶¹⁸ Axel Adlercreutz and Lars Gorton discussed the problems with proving what oral terms the parties have agreed to and they mentioned that in such cases the actions of the parties after concluding the contract may bear significance. Adlercreutz and Gorton, II, 2010, at 100. Geir Woxholth pointed out the difficulties with oral agreements and proving the contents. Woxholth, 2014, at 28–29. A similar comment has been made by Jan Ramberg and Christina Ramberg. See Ramberg and Ramberg, 2016, at 161.

Furthermore, since business acquisition contracts are mostly comprehensive, detailed and the end-product of often quite extensive processes, it could be a defense that there should be a higher threshold for the parties to prove that there are additional oral terms which have not been incorporated in the written contract.⁶¹⁹

In practice, the question of oral express terms is often related to whether pre-contractual statements have become part of the contract or not and may therefore bear some relevance even in business acquisitions. With regard to the common law countries, and leaving the parole evidence rule aside for the moment, Richard Stone has pointed out that under English law in evaluating whether an oral pre-contractual statement should be regarded as a term of a written contract, attention should be paid to the time between the statement and when the contract was entered into and that the longer the time between the statement and entering into the contract, the likelier that the statement will not be regarded as a term of the contract.⁶²⁰ Michael Furmston has mentioned three tests which might help in deciding whether parties' statements are to be regarded as having becoming terms of the contract or not: "i) At what stage of the transaction was the crucial statement made?, ii) Was the oral statement followed by a reduction of the terms to writing?, and iii) Had the person who made the statement special knowledge or skill as compared with the other party?"⁶²¹

With regard to the USA and additional oral terms, Section 216 of the Restatement (Second) stipulates about bringing evidence on "consistent additional terms" in certain cases. The requirement is that the written contract is not regarded as completely integrated and that the additional term includes separate consideration or the question is about a term that may be "naturally omitted."⁶²² It should also be noted that these additional terms may be regarded as implied terms, when the parties have omitted an "essential" term.⁶²³

In the Nordic countries the written contract may be supplemented by other express – that is, oral – terms if it can be proved that the parties have agreed to such terms even though not having incorporated them into the written contract. This is due to the fact that there is no requirement for the parties to enter into a written contract, with some exceptions such as real estate contracts, as was already earlier referred to. However, when the parties have entered into a detailed written contract, the threshold for showing that they have additionally agreed orally on other terms would be high. Furthermore, in general, the parties would face the problem of proving the contents of

⁶¹⁹ For example Jan Schans Christensen suggested that a very detailed business acquisition contract following the Anglo-American drafting style may well lead to a Danish court taking as a starting point that such contract comprehensively regulates the rights and obligations of the parties. Schans Christensen, 1998, at 159.

⁶²⁰ Stone, 2011, at 185. See also Lewison, 2004, at 60. Except for cases of rectification, evidence might be allowed to show misrepresentation. Please refer to subchapter 4.3.3.1 and 4.3.3.2 regarding misrepresentations.

⁶²¹ Furmston, 2012, at 171–177.

⁶²² Restatement (Second), §216 "Consistent Additional Terms": (1) Evidence of a consistent additional term is admissible to supplement an integrated agreement unless the court finds that the agreement was completely integrated. (2) An agreement is not completely integrated if writing omits a consistent additional agreed term which is (a) agreed to for separate consideration, or (b) such a term as in the circumstances might naturally be omitted from the writing."

⁶²³ §204 of the Restatement (Second) and UCC, as further discussed under implied terms below.

such oral terms.⁶²⁴ The matter of additional oral terms would appear when a party claims that the parties have agreed upon something during the negotiations and that such statements have in fact become part of their overall agreement. When evaluating whether pre-contractual statements have in fact been part of the parties' agreements, it has been suggested – with regard to Nordic law – that account should be taken, for example, of how close to the final agreement these statements were made and whether the statements really just refer to one party's aims or whether they actually reflect the mutual intention of the parties.⁶²⁵ In other words, the reasoning is similar to that presented by Richard Stone with regard to the English situation.

3.4.1.2 Use of implied terms

As shown above, there are challenges in proving that the parties have orally agreed to some additional express contract terms when they have summarized their agreement in detailed written contracts. An even more controversial issue is the use of so-called implied terms, when the courts in fact supplement written contracts.

In the common law countries, implied terms are understood as terms which have not been written down or explicitly agreed, but which for some reason are regarded as being part of the agreement between the parties.⁶²⁶ In these cases the courts will have to consider whether a contract should be supplemented by additional provisions. Implying terms with regard to business acquisition contracts between equally strong business parties can hardly be held to be a very feasible solution in the case of a dispute, as contracts are mostly heavily negotiated, detailed and there are few matters of importance which would not have been considered one way or another. However, implying terms may also be seen as part of the general interpretation of contracts⁶²⁷ and therefore it cannot be excluded that under some circumstances terms would be implied even with regard to business acquisition contracts.

It has been said about English practice that the courts have used implied terms with care as part of the contents of a contract.⁶²⁸ Under English law terms might be implied in a contract on the basis of statutes containing compulsory provisions, for example the UCTA and the Sale of Goods Act (1979) as to implied conditions. The English common law system, however, also includes principles for terms implied by the courts when no mandatory statutory provisions exist. These are often distinguished into a) terms implied by law, b) terms implied in fact, and c) terms implied

⁶²⁴ See e.g. Ramberg and Ramberg, 2014, at 144.

⁶²⁵ Hemmo, I, 2007 at 588.

⁶²⁶ See e.g. Guest, Chitty I, 2012, at 985. In the USA implied terms are sometimes referred to as omitted terms. See e.g. Farnsworth, II, 2004, at 342–410. Farnsworth, however, also uses the term implied terms and implication. See e.g. Farnsworth, II, 2004, at 346 and at 416 (question about implied conditions). See also Perillo, 2004, at 162–163.

⁶²⁷ Please refer to subchapter 1.2.4, for an explanation of how interpretation of contracts is sometimes divided into two separate phases i.e. interpretation and supplementation.

⁶²⁸ Lewison, 2004, at 157 and Stone, 2011, at 199.

through custom.⁶²⁹ When the English courts use the method of implying terms, such additional terms are implied based on an objective approach, as the courts do not try to find the “actual” intention of the parties.⁶³⁰ Under English law the contract must be silent on the issue which the implied terms purport to deal with and the implied terms must be certain⁶³¹ and necessary. The necessity test, as appeared in the *Moorcock* case (1889),⁶³² means that certain additional terms might be accepted if they are necessary in order to make the contract work at all.⁶³³ Another test for intervention by the courts is the so-called “officious bystander” test. This test has been explained as if someone were asked whether a provision would be part of a contract or not, the answer would be “oh, of course.”⁶³⁴

Implied terms may not contradict an express term.⁶³⁵ There are still exceptions to this common law rule, for example if the parties jointly intended something else, if there are laws, such as the law of tort or of unjust enrichment, which impose certain legal obligations on the parties regardless of the contract, and contracts that have become standard contracts in the market.⁶³⁶ A summary of the contemporary view on implying contractual terms may be found in the English Supreme Court judgment in *Marks and Spencer plc v BNP Paribas Services Trust Company (Jersey) Limited*,⁶³⁷ where the court said that “A term will only be implied if it satisfies the test of business necessity or it is so obvious that it goes without saying;⁶³⁸ it will be a rare case where only one of those two requirements are met.”⁶³⁹

What is the likelihood of implying terms in agreements between commercial parties? Kim Lewison, for example, said that “The presumption against adding terms is stronger where the contract is a written contract which represents an apparently complete bargain between the

⁶²⁹ See, e.g., Furmston, 2012, at 177–195; Lewison, 2004, at 151–189 and Stone, 2011, at 199–213. Stone has mentioned as reasons for courts having used implied terms i) terms implied by custom (local or trade), ii) terms implied by fact (trying to find the “true intention of the parties.”) (author’s comment: not to be confused with subjective intention, but what the intention of a reasonable person would be), iii) test of necessity (*Moorcock* test to be understood as one of the criteria being that the implication is necessary to make the contract workable), iv) the officious bystander test and v) terms implied by laws and statutes.”

⁶³⁰ See subchapter 3.3.1.1.

⁶³¹ See e.g. *Shell (UK) Ltd v. Lostock Garage Limited* [1976] 1 WLR 1187, where Lord Denning stated regarding implied terms due to particular circumstances (not of common occurrence) at 1197 “... in such cases...; but only when it is necessary and can be formulated with a sufficient degree of precision.”

⁶³² *Moorcock* [1889], *The*, L.R. 14 PD 64, where an implied term was accepted, as the contract would have been unworkable if not supplemented by the term in question.

⁶³³ Stone, 2011, at 202. In *Ashmore v Corp of Lloyd’s (No. 2)* [1992] 2 Lloyd’s Rep. 620, where in a claim for breach of contract based on an implied contractual duty of care was dismissed because the implied terms did not pass the business efficacy test set out in the *Moorcock* case (1889). The claim was also based on breach of statutory duty.

⁶³⁴ Stone, 2011, at 203. In *Ashmore v Corp of Lloyd’s (No.2)*, the officious bystander test was also stated not to be applicable due to the complexity of the term allegedly breached.

⁶³⁵ Collins, 2008, at 238 and Lewison, 2004, at 172–173 and at 207.

⁶³⁶ Collins, 2008, at 240–245.

⁶³⁷ [2015] UKSC 72

⁶³⁸ *Ibid.* at 17–18.

⁶³⁹ *Ibid.* at 21. The Supreme Court also said that: “The implication of a term is not critically dependent on proof of the actual intention of the parties. If one approaches the question by reference to what the parties would have agreed, one is concerned with the hypothetical answer of notional reasonable people in the position of the parties at the time they were contracting. It is necessary but not sufficient condition for implying a term that it appears fair or that one considers that the parties would have agreed it if it had been suggested to them.”

parties.”⁶⁴⁰ Richard Stone also claimed, with regard to the officious bystander test, that it is not easily applicable to complex transactions and he referred to the decision in *Ashmore v Corp.*⁶⁴¹ It seems that the use of implied terms would be less likely in heavily negotiated, detailed written contracts between commercial parties such as business acquisition contracts.

In the USA, regarding the process of implication Arthur L. Corbin proposed that “When a court finds a promise by implication, its procedure may be nothing more than the ordinary interpretation of word symbols...”⁶⁴² Corbin described the different situations where contract terms may be applied as: “When a promise is said to be “implied in fact”, we are describing one that is found by interpretation of a promisor’s words or conduct. When a promise is said to be “implied in law”, we are declaring the existence of a legal duty created otherwise than by assent and without any words or conduct that are interpreted as promissory.”⁶⁴³ Another way of describing implied terms in the USA has been proposed by Charles L. Knapp, who described terms implied by law as such terms which, in addition to terms implied by statute, are terms which emerge from “the law’s belief that agreements made by parties in such circumstances should ordinarily be regarded as having particular legal effects.” It is important to notice, though, that Knapp also said that terms implied by law may not go against the parties’ express provisions.⁶⁴⁴ When there is a written contract, as is assumed in this dissertation, the Restatement (Second) deals with cases of implied terms in the earlier referred to Section 204 “Supplying an Omitted Essential Term”. This allows the supplementing of terms when they are “essential” to determine rights and obligations, but it is also stated that such terms implied by the courts must be “reasonable in the circumstances.”⁶⁴⁵ The UCC contains a provision on implied warranties in sale of goods,⁶⁴⁶ but such warranties may be modified or excluded by express warranties.⁶⁴⁷ When there are both express and implied warranties they are, according to the UCC, construed in consistency with each other and on a cumulative basis, but if such construction is ‘unreasonable’, the intention of the parties is decisive as to which warranty is in a dominant position.⁶⁴⁸ The UCC also provides for implying a price. It may furthermore be

⁶⁴⁰ Lewison, 2004, at 158.

⁶⁴¹ Lloyd’s (No 2), [1992] 2 Lloyd’s Rep 620, where Gatehouse J did not find it possible to apply the officious bystander test due to the suggested question being too complicated to be answered only by ‘yes.’

⁶⁴² Corbin, 3, 1951, at 161.

⁶⁴³ Corbin, 3, 1951, at 161. Corbin also mentioned that promises implied in law are often referred to as quasi-contracts. See further at 162, where Corbin mentioned that there are several examples where “... a contract containing one promise clearly expressed in words has been found to contain another promise by “implication.””

⁶⁴⁴ Knapp, 1996, at 216. Knapp mentioned in this connection the court’s possibility to impose standards such as good faith and fair dealing.

⁶⁴⁵ § 204 of the Restatement (Second): “When the parties to a bargain sufficiently defined to be a contract have not agreed with respect to a term which is essential to a determination of their rights and duties, a term which is reasonable in the circumstances is supplied by the court.” See also e.g. *Jade Realty LLC v. Citigroup Commercial Mortg. Trust* 2005 – EMG, 83 A.D 3d 567 (1st Dept. 2011), where a term was implied because it would otherwise had led to “absurdity” and it was also mentioned with reference to certain previous court practice that the position of the parties was relevant, as “... the instrument was negotiated between sophisticated, counseled, businesspeople negotiating at arm’s length.”

⁶⁴⁶ UCC, §2-314 “Implied Warranty of Merchantability. Usage of Trade and §2-315 “Implied Warranty. Fitness for Particular Purpose.”

⁶⁴⁷ UCC, §2-316 “Exclusion or Modification of Warranties.”

⁶⁴⁸ UCC §2-317 “Cumulation and Conflict of Warranties. Express or Implied.”

recalled that Chapter 2 already mentioned that the Restatement (Second) provides that there is an implied duty of good faith and fair dealing in the performance of every contract.

Under both English law and US law, the use of implied contract terms is furthermore influenced by the parol evidence rule, which will be discussed in the following subchapter.

The Nordic countries do not use or discuss the concept of implied terms in the same structured way as in the common law countries, but the use of and discussion on implied terms may be compared with what Nordic scholars have referred to as supplementing or construing contracts as a form of interpretation.⁶⁴⁹ Except for mandatory provisions of law, which the court would have to take into account, the courts may also, if the contract is mute on some issues relevant for the case, look at non-mandatory provisions of, for example, the Sale of Goods Acts, court practice, trade custom or practice and all based on fundamental contractual principles permeating the system.⁶⁵⁰ Situations vary as to when there is a need to imply or supplement terms and it is not only a question of law in general but also a question of the factual circumstances.⁶⁵¹ It may be a situation where the parties have not explicitly agreed upon a certain issue and the contract is therefore mute upon that issue because the parties may have taken certain matters for granted.⁶⁵² This situation does not necessarily materialize in business acquisition contracts as these are customarily highly detailed, but may be typical of other kinds of standard contracts.

In my opinion, if a contract is very detailed and relates to a complex transaction, as business acquisition contracts often are and especially cross-border ones, and if the contract is not subject to any specific mandatory legislation, the threshold for implying terms based on other reasons should be placed high. The totality of the deal is up to the parties and in business acquisitions it would be rare that essential terms, which for example would lead to an unworkable contract, would be omitted. Obviously, if the contract is mute upon an issue or there are clear discrepancies within the contract, that is, it is poorly drafted, other sources of interpretation may have to be used and the contract may have to be supplemented.

⁶⁴⁹ In subchapter 1.2 the difference was explained between supplementing and interpreting contracts and even though in this dissertation interpretation is used to describe both means with regard to implied terms the supplementing method has its justification in this comparative part of the dissertation.

⁶⁵⁰ Saarnilehto and Annola, 2012, at 441–442 and Ramberg and Ramberg, 2014, at 149–151.

⁶⁵¹ See e.g. Adlercreutz and Gorton, II, 2010, at 52, who also pointed out that it is not always easy to draw a sharp line between implied terms and assumptions. See further comments on the fact that there are many kind of contracts, which are not specifically legislated about and therefore custom and trade usage may be used. See also Saarnilehto and Annola, 2012, at 441–442.

⁶⁵² These type of clauses may be referred to as *naturalia negotii*, although it may be presumed that such terms would not relate to the main obligations of the contracting parties. See e.g. Holm, 2004, at 56, who identified such undertakings as secondary obligations. These clauses are mostly described as very closely related to a specific type of contract. See e.g. Lehrberg, 2014, at 238 and Høgberg, 2006, at 169.

As a matter of fact, it seems to me that the common law way of implying terms in a contract is, as Arthur L. Corbin indicated, not primarily a separate phenomenon, but more an issue of contract interpretation in general.

3.4.1.3 Effect of the parol evidence rule in the UK and the USA

Except for the general description of how oral express terms may be regarded as terms of the contract between the parties and how terms may be implied, in the common law countries the actual contents of the contract and whether other terms are regarded as part of the written contract is dependent on application of the parol evidence rule. Even though the rule is referred to as an evidence rule, it in fact relates to the issue of what the substantive contents of a contract are.⁶⁵³ The rule means that contract parties may not present extrinsic evidence which would vary, contradict or supplement a written contract which is regarded as final and complete that is fully integrated.⁶⁵⁴ Therefore, the first task when contemplating the applicability of the parol evidence rule and generally before interpreting a contract is for the courts to establish whether the contract is fully integrated or not. The presumption in both common law countries is that a final written contract is fully integrated, that is to say, it contains all the agreements between the parties.⁶⁵⁵ If a contract is fully integrated, traditionally the courts in the common law countries were assumed to resolve a dispute within the four corners of the contract. E. Allan Farnsworth described the traditional ‘four corners’ rule as meaning that a court cannot look at any other circumstances outside the contract, whether the language is clear or not.⁶⁵⁶ However, the parties may nevertheless bring evidence that the contract is not fully integrated.⁶⁵⁷ The use of implied contract terms was discussed above and when looking closer at the use of implied terms and use of extrinsic evidence according to the parol evidence rule, the use of implied terms is affected by that rule, as the courts may not use implied terms to contradict the express terms of a contract.

⁶⁵³ See e.g. comment a. to §213 of the Restatement (Second), which states that the parol evidence rule is not a rule of evidence, but a rule of substantive law. See also Burton, 2009, at 64.

⁶⁵⁴ In English practice these guidelines have been confirmed in a number of court cases. One case which is often referred to is *Bank of Australasia v Palmer* [1987] A C 540, where Lord Morris stated (at 545) that: “...parol evidence cannot be received to contradict, vary, add to or subtract from the terms of a written contract, or the terms in which the parties have deliberately agreed to record any part of the contract.” See also Furmston, 2012, at 163, and his reference to P O Lawrence’s statement in *Jacobs v Batavia and General Plantations Ltd* [1924] 1 Ch. 287 (at 295): “It is firmly established as a rule of law that parol evidence cannot be admitted to add to, vary or contradict a deed or other written instrument. Accordingly, it has been held that (except in cases of fraud or rectification and except, in certain circumstances, as a defence to an action for specific performance) parol evidence will not be admitted to prove that some particular term, which had been verbally agreed upon, had been omitted (by design or otherwise) from a written instrument constituting a valid and operative contract between the parties.” See also presentation above regarding implied terms. As to US law, see e.g. presentation by Burton, 2009, at 63–70. See also §213, 214, 215, 216 and 217 of the Restatement (Second). The expression ‘extrinsic evidence’ is used in this dissertation because it describes the fact that the rule covers both oral and written evidence.

⁶⁵⁵ See with regard to English law e.g. Lewison, 2004, at 71, who also explained that a party may bring evidence to the court’s attention to rebut this presumption. As to US law see e.g. §209(3) of the Restatement (Second): “Where the parties reduce an agreement to a writing which in view of its completeness and specificity reasonably appears to be a complete agreement, it is taken to be an integrated agreement unless it is established by other evidence that the writing did not constitute a final expression.”

⁶⁵⁶ Farnsworth, II, 2004, at 309.

⁶⁵⁷ Lewison, 2004, at 71 and Burton, 2009, at 66.

The parol evidence rule and the interpretation tools based on the rule have been adjusted over the years. As to English law, the Law Commission of England and Wales has in one of its reports from 1986⁶⁵⁸ taken a fairly critical approach to the parol evidence rule and questioned whether it is actually a rule and stated that it should rather be regarded as a proposition of law, which is merely a circular statement.⁶⁵⁹ On the other hand, the Law Commission accepted the terminology due to its wide use by legal scholars.⁶⁶⁰ There are fairly established exceptions to the parol evidence rule under English law based on the main question whether a contract is fully integrated or not. For example, extrinsic evidence is allowed when there is an ambiguity in the wording, to show that the written contract is not fully integrated, to show custom or when the validity of the contract is questioned.⁶⁶¹

There are many similarities with how the rule is perceived and applied in the USA. For example, when a contract is regarded as only partially integrated it may be supplemented with terms based on other circumstances, but such supplementing terms may not contradict the written agreement.⁶⁶² Samuel Williston was a strong advocate for the written agreement being the expression of the parties' mutual intention and that extrinsic evidence may be allowed to show the meaning of the words, but not an intention not expressed in the contract.⁶⁶³ Arthur L. Corbin suggested that all evidence should be allowed to show whether the written agreement actually was the true and final agreement between the parties. If that was the case, and there was no fraud or similar invalidating

⁶⁵⁸ Law Commission, Law of Contract: The Parol Evidence Rule, Report No 154, Cmnd 9700, 1986.

⁶⁵⁹ Ibid. at 8, paragraph 2.7.

⁶⁶⁰ Ibid. at 8, paragraph 2.7. More specifically the Law Commission stated that: "Rather, it is a proposition of law which is no more than a circular statement: *when it is proved or admitted that the parties to a contract intended that all the express terms of their agreement should be as recorded in a particular document or documents, evidence will be inadmissible (because irrelevant) if it is tendered only for the purpose of adding to, varying, subtracting from or contradicting the express terms of that contract.* We have considerable doubts whether such a proposition should properly be characterized as a 'rule' at all, but several leading textbook writers and judges have referred to it as a 'rule' and we are content to adopt their terminology for the purposes of this report."

⁶⁶¹ See e.g. Stone, 2011, at 192–194, where he described exceptions to the rules as follows: "i) ambiguity of the used word or phrase, ii) the agreement is incomplete i.e. if a party or the parties bring evidence to the fact that the written agreement was not intended to contain all terms of the contract, iii) custom i.e. a certain word or phrase is used in a certain way in that particular field of business (trade, market or local use) but should not be used to contradict a clear written agreement, iv) starting or finishing date i.e. other evidence than the written agreement may be used to show the date on which a contract was intended "to start to operate", and v) other exceptions i.e. a written agreement was to confirm earlier oral agreements, but doesn't do that correctly, there is a collateral contract, a pre-contractual statement can become part of the contract, if it is of great importance to a party." See also Lewison, 2004, at 70–73, where he mentioned possible exceptions and said that "... evidence is admissible to show that the contract is not yet in force by reason of an unfulfilled condition precedent". He also said that oral evidence can be admissible to show that the parties had no intention to contract. He held that, if the contract does not contain an "entire agreement" clause, evidence would be "admissible to show that the writing was not intended to be the entire contract between the parties", (author's comments: However, with reference to the cases *McGrath v. Shah* (1987) 53 P. & C.R. 452 and *Brikom Investments Ltd v Carr* [1979] Q.B. 467 at 480, CA, Lewison showed that court practice varies as to whether an 'entire agreement' clause is always fully exclusive as to other statements or promises). Lewison also claimed that evidence to prove collateral agreement is allowed if the contract does not contain an 'entire agreement' clause and that evidence is admissible to identify the parties to the contract or the subject matter of the contract or additional consideration. He furthermore mentioned that evidence is admissible to prove custom, and evidence is admissible where it is sought to challenge the validity of the contract (claim for rectification or rescission due to mistake or misrepresentation). With regard to rescission, note also the equitable remedy of restitution

⁶⁶² Burton, 2009, at 70–93, dealt with the question of the parol evidence rule and the issue of total or partial integration. See further Calamari and Perillo, 1966–1967, at 335 and Perillo, 2004, at 125–126.

⁶⁶³ Williston, II, 1924, at 1165, at 1175–1177 and at 1217.

circumstances, then the rule was relevant.⁶⁶⁴ The UCC includes provisions on the parol evidence rule in the shape of Section 2-202 “Final Written Expression: Parol or Extrinsic Evidence”,⁶⁶⁵ which provides that final written integrated agreements may not be contradicted by evidence regarding prior agreements or contemporaneous oral agreement. According to the UCC, the parol evidence rule does not preclude evidence to show trade custom or custom between the parties. If the contract is not regarded as final and fully integrated, parties may also bring evidence of additional terms. The parol evidence rule is furthermore provided for in the Restatement (Second) and more specifically in Section 213 “Effect of Integrated Agreement on Prior Agreements (Parol Evidence Rule)”; in Section 214 “Evidence of Prior or Contemporaneous Agreements and Negotiations”, and in Section 215 “Contradiction of Integrated Terms”. These Sections confirm that unless exceptions have been made in the previous Sections, prior or contemporaneous agreements or negotiations are not admissible in evidence to contradict a term in writing. Under all circumstances, the rule is highly relevant when evaluating or rather excluding prior and simultaneous statements whether written or oral.⁶⁶⁶

The US courts seem to have a somewhat diversified practice as how to apply these rules.⁶⁶⁷ Alan Schwartz and Robert E. Scott have said that New York courts are more prone to use what they call the “hard parol evidence rule,” which is a formalistic approach (focused on the text) and which gives the four corners rule an important position, that is, a contract is regarded as integrated if it appears final and complete on its surface and further that an entire agreement provision could indicate that.⁶⁶⁸ Another way of dealing with these issues is described as the “soft parol evidence rule” which according to Schwartz and Scott is applied by such “anti-formalistic jurisdictions” as California. Schwartz and Scott claim that “these states admit extrinsic evidence of meaning, even if the writing has an unambiguous merger clause or would appear final and complete on its face under the four corners presumption.”⁶⁶⁹ The authors themselves have been regarded as formalistic and as taking an economic view of contract interpretation by emphasizing a literal approach.⁶⁷⁰

⁶⁶⁴ Corbin, 3, 1951, at 264–272.

⁶⁶⁵ This section provides that: “Terms with respect to which the confirmatory memoranda of the parties agree or which are otherwise set forth in a writing intended by the parties as a final expression of their agreement with respect to such terms as are included therein may not be contradicted by evidence of any prior agreement or of a contemporaneous oral agreement but may be explained or supplemented (a) by course of dealing or usage of trade (§1-205) or by course of performance (§2-208); and (b) by evidence of consistent additional terms unless the court finds the writing to have been intended also as a complete and exclusive statement of the terms of the agreement”.

⁶⁶⁶ See §2-202 of the UCC. US legal scholars debated whether the rule actually refers also to contemporaneous statements, see Calamari and Perillo, 1966–1967, at 335 referring to Samuel Williston as accepting that prior and contemporaneous statements are included, but Arthur L. Corbin being more critical and rather defending an opinion that statements are either made prior or subsequent to the written contract. With regard to English practice, see e.g. Guest, Chitty I, 2012, at 963, mentioning – in discussion about allowing extrinsic evidence to contradict documents – an example of when a contemporaneous agreement outside the agreed document would be admissible.

⁶⁶⁷ E. Allan Farnsworth on the other hand mentioned some similarities, as courts in general are prepared to consider evidence of prior negotiations to show that the parties have attached a different meaning from what the words would ordinarily mean. Farnsworth noted that more debate arises when the question is whether the language of the contract is “clear,” “plain” and “unambiguous.” Farnsworth, II, 2004, at 306.

⁶⁶⁸ Schwartz and Scott, 2010, at 959–960

⁶⁶⁹ Schwartz and Scott, 2010, at 960–961.

⁶⁷⁰ Burton, 2009, at 219–220.

Shawn J. Bayern criticized the formalistic view of reviewing contracts and defended in general a view that the courts should look beyond the contract when interpreting the same.⁶⁷¹ E. Allan Farnsworth, on the other hand, identified three kind of cases where it is all the same whether the court applies a more restrictive or liberal parol evidence rule, that is, evidence of prior negotiations is not allowed when such evidence contradicts or adds to the contract; if the dispute is about evidence showing the relevant circumstances, but not including prior negotiations, such evidence would be allowed. Moreover, if the interpretation and dispute concern admissibility of evidence of prior negotiations and the language in dispute is not clear enough without such evidence, the evidence would be allowed.⁶⁷² Even though it seems to be generally accepted nowadays that, if a written contract is incomplete to some extent, the writing might be supplemented by evidence or consistent additional terms – evidence of prior agreements or expressions which contradict the text cannot, however, be used.⁶⁷³

3.4.2 Pre-contractual documentation and statements

3.4.2.1 General observations on relevance of the pre-contractual stage in contract interpretation

When a dispute arises regarding the contents and wording of a contract, a party might want to take recourse to the course of events leading up to entry into the written contract. The question is to what extent may statements, preliminary agreements, drafts, other prepared material and documentation be used as interpretation material in the case of a dispute. In the common law countries the parol evidence rule sets out restrictions in this regard, while in the Nordic countries there is greater flexibility in general to take into account pre-contractual material. It may, on the other hand, be recalled that the previous Chapter discussed that in the common law countries misrepresentations given before the contract was entered into may have an impact on contract interpretation, even when there is a contract provision excluding the impact of the pre-contractual stage. It may also be recalled that the previous Chapter discussed collateral contracts as a means of imposing rights and obligations on the parties due to their actions and statements during negotiations. An example was mentioned in the case of *Evans & Son (Portsmouth) Ltd v Andreas Merzario Ltd*, where the court found that there was a collateral contract and thus allowed evidence as to the pre-contractual situation.⁶⁷⁴ All in all, allowing pre-contractual material and course of events to have an impact on contract interpretation is not a straightforward task.

It has also been noted above that the objective interpretation method takes a more restrictive approach to adding other interpretation material if there is a written, comprehensive contract, while

⁶⁷¹ Bayern, 2009, at 101–137. Bayern dealt in general with the formalistic contract interpretation method presented by Schwartz and Scott, also asserting that a strict division between interpretation and filling gaps could lead to unwanted results, where the courts in fact would have to disregard many cases.

⁶⁷² Farnsworth, II, 2004, at 317.

⁶⁷³ Calamari and Perillo, 1966–1967, at 335.

⁶⁷⁴ [1976] 2 All ER 930; [1976] 1 WLR 1078. See subchapter 2.2.5.

the subjective interpretation method, with its focus on proving actual intent and how the parties understood the wording, would be more inclined to look at other material. Likewise, the contextual interpretation method may in general be more prone to look at other interpretation sources than only the written contract, while the literal interpretation method is mostly restricted to the written contract. There is no exact rule how these methods would be employed in different cases, but they would very much depend on the factual circumstances, for example the nature of the contract and the contractual relationship.

Contractual parties, especially in large transactions, want to ensure high predictability as to the likely outcome and consequences in case of dispute. Therefore, it is also typical that the contract in a business acquisition deals with the question of what impact the pre-contractual stage should have on the interpretation of the written contract. This may do so either on a general level by inserting a contract provision which excludes the use of material prepared or statements made during the pre-contractual stage and/or by dealing with pre-contractual material in specific contractual provisions concerning, for example, representations and warranties. The effect of these kinds of contractual provisions will be further elaborated on, but the fact is that by inserting these kinds of provisions, the parties' intention has already been clearly defined and should not be ignored.

3.4.2.2 Pre-contractual negotiations including documentation

The use of pre-contractual material may be discussed in relation to different issues such as in relation to whether such material can be used to show the intention of the parties. With regard to English law, Lord Hoffman said in *Investors Compensation Scheme Ltd v West Bromwich Building Society*⁶⁷⁵ that evidence of pre-contractual negotiations is not admitted to show subjective intent other than in cases of rectification.⁶⁷⁶ Hoffman's view has not been unchallenged: for example, Lord Nicholls of Birkenhead in *B.C.C.I. v Ali*⁶⁷⁷ questioned whether the underlying principle still applies. The English approach to pre-contractual material in general is rather negative, but there are situations when such material may bear an impact on contract interpretation, such as when there has been a misrepresentation, when the wording of the written contract documentation shows ambiguities and also when the parties want to show that a contract is not fully integrated.⁶⁷⁸ It

⁶⁷⁵ [1998] 1 All ER 98

⁶⁷⁶ [1998] 1 All ER 98. Lord Hoffman's third principle: "The law excludes from the admissible background the previous negotiations of the parties and their declarations of subjective intent. They are admissible only in an action for rectification. The law makes this distinction for reasons of practical policy and, in this respect only, legal interpretation differs from the way we would interpret utterances in ordinary life. The boundaries of this exception are in some respects unclear. But this is not the occasion on which to explore them." In some earlier cases, too, pre-contractual negotiations have been accepted in the case of rectification, e.g. *Arrale v Costain Civil Engineering Ltd* ([1976] 1 Lloyd's Rep.98) and *Partenreederei MS Karen Oltmann v Scarsdale Shipping Co Ltd, The Karen Oltmann* ([1976] 2 Lloyd's Rep 708).

⁶⁷⁷ No. 1 [2001] U.K.H.L.8; [2001] 1 A.C. 251 at 30 C-D

⁶⁷⁸ See statements by Lord Wilberforce in *Prenn v Simmonds and Reardon Smith v Hansen-Tangen* as followed up by Lord Hoffman in *Investor Compensation Scheme v West Bromwich Building Society*.

therefore seems that the general rule is that negotiation material pertaining to the pre-contractual phase is only admissible under special circumstances.⁶⁷⁹ This is irrespective of the English courts generally preferring a contextual approach, but it is based on the courts' right to look beyond the four corners of the contract being quite circumscribed.⁶⁸⁰

In the USA, pre-contractual material may, just as in the UK, be used to show ambiguities in not fully-integrated contracts, to show that the contract is not fully integrated or that there is no contract.⁶⁸¹ The Restatement (Second) and the UCC deal with the issue of when pre-contractual statements and documents may be allowed in contract interpretation.⁶⁸² When pre-contractual statements are used, they may not contradict or add terms to fully integrated agreements.⁶⁸³ Introducing such statements and documents in the USA is connected with several technicalities, just as in the UK. For example, E. Allan Farnsworth discussed the interrelationship between the parol evidence rule and the plain meaning rule, which he described as being applicable when "... the meaning of language, when taken in context, is so clear that evidence of prior negotiations cannot be used in its interpretation."⁶⁸⁴ However, he rhetorically asked whether language can ever be so clear.⁶⁸⁵ It may also be recalled that in referring to Steven J. Burton's explanation of the subjective and objective methods in relation to showing intent by using other material, Burton asserted that scholars defending the subjective interpretation method are more inclined to consider both past and present circumstances and evidence showing the parties' actual state of mind, whereas scholars defending the objective method may take into account circumstances other than just the written contract, but where the relevance consists in finding a "reasonable meaning" of the parties' intention by reviewing the language used in the context and not the meaning a party or the parties may have had.⁶⁸⁶ In the USA collateral contracts may also be used as a means of acting upon pre-contractual statements as separate contracts, even though the final written contract may be regarded as fully integrated.⁶⁸⁷

In the Nordic countries the parol evidence rule does not exist and Nordic judges or arbitrators would not be bound by such a general rule: indeed, on the contrary.⁶⁸⁸ When discussing the parol evidence rule, legal scholars in the Nordic countries have suggested that implementing such a rule

⁶⁷⁹ See e.g. *Chartbrook Ltd v Persimmon Homes Ltd* [2009]1 AC 1101.

⁶⁸⁰ McKendrick, 2013, at 159.

⁶⁸¹ Farnsworth, II, 2004, at 228, at 239 and at 225–226; Burton, 2009, at 68 and at 97–98.

⁶⁸² §2–202(1) of the UCC and §213 and 214 of the Restatement (Second). This is in line with the parol evidence rule earlier discussed.

⁶⁸³ Burton, 2009, at 64 and at 66 and Farnsworth, II, 2004, at 239 and at 306.

⁶⁸⁴ Farnsworth, II, 2004, at 308–309.

⁶⁸⁵ Farnsworth mentioned that Alaska has abandoned this rule and that also states such as Nevada and Delaware have criticized the rule in case law. However, the majority of courts still adhere to some kind of plain meaning rule. Farnsworth, II, 2004, at 308.

⁶⁸⁶ Burton, 2009, at 51.

⁶⁸⁷ See *Lee v. Joseph E. Seagram & Sons, Inc.*, 552 F.2d 447 (2d Cir. 1977). Farnsworth, II, 2004, at 235–236 and Burton, 2009, at 94–97.

⁶⁸⁸ The fact that the Nordic countries do not adhere to the parol evidence rule has been confirmed by several legal scholars. See e.g. Gomard, Godsk Pedersen and Ørgaard, 2009, at 78, footnote 141; Gorton, 2009, at 178; Hagstrøm, 1994, at 392 and Hellner, 1993, at 202.

could in principle be seen as contradicting the provisions of the Codes of Judicial Procedure according to which the parties have the right to freely present evidence in a case while the role of the court is to analyze and judge whether the evidence presented is relevant and what evidentiary value it should be given.⁶⁸⁹ Nevertheless, the written contract would be the starting point in the interpretation of the parties' agreements. Therefore, to what extent other evidence is needed or given value would depend on the contents of the parties' agreements and their relevance, which in turn is very much based on the factual circumstances in relation to the dispute in question. As the Nordic countries do not face the same kind of limitations similar to those which the parol evidence rule imposes, evidence of, for example, pre-contractual statements and drafts may be more easily submitted and pre-contractual statements made during negotiations may be used in contract interpretation when interpretation of the contract itself does not provide answers to the dispute to be resolved.⁶⁹⁰

One additional point with regard to all jurisdictions is to what extent unilaterally prepared material may be used as evidence. It was already noted above that under English law pre-contractual negotiations and material may not be used to show subjective intent except in cases of rectification, for example when mistakes have been made.⁶⁹¹ Pre-contractual material in general is not admissible, though with some exceptions, but regardless of the exceptions unilaterally prepared material would be hard to include unless such material has been shared with the other party.⁶⁹² Unilaterally prepared material could, for example, be used to show background facts, which may be allowed when using the contextual interpretation method. In the USA the case law with regard to admitting pre-contractual evidence regarding negotiations is more diversified depending on which state is concerned. Unilaterally prepared material would not *per se* be excluded, but it would be subject to the same kind of limitations as are applicable to allowing evidence from prior negotiations in general. The question of unilaterally prepared material may in the Nordic countries be analyzed based on whether such material actually shows the intention of a party or the parties. This question is also related to the different methods and, as Vesa Annola has pointed out, one of the main questions in subjective interpretation is when unilaterally prepared documentation will be allowed as evidencing the subjective or mutual intention of the parties.⁶⁹³ Awareness by the other party of the intention has been held to be generally applicable in the Nordic countries in order for unilateral intention to be considered in contract interpretation.⁶⁹⁴ Unilateral intention of a party is

⁶⁸⁹ Hellner, 1993, at 186; Gomard, Godsk Pedersen, Ørgaard, 2009, at 78, footnote 14; Hagstrøm, 1994, at 392; Gorton, 2009, at 170–188; Lehrberg, 2014, at 96 and Krüger, 1989, at 515.

⁶⁹⁰ Lehrberg, 2014, at 134–138; Annola, 2015, at 137–140; Høgberg, 2006, at 113–114 and Gomard, Godsk Pedersen and Ørgaard, 2009, at 78.

⁶⁹¹ This was expressed by Lord Hoffman in his third principle in *Investors Compensation Scheme Ltd v. West Bromwich Building Society*.

⁶⁹² See e.g. *Chartbrook Ltd v Persimmon Homes Ltd* ([2009] 1 AC 1101), which confirmed that pre-contractual documentation and other proofs of the negotiations are not admissible. However, in that decision Lord Hoffman also noted that this rule does not apply e.g. in situations where it is necessary to prove that a party knew about some background fact or in cases of rectification and estoppel.

⁶⁹³ Annola, 2016, at 75.

⁶⁹⁴ Annola, 2016, at 65–66.

also relevant when discussing the doctrine of failed assumptions; in order for the theory to become applicable the other party must be aware of that intention.⁶⁹⁵ In other words unilaterally prepared material which has not been made available in negotiations would not be of great evidentiary value in the Nordic countries.

Interpretation material may also involve use of material not prepared by the parties. This kind of material would be typical when the contract and the material prepared by the parties is not sufficient.⁶⁹⁶ It could be admitted, for example, to show some technicalities in relation to the industry in which the target for the acquisition operates or how certain contractual terms are in general perceived in business acquisitions.

As described above, the technicalities of contract interpretation in the form of the parol evidence rule lead in principle to fairly restrictive practice in the common law jurisdictions concerning what other material may be used in contract interpretation in addition to the written contract documentation. On the other hand, it seems that there are so many exceptions to the parol evidence rule that its relevance could be questioned. The Nordic situation is different in the sense that contractual parties have broad rights to bring evidence before the court when trying to prove their standpoint – whatever that standpoint is. This also means that Nordic judges do not have to put as much time and effort as their common-law colleagues into explaining why certain pre-contractual evidence has been allowed.

The characteristics of business acquisitions as extensive projects – starting from the initial steps for initiating an acquisition, the preparations made by the seller and by the buyer, the negotiations, the likely examination of the target, possible preliminary agreements, possible detailed written contract and finalization of the transaction – give a different framework for contract interpretation than many other typical cases. The complexity, including the possibly large number of people involved, is even more striking in cross-border business acquisitions. That is a sound reason to document the final agreements between the parties into detailed written contracts, which indeed is customary in this field of business. Professional parties may be assumed to recognize that these detailed contracts as a starting point exhaustively set out their rights and obligations.⁶⁹⁷ This might sound self-evident, but a review of works by Nordic scholars elaborating on how to find the intent of the parties based on use of other interpretation sources, left me with an impression that the significance of the written contract as the most important interpretation source easily becomes depreciated in such discussion. However, when discussing business acquisitions, and especially cross-border business acquisitions, where the contracts are mostly very detailed and – if well-

⁶⁹⁵ The doctrine of failed assumptions was discussed in subchapter 2.2.5.

⁶⁹⁶ Annola, 2016, at 258 and Högberg, 2006, at 172–187.

⁶⁹⁷ See e.g. Högberg, 2006, at 131, where he also noted that a detailed contract which seems thorough generally gives the impression that the parties have aimed to exhaustively regulate their contractual relationship. In this regard he further suggested that if the contract is materially detailed and/or has a complicated structure or character, it also may be seen as the parties having assumed that there would be no deviation from the wording of the contract based on other interpretation sources.

drafted – exhaustively contain the parties’ agreements, the significance of written contracts cannot be over-emphasized.

Therefore, in my opinion, recourse to pre-contractual material prepared, used or negotiated by the parties should be restrictively used and allowed mainly when it is imperative in order to reach a conclusion on ambiguous wording or in cases where the contract does not provide sufficient information as to the dispute to be resolved and the agreements between the parties.⁶⁹⁸ Other phenomena typical of business acquisitions such as due diligence may in fact have implications for contract interpretation, but they do not as such alter my principle view. With regard to typical terminology in cross-border business acquisition contracts, use of pre-contractual material may have to be considered, as such material may show that the parties intended to give the typical terminology either its common law meaning or that it should be interpreted in accordance with the governing law.

3.4.2.3 Effect of entire agreement provisions

As business acquisitions are often quite extensive processes, involving many people and including different phases, there is always a risk that some matter or incident is not reported back to the representatives negotiating the draft contract. Obviously, the parties can always provide in the contract as to who will bear the risk for these types of flaws and these agreements might be reflected, for example, in definitions of the parties’ knowledge, that is, the knowledge of a party’s team member may be regarded as being the knowledge of that party.⁶⁹⁹ However, it is also typical that parties, after having negotiated a detailed and comprehensive contract, want to exclude in general any impact of the process leading up to entry into the contract. When the parties want to emphasize that their agreements are comprised in the written contract, they might resort to agreeing in the final contract upon a so-called entire agreement provision.⁷⁰⁰

Entire agreement provisions originate from the common law jurisdictions⁷⁰¹ and deal with similar issues of the admissibility and effect of pre-contractual evidence and the assumption that the written contract includes the parties’ final and complete agreement as the parol evidence rule. The preceding subchapter discussed with regard to the parol evidence rule that interpretation and use of extrinsic evidence may in some states in the US also be influenced by whether the contract includes an entire agreement provision or not. With regard to English law, it has been claimed that

⁶⁹⁸ See e.g. Høgberg, 2006, at 133, noting that if the contract is not sufficiently well drafted and a text-based intentional interpretation method is not applicable, other sources will obviously have to be used.

⁶⁹⁹ The parties should also consider what kind of knowledge is relevant e.g. actual, implied or after due inquiry.

⁷⁰⁰ Entire agreement provisions are also referred to as ‘merger’ or ‘integration’ provisions. See e.g. Escobar and Risdon, 2003, at 566–575. See also Christou, 2012, at 296–297, who discussed ‘whole agreement clauses’, of which ‘merger clauses’ were defined as such that “(… the whole of the parties’ agreement has been merged into the final document containing the clause).”

⁷⁰¹ It has indeed been said that the practice of including entire agreement contract provisions has probably come from the USA. Guest, Chitty I, 2012, at 966, footnote 472.

a reason for entire agreement provisions having become so common is that the parol evidence rule has become more relaxed.⁷⁰²

In the discussion here the focus is on entire agreement provisions, where the parties have agreed in one form or another that the contract, including its schedules, constitutes the whole agreement between the parties and that the contract supersedes all previous agreements, negotiations, drafts and other communications and understandings.⁷⁰³ These contract provisions may be drafted in a number of ways depending on whether the parties want to deal with some specific issues or not.⁷⁰⁴ The effect of an entire agreement provision under English law has been described as making it difficult to include other terms in a contract which contains an entire agreement provision, even including reliance upon a collateral contract.⁷⁰⁵ However, that this is not always true is evidenced by two fairly recent English court cases dealing with entire agreement provisions: *AXA Life v Campbell Martin Ltd*⁷⁰⁶ and *Invertec Limited v De Mol Holding BV and Henricus Albertus De Mol*.⁷⁰⁷ These decisions may be seen as confirming that regardless of an entire agreement provision in some cases the court will still go beyond the four corners of the contract.⁷⁰⁸ The situation is by no means clear-cut and the above decisions have been questioned in two other court decisions,⁷⁰⁹ that is, *Sycamore Bidco Ltd v Breslin*⁷¹⁰ and *Bikam OOD v Adria Cable*.⁷¹¹ The wording of the entire agreement clause is obviously of utmost interest in analysing the effect of such a clause, but there are also other aspects to bear in mind, for example that liability for pre-contractual

⁷⁰² McKendrick, 2012, at 403.

⁷⁰³ An example of how such clauses could be drafted: “This agreement including its exhibits and appendices represents the entire agreement between the parties regarding the subject matter hereof and supersedes any and all previous agreements, negotiations, communications, draft and/or understandings, whether oral or written.” (This example drafted by the author).

Another example may be taken from ICC Model Share Purchase Agreement, 2004, at 24, Art. 15.2: “This Agreement constitutes the entire agreement between the parties in relation to the sale and purchase of the Shares and other matters covered by it and supersedes any previous agreement between the parties in relation to those matters, which shall cease to have any effect.”

A further example is taken from Warren’s Forms of Agreements, 2, 2007, Form 101.3.03: “This Agreement (including its Exhibits) and the agreements, documents and instruments to be executed and delivered pursuant to them are intended to embody the parties’ final, complete and exclusive agreement with respect to the ____ and related transactions. They are intended to supersede all prior agreement, understandings and representations, written or oral, with respect to them, and may not be contradicted by evidence of any prior or contemporaneous agreement, understanding or representation, whether written or oral.”

⁷⁰⁴ For example, Richard Christou thoroughly analyzed the case law pertaining to entire agreement clauses based on such clauses that excluded “liability for pre-contract misrepresentation”, clauses which “acknowledge that a party has placed no reliance on the other party’s pre-contract representations or which accept that the other party has made no such representations” and clauses which “prevent one party attempting to include things raised in prior negotiations as a term of the agreement finally reached.” Christou, 2012, at 297.

⁷⁰⁵ Stone, 2013, at 202 including footnote 65, referring to *The Intntrepreneur Pub Co (GL) v East Crown Ltd* [2000] Lloyd’s Rep 611. See however also Lewison, 2004, at 80, who noted that in *McGrath v. Shah* (1987) 57 P. & C.R. 452, an entire agreement clause did not restrict statements to amount to a collateral contract, but that in *Deepak Fertilisers and Petrochemical Corp v Davy McKee* [1999] 1 All E.R. (Comm.) 69, an entire agreement clause was regarded so as to “preclude reliance on a collateral contract.” A similar approach was taken in *Intntrepreneur Pub Co v East Crown* [2000] Lloyd’s Rep 611 and in *Intntrepreneur Pub Co (C.P.C.) v Sweeney* [2002] 2 E.G.L.R. 132, see Lewison, 2004, at 81.

⁷⁰⁶ [2011] EWCA Civ 133

⁷⁰⁷ [2009] EWHC 2471 (Ch)

⁷⁰⁸ See e.g. Cowper, 2013, at 3, where – based on these two cases – he commented that ‘entire agreement’ provisions are not automatically exclusive according to their wording.

⁷⁰⁹ See also comment by Cowper, 2013, at 3, referring to the inconsistency as making the legal situation unclear.

⁷¹⁰ [2012] EWHC 3443 (Ch)

⁷¹¹ [2012] EWHC 621 (Comm)

misrepresentations may still under certain circumstances exist, it may not be effective in relation to terms implied by statutory acts or common law and there is a test in relation to whether it is reasonable based on the UCTA.⁷¹² It has also been said that if the parties are ‘sophisticated’, they have been ‘properly advised’ and when the negotiations have been complex an entire agreement provision would customarily be found reasonable.⁷¹³

In the USA, entire agreement contract provisions may in some states effectively show that the contract is fully integrated, but that does not necessarily mean that such a provision will exclude all and any extrinsic evidence.⁷¹⁴ It has also been said that “... some courts will treat merger provisions as only one factor to be considered in determining whether a contract is a total integration.”⁷¹⁵ It has furthermore been submitted that due to the fact that these types of contract provisions have become so common, “... absence of one may give rise to a contrary inference.”⁷¹⁶ The Restatement (Second) does not specifically deal with entire agreement provisions and their effect, but in broad terms deals with similar matters via the provisions on integration and the parol evidence rule.⁷¹⁷ There are differences between the states as to how the parol evidence rule has been used, as stated above, and as part of that rule the views of Schwartz and Scott were discussed, according to which an entire agreement provision in New York would indicate that the contract is fully integrated, while California generally would admit evidence, even if an unambiguous entire agreement provision had been included.⁷¹⁸

Regardless of the common law background, entire agreement provisions are frequently used in business acquisition contracts governed by Danish, Finnish, Norwegian or Swedish law. As noted above, the Nordic countries do not have a comparable rule to the parol evidence rule, which means that interpretation of an entire agreement clause would not be by analogy or influenced by the parol evidence rule.⁷¹⁹ Interpretation of the contract and a standard entire agreement clause would hardly preclude a party from bringing to the court evidence regarding factual circumstances which were prevailing or which induced a party to enter into the contract in question. Examples might include situations where the buyer would like to prove that the subject of the transactions was not in conformity with the information provided by the seller.⁷²⁰ Nor is it very likely that such a clause would exclude general contractual principles or statutory laws from being applicable, unless some

⁷¹² Christou, 2012, at 302.

⁷¹³ Christou, 2012, at 320.

⁷¹⁴ Farnsworth, II, 2004, at 263–265.

⁷¹⁵ Escobar and Risdon, 2003, at 566, referring to several court cases e.g. *Orth-O-Vision, Inc. v. Home Box Office*, 474 F. Supp. 672 (S.D.N.Y. 1979) “(holding that a merger provision creates a strong presumption that the parties intended their agreement to be a complete integration).” However, they also refer to other cases where a merger clause played just a part e.g. *Betz Laboratories, Inc. v. Hines*, 647 F.2d 402 (3d Cir. 1981) and *Seiden v. American Express Co.*, 523 F.Supp.1007 (E.D. Pa. 1981).

⁷¹⁶ Farnsworth, II, 2004, at 263.

⁷¹⁷ Restatement (Second): §212 “Interpretation of Integrated Agreement”, §213 “Effect of Integrated Agreement on Prior Agreements (Parol Evidence Rule)”, §214 “Evidence of Prior or Contemporaneous Agreements and Negotiations.” See also §216 “Consistent Additional Terms.”

⁷¹⁸ See Schwartz and Scott, 2010, at 960–961.

⁷¹⁹ See subchapter 3.4.1.3.

⁷²⁰ See e.g. Waersted Bjornstad, 2009, at 50.

specific non-mandatory rules are excluded.⁷²¹ Unless the contract is so clearly drafted that there is no room or need for other interpretation material, the Nordic courts would be likely to use even pre-contractual actions and documents in order to find the meaning of the contract.⁷²² Especially, as the aim is to find the mutual intention of the parties by using the contextual interpretation method, which means that not only is the contract interpreted as a whole, but all relevant circumstances should be taken into account.⁷²³

Nevertheless, in my opinion, commercial parties - and especially parties assisted by legal advisors - could be presumed to have the knowledge to understand the importance and the effect of an entire agreement clause. When deciding about the effect of an entire agreement provision and how limiting such provision should be regarded as to allowing evidence from the pre-contractual stage, the effect may also depend on the matter discussed. For example, if the question is about a dispute,

⁷²¹ Gorton, 2009, at 181, discussed situations in relation to acquisition contracts, where a clause excludes the applicability of the Sale of Goods Act. His opinion was that very brief exclusions without further specification probably makes it quite unlikely that a court would regard itself as precluded from using in analogy general contractual principles which are close to what has been stated in the Act in question. Liebkind, 2010, at 165, also found it unlikely that the Sale of Goods Act and its underlying principles could effectively in total be excluded as supplementing sources. See further Buskerud Christoffersen, 2008, at 380 where – after having discussed §17(2) of the Sales of Goods Act with regard to defects in the target – she found that an entire agreement clause (as she had described it) could exclude or at least limit the possibility of taking recourse to the Act, but not in cases of incorrect or missing information. The clause, she found, concerns the actual facts but is not about excluding legal provisions which represent fundamental principles of Norwegian law. See also Waersted Bjornstad, 2009, at 49, who suggested that “general rules of law cannot be considered as one group of rules in relation to EA-clauses”. He explained that while entire agreement clauses are primarily about avoiding taking pre-contractual circumstances into consideration, the same is not applicable to other rules e.g. remedies for breach of contract or co-operation obligation. Waersted Bjornstad, 2009, at 49–50. See further Möller, 2011, at 256–257, who held that such a clause does not mean that “all sources of law other than the contract would be excluded.” This is especially in relation to established practices or usages, unless explicitly so mentioned in the clause. But Gustaf Möller also said that the clause would likely have minor effects if it is necessary to fill a gap in a contract but it might prevent supplementation when such is not necessary in order for the contract to function. Additionally, see Sjöman, 2002–2003, at 935–941. Sjöman dealt with the question of integration clauses in relation to non-mandatory laws and referred to several arbitral awards where there seems to be some discrepancy between a case from 1986 and later cases of which a case from 2002 (2002-06-11) was the most recent. The 2002 case dealt with an acquisition where the buyer later revoked the contract and the deal due to defects in the object. However, this decision does not expressly take a standpoint on the question of the inter-relation between entire agreement clauses and non-mandatory law, which has also been commented on by Gorton, 2009, at 179–180.

⁷²² See Hemmo, I, 2007, at 599–601 and Lehrberg, 2014, at 95–96. Indeed, Lehrberg had an even more restrictive view than Hemmo on the effect of entire agreement clauses. See also Møgelvang-Hansen, 2011, at 236–237, noting that there does not seem to be any published Danish case law concerning entire agreement clauses, but his opinion was that Danish courts are not likely to exclude evidence as irrelevant because of the clause. He further said that “The general opinion in the legal doctrine is that the entire agreement clause cannot be taken literally. Conversely, the clause may have the effect that it may be harder for the party in question to convince the court that the written contract does not reflect the common intention of the parties.” Hagstrøm, 2011, at 268–269, who referred to a situation where the parties have inserted the clause without having really any mutual understanding and he presumed that the matter would be resolved in line with Art. 2(1)(17) of the UNIDROIT Principles 2004, but he also said that it is not clear that Norwegian law would accept such a strict solution as may be drawn from the UNIDROIT Principles. See further Bryde Andersen, 2003, at 136, who said that that entire agreement clauses cannot without reservation be held contractually valid, but they have an evidentiary function in the sense that they mean that the written contract comprises the parties’ agreement.

⁷²³ See e.g. Buskerud Christoffersen, 2008, at 377. See also Edlund, 2001, at 173, suggesting that the pre-contractual history may have an impact on interpretation regardless of an entire agreement clause. He referred to the fact that many contracts are drafted so that they need to be supplemented or filled in by different matters. However, he was also of the opinion that such a clause would be a ‘stop sign’ to introduce rights and obligations that are not agreed in explicit contract terms. Edlund further emphasized that such a clause would make it more difficult for a party who wants to introduce a right that does not appear from the text itself i.e. that there would be some kind of side agreement which was intended to be valid regardless of the entire agreement clause. See also Hemmo I, 2007, at 599–601, maintaining that the effect of an entire agreement clause is that it is diminishing upon interpretation material outside the contract, but it does not in general totally extinguish the possibility to rely e.g. on previous negotiations in the case of an unclear contract provision. However, the situation is different if interpretation based on the written document gives a clear result.

the outcome of which may overturn the whole contract, it may be justified that a judge would take a more liberal view as to allowing evidence regardless of the entire agreement provision.⁷²⁴ It is fair to say that even in the Nordic countries an entire agreement clause cannot be ignored and would certainly make the courts more cautious when evaluating pre-contractual evidence.⁷²⁵ This is regardless of the fact that entire agreement clauses are quite standardized and are not necessarily individually negotiated. It has, on the other hand, been submitted that even in business acquisitions an entire agreement provision should not have too much effect if it has not been separately negotiated.⁷²⁶ Certainly, parties do not always realize the far-fetched consequences that entire agreement provisions may have and easily refer them to the category of legal technicalities of less interest, but as already noted commercial parties should not be able to escape liability due to lack of interest for this kind of boilerplate clause.⁷²⁷ In general, however, even if entire agreement provisions may be influenced by the governing law, the fact that parties have included such provisions in their contract out of their free will should at the very least put the threshold high for allowing parties to prove that there are other agreements than those incorporated in a detailed written contract. As to evidentiary material needed in contract disputes, entire agreement provisions should also in such cases make a court more cautious and the court should scrutinize the reasons why such material should be allowed, if at all.

3.4.3 Contract law as a source

In the common law jurisdictions and to some extent even in the Nordic countries the written contract between business parties may be described as identifying the contract law between the parties.⁷²⁸ This is mainly due to the fact that there is no comprehensive codification of contract law in the jurisdictions. The contract between the parties is of course subject to a multitude of other laws such as labor law, anti-trust law, environmental law and other regulations, which might be mandatory and therefore have to be taken into account, but that is a different issue. Furthermore, even though the contract may be regarded as the contract law between the parties, contractual principles and case law have an impact on how the contract is interpreted in a dispute.⁷²⁹ A general

⁷²⁴ Buskerud Christoffersen, 2008, at 378–381.

⁷²⁵ See also Gorton, 2011, at 230, where he in fact said that even if Sweden does not have a parol evidence rule, an entire agreement clause would to some extent limit the court's freedom to consider other evidence.

⁷²⁶ Adlercreutz, 1996, at 28, said that entire agreement clauses should be given due attention only if they have not been routinely incorporated and that further the parties can be presumed to have been able to understand the meaning of such a clause.

⁷²⁷ See e.g. Norros, 2008, at 200–202, explaining his opinion that entire agreement clauses between business parties should not be questioned unless a party knows about the diverging opinion of the other party regarding the contract, but intentionally does not mention it. See also Cordero-Moss, 2016, at 1304–1305, suggesting that lack of interest in these kinds of contract provisions is not necessarily due to the parties ignoring the possibility that the governing law may have an impact on the contract or that they want to "... exclude the applicability of national law." Cordero-Moss explained that it is more often a calculated evaluating of the fact that there are less costs involved with taking such a risk in comparison with negotiating each and every contract provision in order to meet the governing law.

⁷²⁸ Bryde Andersen, 2005, at 104.

⁷²⁹ See e.g. Cordero-Moss, 2016, at 1312, urging parties to commercial contracts to take into consideration that the governing law may have an impact on their contracts and suggesting that if they do not do so then "... they have either been reckless, or they have taken a legal risk."

description of contract law was given in Chapter 2⁷³⁰ and contract law as applicable to business acquisitions will be discussed below, wherefore contract law in this connection is just mentioned for the sake of completeness as one of the sources of interpretation. The methods and principles of contract interpretation have been discussed above, as they form part of the discussion on contract law and how the agreements between the parties are determined. A more detailed discussion on interpretation will follow in the next Chapters based on the assumption that the written contract and other possible interpretation sources relevant for the dispute at hand have been determined.

3.5 Other rules and principles which may affect interpretation

Except for general interpretation methods and what they lead to with regard to interpreting the express wording of a written contract, a variety of other interpretation rules and principles may be of assistance when the interpretation methods described above and firstly implemented do not lead to solutions.⁷³¹

One of these rules is *in dubio contra stipulatorem* or, as it is also called *in dubio contra proferentem* – legal scholars tend to use different Latin expressions for this rule. This rule may be used when deciding upon ambiguities in a contract and the underlying question is how the responsibility of the ambiguity is perceived to have an effect on the interpretation. The *contra stipulatorem* rule means – in all jurisdictions – that in the case of ambiguities in a contract, an interpretation which is less favorable for the party that drafted or incorporated the contractual term or contract in question is preferred.⁷³² It seems that this way of describing the rule is governing in the USA, while it has also been mentioned that under English law this rule could rather be described as the interpretation goes against the “person for whose benefit the clause operates.”⁷³³ It may also be noted that in the Nordic countries, when the contract has been drafted by an external lawyer on behalf of a party, the rule would still be applicable to the party in question.⁷³⁴ Another way of describing the rule has been developed in the Nordic countries, which is that the interpretation would be detrimental to the party having had the best possibilities to abolish the ambiguity.⁷³⁵ Bert Lehrberg has understood the rule as meaning that the interpretation is to the detriment to the party liable for the ambiguity or having had the best possibility to fend off the ambiguity.⁷³⁶

⁷³⁰ See subchapters 2.2.1-2.2.6.

⁷³¹ See e.g. Annola, 2016, at 258–259 who regarded these rules as part of a risk-dividing interpretation method, which is used when the interpretation of the wording of the contract documentation including evaluation of a contextual approach does not lead to a conclusive decision. See also Burton, 2009, at 15, who said that this rule “...is available when, after interpretation is exhausted, there is a gap on the disputed point.”

⁷³² Lehrberg, 2014, at 195; Bryde Andersen, 2005, at 344–346; Hov and Høgberg, 2009, at 284–285; Hemmo, I, 2007, at 638–647; Burton, 2009, at 187–188 and Guest, Chitty I, 2012, at 954–955.

⁷³³ Lewison, 2004, at 208.

⁷³⁴ Hov and Høgberg, 2009, at 285.

⁷³⁵ Lehrberg, 2014, at 195. Lehrberg also mentioned other opinions e.g. that the decisive factor might be a party who should have expressed himself more clearly or otherwise is guilty of ambiguity. See also Huser, 1983, at 553 and at 561; Hov and Høgberg, 2009, at 260 and at 283 and Annola, 2016, at 273.

⁷³⁶ Lehrberg, 2014, at 196.

The rule *in dubio contra stipulatorum* or its equivalent *in dubio contra proferentem* is not necessarily all that interesting in business acquisition contracts, especially when the parties are, as assumed in this dissertation, of equal strength.⁷³⁷ Even in cases of controlled auctions, where the seller customarily prepares the draft contract sent out to the bidders, bidders are invited to comment on the draft contract. In most such cases there are furthermore more negotiations about the transaction and the draft contract with the bidder or bidders chosen for the final negotiations. There might be tactical reasons why a bidder would refrain from requiring material changes to the draft, but that is not a reason to impose a greater responsibility on the seller, as the bidder had the chance to comment and pose questions as to the meaning of the contents of the contract. As a practicality it may be noted that it is quite common that the written contract in business acquisitions contains language to the effect that the contract has been drafted jointly.

Another rule which is sometimes referred to, especially if the *in dubio contra proferentem* rule is not sufficient to reach a conclusive decision, is the so call *de minimis* rule. This rule means that when a party has undertaken some obligations and the extent of those obligations is not clear, the least burdensome interpretation alternative for that party will be applied, if there are interpretation alternatives.⁷³⁸ However, considering the applicability in business acquisition contracts entered into between equally strong business parties, this rule seems to be of little relevance. It has also encountered criticism as being more or less unworkable,⁷³⁹ and especially in contracts where payment is to be made.⁷⁴⁰ However, the *de minimis* rule could be applicable in contracts where the parties have included in their contract different kinds of limitation of liability clauses, where a restrictive interpretation in general is perceived as governing if the limitation clause is very widely drafted, ambiguous and unless it has been separately negotiated.⁷⁴¹

There are further some even more technical interpretation rules and principles used in the common law jurisdictions, for example a general term joined with a specific one will be deemed to include only things that are like the specific ones i.e the so called *ejusdem generis* principle and an interpretation which makes the contract valid is preferred over an interpretation which makes the contract invalid.⁷⁴² In the Nordic countries similar technical interpretation rules are generally used,

⁷³⁷ See e.g. Buskerud Christoffersen, 2008, at 56. In this connection Buskerud Christoffersen also referred to a decision of the Norwegian Supreme Court, Rt. 1992.796, where the rule was not applied in spite of a certain discrepancy between the bargaining positions of the parties but the court emphasized that both parties were represented by attorneys and that even if the other party had prepared the draft, it had also been amended after negotiations.

⁷³⁸ Adlercreutz and Gorton, II, 2010, at 114; Bryde Andersen, 2005, at 348; Annola, 2016, at 277 and Krüger, 1989, at 515.

⁷³⁹ Hov and Høgberg, 2009, at 260.

⁷⁴⁰ Annola, 2016, at 278.

⁷⁴¹ Bryde Andersen, 2005, at 351–352. However, Vesa Annola drew a distinction between restrictive interpretation, which he held to be concerned especially with an individual contractual term, and *de minimis* applicability, which he found is often based on an analysis of the whole contract in relation to a specific contractual term, Annola, 2016, at 277–278.

⁷⁴² Such rules have e.g. been described in Macneil and Gudel, 2001, at 699–701 as (a) “The meaning of a word in a series is affected by others in the same series; or, a word may be affected by its immediate context”; (b) “A general term joined with a specific one will be deemed to include only things that are like (of the same genus as) the specific ones.” (author’s comment: when the listing starts with a general word, which is followed by more specific ones, other

although the *ejusdem generis* principle has been met with skepticism as to its applicability, unless the wording of the contract provides for an interpretation according to that principle.⁷⁴³

3.6 Conclusions and open questions

In terms of the intention of the parties and the meaning of the wording of the contract documentation, there are surprisingly many similarities between the jurisdictions. Discussions in the common law countries might be more technical and structured, but except for the approach to subjective intent under English law, the conclusions are very often similar. It seems that a common feature for all jurisdictions is that a contextual interpretation in some form or another is used. The similarities are most obvious with regard to interpreting the wording of the contract, as that wording will be analyzed in general based on the whole contract. When the question is of context in relation to circumstances affecting interpretation, the contextual interpretation method shows similarities on a principle level, as the commercial setting of the contract as well as branch, custom between the parties and other customs may bear an impact on interpretation. Nevertheless, an interpretation starting from the wording of the contract may in a way be seen as a literal exercise where the contract is read and the wording is judged based on what that wording ordinarily means. The difference between the jurisdictions is most apparent when discussing the surrounding context and what other sources may be taken into account and allowed as evidence. With regard to the USA it also has to be recognized that, although a contextual approach when interpreting the meaning of the words is governing, some states are more inclined to use a more literal approach, but even then the words would be used in the context of the whole contract.

The written contract is, in all jurisdictions, presumed to reflect the mutual intention of the parties, but what kind of intention is sought shows differences between the jurisdictions. English law seems to have taken the most categorical view, as the actual/subjective intention of the parties bears little relevance and intention is based on objective standards. The objective intention as expressed in the contract is judged from the perspective of how a reasonable person would understand the document having had access to the same relevant background knowledge which would have been available to the parties at the time of their entering into the contract. Under US law there seems to be some

things similar to the ones specified will be included. This is the so called *ejusdem generis* principle.) (c) “If one or more specific items are listed, without any more general or inclusive terms, other items although similar in kind are excluded.” (d) “... an interpretation that makes the contract valid is preferred to one that makes it invalid.” (e) A written contract which “...contains a word or phrase which is capable of two reasonable meanings, one of which favors one party and the other which favors the other,” should be interpreted in a way which is less favorable to the party that drafted the contract. (f) A specific provision is an exception to a general one – ‘...if two provisions of a contract are inconsistent with each other and if one is “general” enough to include the specific situation to which the other is confined, the specific provision will be deemed to qualify the more general one’, i.e., to state an exception to it. (g) Handwritten or typed provisions control printed provisions. The Restatement (Second) identified some of these rules in §203 “Standards of Preference in Interpretation.” The above is not a full account of all the rules Macneil and Gudel described.

⁷⁴³ Bryde Andersen, 2005, at 332–333; Lehrberg, 2014, at 135 and Huser, 1983, at 506–507. Examples of similarities between the common law and Nordic jurisdictions, if there is inconsistency between different provisions, the written provision will prevail over typed provisions and more detailed provisions go before more general provisions.

support for a subjective approach, where the parties' actual intent is given a more prominent position, if it can be confirmed. However, such intent is as a rule to be found in the written contract, wherefore one could also say that in fact the objective theory is governing. In the Nordic countries, both subjective and objective intention is important. In commercial relationships the assumption is that the intention is expressed in the written contract, which could be compared with how objective intention is understood in the common law countries. Nevertheless, there is a lower threshold than in the common law countries to accept mutual subjective intention over the wording of the contract, if mutual intention can be proved. In proving that intention, there is a greater flexibility than in the common law countries to accept extrinsic evidence to show mutual intention. One additional comment regarding all jurisdictions is that even though subjective intention may have an impact on contract interpretation, such intention, once confirmed, will still be judged objectively, as pointed out by Vesa Annola. Therefore, most jurisdictions actually employ both objective and subjective methods.

In terms of the wording of a contract and of other interpretation material, in all jurisdictions the wording would be given its ordinary meaning based on an objective test. Nevertheless, the wording would be put into context and seldom would a literal interpretation of a single word or phrase be employed today. Such ordinary wording may be diverged from if the parties have given the words a special meaning. In the interpretation of ambiguous wording, trade custom, branch-specific, party course of trading or similar custom may be used to show the meaning.

Classification of the method used depends very much on what elements are perceived as the most important features of such methods. It seems to me that Joseph M. Perillo nailed the situation when he said (with regard to the USA) that there is no absolute objective or subjective interpretation method with regard to the parties' intention, but rather a mix.

The written contract as a source for contract interpretation is recognized in all the jurisdictions, but even so the question may arise whether it incorporates all agreements between the parties or not. In such cases it may be necessary to identify the terms of agreements between the parties even if it means reviewing factors outside the written contract. The question of express oral terms is dealt with somewhat differently among the jurisdictions. The more technical construction and restrictive approach when evaluating such additional terms may in the common law countries partly be based on the parole evidence rule, but perhaps also in general due to a reluctance to try to "rewrite" the contract for the parties. In the Nordic jurisdictions it is in principle easier for the parties to show that express oral terms have been agreed, although not necessarily incorporated in the written contract, as there are fewer restrictions in general on using pre-contractual evidence. In practice, the general challenges with proving oral agreements may lead to the outcome in a dispute not differing substantially. Furthermore, the fact that business acquisition contracts are detailed and often heavily negotiated makes it hard for a party to show that matters, at least substantial ones, would have been agreed upon only orally.

The use of implied terms as a question of supplementing a contract is part of contract interpretation, where the difference between interpreting and construing or supplementing a contract as such bears some relevance. Nevertheless, in the common law jurisdictions the issue has been dealt with separately and in quite a structured way. The English system has created several tests for when implied terms may be used, but in both common law jurisdictions implied terms may not contradict express terms agreed by the parties.

Implied terms may also be used in the Nordic courts, but the discussion has been less about these terms as a special category of terms and more about under what circumstances a contract may be supplemented with additional terms. Contract terms may be supplemented in the Nordic countries, for example when the contract does not stipulate about issues relevant for the case and when such terms are a necessity for the contract to be workable or when such terms are typically included or the parties have taken some matters for granted. Nordic courts are not very prone to imply terms in commercial contracts between commercial parties. When it has been done, the question has often been about the contract not actually reflecting the intention of the parties or a term has been omitted by mistake.

Implied terms into business acquisition contracts could be seen as an anomaly, because customarily there would be no need for that. When the parties have gone through the whole process including the negotiations and agreed upon a transaction in a detailed contract, the likelihood that important aspects of the transaction including the rights and obligations of the parties have not been set out in the contract is minimal. There may, of course, be poorly drafted contracts, but if in such case substantial matters have not been accounted for, the question may well be whether there is a final contract at all. Similarly, if the contracts are so poorly drafted that they are filled with ambiguities, the question is whether there is a contract at all, as the parties should draft the contracts and not the courts.

Assuming that the contract meets the criteria for a valid contract, an important question is to what degree other, party-related, interpretation sources may be used if the interpretation of the contract is not sufficient to provide a solution to the dispute. It has been established above that it is possible in all jurisdictions, under certain circumstances, that previous negotiations including drafts as well as other statements and agreements made during the time before or on entry into a contract might have an effect on contract interpretation, especially if the contract is ambiguous or mute upon an issue. It has also been established that a contextual interpretation method is governing in all jurisdictions, although there are differences with how that method is perceived, especially with regard to pre-contractual evidence.

The extent of use of pre-contractual material is hard to describe precisely and the situation is floating to say the very least, but it may be concluded that in the Nordic countries the inclination and possibilities to take into consideration pre-contractual material is more extensive than in the common law countries. Moreover, in practice, the courts may show quite considerable flexibility

in allowing extrinsic evidence, but its evidentiary value is a different issue and would be dependent on the factual circumstances. In the common law jurisdictions – regardless of the parol evidence rule – previous negotiations, drafts and statements might be considered if the contract is not fully integrated. Other exceptions to this rule exist as well, for example in the case of claims for rectification or rescission due to mistake or misrepresentation or in the case of collateral contracts. Unfortunately, court practice shows that perception and implementation of the parol evidence rule still varies amongst the common law courts and legal scholars. There are also multiple alternatives for avoiding this rule, but it cannot be ignored and if a dispute arises in a common law jurisdiction, the interpretation process would have to be carried out taking into consideration this rule as well as other technicalities with regard to the use of extrinsic evidence.

Entire agreement contract provisions are as such accepted in all jurisdictions, but their effectiveness varies somewhat. When comparing the common law and Nordic law jurisdictions, it seems that the strongest and most consistent impact of an entire agreement provision is to be found in the UK. In the USA an entire agreement provision would lead to a very high threshold for reviewing any pre-contractual statements or actions, but court practice varies between the different states. The assumption regarding the impact and scope of an entire agreement provision is less clear in the Nordic countries, but it is clear that it is not without any effect at all and it may very well raise the threshold for allowing parties to prove that there are other agreements than those incorporated in the written contract or to use pre-contractual material in general as evidence. It has been shown that there are opinions according to which the effect of an entire agreement provision may depend on whether it has been separately negotiated or if it has been included as more or less a boilerplate clause. In terms of business acquisition contracts, I do not think that this is a sufficient argument. If the parties are business entities, as assumed in this dissertation, one could require that they should take the risk of not having understood the importance of such a contract provision. In most cases, the parties are furthermore assisted by lawyers, who at least may be presumed to understand the effect of an entire agreement provision.

When reviewing the different contract interpretation methods presented above, my conclusion is, with regard to business acquisition contracts, that the most reliable interpretation method considering the interest of the parties, is a contextual objective method for interpretation. I would, nevertheless, take a rather pragmatic view as to the process of interpretation as such, because all elements described above as being typical of the different interpretation methods are present. The subjective element is relevant when it is necessary to find out whether there have been some deficiencies in the contracting and also in connection with how the parties' agreements are reflected in the contract; therefore interpretation of business acquisition contracts may be seen as not purely objective, but the objective method is influenced by subjective aspects. Furthermore, even if a contextual method is preferred, the interpretation would have to start with analyzing the wording of the contract, which in fact is quite a literal exercise. Secondly, even if a contextual method is preferred, the use of other interpretation material should be fairly restricted when the question is

about heavily negotiated and detailed business acquisition contracts, as the parties may be presumed to ensure that the contract correctly reflects and includes all their understandings and agreements. The written contract should be the most significant source in the interpretation of business acquisition contracts and especially in the case of cross-border transactions. The reason for this assertion is that when the parties represent different legal families with a different cultural and legal background and with a different understanding of the implications of the whole process leading, hopefully, up to a written contract, there are many risks that the uncertainties connected to this diversified setting could lead to unmanageable conflicts if the written contract is not the primary interpretation source. The parties, regardless of their background, are primarily responsible for ensuring that the written contract reflects their intentions and that the parties understand the contract in the same manner.

The above discussions were carried out on a fairly general level and therefore the following Chapters will analyze what these discussions and conclusions mean when looking more closely at the different elements of business acquisition contracts. The following Chapter will scrutinize the use of certain common law terminology typically used in business acquisition contracts, its meaning in the respective jurisdictions and whether similar concepts may be found and construed in the Nordic countries. The open questions, which will be reverted to in the following Chapters, also pertain to the challenges when using foreign language, the relevance of market practice and the cross-border element when deciding upon, for example, whose meaning shall prevail, when the contract is governed by Nordic law.

4 COMMON LAW TERMINOLOGY IN BUSINESS ACQUISITION CONTRACTS AND NORDIC ASPECTS

4.1 Introduction

The previous Chapter covered contract interpretation methods, rules and principles and their applicability to business acquisition contracts. Based on typical elements described by legal scholars as characteristic of objective, subjective, literal and contextual interpretation methods, a defense was presented for a contextual objective interpretation method as the most viable method for business acquisition contracts, in both domestic and cross-border contexts. It was, however, also noted that elements of all the above methods influence the interpretation, even – in some cases – subjective elements. Furthermore, the written contract was emphasized to be the main interpretation source.

In this Chapter, the discussion will focus on the consequences of using common law terminology in business acquisition contracts governed by Nordic law. There is at least in theory a tension between some of the terminology used and how such terminology would be understood under Nordic law. The discussion will be based on examples of terminology customarily appearing in acquisition contracts. Most business acquisition contracts include warranties, or representations and warranties and very often also conditions.⁷⁴⁴ These contract terms have their distinctive features as legal concepts in the common law jurisdictions, but they customarily appear in contracts governed by Nordic law and their functionality in such contracts is similar. Therefore, comparing the different dimensions – including the functionality of those concepts – is important in order to analyze how they should be interpreted in business acquisition contracts governed by Nordic law.⁷⁴⁵

Warranties, representations and conditions are all important contract terms in business acquisition contracts, as they establish what the parties have agreed about the properties of the target, what other assurances have been given by the parties, they may furthermore include references to the pre-contractual stage and they deal with how the transaction is going to be carried out. Based on my own experience, however, there is very little, if any, discussion during the negotiations about the common law meaning of conditions, warranties and representations and also about whether the terminology is used in accordance with its common law meaning or not. Thus, it is very seldom that a subjective intention is attached to this terminology, which makes it even more important that the contract is interpreted according to an objective method.

⁷⁴⁴ This fact is reflected in a number of practical handbooks. See e.g. Warren's Forms of Agreement, 2, 2007, Form 8.6.01; ICC Model Share Purchase Agreement, 2004 and Schans Christensen, 1998, at 182–185 and at 191–237.

⁷⁴⁵ See e.g. Bogdan, 2013, at 47: “When comparing legal rules from different countries one should consequently strive to compare such rules that regulate the same situations in people’s lives.” Michael Bogdan did not only discuss rules, but also concepts in a broader sense. Bogdan, 2013, at 47–48.

In this Chapter, the main aim is to consider conditions, warranties and representations as common law legal concepts and analyze possible equivalent or compatible concepts under Nordic law. In the common law jurisdictions, warranties, representations and conditions have their respective characteristics as legal concepts including the different kind of remedies in case of breach or non-fulfillment. Therefore, a comparison to Nordic law requires an analysis of these characteristics in order to be able to discuss whether there are similar concepts or whether such concepts can be construed under Nordic law.⁷⁴⁶ The labelling of terms and simple linguistic translations based on vocabularies are not sufficient means to carry out a comparison, but rather their underlying nature and functionality are important elements in this exercise.⁷⁴⁷ However, any comparison will have to start with an understanding of what these concepts mean in the respective jurisdictions. Whether it is possible to find compatible terminology under Nordic law or not will affect further discussions on what the objective interpretation method means and how market practice and common law origin may affect the interpretation of business acquisition contracts.

4.2 Categorization of contract terms

It is a particular feature of English law that contract terms are divided into different categories depending on their importance and effect. The two main categories of contract terms under English law have traditionally been ‘conditions’ and ‘warranties’. Contemporary English law recognizes a third category of terms, which are neither conditions nor warranties or the contract is silent upon the division, that is ‘innominate terms’ or ‘intermediate terms’.⁷⁴⁸

Another example of terminology also relevant for this dissertation are so-called representations. Representations are complicated to discuss as legal concepts, as they may be discussed, for example, based on how they are understood in common law, or based on them as contractual terms or based on them as pre-contractual statements which have induced a party to enter or not to enter

⁷⁴⁶ The traditional jurisprudence of concepts may have led to theoretical and rigid constructions of law and legal systems and is no longer as such used in the Nordic countries. See e.g. Hellner, 2001, at 136 and Siltala, 2004, at 608. However, as Jan Hellner noted, legal scholars engaged in the jurisprudence of concepts did important work in clarifying different legal concepts. Hellner, 2001, at 137. Hellner also pointed out that concepts are useful in order to get a clear picture of the legal system in question and to unify rules in groups united by similar concepts. Hellner, 2001, at 144. Discussion of common law terminology in this dissertation is not primarily a question of systematizing legal systems, but rather to acknowledge that in common law countries behind terminology lie defined legal concepts which cannot be ignored when the aim is to find out how this terminology and those legal concepts would or could work under Nordic law.

⁷⁴⁷ Michael Bogdan, e.g., suggested that when comparing “the substantive contents of two (or more) legal systems, one must consequently not pay much attention to the names and labels of the legal rules, but should instead consider the real or potential conflict situations that the rules being studied are intended to regulate. The compared legal rules and institutions must be comparable functionally i.e. they must be intended to deal with the same problem.” Bogdan, 2013, at 48. In this dissertation, conditions, warranties and representations are used in all jurisdictions in business acquisition contracts and deal with the same kind of issues.

⁷⁴⁸ See presentations of contemporary views on categories e.g. Stone, 2013, at 207–208; Guest, Chitty I, 2012, at 917; Lewison, 2004, at 466 and Furmston, 2012, at 195. See also Peel and Treitel, 2015, at 979 and at 986–988, describing the traditional view on the existence of two categories only i.e. conditions and warranties, but that contemporary law prefers three categories, as is also Peel and Treitel’s preferred choice. See for a summarized presentation of relevant case law and basic information on conditions in relation to innominate terms and warranties Macdonald and Atkins, 2014, at 112, who also note that traditionally the view was that there were only two categories.

into a contract. Additionally, remedies may be available based not only on contract law, but also on tort law. This complexity might be a reason why representations are not necessarily discussed in the common law countries in connection with different categories of contract terms, but the discussion has often focused on misrepresentations as means of action when pre-contractual representations are not correct.⁷⁴⁹ As representations, once incorporated into a written contract, may actually be nothing more than warranties, which is frequently the case in business acquisition contracts, the decision has here been made to discuss representations and misrepresentations in connection with different categories of contract terms.

In the USA, the discussion about conditions, warranties, representations and about other contract terms in general has been less dogmatic than in the UK and a more functional approach has been the basis for discussions. The categories are as such discussed and of interest to US legal scholars as well. The Restatement (Second) deals with conditions, but not necessary based on the same understanding as under English law. Warranties and representations constitute separate legal concepts with different remedies. Warranties, for example, exist not only under common law, but the UCC also specifically deals with warranties.⁷⁵⁰ Representations are as such not provided for in the Restatement (Second), but misrepresentations are dealt with.⁷⁵¹ Nevertheless, the tendency to take a more functional approach to this terminology in the USA may be seen in the use of representations and warranties in business acquisition contracts. It is quite common that even when the contract is governed by US law, the difference between representations and warranties is not emphasized and these terms are in practice often used more or less interchangeably.⁷⁵²

Under English law specific remedies are attached to the different categories of contract terms. These remedies are an essential part of the categorization under English law. That is also the reason why these remedies are described in the discussions below, even though remedies in general are not analyzed in this dissertation. For the sake of completeness, the discussion on remedies will also cover the situation in the other jurisdictions.

In the Nordic countries contract terms are not categorized in the same manner as in the common law jurisdictions. The Nordic system is not prone to assign distinct features to contract terms based on the name of the terms, but rather the contents and in what connection a contract term is used are more important elements.⁷⁵³ This may be seen as a reflection of the very strong emphasis and use of a contextual method in interpretation of contracts. However, also more generally there has been

⁷⁴⁹ A comprehensive introduction to representations and misrepresentations under English law is made e.g. in Peel and Treitel, 2015, at 404–495. As to US law, see, e.g., Perillo, 2004, at 336–360.

⁷⁵⁰ §2 of the UCC.

⁷⁵¹ Chapter 7, Topic 1 of the Restatement (Second).

⁷⁵² See comments in this respect by e.g. Jones and Lutton, 1994, at 364 and West and Lewis, 2009, at 1008.

⁷⁵³ For example Mattias Hedwall has noted, when discussing different categories of contract terms under English law, that Swedish law does not recognize this kind of categorization. Hedwall, 2004, at 202–203. Mads Bryde Andersen and Eric Runesson has explained this as Nordic lawyers being more inclined to “focus on the nature of the underlying intent and the expectation that it could reasonably create in the mind of the recipient.” Bryde Andersen and Runesson, 2015, at 16.

a certain reluctance to discuss different concepts purely based on their particularities. Of course, legal reasoning has to take its starting point in some kind of concepts. However, it has been claimed that in general in the Nordic jurisdictions concepts rather “define a conceptual framework within which the balancing of interests can take place.”⁷⁵⁴ In this dissertation, the conceptual framework is business acquisition contracts, where it is quite typical that conditions, warranties and representations are incorporated as contract terms. Whether the common law meaning should have an impact or not on the interpretation of business acquisition contracts is to be discussed, but before that it is necessary to see to what extent this terminology actually creates a problem if Nordic law governs contracts. Therefore, analysis of the legal concepts – conditions, warranties and representations – has to be based on their nature and functionality, because otherwise it would not be possible to conclude whether the common law understanding of these legal concepts can be matched under Nordic law. In other words, as noted above in the introduction to this Chapter, in order to be able to discuss the consequences of the use of common law terminology in business acquisition contracts governed by Nordic law, it is necessary to understand what the features of these concepts are under English and US law respectively and whether similar concepts exist or can be construed under Nordic law.

4.3 Conditions, warranties and representations as legal concepts

4.3.1 Conditions

4.3.1.1 Conditions as a special category of contract terms

Conditions may be used in different connections affecting a contract, but in the following conditions included as provisions in a written contract will be discussed. Under English law a contractual term categorized as a ‘condition’ entails in principle that it is a very important term⁷⁵⁵ or, as has been described, it goes to the ‘root’ of the contract.⁷⁵⁶ The second characteristic of a condition is that breach gives the innocent party the right to terminate the contract.⁷⁵⁷ Except for the common law concept of conditions, conditions have also been described in statutory law, for example in the English Sale of Goods Act 1979. Section 12(1) of the Sale of Goods Act 1979 stipulates that in a sale contract is an implied term that the seller has the right to sell the goods and that term is according to Section 12(5A) (inserted in 1995 and concerning only England, Wales and Northern Ireland) to be regarded as a condition. Similarly (again with regard to England, Wales

⁷⁵⁴ Bryde Andersen and Runesson, 2015, at 16.

⁷⁵⁵ See e.g. Guest, Chitty I, 2012, at 919–920; Adams and Brownsword, 2007, at 167; Macdonald and Atkins, 2014, at 113–114; Stone, 2013, at 208 and McKendrick, 2013, at 175.

⁷⁵⁶ See e.g. Treitel, 1995, at 705; Peel and Treitel, 2015, at 981; Adams and Brownsword, 2007, at 167 and McKendrick, 2013, at 175.

⁷⁵⁷ See e.g. Guest, Chitty I, 2012, at 919–920; Peel and Treitel, 2015, at 981 and Stone, 2013, at 208. It may also be noted that termination is not the only remedy available. See further subchapter 4.4.1.

and Northern Ireland), the description and satisfactory quality of the goods are – according to the Act – regarded as conditions.⁷⁵⁸ The fact that there is no specific definition of conditions in these stipulations is, on the other hand, an indication that the traditional common law concept of what a condition entails, that is, the right to termination, is still relevant. Conditions are, however, used in many different ways and sometimes the condition might be just about an ordinary contractual term.⁷⁵⁹

In the USA, a contractual term denominated as a condition has often been analyzed based on the understanding that conditions limit or qualify the undertakings by the parties. This can be – and has been – compared with how promises function.⁷⁶⁰ The basic characteristic of a condition as described in the Restatement (Second) is that it “... is an event, not certain to occur, which must occur, unless the non-occurrence is excused before the performance under a contract becomes due.”⁷⁶¹ This definition in fact describes the nature of conditions precedent. Nevertheless, it has also been acknowledged that conditions are used in many senses and they might even be used to describe ordinary contract provisions.⁷⁶² Naming a contractual term a ‘condition’ does not under US contract law mean that the assumption automatically is that the term is very important.⁷⁶³ Another difference from English law is that under US contract law there is no presumption that the

⁷⁵⁸ See §13(1A), 14(6) and 15(3) of the English Sale of Goods Act 1979.

⁷⁵⁹ Guest, Chitty I, 2012, at 919; Peel and Treitel, 2015, at 70 and Atiyah and Smith, 2005, at 193–195. See further with regard to different conditions a description by Kim Lewison: “In English law the word “condition” may mean (i) a requirement which must be satisfied before any contract comes into existence; (ii) a requirement which must be satisfied before a party can be liable to perform his obligations under a contract; (iii) a term of the contract; (iv) an important term of the contract, breach of which will amount to a repudiation of the contract; (v) a requirement which if satisfied will automatically bring the contract to an end; or (vi) a requirement which if satisfied will entitle one party to bring the contract to an end.” Lewison, 2004, at 451.

⁷⁶⁰ Samuel Williston e.g. asserted that “A condition in a promise limits the undertaking of the promisor to perform, either by confining the undertaking to the case where the condition happens, or to the case where it does not happen.” Williston, II, 1924, at 1279. Williston was quite critical of the development in England where the word “condition” according to him had been referred to as a special kind of promise, especially in sales law, and he found that to some extent this development had been followed in the USA. Williston, II, 1924, at 1282–1283. Arthur L. Corbin also drew a distinction between promises and conditions and maintained that “A promise in a contract creates a legal duty in the promisor and a right in the promisee; the fact or event constituting a condition creates no right or duty and is merely a limiting or modifying factor.” Corbin, 3A, 1960, at 25. For a more contemporary view, see e.g. Joseph M. Perillo: “The basic concept of a condition is that it is an act or event that qualifies a promised performance.” Perillo, 2004, at 413. However, he preferred the definition that “... a condition is an act or event, other than a lapse of time, which, unless the condition is excused, must occur before duty to perform a contractual promise arises (condition precedent), or which discharges a duty of performance that has already arisen (condition subsequent).” Perillo made this definition after having discussed the two different definitions in §250 of the Restatement (First) and §224 of the Restatement (Second). Perillo, 2004, at 414.

⁷⁶¹ §224 of the Restatement (Second). Comment b. furthermore explains that “... there is inherent in the concept of condition some degree of uncertainty as to the occurrence of the event. Therefore, the mere passage of time, as to which there is no uncertainty, is not a condition and a duty is unconditional if nothing but the passage of time is necessary to give rise to a duty of performance.” Comment c. states that “In order for an event to be a condition, it must qualify a duty under an existing contract.”

⁷⁶² Corbin, 3A, 1960, at 11. Note also that Arthur L. Corbin on that same page added that “... there is no single “correct” definition” of the term ‘condition’. See further Farnsworth, II, 2004, at 414, describing the situation as such that in some cases lawyers use the term when they refer to promises which are conditional and sometimes they use conditions as ‘operative facts’. Comment a. to §224 of the Restatement (Second) notes that a condition is used “... to denote an event which qualifies a duty under a contract.”, but the note also acknowledges that conditions are used with a variety of other meanings. References are made to transfer of property and the law of trusts.

⁷⁶³ See e.g. Farnsworth, II, 2004, at 415, suggesting that “Although a condition is usually an event of significance to the obligor, this need not be the case. In exercising their freedom of contract, the parties are not fettered by any test of materiality or reasonableness. If they agree, they can make even an apparently insignificant event a condition.”

concept of condition in itself implies a right of termination, but rather that the nature of the condition is decisive.⁷⁶⁴ The UCC does not include provisions on conditions, but, as just noted above, the Restatement (Second) does.⁷⁶⁵ This may also be taken as an indication that in the USA the division of contract terms into conditions and warranties as a matter of theory is not as significant as in the UK.⁷⁶⁶

In both common law jurisdictions, conditions denominated as conditions in contracts would as a starting point be complied with by the courts.⁷⁶⁷ However, even express denominations may be challenged as to whether the contract terms in question are to be regarded as conditions at all and thereafter what implications follow therefrom. The interpretation by English courts would depend on several factors, for example whether the parties intended the term to actually lead to consequences for non-fulfillment of conditions such as the right of a party to terminate the contract.⁷⁶⁸ That interpretation would be based on an objective evaluation of the intent of the parties.⁷⁶⁹ It may be recalled that in the previous Chapter it was established that, in contract interpretation under English law, finding the subjective intention is not an option. In the USA, when interpreting whether a contract term is to be regarded as a condition or not, the question of subjective or objective intention is just part of the question, as conditions are mostly discussed based on their functionality. Furthermore, interpretation guidelines as to how to interpret conditions may be found in Section 227 of the Restatement (Second), which includes a standard of preference.⁷⁷⁰ E. Allan Farnsworth has observed that the courts have preferred an interpretation

⁷⁶⁴ See e.g. Corbin, 3A, 1960, at 33, emphasizing that a condition may only be regarded as broken if a party has promised that it will occur. See also Farnsworth, II, 2004, at 453–454, who submitted that a breach of a condition may be regarded as a situation where a party either prevents the occurrence of a condition or fails to co-operate. As a third category Farnsworth mentioned cases of repudiation.

⁷⁶⁵ §224–230 of the Restatement (Second).

⁷⁶⁶ See e.g. Schwenzer, Hachem and Kee, 2012, at 368, contending that “Among the common law jurisdictions, the USA has parted ways with the traditional English distinction of conditions and warranties.”

⁷⁶⁷ See e.g. McKendrick, 2013, at 177. As to the USA, e.g., Samuel Williston noted that express conditions or conditions implied in fact were generally to be enforced by the court based on the will of the parties with the exceptions of conditions that contravened public policy. Williston, II, 1924, at 1289. Joseph M. Perillo opined that conditions expressly agreed by the parties must be strictly complied with. Perillo, 2004, at 419, but he also referred to the fact that terms are not always labelled that clearly and that the distinction between a promise and a condition is then crucial for contract interpretation. Perillo, 2004, at 420. See further Farnsworth, II, 2004, at 422–423, observing that traditionally the courts have strictly applied conditions so labelled by the parties.

⁷⁶⁸ McKendrick, 2013, at 177–178 and at 758–768, who described the situation as such that the courts would analyze whether the parties actually intended to use the word condition “in its technical sense.” He referred to *L Schuler AG v Wickman Machine Tools Sales Ltd* [1974] AC 235; [1973] 2 All ER 39 – as also did Peel and Treitel, 2015, at 983 – in which the parties had defined a term as a ‘condition’, but the court held that a certain minor breach of that condition was not sufficient for termination of the contract and found that the parties had used the term in a non-technical legal sense. In other words it had simply been used to denominate a term of the contract.

⁷⁶⁹ Macdonald and Atkins, 2014, at 125.

⁷⁷⁰ §227 of the Restatement (Second): “(1) In resolving doubts as to whether an event is made a condition of an obligor’s duty, and as to the nature of such an event, an interpretation is preferred that will reduce the obligee’s risk of forfeiture, unless the event is within the obligee’s risk of forfeiture, unless the event is within the obligee’s control or the circumstances indicate that he has assumed the risk. (2) Unless the contract is of a type under which only one party generally undertakes duties, when it is doubtful whether (a) a duty is imposed on an obligee that an event occur, or (b) the event is made a condition of the obligor’s duty, or (c) the event is made a condition of the obligor’s duty and a duty is imposed on the obligee that the event occur, the first interpretation is preferred if the event is within the obligee’s control. (3) In case of doubt, an interpretation under which an event is a condition of an obligor’s duty is preferred over an interpretation under which the non-occurrence of the event is a ground for discharge of that duty after it has become a duty to perform.”

that “...imposes on a party a duty to see that an event occurs, rather than one that makes the other party’s duty conditional on occurrence of the event.”⁷⁷¹ When parties have not expressly denominated contractual provisions as conditions in a contract, conditions might still be implied in fact or in law in both common law countries.⁷⁷² Generally, terms classified as conditions in Acts will be complied with;⁷⁷³ conditions implied in fact or law are subject to the decisions of a court and in that sense the matter is less about whether conditions are complied with due to their specific categorization or not, but rather what is regarded as a condition.⁷⁷⁴

In the Nordic countries, legal scholars have discussed conditions based on general contract law, but not necessarily based on the traditional English view of conditions being essential terms, breach of which gives rise to the right to terminate the contract, as the Nordic discussion has been more focused on the functions of contractual conditions.⁷⁷⁵ It is quite typical that the discussion on conditions is based on the assumption that conditions are understood as being contractual terms that make performance or existence of the contract subject to some uncertain event.⁷⁷⁶ In this respect, the discussions have more in common with discussions in the USA than in the UK. Contractual conditions may also often be used just to describe ordinary contractual terms,⁷⁷⁷ which was said to be the case in both common law jurisdictions as well.

When comparing the English understanding of conditions in general with equivalent concepts under Nordic law, a pale resemblance of the English concept as to conditions being essential terms may be found in the way some Nordic legal scholars classify contract terms as imposing main or secondary obligations. Main obligations relate to the main subject of the contract whilst secondary

⁷⁷¹ Farnsworth, II, 2004, at 431. A similar opinion was presented in Farnsworth, Young and Sanger, 2001, at 673.

⁷⁷² See e.g. McKendrick, 2013, at 176–177 and Perillo, 2004, at 419.

⁷⁷³ This is relevant for the UK. See e.g. comment by Guest, Chitty I, 2012, at 926.

⁷⁷⁴ See e.g. McKendrick, 2013, at 176, discussing situations where the courts find that a term goes to the ‘root’ of the contract and secondly situations where there are some authoritative reasons e.g. that standard terms are involved, which justifies a decision to hold a certain term as a condition. Joseph M. Perillo suggested with regard to US law that conditions implied by law are constructive conditions which have to be substantially complied with and that conditions implied in fact have to be strictly complied with, as they are similar to express conditions, although they are not expressly stated, but they will be held to be conditions based on the other terms of the contract and based on general interpretation methods. Perillo, 2004, at 419. See, however, also Farnsworth, II, 2004, at 416, footnote 11, where he maintained that the difference between conditions implied-in-law and implied-in-fact is in practice of less relevance even if in theory implied-in-fact conditions should be complied with strictly.

⁷⁷⁵ The English traditional concept has influenced some discussions e.g. in contributions by different Nordic scholars in the book “Boilerplate Clauses, International Commercial Contracts and the Applicable Law.” Peter Møgelvang-Hansen discussed conditions purely from the perspective of how contracts may be terminated. Møgelvang-Hansen, 2011, at 239–240. Gustaf Möller discussed conditions based on a condition being “[a] clause according to which certain obligations regulated in a contract are fundamental and according to which any breach thereof shall amount to a fundamental breach of the contract...” and held that it is not decisive that a term is regarded as a condition, but that the parties have expressed that it is important. Möller, 2011, at 258–259. Viggo Hagstrøm also took as an assumption that “[t]he conditions clause, meaning that any breach of a described duty is a fundamental breach” and he compared that with *betingelser* under Norwegian law. He also further discussed how the termination right would work. Hagstrøm, 2011, at 270–271. Lars Gorton on the other hand stated that he discussed conditions precedent and noted that such conditions may be either resolute or suspensive, whereas Gorton rather described the nature of different conditions precedent. Gorton, 2011, at 284. The different writings were based on a model clause (on page 119 of the book) according to which the obligations regulated in a specific section of a contract were denominated as fundamental and that breach would amount to a fundamental breach of the contract.

⁷⁷⁶ See e.g. Kivimäki and Ylöstalo, 1981, at 291.

⁷⁷⁷ See e.g. Adlercreutz and Gorton, I, 2011, at 117.

obligations are complementary to those obligations.⁷⁷⁸ The division and the extent of main and secondary obligations depends on the contract in question, for example whether it is a sale or a licensing contract.⁷⁷⁹ However, main obligations may be expressed in several contract terms and it is not to be said that all of them are of equal importance, which makes it difficult to directly compare them with conditions under English law. Moreover, obligations which have not necessarily been expressly included in the written contract, but which appear from contract law – both statutory law and contractual principles – have also been held to be secondary obligations in addition to obligations appearing from the contract.⁷⁸⁰ Bernhard Gomard, who defended the division of contractual terms into main obligations and secondary obligations, emphasized that the division is especially important when deciding upon the remedies in case of breach.⁷⁸¹ The relevance of the division and its shortcomings have, on the other hand, been noted and criticized by several Nordic scholars.⁷⁸² The practical implication is one aspect, but for example Lars-Erik Taxell was of the opinion that a division is not necessary even with regard to remedies, as he saw that it does not make any difference in theory whether the breach is of a main obligation or a secondary obligation.⁷⁸³ This is correct and as there is no inherent right of termination due to breach of a main or a secondary obligation under a contract, the second characteristic of the traditional English concept of a condition is not met.⁷⁸⁴ Unless the parties have agreed upon a contract term setting out the remedies in the case of breach of certain essential contract terms, the discussion about terminating a contract due to breach of a specific contract term would in the Nordic countries have to be substantially enlarged to encompass the pre-requisites for terminating contracts in general.

⁷⁷⁸ The division was presented and commented on e.g. by Taxell, 1972, at 2; Grönfors, 1993, at 100; Gomard, 2006, at 48–58 and Hagstrøm and Aarbakke, 2004, at 111–114.

⁷⁷⁹ Additionally, the division has been discussed in this dissertation in contemplating whether an agreement has actually emerged even where the parties have not signed a final written contract. See subchapter 2.2.5, where the discussion on agreements emerging during negotiations contained some thoughts on main and secondary obligations. See also Wilhelmsson, Sevón, Koskelo, 2006, at 19, where they at least indirectly seemed to take it for granted that there are main and secondary obligations, as they mentioned that the Finnish Sale of Goods Act regulates the main obligations of the seller e.g. timely delivery and delivery of the goods according to contract and – with regard to the buyer – rules on payment of the purchase price and the duty to co-operate and to take delivery of the goods, and they note the fact that the Acts do not provide for secondary obligations.

⁷⁸⁰ See e.g. Hagstrøm and Aarbakke, 2004, at 112–113 and Wilhelmsson, Sevón, Koskelo, 2006, at 19. In connection with discussing secondary obligations as not appearing from the Finnish Sale of Goods Acts, Wilhelmsson, Sevón and Koskelo suggested that secondary obligations are governed by general contractual principles and may also be ruled by using the provisions of the Act analogously. See also, Gomard, 2006, at 48–49, who noted that except when secondary obligations are expressly mentioned in the contract, their contents and nature are based on general law, but also on the nature of the contract in question and of factual circumstances. Gomard referred e.g. to the principle of loyalty. Gomard, 2006, at 49–51.

⁷⁸¹ Gomard, 2006, at 49.

⁷⁸² See e.g. Bryde Andersen 2003, at 296–297 and at 379–380, who suggested e.g. that the division between main and secondary obligations is not clear-cut and Taxell, 1972, at 2, who also pointed out that the division is not clear and is often of little relevance. See also Saarnilehto, 2012, at 173, emphasizing that both main and secondary obligations must be performed properly and from that perspective the division is not very relevant.

⁷⁸³ Taxell, 1972, at 205 and at 284. Also Jo Hov has made a similar comment, as he said that in principle the same kind of remedies are available in both cases. Hov, 2002, at 59.

⁷⁸⁴ Taxell, 1972, at 205.

The traditional English concept of conditions as being very important terms, which in case of breach gives rise to the right of termination, does not in my opinion have a distinct equivalent concept in the Nordic jurisdictions.⁷⁸⁵ It should also be noticed that this traditional English view is not matched in the USA. Therefore, in cases where cross-border business acquisition contracts include the term condition, it is not primarily a question of whether the term should be given its common law meaning, but more about whether it should be given its English or its US meaning.

4.3.1.2 Different kinds of conditions

When discussing business acquisition contracts, the traditional English understanding of conditions is not actually as important as the functions of different kinds of contract terms called conditions in those contracts. Legal doctrine tends to categorize conditions in various ways in the two common law jurisdictions, but one significant way is to classify conditions on the basis of when a party is obliged to perform. This kind of categorization is customarily done by dividing conditions into conditions precedent and conditions subsequent, although in this connection a third category is sometimes mentioned: concurrent conditions.

As to English law, G.H. Treitel defined conditions precedent as follows: “A condition is precedent if it provides that the contract is not to be binding until the specified event occurs.”⁷⁸⁶ However, several legal scholars including Treitel have noted that certain obligations of the parties might exist regardless of a condition precedent not being fulfilled and that there are conditions precedent which merely suspend fulfillment but which do not affect the existence of an agreement.⁷⁸⁷ In the USA, Arthur L. Corbin defined conditions precedent in a valid contract as “...those facts and events, occurring subsequently to the making of a valid contract, that must exist or occur before there is a right to immediate performance, before there is a breach of contract duty, before the usual judicial remedies are available.”⁷⁸⁸ The Restatement (Second) deals with conditions in general but does not contain any specific section on conditions precedent.⁷⁸⁹ On the other hand, the definition of condition in Section 224 actually reflects the essence of a condition precedent.⁷⁹⁰ In other words, in both common law countries conditions precedent mean that fulfillment of the contract is suspended, or the contract might not even come into existence, unless certain future matters do or do not materialize.⁷⁹¹

⁷⁸⁵ See e.g. Gorton, 2011, at 300, stating that “Swedish law does not recognise the traditional distinction in common law between conditions and warranties...”

⁷⁸⁶ Treitel, Chitty I, 2012, at 265–266.

⁷⁸⁷ Treitel, Chitty I, 2012, at 266–272; Guest, Chitty I, 2012, at 919–923 and Lewison, 2004, at 454.

⁷⁸⁸ Corbin, 3A, 1960, at 16.

⁷⁸⁹ See Introductory Note to Topic 5. Conditions and Similar Events of the Restatement (Second).

⁷⁹⁰ See e.g. Farnsworth, II, 2004, at 421.

⁷⁹¹ See e.g. Guest, Chitty I, 2012, at 922 and Perillo, 2004, at 414–415.

In business acquisitions the most commonly used conditions are conditions precedent, where finalization of the transaction is subject to certain conditions having been fulfilled. The conditions precedent sections in business acquisition contracts are transaction-specific including factual matters such as approval by the competition authorities or at least waiting out a standstill period, which may be a requirement in several jurisdictions or the transaction may be subject to obtaining approval from shareholders or the board of directors.⁷⁹² Of course, other approvals from authorities or from third parties may also be necessary.⁷⁹³ Conditions precedent may further include provisions that the buyer has carried out a due diligence investigation between signing and closing (to his [reasonable/full] satisfaction),⁷⁹⁴ that there is no breach or at least no material breach of warranties, or that the warranties are true and correct at signing and at closing, but also more general statements, for example that no material adverse changes have occurred with regard to the target and its business.⁷⁹⁵

A condition subsequent means that the parties have agreed that when a certain matter takes place or does not take place, the duty to perform is extinguished or the contract might come to an end.⁷⁹⁶ Kim Lewison summarized the nature of conditions subsequent under English law as follows: “A condition subsequent is a condition which brings a subsisting liability to an end on the fulfilment of the condition.”⁷⁹⁷ G.H. Treitel on the other hand described conditions subsequent as “It is subsequent if it provides that a previously binding contract is to determine on the occurrence of the event...”⁷⁹⁸ In the USA, Samuel Williston took a fairly critical view of conditions subsequent.⁷⁹⁹ Arthur L. Corbin noted that the term ‘condition subsequent’ could be used for facts and events

⁷⁹² See e.g. Stilton, 2015, at 33 and Egholm Hansen and Lundgren, 2014, at 46.

⁷⁹³ See e.g. Egholm Hansen and Lundgren, 2014, at 46.

⁷⁹⁴ See e.g. Warren’s Forms of Agreements, 2, 2007, at 8-308 – 8-309 (under Art. IX Conditions Precedent to the Obligation of Purchaser to Close) “P.6 Satisfactory Business Review. Prior to the execution of this Agreement, Purchaser has satisfied itself, after receipt and consideration of the Sellers Disclosure Schedule and the audited balance sheet of Target as of ... and after Purchaser and its representatives have completed the review of the Business contemplated by this Agreement, that none of the information ... resulted in, or may result in, a Materially Adverse Change in the condition (financial or otherwise), assets, properties, Business or prospects of Target.” and further on at 8-309 “9.7 Shareholder Approval. The shareholders and Board of Directors of Purchaser shall have approved the transaction described in this Agreement.” See also Art. X “Conditions Precedent to the Obligation of Selling Shareholders to Close,” at 8-309, “10.3. Authority. All actions required to be taken by, or on the part of, Purchaser to authorize the execution, delivery and performance of this Agreement, and the consummation of the transactions contemplated hereby shall have been duly and validly taken by Purchaser’s Board of Directors and shareholders.”

⁷⁹⁵ Ibid. Art. IX (author’s comment: conditions precedent for the benefit of the buyer), at 8-308, “9.3 No Adverse Change. There shall not have occurred between the date hereof and the Closing Date any Material Adverse Change in the condition (financial or otherwise), assets, liabilities... of Target, ... or in the ability of the Selling Shareholders to consummate the transactions contemplated herein, and ...” Art. X (author’s comment: conditions precedent for the benefit of the seller), at 8-309, “10.1 Representations and Warranties. The representations and warranties of Purchaser contained in this Agreement and in any Purchaser Document shall be true on and as of the Closing Date with the same force and effect as though made on and as of the Closing Date, and at the Closing Purchaser shall have delivered to the Selling Shareholders a certificate to such effect.” (Author’s comment: the important part of this condition is actually that the representations and warranties are repeated as of the Closing Date).

⁷⁹⁶ See e.g. Guest, Chitty I, 2012, at 923 and Perillo, 2004, at 416–417. See also definition in Farnsworth, Young and Sanger, 2001, at 665 who described conditions subsequent as “Parties sometimes provide that the occurrence of an event, such as the failure of one of them to commence an action within a prescribed time, will extinguish a duty after performance has become due, along with any claim for breach.”

⁷⁹⁷ Lewison, 2004, at 473.

⁷⁹⁸ Treitel, Chitty I, 2012, at 265–266.

⁷⁹⁹ Samuel Williston found that conditions subsequent were basically conditions precedent “to the vesting of liability and are subsequent only in form.” Williston, II, 1924, at 1286.

which take place after a contract has been entered into and upon fulfillment that will be regarded as termination or discharge regardless of whether there has been a contract breach or not.⁸⁰⁰ Conditions subsequent have impliedly been dealt with in Section 230 (“Event that Terminates a Duty”) of the Restatement (Second). According to this Section, if the contract determines that a duty to perform or an obligation to pay damages is discharged upon the occurrence of an event, that provision would be upheld, with some exceptions.⁸⁰¹ However, it is worth noticing that the Restatement (Second) does not use the concept “conditions subsequent” and that was a deliberate choice.⁸⁰²

In business acquisition contracts, provisions on payment of purchase price in the form of so-called earn-outs could be regarded as conditions subsequent. For example, part of the purchase price is to be paid based on an earn-out formula, which might be calculated based on the turnover or profitability of the target for subsequent years.⁸⁰³ Analysis of the effect of such conditions must, however, also be based on the other provisions of the contract, which might lead, for example, to the obligations under warranties given in the contract still being valid and enforceable, whilst the earn-out provision has come to an end. Conditions subsequent are therefore here merely mentioned as an example of how conditions might be construed in connection with business acquisitions.

As noted in the previous subchapter, Nordic scholars have often discussed conditions from the perspective that conditions are understood as contractual terms, which make performance or even the existence of the contract subject to some uncertain event. The uncertain events or facts would have been identified in the contract and they have to occur or not occur before performance by the parties becomes due.⁸⁰⁴ In the Nordic countries conditions precedent would in general be referred to as preconditions for fulfillment of the main obligations under the contract,⁸⁰⁵ whilst in the common law countries the contract would be described as contingent on fulfillment of

⁸⁰⁰ Corbin, 3, 1951, at 515–516.

⁸⁰¹ §230 of the Restatement (Second) stipulates that “(1) Except as stated in Subsection (2), if under the terms of the contract the occurrence of an event is to terminate an obligor’s duty of immediate performance or one to pay damages for breach, that duty is discharged if the event occurs. (2) The Obligor’s duty is not discharged if occurrence of the event (a) is the result of a breach by the obligor of his duty of good faith and fair dealing, or (b) could not have been prevented because of impracticability and continuance of the duty does not subject the obligor to a materially increased burden. (3) The obligor’s duty is not discharged if, before the event occurs, the obligor promises to perform the duty even if the event occurs and does not revoke his promise before the obligee materially changes his position in reliance on it.”

⁸⁰² Comment e. to §224 of the Restatement (Second). Situations sometimes described as conditions subsequent have been regarded as being taken care of by §230, which deals with events that discharge the duty of performance. See Farnsworth, II, 2004, at 419 and at 421.

⁸⁰³ As to earn-out formulas, see e.g. Schans Christensen, 1998, at 173–177.

⁸⁰⁴ In Norway this kind of condition is often referred to as a *betingelse* to be distinguished from presumptions i.e. *forutsetning*. See e.g. Hagstrøm and Aarbakke, 2004, at 766–767 and Hov, 2002, at 86–87. *Betingelse* is also often used in Denmark to describe the situation where performance is subject to conditions. See e.g. Bryde Andersen, 2003, at 201–203. In Sweden generally just the term *villkor* or *villkorat avtal* is used. See e.g. Adlercreutz and Gorton, I, 2011, at 117 and Ramberg and Ramberg, 2015, at 107. In Finnish these kind of terms are referred to as *ehto*. See e.g. Kivimäki and Ylöstalo, 1981, at 291 and Telaranta, 1990, at 58.

⁸⁰⁵ See e.g. Bryde Andersen, 2003, at 215; Schans Christensen, 1998, at 178, Sevenius, 2012, at 127 and Adlercreutz and Gorton, 2011, at 117–118.

conditions.⁸⁰⁶ The effect of contractual conditions making performance under the contract dependent on some uncertain event occurring or not occurring has led to Nordic scholars often discussing whether such contract terms merely suspend or in fact discharge performance, where a condition precedent could be described as a suspending term and a condition subsequent as a discharging term.⁸⁰⁷ This is as such not a Nordic novelty, since for example in the PECL the terms conditions precedent and conditions subsequent are not used, but the essence of these concepts is to be found in what the PECL calls suspensive conditions and resolutive conditions.⁸⁰⁸ Conditions precedent, as customarily used in business acquisition contracts, could under Nordic law be described as rather only suspending the main performance, as the contract would in several other aspects be binding.⁸⁰⁹ However, there is also attached a discharging element to conditions precedent, as if the conditions are not fulfilled or waived the obligations of the parties to perform would be discharged. The relevance of the division of conditions precedent into suspensive and resolutive conditions might be more important in real estate transactions, where legislation might set certain restrictions on the use of resolutive conditions.⁸¹⁰

Quite frequently, the parties agree in the written contract on the consequences of non-fulfillment or breach of conditions precedent. The consequences could in such cases depend on whether a party has assumed some outright liability for the fulfillment of a condition or not and whether the parties have specifically agreed what will happen if a condition precedent does not materialize. If a party has undertaken some specific liability for fulfillment of a condition, that is, in fact has promised that a certain matter will occur or not occur, in common law terminology that would be described as the condition being of a promissory nature. In both common law countries a promissory condition is understood as meaning that a party has promised, that is, undertaken responsibility, that certain facts or events will take place or will not take place, as the case may be, and those facts or events are pre-conditions for fulfillment of the obligations.⁸¹¹ Promissory conditions may be compared with contingent conditions, a term used especially by English legal scholars, which means that a party has not promised or undertaken any separate responsibility for the occurrence

⁸⁰⁶ See e.g. Treitel, Chitty I, 2012 at 266–272; Guest, Chitty I, 2012, at 919–923; Corbin, 3A, 1960, at 16 and Perillo, 2004, at 414–416.

⁸⁰⁷ Definitions of suspensive and discharging contract terms may be found e.g. in Bryde Andersen, 2003, at 202–203; Woxholth, 2014, at 64; Saarnilehto and Annola, 2012, at 401 and Adlercreutz and Gorton, I, 2011, at 117.

⁸⁰⁸ PECL. Art. 16:101. Naming conditions as suspensive and resolutive has also been noted to sometimes being made under English law. See Treitel, Chitty I, 2012, at 265, footnote 748.

⁸⁰⁹ See also Simonsen, 1997, at 29, mentioning conditions such as financing and board approvals and noting that such contracts would be regarded as binding, but their entry into force would be suspended. Lars Simonsen also mentioned that if there is a binding contract, both the purpose of the contract and the general loyalty obligation leads to the situation where a promisor must reasonably act for the contract to be fulfilled. Simonsen, 1997, p. 30.

⁸¹⁰ See e.g. Niemi, 2016, pp. 210–211 and Adlercreutz and Gorton, I, 2011, p. 177.

⁸¹¹ See e.g. Guest, Chitty, I, 2012, pp. 920–921; Perillo, 2004, pp. 419–420 and Corbin, 3A, 1960, pp. 27–28. See also Farnsworth II, 2004, p. 427 who further elaborated on the mechanism as he described that when a party wants the other party to take responsibility for a condition he can do so by making his own duty being conditioned upon the occurrence of the other party's duty; or by having the other party to take responsibility for that a certain event occurs (with the risk of damages otherwise; or by having his own duty subject to the occurrence of the other party's duty and in addition having the other party taking responsibility for that the event.

or non-occurrence of conditions.⁸¹² However, even if conditions precedent are often contingent, they may also be promissory, as a party may have assumed some responsibility for their occurrence.⁸¹³ Regardless of whether a condition precedent is a promissory condition or not, in both common law jurisdictions the parties must still act diligently under the contract to fulfil a condition. Kim Lewison asserted with regard to English law, for example, that “The parties are under an implied obligation not to prevent the fulfillment of a condition upon which a contract depends. In addition, one or both of them may be under an implied obligation to take steps to procure that the condition is fulfilled.”⁸¹⁴ What this obligation actually entails is not easily defined and it has been submitted that there are different degrees of such obligations as there might be a question of ‘deliberately’ preventing or ‘wrongfully’ preventing.⁸¹⁵ Furthermore, the question of reasonable diligence in seeing to it that a condition takes place has been mentioned as used in some cases.⁸¹⁶ Similar opinions have been presented in the USA, which is further emphasized by the fact that the Restatement (Second) includes a Section according to which the parties must act in accordance with good faith and fair dealing in the performance of a contract. Moreover, the UCC also recognizes such a duty.⁸¹⁷ If there is no express undertaking by a party with regard to a condition precedent, this has been claimed to mean under US law that a party should at least not prevent a condition of the other party from being fulfilled.⁸¹⁸ With regard to good faith and active actions in order to ensure that a condition occurs, even though it is not a promissory condition, it has been held that such a duty should rather be described as a duty to use one’s best efforts, and that even best efforts may sometimes be disregarded if the other party has actually assumed the risk that the party in question will not do so.⁸¹⁹ It is hard to draw any firm conclusions with regard to contingent conditions precedent and the obligations of the parties just based on common law. It is thus quite understandable why business parties would prefer to set out their rights and obligations in detailed contracts.

Conditions precedent may also be promissory to the extent that a party has – or both parties have – undertaken a general duty to promote fulfillment of conditions.⁸²⁰ The parties may have

⁸¹² See e.g. Peel and Treitel, 2015, at 907, discussing promissory and contingent conditions. As to the USA see e.g. Burnham, 2002, at 390, footnote 37, noting that conditions as defined in the Restatement (Second) are sometimes referred to as ‘contingencies’.

⁸¹³ Guest, Chitty I, 2012, at 922 and Corbin, 3A, 1960, at 27–28. Corbin mentioned that a contract can be drafted so that it creates a duty to ensure that a fact comes into existence, which he described as a promissory condition.

⁸¹⁴ Lewison, 2004, at 461. Lewison further explained that “[t]here is imposed on parties to a contract a general duty to co-operate in the performance of the contract. This duty includes a duty not to prevent the fulfilment of conditions.”

⁸¹⁵ Treitel, Chitty I, 2012, at 268.

⁸¹⁶ Treitel, Chitty I, 2012, at 270–271.

⁸¹⁷ Good faith and obligation during performance is specifically provided for in §205 of the Restatement (Second), but also in §230(2)(1) and is additionally provided for in §1-203 of the UCC. See also Farnsworth, Young and Singer, 2001, at 685, who brought forward that a party shall at least do nothing to prevent the occurrence of a condition. The same comment was made by E.Allan Farnsworth, but in addition he submitted that there may also be situations where a party may have to take actions, which he preferred to call not an action based on good faith, but rather based on a duty to use “best efforts”. Farnsworth, II, 2004, p. 454–456. See also Perillo, 2004, pp. 453–456.

⁸¹⁸ Perillo, 2004, p. 474, and Farnsworth, II, 2004, p. 454.

⁸¹⁹ Farnsworth, II, 2004, pp. 455–456.

⁸²⁰ See e.g. Schans Christensen, 1998, p. 185.

separately agreed in the contract that each will use their best efforts or their reasonable best efforts to cooperate and bring about fulfillment of conditions.⁸²¹ The examples in the footnotes show that the language would still be fairly vague, but at least they emphasize that the parties either have to use their best efforts or even good faith in ensuring that conditions precedent are fulfilled. These provisions are more important from a common law perspective, as they may increase the likelihood that a common law court would expand the notion of cooperation as otherwise understood in connection with conditions precedent. It may also be recalled that even under English law an explicit provision to perform a contract in good faith has been regarded as valid and enforceable.⁸²²

Under Nordic law, it is not as important as in the common law countries whether the contract contains specific provisions on the obligation of the parties to promote fulfillment of conditions precedent or not, as the parties would still be obliged based on general contractual principles to act loyally and in good faith in order to promote fulfillment of those conditions.⁸²³ However, by inserting language on promotion one could say that the general principles are strengthened.⁸²⁴ Furthermore, for example the Finnish, Norwegian and Swedish Sale of Goods Acts contain certain obligations on the buyer's side to co-operate in order for the seller to be able to fulfill its obligations to deliver.⁸²⁵ If a party has undertaken some specific liability for the occurrence or non-occurrence of a condition precedent, such liability would be assessed based on general contract law and not specifically on the basis that the term as such is called a condition precedent.⁸²⁶ In other words, use of the term 'condition' in a written contract does not indicate in itself that conditions would be

⁸²¹ See e.g. Stilton, 2015, at 713, Schedule 10 to Precedent 3 Assets Sale and Purchase Agreement Version A,:

2. The Parties' endeavours

"Each of the parties shall use all reasonable endeavours to ensure that the said provisions of this Agreement become unconditional in accordance with their terms ..."

Warren's Forms of Agreement, 2, 2007, Form 8.6.01, at 8-253 – 254 (Art. V Covenants of Seller)

"5.11. Fulfillment of Conditions

The Seller will take all commercially reasonable steps necessary or desirable and proceed diligently and in good faith to satisfy each condition to the obligations of the Purchaser contained in this Agreement and will not permit the Companies or the Target Subsidiaries to, take or fail to take any action that could reasonably be expected to result in (a) the nonfulfillment of any such condition or (b) in the failure to consummate the transactions contemplated hereby." at 8 – 255 (Art. VI Covenants of Purchaser):

"6.4. Fulfillment of Conditions

The Purchaser will take all commercially reasonable steps necessary or desirable and proceed diligently and in good faith to satisfy each condition to the obligations of the Purchaser contained in this Agreement and will not take or fail to take any action that could reasonably be expected to result in (i) the nonfulfillment of any such condition or ii) the failure to consummate the transactions contemplated hereby."

⁸²² In the earlier referred to *Mid Essex Hospital Services NHS Trust v Compass Group UK & Ireland Ltd (t/a Medirest)* [2013] EWCA Civ 200, good faith was accepted to the extent it was related to the matters set out in a specific clause, although a general good faith obligation applied to other parts of the contract was not found to exist. Hence, it may well be that even under English law a good faith provision with regard to the fulfillment of conditions precedent could be held valid, although it seems more likely that a best efforts, reasonable efforts, or reasonable best efforts provision would be the choice for an English lawyer. See Stilton, 2015, at 116.

⁸²³ See e.g. Hagström and Aarbakke, 2004, at 73; Mähönen, 2012, at 127–128; Bryde Andersen, 2005, at 115; Ramberg and Ramberg, 2014, at 32 and Flodgren and Runesson, 2015, at 44–45.

⁸²⁴ For example Johannus Egholm Hansen and Christian Lundgren have inserted in their model provision for conditions precedent on authority approvals that the parties shall loyally cooperate in order to ensure that consents from authorities are received as soon as possible by providing all relevant information. Egholm Hansen and Lundgren, 2014, at 748.

⁸²⁵ §50(1) of the Finnish, Norwegian and Swedish Sale of Goods Act.

⁸²⁶ When discussing representations and warranties the situation is different, as in many cases special undertakings lead to strict liability.

treated differently in contract interpretation, but such contract terms would be put into context and analyzed objectively unless the parties show that they intended to give the term some specific, maybe English, meaning.

A third category mentioned above was concurrent conditions, the essence of which is that the parties are required to perform at the same time, that is, one party's obligation to perform is conditional upon the other party's performance.⁸²⁷ This is typical of business acquisitions, as transfer of ownership to the buyer is mostly attached to a condition that the purchase price, or at least part of it, is paid simultaneously with the transfer.

For the sake of completeness, and even if conditions precedent are of great significance in business acquisitions, it should be noted that the term 'conditions' may also be used otherwise in these contracts. It is, for example, quite common that in the contract provision where the parties agree upon the sale and purchase of the target or sometimes even in the recitals, appears something on the lines that "subject to the terms and conditions" the seller shall sell/sells and the buyer shall buy/buys the target.⁸²⁸ Based on my own experience, the term 'condition' is often not discussed in this connection, but the word is included more or less as a standard and sometimes even regardless of whether there are contractual terms named 'conditions' in the contract or not. If the phrase 'subject to the terms and conditions' is used, but there are no contract terms named conditions, the question is whether the phrase might, for example, enhance the possibility for a party to claim that a specific contract term should be regarded as a condition, meaning that it is a very important term as understood under English law. This question is above all relevant when the contract is governed by English law, since terming contract provisions as conditions implies that they are essential terms, breach of which may lead to termination of the contract. It may also be recalled that, according to contemporary English law, the English courts would pay regard to the intention of the parties when the contract was made, that is, whether the parties intended to use the term 'condition' in its traditional, technical sense. This analysis would always be based on an objective intention,

⁸²⁷ See e.g. Guest, Chitty I, 2012, at 922–923, describing the situation as follows: "Where the promises made by each party are to be fulfilled at the same time, or at any rate, where each party's obligation is to depend on the readiness and willingness of the other to perform at that time, the promises are termed concurrent conditions." (at 922). Guest also suggested that such conditions are "normally contingent and not promissory, and in such a case neither party will be liable to the other if the condition is not fulfilled. For example a seller's delivery of the subject of the transaction is conditional upon the buyer's performance, which may be simultaneous payment of the purchase price or part-payment and providing security or similar arrangements." See also Perillo, 2004, at 415–416 who argued that concurrent conditions are actually a form of condition precedent. See further, Corbin, 3A, 1960, at 19.

⁸²⁸ These provisions may be drafted in various ways, but the main observation is that they refer to 'conditions'. See e.g. Warren's Forms of Agreements, 2, 2007, Form No. 8–216, 8.6: Recitals B "The Seller desires to sell ... and the Purchaser desires to purchase ... on the terms and subject to the conditions set forth in this Agreement." The same kind of language appears in Art. II, 2.1. Purchase and Sale, which states "The Seller agrees to sell... the Purchaser agrees to purchase ... on the terms and subject to the conditions set forth in this Agreement." As to this specific form of stock purchase agreement, note that the form actually provides for express conditions precedent (Art. VII Conditions to Obligations of Purchaser and Art. VIII Conditions to Obligations of Seller). Another example showing the same structure using the expression in the recitals and in the sale and purchase provision may be found in Share Purchases Practice Manual, 2000, at 4.26 and at 4.40, but just as in the form in Warren's Forms of Agreements, 2, 2007, this model agreement also includes conditions precedent. As to Nordic practice see e.g. Schans Christensen, 1998, at 165, noting that a model provision with regard to sale could be drafted as follows: "Subject to the terms and conditions set forth in this Agreement, The Seller agrees to sell... and the Buyer agrees to purchase..."

as contract interpretation is based on the objective method, as emphasized already in Chapter 3. With regard to the USA, it may be recalled that conditions are, first and foremost, discussed based on a functional approach. Indeed, it has been claimed that in unclear situations it is more likely that contract terms would be interpreted as creating a duty or an obligation to act rather than being classified as conditions, the result of which would lead to no liability arising if the condition does not materialize.⁸²⁹ Thus, from a common law perspective it seems that the risk with using phrases like ‘subject to the terms and conditions’ at the beginning of a business acquisition contract does not necessarily lead to an enhanced possibility of construing as conditions terms not labelled as conditions. One exception should be acknowledged because the English Sale of Goods Act 1979 includes certain provisions according to which ‘title, description and quality’ are all conditions, whether so labelled in the contract or not.⁸³⁰ The Act in question is not applicable to share sales,⁸³¹ but with regard to asset sales it has been noted that the title and certain other characters of the goods just mentioned may be implied.⁸³² In the USA the UCC does not refer to conditions, but the Restatement (Second) does. On the other hand, the definition of conditions in the Restatement (Second) effectively describes conditions precedent. From a Nordic perspective, the condition terminology is not decisive, but whether there are contract terms which are so essential that a breach of them gives rise to the right to terminate the contract, as understood by English law, would be judged based on the contextual interpretation method taking into account all relevant circumstances. However, if the term has been used intentionally to describe the traditional English common law term, then that would have an effect on the interpretation and the decision. Conditions as to other contract terms would have to be interpreted based on the wording and the function of the term in question.

4.3.2 Warranties

Under English law, warranties have traditionally been perceived as less important terms or at least less important than conditions.⁸³³ The main difference between the traditional concept of conditions and warranties under English law is that a breach of warranty may lead to damages, but a breach does not lead to the right to terminate the contract,⁸³⁴ whilst a breach of condition may lead to both remedies. On the other hand, it has been claimed that the difference between conditions and

⁸²⁹ See previous subchapter.

⁸³⁰ Guest, Reynolds and Beale, Chitty II, 2012, at 1470–1471. In that same connection the authors refer to §15(A) of the Sale of Goods Act 1979 in observing that a breach of such conditions entitles the buyer to reject goods, but in commercial transactions the right of rejection may be limited in the case of minor breaches. Note that the section in question also states that the right of rejection may still exist if it is so stated in or may be implied from the contract and further that minor breaches would be regarded as breaches of warranty but not of condition. In general, however, it may be noted that this section applies only to the seller’s default.

⁸³¹ Guest, Reynolds and Beale, Chitty II, 2012, at 1451, footnote 23 and Knight, 1997, at 134.

⁸³² Knight, 1997, at 134.

⁸³³ Peel and Treitel, 2015, at 981, suggesting that “[a] warranty ... concerns some less important or subsidiary element of the contract.” See also Guest, Chitty I, 2012, at 923–924.

⁸³⁴ See e.g. Guest, Chitty I, 2012, at 917 and at 923; Stone, 2013, at 208; McKendrick, 2013, at 183; Macdonald and Atkins, 2014, at 125 and Chen-Wishart, 2012, at 467.

warranties is not as decisive as it used to be, due to the fact that breach of an innominate term may, if grave enough, lead to a situation where both termination and damages are available remedies.⁸³⁵ Whether this statement includes warranties or not is debated. It has been argued that a breach of warranty might give the right to terminate the contract if the consequence of the breach is “substantial failure in performance.”⁸³⁶ Nevertheless, it has also been asserted that a contractual term regarded or denominated as a warranty does not give rise to the right to terminate the contract under English law.⁸³⁷ This probably better describes the prevailing situation, as the possibility to terminate a contract due to a breach of a warranty may rather be seen as an exception, while breach of a condition is more likely to allow the innocent party to terminate the contract.

Warranties have been described as binding undertakings by the parties, or— as has also been said — a warranty is often used just as a “contractual undertaking of promise.”⁸³⁸ Warranties may in English practice be defined as assurances that something stated is true and correct or — to put it in more analytical words — a warranty amounts to “an undertaking under a contract that a statement of fact is true and correct”⁸³⁹ or “A warranty ... is a contractual promise that a given statement of fact is correct.”⁸⁴⁰ It may be recalled that in the previous subchapter we discussed promissory conditions, which mean that a party has promised in some form or another that a certain matter will occur or will not occur and such occurrence or non-occurrence is a pre-condition for the parties becoming obligated to carry out the main performance under the contract. Warranties, on the other hand, are not in themselves tied to performance becoming due or not and are therefore clearly distinguishable from promissory conditions. The parties may have denominated a term as a warranty or certain matters may be found to be a warranty based on statute, for example the English Sale of Goods Act (1979).⁸⁴¹ Section 61(1) of the Act describes (with regard to England, Wales and Northern Ireland) warranties as follows: ““warranty” ... means an agreement with reference to goods which are the subject of a contract of sale, but collateral to the main purpose of such contract, the breach of which gives rise to a claim for damages, but not to a right to reject the goods and treat the contract as repudiated.” In other words the description focuses on a warranty as a less important term and it further circumscribes the remedies which differentiate warranties from

⁸³⁵ See e.g. Treitel, 1995, at 710–716.

⁸³⁶ Peel and Treitel, 2015, at 997. On the other hand in a case where substantial failure is claimed, the question is less about terminology, but more about a total review of performance under the contract. It has also been submitted that the principle of substantial performance has seldom been used and may therefore be regarded as less important. See Stone, 2013, at 439.

⁸³⁷ Stone, 2013, at 448–449.

⁸³⁸ Guest, Chitty I, 2012, at 923.

⁸³⁹ Bugg, 2010, at 97–98.

⁸⁴⁰ Cowper, 2013, at 3.

⁸⁴¹ The previous subchapter noted that title and certain qualities of goods are regarded as conditions under §14 of the Sale of Goods Acts 1979. An exception exists where the seller has drawn the buyer’s attention to possible defects or — if the buyer has examined the goods — that the buyer ought to have found such defects during the examination. According to §11 of the same Act a buyer may elect to regard such an implied condition as a warranty and further that when construing a contract, a condition may be found to be a warranty and vice versa.

conditions. It may in this connection be noted that the Sale of Goods Acts 1979 does not apply to the sale of shares or other securities.⁸⁴²

With regard to US law it may be recalled that categorization of contractual terms into conditions and warranties is not done in the same manner as under English law. Warranties are not under US law *per se* regarded as less important contract terms than conditions; nor is there attached any in-principle limitation on available remedies. In general, it is held under common law that warranties in the US are contractual promises by a party that a certain fact or facts are correct and a breach of warranty is a breach of a promise that something is correct.⁸⁴³ When warranties are discussed by US legal scholars or dealt with by the courts, reference is often made to something of a landmark case regarding warranties. This case is *Metropolitan Coal Co. v. Howard*,⁸⁴⁴ where a warranty was described as follows:

A warranty is an assurance by one party to a contract of the existence of a fact upon which the other party may rely...⁸⁴⁵

The Restatement (Second) does not deal with warranties specifically, but the UCC does. The applicability of the UCC is limited to certain contracts, but it has been submitted that courts have taken recourse to the UCC when analyzing other commercial transactions.⁸⁴⁶ The UCC stipulates both about express and implied warranties⁸⁴⁷ and it has been submitted that the stipulations on warranties in the UCC “... goes well beyond common law.”⁸⁴⁸ Express warranties have been described in Section 2-313 of the UCC⁸⁴⁹ and implied warranties according to the UCC are warranties on good title,⁸⁵⁰ warranties against infringement,⁸⁵¹ warranties with regard to goods being merchantable,⁸⁵² and goods being fit for a particular use, if the seller had reason to know that

⁸⁴² See e.g. Guest, Reynolds and Beale, Chitty II, 2012, at 1451, footnote 23.

⁸⁴³ See e.g. West and Lewis, 2009, at 1008–1009.

⁸⁴⁴ 155 F.2d 780 (2d Cir. 1946)

⁸⁴⁵ Ibid. at 784. Note that this case was judged under New York state law.

⁸⁴⁶ As to the applicability of the UCC, see Perillo, 2004, at 18: “Most of the provisions of the Code do not affect basic contract law; those that do are mostly contained in Article 2, which deals with the sale of goods and in Article 9 which deals, amongst other things, with the assignment (transfer) of some contract rights. As the most recent legislative statement of certain contract principles and rules, Article 2 of the Code has increasingly been looked to by courts for guidance in transactions other than the sale of goods. As one court has stated: “While this contract is not controlled by the Code, the Code is persuasive here because it embodies the foremost legal thought concerning commercial transactions.” (Footnote 5 *Vitex Mfg. Corp. v. Caribtex Corp.*, 377 F.2d 795, 799 (3d Cir.1967); see also *Deisch v. Jay*, 790 P.2d 1273 (Wyo.1990)). See further Carlson, 2004, at 133 regarding the applicability of the Code and also Jones and Lutton, 1994, at 389.

⁸⁴⁷ §2-312 – 2-318 of the UCC.

⁸⁴⁸ Burnham, 2002, at 403.

⁸⁴⁹ “§2-313: Express Warranties by Affirmation, Promise, Description, Sample. (1) Express warranties by the seller are created as follows: (a) Any affirmation of fact or promise made by the seller to the buyer which relates to the goods and becomes part of the basis of the bargain creates an express warranty that the goods shall conform to the affirmation or promise. (b) Any description of the goods which is made part of the basis of the bargain creates an express warranty that the goods shall conform to the description. (c) Any sample ... (2) It is not necessary to the creation of an express warranty that the seller use formal words such as “warrant” or “guarantee” or that he have a specific intention to make a warranty, but an affirmation merely of the value of the goods or a statement purporting to be merely the seller’s opinion or commendation of the goods does not create a warranty.”

⁸⁵⁰ §2-312 of the UCC.

⁸⁵¹ §2-312 of the UCC.

⁸⁵² §2-314 of the UCC.

the buyer is relying on the seller's skill and knowledge.⁸⁵³ The UCC also stipulates about requirements for exclusions or limitations of warranties, for example that exclusions or limitations should be stated in "conspicuous" language and as to title, exclusions should be referred to by specific language or by circumstances such that the buyer has reason to know that no warranty is provided on title.⁸⁵⁴

Warranties are not categorized as a distinctive group of contractual terms in the Nordic countries and there is no general enacted contractual legislation or rule about warranties.⁸⁵⁵ Therefore, there is no assumption – as under English law – that warranties are less important contract terms. Warranty as a term may not necessarily have been used but more often warranties have been referred to as guarantees and have been widely discussed by Nordic legal scholars.⁸⁵⁶ Legal

⁸⁵³ §2-315 of the UCC.

⁸⁵⁴ §2-312 as to title warranties and §2-316 as to other warranties. This later section e.g. states that when creating an express warranty or to negate or limit a warranty, "words and conduct shall be construed wherever reasonable as consistent with each other; but subject to the provision of this Article on parol or extrinsic evidence (Section 2-202)". It is also further stated that limitation or negation is not allowed if the construction would be 'unreasonable'. This actually applies to all warranties. The section deals specifically with implied warranties of merchantability that exclusion or modification text must contain the word 'merchantability' and the writing must be 'conspicuous'. The section adds that an implied warranty of fitness which is excluded or modified must be in writing and also conspicuous. However, note also that the section – regardless of these requirements – states that implied warranties may be excluded by expressions like 'as is', 'with all faults' and other wording that makes the buyer aware of exclusion of warranties and stresses that there is no implied warranty. If the buyer has examined the goods, there is no implied warranty as to defects which the buyer should have noticed and last but not least an implied warranty may be excluded or modified by 'course of dealing or course of performance or usage of trade'.

⁸⁵⁵ See e.g. comment by Buskerud Christoffersen, 2008, at 211–212, that a guarantee by a party does not have a specific definition. See also Anders Knabe as to the fact that warranties do not have a certain content, Knabe, 1989, at 86. See further Wetterstein, 1982, at 72–73, maintaining that when a warranty is included in a written contract, it is not decisive that the word warranty – actually he used the word guarantee – is included but rather that it is clearly stated that the seller takes responsibility for the properties of the target in question.

⁸⁵⁶ See e.g. Ramberg and Ramberg, 2014, at 226–229; Wetterstein, 1982, at 69–73; Hellner, Hager and Persson, 2011, at 105–110; Ramberg and Herre, 2014, at 52 and at 94; Calissendorff and Calissendorff, 1999, at 82, at 85 and at 89–93; Knabe, 1989, at 85–86; Hultmark, 1992, at 145–148; Clausen, Edlund, Ørgaard, 2012, at 159–160; Bryde Andersen, 2003, at 324–328; Gomard, 2006, at 219–224; Gomard and Iversen, 2012, at 303–306; Buskerud Christoffersen, 2008, at 211–216, at 367–373, at 469–470 and in general chapter 7 on 'objective' warranties and chapter 8 on 'subjective' warranties; Hov, 2002, at 102–104; Hagstrøm and Aarbakke, 2004, at 386–389 and at 514–517; Taxell, 1972, at 462–465; Wilhelmsson, Sevón, Koskelo, 2006, at 107; Bärlund, 2003, at 324–325 and Aurejärvi, 1981, who, e.g., consistently used the term 'guarantee'. Also a selection of literature of a more practical nature deals with warranties and breach of warranty e.g. Hedwall, 2004, at 199–200; Egholm Hansen and Lundgren, 2014, at 199–210; Sevenius, 2012, at 303–305 and Schans Christensen, 1998, at 191, who also referred to warranties as guarantees.

scholars have often divided them into separate categories,⁸⁵⁷ but the relevant category here is contractual undertakings or promises that certain matters are true and correct.⁸⁵⁸

The Nordic Sale of Goods Acts do not use the words ‘warranties’, but include provisions on ‘specific undertakings’ in connection with available remedies in case of breaches of these specific undertakings.⁸⁵⁹ By these undertakings is meant that goods are defective if they divert from what the seller has specifically undertaken. There has been some discussion amongst Nordic scholars as to what the term ‘specific undertaking’ means,⁸⁶⁰ but explicit warranties included in a written contract should undoubtedly be regarded as such specific undertakings, as the seller does indeed specifically warrant that certain facts are true and correct and in that sense gives a binding commitment. It may further be noted that the Nordic Sale of Goods Acts also in fact recognize different kinds of warranties, as there are different provisions for remedies in case of defective goods and in case of defective title.⁸⁶¹

⁸⁵⁷ See e.g. Aurejärvi, 1981, at 24–29, discussing quality guarantees and summarizing that quality guarantees do not have such independent elements as would lead to stricter consequences. Aurejärvi further discussed repair guarantees, though as these are of less interest for this dissertation the matter will not be further pursued. Aurejärvi, 1981, at 71–85. See also Ramberg and Ramberg, 2016, at 249, who divided guarantees into something called “Almén guarantees,” which means that certain characteristics of the goods should exist at the time of delivery of the goods, and as the second category functional or sustainability guarantees, where the goods should be functioning during a certain period of time. See further Buskerud Christoffersen, 2008, at 211, who explained that there are three types of guarantees in Norwegian law i.e. independent guarantees, where someone takes on economic responsibility independently, third party guarantees, where a creditor takes on responsibility for the obligations of a debtor and then, as is actually discussed in this dissertation, guarantees where a party takes on certain responsibility due to a guarantee. Mads Bryde Andersen divided guarantees into guarantees which are independent of other obligations of a party (third party guarantees) and party guarantees which are explicitly agreed or understood in different transactions. Bryde Andersen, 2004, at 325–333. He additionally mentioned back-to-back guarantees and other guarantees by suppliers. Bryde Andersen, 2004, at 333–336.

⁸⁵⁸ See e.g. Hultmark, 1992, at 145, who discussed warranties based on the assumption that the seller takes responsibility for certain circumstances (author’s comment: it may be that the Swedish word used in this connection actually refers to properties) in addition to what the seller has stated about the target of the sale; Egholm Hansen and Lundgren, 2014, at 261, who described warranties as the seller guaranteeing on an objective basis that certain circumstances or matters exist, that they will continue to exist or even that they will develop in a certain manner; Buskerud Christoffersen, 2008, at 209, who described seller’s warranties as guarantees that the target has or does not have certain characteristics. Aurejärvi again described ‘guarantees’ in contracts as agreements in the sale contract according to which the goods sold have certain quality properties, which may be positive or negative. Aurejärvi, 1981, at 8. Lars-Erik Taxell said that a guarantee is an undertaking by a party to a contract to bear liability for certain facts or for given information conforming to reality. Taxell, 1972, at 462. See also Schans Christensen, 1998, at 191, who described warranties as a supplement to given information and where a party assures that the information is correct. See also Gomard, 2006, at 214–215 and at 223, who compared guarantees with promises.

⁸⁵⁹ §40(3) of the Finnish, Norwegian and Swedish Sale of Goods Act and §42(2) of the Danish Sale of Goods Act.

⁸⁶⁰ See e.g. Wetterstein, 1996, at 481–482, discussing how specific undertakings should be understood with reference i.a. to the Finnish Sale of Goods Act Bill (1986:93, at 88). The Bill stated that these specific undertakings are generally understood as being what the seller has explicitly communicated, but that such an undertaking may also be regarded as the buyer having communicated that certain properties are connected to the goods and the seller has entered into the contract knowing of that assumption. Wetterstein’s own conclusion was that even undertakings not specifically incorporated in the contract may under certain circumstances be regarded as such undertakings. Wetterstein, 1996, at 486–487. See also the Swedish Bill (1988/89, at 139), which states that specific undertakings may also be regarded as other undertakings e.g. the buyer’s communication. See further comments by Håstad, 2009, at 120–121, discussing this matter from the perspective of damages, but where he also stated that as to the nature of specific undertakings and what all they incorporate in the Swedish situation is somewhat unclear. The same kind of reasoning applies to the Norwegian situation by Herman Bruserud. See Bruserud, 2015A, at 224–225.

⁸⁶¹ §30–40 of the Finnish, Norwegian and Swedish Sale of Goods Acts deal with remedies in cases of defective goods and §41 deals with legal defects i.e. defects in title. The Danish Sale of Goods Act, which is basically the Sales Act from the beginning of the 20th century, provides for remedies in the case of defective goods in §42–54 and in the case of defective title in §59.

When discussing the use of warranties in business acquisition contracts governed by Nordic law based on contract law in general, it is not decisive whether assurances are labelled as ‘warranties’ or not, as the analysis of what kind of contract term is involved would be based on the contents of the contract term and interpretation of the term in question would be based on general interpretation methods.⁸⁶² Although naming contract terms as warranties gives a strong indication that the parties intended them to amount to some form of promises, the denomination is not sufficient, but the consequences depend on the contents of the warranties in the context of the whole contract.⁸⁶³

4.3.3 Representations

4.3.3.1 Common law and representations

Due to the fact that untrue representations – that is, misrepresentations – may have an impact on contract interpretation, whether such representations have been included in the contract or not, it is necessary to discuss representations also as stand-alone legal concepts.

In order to identify what is meant by a representation under common law, the required elements have been derived from the definition of misrepresentation. This has resulted in a definition of a representation under English common law according to the following. A representation is a statement of past or present fact – today also a statement of law⁸⁶⁴ – made by one party to the other party before or on entering into a contract and that statement is made in order to induce the other party to enter into the contract and the representee relies upon the statement.⁸⁶⁵ The different criteria have been widely discussed. For example, G.H. Treitel maintained that the statements should be material and that the materiality aspect should be evaluated from a reasonable man’s point of view, and the other party should have had reasons to rely upon it.⁸⁶⁶ H.G. Beale noted with regard to the question of materiality that statements should be material from the perspective that they were likely to induce a party to enter into a contract, but he questioned Treitel’s approach that materiality would always be judged based on what a reasonable man would do, as Beale held that if the representor knew or ought to have known that the other party was likely to act on the representation, then that would be sufficient for an action in misrepresentation.⁸⁶⁷ It is possible to understand Treitel’s comment on the reasonable man in light of the fact that one of the cornerstones

⁸⁶² See e.g. Wetterstein, 1982, at 72; Wilhelmsson, Sevón and Koskelo, 2006, at 107; Hedwall, 2004, at 199, Bruserud, 2015A, at 224 and Gomard and Iversen, 2012, at 304–305.

⁸⁶³ See Bruserud, 2015A, at 224, suggesting that using the word ‘guarantee’ does not necessarily imply an absolute obligation to compensate, but the situation as to the meaning of the guarantee must be interpreted in the specific case.

⁸⁶⁴ See e.g. Stone, 2013, at 279–281.

⁸⁶⁵ See e.g. Treitel, 1995, at 307–318. As to other different ways of describing misrepresentations see e.g. Macdonald and Atkins, 2014, at 286–299; Beale, Chitty I, 2012, at 574–586 and at 590–600 and Furmston, 2012, at 340. Representations and misrepresentations are also of relevance if they induce a party not to take action e.g. not enter into a contract. See discussion in subchapter 2.2.6.

⁸⁶⁶ See Treitel, 1995, at 312–314. In this connection note that exceptions to the materiality rule are situations of fraud and a specific statement that a representation is material. Peel and Treitel, 2015, at 412.

⁸⁶⁷ Beale, Chitty I, 2012, at 597–599.

in English contract interpretation is the objective method. Beale's comment may be seen as a reflection of the fact that under some circumstances the factual – and in that sense subjective – circumstances may play a role even in English contract interpretation. As to the element of reliance, in general the representee has to show that it was reasonable to rely upon the statement.⁸⁶⁸ No exact standard of reasonable reliance has been defined, but Hugh Collins has said that the courts would likely refer to “standard trading and professional practices”, as well as taking into account the “skill and knowledge” of the parties.⁸⁶⁹ As it is a requirement that the representee has relied on the representation and thus if he did not know about it, if he entered into the contract knowing about the misrepresentation or the representations did not influence his decision to enter into the contract, these circumstances may preclude the representee from an action due to misrepresentation.⁸⁷⁰ This has been well summarized by Michael Furmston, who said that the misrepresentation is harmless “...if the plaintiff: (a) never knew of its existence, (b) did not allow it to affect his judgment or (c) was aware of its untruth.”⁸⁷¹

Under English law representations should be explicitly given, but in some exceptional cases silence may amount to a misrepresentation.⁸⁷² Telling or writing ‘half-truths’ – that is, telling something but being silent upon some fact which actually distorts the meaning of the disclosed fact or given statement – might also amount to misrepresentation, as well as situations where the statement as such was true when given but does not remain true during subsequent negotiations.⁸⁷³ Non-disclosure may in some exceptional cases also be regarded as misrepresentation.⁸⁷⁴ Representations have in general not been regarded as including statements regarding the future, statements of opinion or belief or general praise/marketing talk.⁸⁷⁵ A mere description of exclusions as brief as this may give a false impression that this goes for all and any statements of that kind, but statements of opinion or belief or statements about the future may contain facts which make them representations at least to some extent.⁸⁷⁶ As an example of this kind of situation, an old court case – *Edgington v Fitzmaurice*⁸⁷⁷ – and Lord Justice Bowen's statement are often referred to.⁸⁷⁸ This

⁸⁶⁸ See e.g. Furmston, 2012, at 345–348 and Stone, 2011, at 272–274.

⁸⁶⁹ Collins, 2008, at 190.

⁸⁷⁰ See e.g. Treitel, 1995, at 314–315 and McKendrick, 2013, at 231.

⁸⁷¹ Furmston, 2012, at 346.

⁸⁷² Furmston, 2012, at 344–345 and Stone, 2011, at 271–272.

⁸⁷³ Furmston, 2012, at 344–345.

⁸⁷⁴ Peel and Treitel, 2015, at 479.

⁸⁷⁵ Treitel, 1995, at 307–309.

⁸⁷⁶ As to general marketing talk/‘talking up’, G. H. Treitel referred to ‘mere puffs’, but also stated that the “...distinction is between indiscriminate praise, any specific promises or assertions of verifiable facts.” See Treitel, 1995, at 307, referring e.g. to *Carlill v Carbolic Smoke Ball Company* [1893] QB 256, where the defendant had advertised that the smoke-balls would “give immunity from influenza.” See also Adams and Brownsword, 2007, at 162. As to statements of opinion or belief, these might impliedly involve a statement of fact. Treitel used an example of a person stating that he is of a certain opinion, whereas he is not actually of that opinion, Treitel, 1995, at 307. See also Furmston, 2012, at 342. Statements regarding the future might also include facts, which Treitel dealt with as to intentions and suggested that stating a present intention which one does not have may be regarded as a misrepresentation of fact; another example he used is stating – as to some future matters – an expectation or belief that one does not actually have. Treitel, 1995, at 308. He referred to *Edgington v. Fitzmaurice* ((1885) L.R. 29 Ch.D. 459).

⁸⁷⁷ (1885) 29 Ch.D.459

⁸⁷⁸ Ibid at 482 and 483.

case was about a public deal, where a company issued a prospectus for a public loan. In the prospectus, the company said that the proceeds would be used for the improvement of certain buildings and extending the business. However, the company's intention was actually to pay off some existing liabilities. This statement was regarded as a misrepresentation, although the statement in itself related to future activities in the shape of planned improvements and extensions.

According to US law, the essence of representations can be drawn from the Restatement (Second). The Restatement contains no definition of what a representation is, but there is a definition of what amounts to a misrepresentation and what the remedies are in cases of misrepresentation. Misrepresentation is defined in Section 159 of the Restatement (Second) and based on that definition one could define a representation as "an assertion of a fact",⁸⁷⁹ which has been made fraudulently or is material,⁸⁸⁰ the representation must in a substantial manner have induced a party to enter into the transaction,⁸⁸¹ and the party entering into the transaction must show justifiable reliance.⁸⁸² The statement of fact has to relate to past or present facts.⁸⁸³ The Restatement (Second) contains further provisions on how these elements are judged, for example what is meant by 'materiality' and 'justifiable reliance'.⁸⁸⁴

A statement as to matters of law may either be an opinion or a fact.⁸⁸⁵ Furthermore, just as under English law, telling 'half-truths' might amount to misrepresentation⁸⁸⁶ and also hiding facts or trying to prevent a party from finding out a fact.⁸⁸⁷ Non-disclosure might amount to misrepresentation in some specific cases, that is, if made fraudulently, or if it is material, or if an earlier statement is no longer correct, or if one party knows about the other party's mistaken basic assumption, or if one party knows that the other party is mistaken with regard to the contents or the

⁸⁷⁹ §159 of the Restatement (Second) defines a misrepresentation as "... an assertion that is not in accord with the facts."

⁸⁸⁰ §162 of the Restatement (Second) provides that "(1) A misrepresentation is fraudulent if the maker intends his assertion to induce a party to manifest his assent and the maker (a) knows or believes that the assertion is not in accord with the facts, or (b) does not have the confidence that he states or implies in the truth of the assertion, or (c) knows that he does not have the basis that he states or implies for the assertion. (2) A misrepresentation is material if it would be likely to induce a reasonable person to manifest his assent, or if the maker knows that it would be likely to induce the recipient to do so."

⁸⁸¹ §167 of the Restatement (Second) stipulates that "A misrepresentation induces a party's manifestation of assent if it substantially contributes to his decision to manifest the assent."

⁸⁸² §164 of the Restatement (Second) deals with situations where misrepresentation makes a contract voidable and states that "(1) If a party's manifestation of assent is induced by either a fraudulent or a material misrepresentation by the other party upon which the recipient is justified in relying, the contract is voidable by the recipient. (2) If a party's manifestation of assent is induced by either a fraudulent or a material misrepresentation by one who is not a party to the transaction upon which the recipient is justified in relying, the contract is voidable by the recipient, unless the other party to the transaction in good faith and without reason to know of the misrepresentation either gives a value or relies materially on the transaction." §168 deals with the requirement of reliance on opinions, §169 deals with when reliance on opinions is not justified, §170 is about reliance on assertions as to matters of law, §171 provides for when reliance on an intention is not justified, §172 deals with the question of when fault makes reliance unjustified.

⁸⁸³ See comment c. Meaning of 'fact' to §159 of the Restatement (Second). Note that the same comment provides for future events to be covered only if some special circumstances indicate that the representation of facts indicates that those facts will lead to some future actions e.g. in relation to the output of a machine.

⁸⁸⁴ See §162–172 of the Restatement (Second) and the comments in these sections.

⁸⁸⁵ See comments to §170 of the Restatement (Second).

⁸⁸⁶ See comment b. Half-truths to §159 of the Restatement (Second).

⁸⁸⁷ See comments a. Scope and comment and b. Common situations to §160 of the Restatement (Second).

legal effects of a writing. Furthermore, there is a disclosure assumption based on the fiduciary relation between the parties.⁸⁸⁸ Statements of opinion are generally excluded, but might amount to misrepresentation in certain cases where the recipient might conclude that opinions expressed are based on facts and may therefore be relied on.⁸⁸⁹ In general, statements of intention may not be relied upon. The exceptions are cases where “reasonable standards of dealing” were not met and cases where intentions are promised, but there is no real intention to perform.⁸⁹⁰ This description is based on the Restatement (Second), but as always with regard to the USA, the contents of the different elements are set out in case law, which may vary between the states.

The remedies for misrepresentations may in both common law countries not only be based on contract law, but also on tort laws, which will be reverted to below.

4.3.3.2 *Representations as contractual terms*

When representations have been incorporated as contractual terms and even if a claim for misrepresentation would be available under common law, the following should be noted with regard to the nature and effect of contractual representations. Under English law representations included as express terms of written contracts may be regarded as nothing more than warranties, but even if a representation is included as a contractual term, it does not necessarily exclude remedies for misrepresentation, unless specifically so agreed and even then subject to limitations.⁸⁹¹ If a representation is included as a contractual term and it is not correct there would be a breach of contract. After enactment of the Misrepresentation Act 1967,⁸⁹² even if an incorrect representation – that is, a misrepresentation – has been given prior to or on entering into a contract and has subsequently been incorporated as a contractual term, the innocent party may claim for misrepresentation.⁸⁹³ In other words, the fact that the misrepresentation has been included as a contract term and whether it is called a representation or a warranty does not *per se* preclude remedies available for misrepresentation.⁸⁹⁴ It is quite a complicated situation, as during the

⁸⁸⁸ See comments to §161 of the Restatement (Second). See also Farnsworth, 1987, at 277 and Perillo, 2004, at 349–352.

⁸⁸⁹ See e.g. comment d. to §168 and see comments to §169 of the Restatement (Second). See further Perillo, 2004, at 342–444.

⁸⁹⁰ See comments to §171 of the Restatement (Second).

⁸⁹¹ See e.g. Peel and Treitel, 2015, at 429–430 and at 458 and Macdonald and Atkins, 2010, at 90. See also Lewison, 2004, at 78, discussing situations where during negotiations statements of fact or opinion might be held to be a term of the contract and amongst the reasons mentioned are that if oral representations are written down it is “good evidence” that this was intended to be a warranty. However, the totality of the situation has to be evaluated.

⁸⁹² Prior to the Misrepresentation Act 1967 misrepresentations were held to be relevant only to pre-contractual statements, but due to the Act misrepresentations are just as important when incorporated as contractual terms. See e.g. Beale, Chitty I, 2012, at 573.

⁸⁹³ §1 of the Misrepresentation Act 1967 provides that: “Where a person has entered into a contract after a misrepresentation has been made to him, and (a) the misrepresentation has become a term of the contract; or (b) the contract has been performed; or both, then, if otherwise he would be entitled to rescind the contract without alleging fraud, he shall be so entitled, subject to the provisions of this Act, notwithstanding the matters mentioned in paragraphs (a) and (b) of this section.” See also Beale, Chitty I, 2012, at 573.

⁸⁹⁴ As to the right of rescission even when a misrepresentation has been included in the contract as a warranty, see e.g. Beale, Chitty I, 2012, at 634. Kim Lewison suggested that the importance of the difference between a representation

negotiations representations could have been given which later turn out to be false, and the same misrepresentations may subsequently have been confirmed in the contract, which should be interpreted together with the other contract provisions. Nevertheless, remedies for pre-contractual misrepresentations might still be possible under English law.⁸⁹⁵ It seems that a factor to consider in this regard is whether the misrepresentation in some form or other has appeared in the negotiations or previous drafts. For example, Justice Simon stated in *Bikam OOD v Adria Cable*⁸⁹⁶ that “I am doubtful that a representation which only appears in a contract can fall within the terms of s. 2(1) of the Misrepresentation Act 1967 in the light of the wording of the statute.”⁸⁹⁷ Unfortunately, the matter was not further elaborated on in that specific case, as it was not necessary for the decision. The statement could, however, be seen as reflecting an opinion that in order for the rule as appearing in the said Section to apply, some form of statements or negotiations regarding the representation have to occur prior to the contract, which as a matter of fact would be typical in most business acquisitions.

In the USA if a representation is incorporated as a term of a contract and as a matter of fact confirmed to be true the representation will first and foremost be regarded as a warranty with consequences related thereto in case the statement is not true.⁸⁹⁸ In comparison with the UK, there is no Act specifically dealing with representations – or rather misrepresentations – incorporated into a contract. Even though representations are regarded as warranties when included in a contract,⁸⁹⁹ this does not preclude remedies for misrepresentation. However, whether it is possible or not is related to whether the elements of misrepresentation as presented above in the previous subchapter exist, to the nature of the misrepresentation and to the contract as a whole, for example possible non-reliance or limitation provisions are likely to have an effect on the available remedies.⁹⁰⁰ Statements in a contract regarding facts which are not true, whether labelled as warranties or representations and subject to the other contract provisions, have been described in general as leading to a situation where the other party might have recourse to several remedies,

and a warranty is less nowadays due to the provisions of the Misrepresentation Act 1967, which allows actions for other misrepresentations than only fraudulent ones and the fact that rescission is possible even after the contract has been completed. Lewison, 2004, at 79.

⁸⁹⁵ Peel and Treitel, 2015, at 406, giving as an example where this has been the case i.e. *Eurovideo Bildprogramm GmbH v Pulse Entertainment Ltd* [2002] EWCA Civ 1235 at 19, where contractual representations had in fact also been stated in previous drafts.

⁸⁹⁶ [2012] EWHC 621 (Comm)

⁸⁹⁷ *Ibid*, at 39. See further §2(1) of the Misrepresentation Act 1967, which provides that: “Where a person has entered into a contract after a misrepresentation has been made to him by another party thereto and as a result thereof he has suffered loss, then, if the person making the misrepresentation would be liable to damages in respect thereof had the misrepresentation been made fraudulently, that person shall be so liable notwithstanding that the misrepresentation was not made fraudulently, unless he proves that he had reasonable grounds to believe and did believe up to the time the contract was made that the facts represented were true.”

⁸⁹⁸ Perillo, 2004, at 356.

⁸⁹⁹ 75 N.Y.2d 496, 554 N.Y.S.2d 449, 553 N.E.2d 997, 7 ALR5th 1154 (1990) and Perillo, 2004, at 339, footnote 4.

⁹⁰⁰ Similarly to Perillo, Glenn D. West and W. Benton Lewis Jr. also suggested that representations incorporated into a written contract are warranties. See West and Lewis, 2009, at 1008.

⁹⁰⁰ Heffer and Pierce, 2003, at 250–251. See also West and Lewis, 2009, at 1010, where they criticized the fact that some courts have accepted separate tort claims for breach of warranties, which means that the claims recognize certain requirements for a misrepresentation claim in tort i.e. culpability, materiality and reliance.

such as a “tort-based claim for misrepresentation, a contract-based claim for breach of warranty or both.”⁹⁰¹ However, the extent of how the incorporation of representations into a contract affects remedies for misrepresentation is highly dependent on which state law governs the contract, as this is an area where practice varies between the states. It seems that in the USA the fact that incorporated representations are warranties has caused less discussion, but the question of remedies in such cases is much more diversified and controversial.

Both under English law and under US law, tort laws also play an important role when the discussion includes available remedies, even when representations are included in the contract.

4.3.3.3 What is a ‘representation’ under Nordic law?

In the Nordic jurisdictions there is no direct equivalent concept of representations and specific consequences if they amount to misrepresentations as understood by English or US law. The common law concept of representations as statements of past and present facts, or in some cases law, given before or on entering into a contract, which have induced the other party to enter into a contract⁹⁰² and the innocent party having justifiably relied on the statements, would under Nordic law rather have to be analyzed based on several other rules and principles. For example, these statements could be assessed based on the rules and principles in relation to disclosure of information and knowledge at the time of concluding a contract and the loyalty obligation of the parties in negotiations and in the performance of a contract. Representations have also in the Nordic countries been described as declarations or information about factual circumstances,⁹⁰³ but the limitations as to what kind of statements could amount to representations are not as specifically defined as in the common law countries. When ‘representations’ are used to describe certain terms of a written contract governed by Nordic law, such representations would in most cases be dealt with just like any other contractual term and therefore breach of a term denominated as a representation does not in itself lead to any specific remedies. When a party has assured or warranted the correctness of contractual representations, that contract term could be regarded as the same kind of ‘specific undertaking’ identified by the Nordic Sale of Goods Acts and described above when discussing warranties.⁹⁰⁴

If representations are understood as statements of facts, which actually in general may be referred to as information, the Nordic Sale of Goods Acts contain several provisions on what kind of information is required and what the effect may be if information provided is not correct or information is not disclosed. Section 18 of the Finnish, Norwegian and Swedish Sale of Goods

⁹⁰¹ Adams, 2015, at 205.

⁹⁰² It may be recalled that misrepresentations may also exist under English law when a misrepresentation leads to a party refraining from entering into a contract. This possibility was discussed in subchapter 2.2.6. In this connection, however, representations and misrepresentations are discussed assuming that a contract has been entered into.

⁹⁰³ See e.g. Schans Christensen, 1998, at 191

⁹⁰⁴ See previous subchapter.

Acts all stipulate that ‘goods are defective’, if they do not conform to information given by or – with some exceptions – on behalf of the seller before conclusion of the contract and the information has presumably influenced the sale.⁹⁰⁵ The information is related to the properties and use of the goods and does not have to be statements regarding only past and present fact, which was an element of representations under English and US law. The information should also have ‘influenced the sale’ or – as the Finnish Sale of Goods Act stipulates – ‘influenced the contract’. The requirement is not as strong as the inducement element under common law, but there are similarities.

This requirement is repeated in Section 19 of the Finnish, Norwegian and Swedish Sale of Goods Acts, although only with regard to information provided by the seller and not if the information is provided by third parties. The Section further stipulates that even if goods are sold ‘as is’ they are defective if the seller fails to disclose to the buyer material information regarding the properties or the use of the goods which the seller could not have been unaware of and which the buyer reasonably could expect to be informed about and failure to disclose the information can be presumed to have had an effect on the contract/sale.⁹⁰⁶ In other words, material information, which was one of the requirements for misrepresentation existing under US law and – although debated but in most cases also under English law – could have an impact on whether the information will lead to the goods being defective provided such information has had an impact on the sale and/or the contract.

Both under Section 18 and Section 19 of the Finnish, Norwegian and Swedish Sale of Goods Acts, the fact that information was not correct may be compared with the requirement under a misrepresentation that a statement of fact or law is not correct. Furthermore, the requirement in these Sections that the information could be presumed to have an effect on the sale and the contract may be compared with the common law inducement element as being an essential part of the characterization of representation.

Section 17 of the Finnish, Norwegian and Swedish Sale of Goods Acts furthermore includes some language which may be compared with the reliance element as part of the common law definition of representation. For example, Section 17 of the Acts in question stipulates that, unless otherwise provided for in the contract, the goods must be fit for the purpose for which goods of similar kind are generally used and that the goods must be fit for the particular purpose for which the goods are intended to be used, provided that the seller knew or must have known of the particular purpose for which the goods were intended to be used at the time of concluding the contract and it was

⁹⁰⁵ §18 of the Finnish, Norwegian and Swedish Sale of Goods Acts all refer to information as to the properties /characteristics of and use of goods. When someone other than the seller provides the information, the requirement is further that the seller knew or should have known about the information. §76 of the Danish Sale of Goods Act contains a similar rule concerning sales to consumers, but these rules have been regarded as also applicable to commercial transactions between business parties. See e.g. Bryde Andersen, 2005, at 112 and Clausen, Edlund and Ørgaard, 2012, at 152–153.

⁹⁰⁶ The exact wording of the sections differs somewhat, but in essence they all regulate material information which may have an impact on the transaction at hand.

reasonable for the buyer to rely on the seller's skill and judgment. The question of 'fit for the purpose for which goods of similar kind are generally used' or 'particular purpose' would require some creativity to be used in business acquisitions, but perhaps a situation where the buyer has thought that he bought a business which could be run as before, but it appears that this was not the case, could be regarded as such a situation. On the other hand, this matter is more complicated, as there are also requirements of reasonableness by the buyer to rely on the seller's skill and judgment and the seller must have realized the particular purpose. This, on the other hand, may be compared to the common law requirement of the buyer having relied on a representation, where reliance would also be judged based on whether it was reasonable for the buyer to rely upon the representation and where the skill and knowledge of the other party is also considered in the analysis.

When analyzing certain elements of the common law concept of representations and misrepresentations, the following may additionally be noted with regard to Nordic contract law. A party who claims that he has relied upon statements and information prior to or on entering into the contract and such statements induced him to enter into the contract could refer to the invalidity provisions under the Nordic Contract Acts and specifically Section 30.⁹⁰⁷ According to this Section, if a party has been induced to enter into a juridical act due to fraudulent misrepresentation by the other party, the innocent party is not bound by the juridical act in question provided the other party was guilty of fraudulent behavior or knew or should have known that the misrepresentation would bring about the inducement. The wording of this Section varies somewhat in the Nordic countries, as some specifically spell out, for example, that non-disclosure may be regarded as misrepresentation.⁹⁰⁸ It seems that at least this Section provides a concept fairly close to misrepresentation in common law. However, it is not an exact match, as the requirement of common law that statements of facts or law must concern the past or the present is not incorporated in Section 30.

⁹⁰⁷ In the book *Restatement of Nordic Contract Law*, 2016, at 140–141 this kind of misleading behavior is discussed under the heading 'fraud'. Fraud in this connection has been described thus: "The concept of fraud denotes that the party in question knew that the information provided was false and was aware that the misrepresentation might provoke a juridical act." Further, reference was made to Rt. 1999.210 of the Norwegian Supreme Court, which has said that fraud "requires non-disclosure of facts with intent to defraud." The term used in the Nordic Contracts Act is in Swedish actually *svek*, a word that could also be translated as "deceit." It would, however, expand the discussion too much to discuss the differences between deceit and fraud from a Nordic point of view, but it is not exactly the same as the tort of deceit under common law. See also §33, which could actually render the whole contract void *ab initio*. However, it has been said by several Nordic legal scholars that §33 and also the general adjustment section, §36, has seldom been used in purely commercial contractual relationships.

⁹⁰⁸ §30 of the Finnish Contract Act provides: "A transaction into which a person has been fraudulently induced shall not bind him/her if the person to whom the transaction was directed was himself/herself guilty of such inducement or if he/she knew or ought to have known that the other party was so induced." The Danish, Norwegian and Swedish Acts contain more elaborate language. However, in Finland the same principles apply, although not specially set out in the section in question. See e.g. Saarnilehto and Annola, 2012, at 421–422. See also Mäkelä, 2010, at 256, who maintained that in general it has little relevance how careful the innocent party has been.

4.3.4 Warranties and representations in business acquisition contracts

Above the different understandings of warranties and representations as legal concepts were discussed, but even though many business acquisition contracts include provisions named representations and warranties, the common law difference between warranties and representations is not necessarily an issue in negotiating and drafting such contracts. As already noted, it seems that these terms in practice are often used interchangeably even in the common law jurisdictions.⁹⁰⁹ It is also typical that contracts do not separately list representations on the one hand and warranties on the other hand.⁹¹⁰

Both parties mostly give some representations and warranties, but the seller's are typically more extensive and probably also more litigated. The seller's representations and warranties in business acquisition contracts would contain, for example, assurances as to certain qualities of the target being sold, as well as assurances as to the ownership and transferability of the target,⁹¹¹ but also

⁹⁰⁹ For example, the US Warren's Forms of Agreements, 2, 2007, Part II, Form No. 8.4.01 (Agreement for Purchase and Sale of Assets of Hotel) at 8-71 and 8-73; Form No. 8.4.02 (Agreement for Purchase of Assets of Petroleum Station), at 8-90 and 8-93; Form No. 8.4.03 (Agreement to Purchase Assets of Automobile Dealership), at 8-115 and 8-119; (Agreement for Purchase and Sale of Assets of Dental Practice) at 8-132 and 8-133 (only the heading Representation and Warranties by Buyer) and the list may be continued for asset sales, as well as for other sales. See Form No. 8.6.01 (Stock Purchase Agreement (Transaction includes Foreign Subsidiaries), at 8-225 and 8-244 and Form No. 8.6.02 (Stock Purchase Agreement (Using New Subsidiary for Acquisition) at 8-280 and 8-301. The form agreements include sections denominated "Representations and Warranties of the Sellers" and "Representations and Warranties of the Buyers" and these sections start with the wording "Sellers/Buyers represent and warrant that:..." The forms presented by Andrew Stilton and published in the UK include sections titled 'Warranties', but the definition of Warranties includes warranties and representations; 2015, Precedent 1 (Share Sale and Purchase Agreement Version A – Corporate Sellers), at 527 definition of Warranties, at 531 refers to Warranties and that they have induced the buyer to enter into the agreement; Precedent 2 (Share Sale and Purchase Agreement Version B – Individual Sellers), at 595 the definition of Warranties includes representations, at 599 refers to Warranties and that they have induced the buyer to enter into the agreement. Precedent 3 (Assets Sale and Purchase Agreement Version A – For use when debtors and creditors are being transferred to the Buyer), at 668 the definition of Warranties includes representations, at 678 refers to Warranties and that they have induced the buyer to enter into the agreement. Precedent 4 (Assets Sale and Purchase Agreement Version B – For use when debtors and creditors are not being transferred to the Buyer but are being retained by the Seller) at 728 the definition of Warranties includes representations, at 739 refers to Warranties and that they have induced the buyer to enter into the agreement. The ICC Model Share Purchase Agreement, 2004, includes a section on 'Warranties' but the contract does not refer to representations specifically, at 19, Art. 8 Warranties. The model contract includes, however, a section, at 24, "15.3 Non-reliance" stating that the parties "... could have not relied on any statement or representation (save in the event of fraud) or warranty not contained in the Agreement or contained in any of the agreed form documents and each party unconditionally waives and claims in relation to, any statement, representation (save in the event of fraud), warranty or undertaking which is not expressly set out or referred to in this Agreement of any of the "agreed form" documents." Additionally, attached to the same model contract are Schedules A and B, the headings of which both include the word representations. P. 37 Schedule A is titled "Representations and Warranties" and Schedule B is titled "Exceptions and Qualifications to the Representations and Warranties." In short, in all these model contracts or forms the word representation appears in one form or another, although there are some differences as to usage.

⁹¹⁰ See the examples in the books referred to in the preceding footnote.

⁹¹¹ Representations and warranties may include matters such as the financial position and accounts of the target; the targets' assets and liabilities, which would be more extensively addressed in asset deals; corporate matters; employment matters; disputes, environmental matters and ownership issues like title. The representations and warranties might furthermore include some more general assurances, e.g., regarding information provided and the conduct of business of the target during a certain period, maybe after a certain date of the latest financial accounts or regarding the period between signing and closing, if closing is deferred. Example warranties may be found in a large number of books. See e.g. Stilton, 2015, at 899–907, these example warranties pertain to share sales, they do not include tax warranties and they are described as 'short form'; and at 899–907, where warranties pertain to asset sales and are also described as 'short form'. See also Warren's Forms of Agreement, 2, 2007, Part II, Form 8.6.01, Stock Purchase Agreement, at 8-225 – 8-244 (seller's representations and warranties) and at 8-244 – 8-247 (buyer's representations and warranties). As to the Nordic countries, see e.g. Egholm Hansen and Lundgren, 2014, at 200–209

more generally worded assurances regarding, for example, information. These assurances clarify what the buyer may expect of the target and what the buyer may expect as to the ownership being transferred, but they also clarify what commitments the seller undertakes with regard to the target, the ownership and more generally to the transaction as such. It should also be acknowledged that once the contract incorporates representations and warranties by the parties, it has an effect on the risk allocation between the parties. This is due to the fact that representations and warranties in business acquisition contracts customarily include some form of undertaking by the party giving such statements, that is, that they are true and correct. It is just as typical that the representations and warranties given are subject to different kinds of qualifications. For example they may be qualified by seller's knowledge, by matters appearing in a separate disclosure schedule or as disclosed in the warranty section itself, or they may be qualified by the buyer's due diligence. Mostly the parties would negotiate and agree upon quite specific wording that defines what is meant, for example, by seller's knowledge, buyer's knowledge or due diligence.⁹¹²

4.4 Available remedies

4.4.1 Breach or non-fulfillment of conditions

Analyzing the traditional concept of conditions and consequences related thereto and remedies in case of non-fulfillment or breach shows a difference between the UK and the USA. The traditional English understanding of those consequences is that breach of a contractual condition may lead to the right to terminate the contract.⁹¹³ The reason for or nature of the breach or the consequences due to termination have not been decisive. John N. Adams and Roger Brownsword have explained the traditional English approach as meaning that, when courts consider whether or not a term is a condition, if it is not classified as such in the contract, in an Act or based on court precedent, the courts would just consider whether the term is "essential or fundamental" or if breach of the term

(seller's representations and warranties) and at 210 (buyer's warranties); Schans Christensen, 1998, at 202–237; Sevenius, 2012, at 303–304; Doepel, Fogelholm, Karanko, Saanio and Wilkman, 2011, at 366–372 and Buskerud Christoffersen, 2008, at 236–256.

⁹¹² If these qualifications are not defined in the contract, e.g. the expression 'Seller's Knowledge' does not in itself give any indication of how such knowledge should be assessed. It is a question of what is regarded as knowledge; is it actual knowledge, is it knowledge after due inquiry or inquiry that should have been made or is it a combination of these. As this dissertation deals with legal entities that have entered into contracts, it is also a question of whose knowledge is relevant, i.e. who are the persons/representatives of the seller to be included in the group of people relevant for determining the seller's knowledge? The same comments may be made with regard to 'Buyer's Knowledge'. Definition of due diligence may also be valuable in the sense that it could identify the information provided and limiting the representations and warranties. If nothing is specifically agreed, it would be a much more extensive and expensive process to prove what should be regarded as having been meant by these expressions.

⁹¹³ Instead of termination, some legal scholars use the term rescission when referring to the non-fulfillment of a condition and its consequences. However, in this dissertation the term rescission is used only in connection with misrepresentation. This is also the way e.g. Evan McKendrick has used the term rescission. McKendrick, 2013 at 237. When McKendrick discusses breaches of conditions, he refers to the right for a party to "terminate performance of the contract." This is evidently in order not to confuse the consequences of rescission in the case of a misrepresentation (retroactive and prospective effect) with "rescission" in the case of a breach of condition (prospective effect). McKendrick, 2013, at 324.

in question “necessarily would strike at the root of the contract.”⁹¹⁴ There are, however, several legal scholars, including Adams and Brownsword, who have claimed that according to the modern English approach the consequences of a breach would also be included in the analysis.⁹¹⁵ This may seem surprising, but on the other hand in the previous Chapter it was also noted that contemporary English contract interpretation has developed and interpretation is based more and more on a contextual method. This method is foremost related to background facts and not to subsequent events, but it may be a reflection of the fact that English contract interpretation has taken a more comprehensive view of contract interpretation. It may be recalled, for example, that when there are alternative solutions, English courts may use the alternative which makes more business common sense.⁹¹⁶ In addition to the right to terminate as a standard remedy under English common law and subject to the comments above, the ‘innocent’ party may have the right to claim damages due to a breach of condition.⁹¹⁷ Alternatively, the ‘innocent’ party may decide – regardless of non-fulfillment of the condition – to confirm the contract but claim damages.⁹¹⁸ Section 11(2) of the English Sale of Goods Act 1979 furthermore entitles the buyer to treat a breach of condition as a breach of warranty, but the courts may also treat a condition as a warranty and vice-versa.⁹¹⁹ Conditions denominated as conditions in contracts governed by English law would still have strong evidentiary value that the contract terms should be treated accordingly, but the courts could assess whether it would be typical that such conditions in that contract and context were intended to be conditions in their traditional, technical meaning.⁹²⁰ Conditions precedent are of most interest in this dissertation and if nothing is agreed in the contract, under English law the occurrence or non-occurrence of a contingent condition precedent as firstly suspending performance by the parties would eventually lead to the obligations of the parties being discharged either by the contract stating something to that effect, that it is otherwise obvious that the condition can no longer materialize and if nothing is stated in the contract the courts would evaluate the situation based on

⁹¹⁴ Adams and Brownsword, 2007, at 167.

⁹¹⁵ Adams and Brownsword, 2007, at 167. Adams and Brownsword identified four principles affecting the decision whether a term is to be regarded as a condition or not when analyzing what consequences a breach of condition should have i.e. they refer to the principle of proportionality (“it is unfair to the contract-breaker to allow the innocent party to withdraw for a breach with trivial consequences”), the bad faith principle (“a party should not be permitted to use a trivial breach as an excuse for a withdrawal from a contract when the real reason for withdrawal is not the breach itself”), to the certainty principle (“the innocent party should be left in no doubt as to the remedies he has in the event of a breach. The point here is that if A is in breach, but B’s withdrawal is unjustified, B (the innocent party originally) now finds his over-retaliation treated as a breach” and to the principle of sanctity of contract (“a party is not to be lightly relieved from the terms of his bargain”) This kind of evaluation has also been presented by other authors, although in somewhat different forms, but the main criteria being that not any breach of a less important term with reference to such term being a condition should give the right to terminate the contract. See further e.g. Guest, Reynolds and Beale, Chitty II, 2012, at 1468; McKendrick, 2013, at 179–181 and Collins, 2008, at 359–361. See also Macdonald and Atkins, 2014, at 123, observing that the courts would be careful with classifying even an express condition as a condition allowing termination considering that the parties may not have intended to use the term condition in its technical sense, if it would lead to unreasonable results. They referred to the case of *L Schuler AG v. Wickman Machine Tool Sales Ltd* [1974] AC 235; [1973] 2 All ER 39.

⁹¹⁶ See subchapter 3.3.2.1.

⁹¹⁷ See e.g. McKendrick, 2013, at 175.

⁹¹⁸ See e.g. McKendrick, 2013, at 175.

⁹¹⁹ §11(3) of the Act in question stipulates that the classification of the terms depends on the construction of the contract and mentions that even if a term is called a warranty, it may be regarded as a condition.

⁹²⁰ See e.g. Macdonald and Atkins, 2014, at 113–114, suggesting that outlines for the categorization may be found in *Bentsen v Taylor, Sons & Co (No 2)* [1893] 2 QB 274 and *Bunge Corp v Tradax Export SA* [1981] 1 WLR 711.

what can be regarded as a reasonable time.⁹²¹ Nevertheless, breach of a condition, not being a condition precedent but rather an important term of the contract, would still embrace the right to terminate the contract subject to the requirements described above.⁹²²

The discussion in the USA about non-occurrence and breach of conditions is quite extensive and includes *inter alia* discussions about material and substantial performance, failure of consideration, excuses for non-performance and consequences depending on the nature of the conditions.⁹²³ The main point is, however, that in the USA denominating terms as conditions in a contract has not as such entailed a right to terminate the contract, but the consequences of a breach of a condition are more focused on the nature of the condition.⁹²⁴ Based on the definition of conditions in the Restatement (Second), if a condition does not materialize, the assumption according to Section 225 is that there is no breach, unless otherwise agreed.⁹²⁵ In general, therefore, unless a party has undertaken some form of duty for fulfillment of a condition, then non-fulfillment of a condition would merely excuse and suspend performance but not give rise to other remedies.⁹²⁶ Arthur L. Corbin was as a matter of fact critical of the use of the expression “breach of contract” in cases of non-occurrence or failure of a condition, as breach is related to promises, but he did mention breach of contract in connection with promissory conditions, while Joseph M. Perillo mentioned the possibility of breach of a contractual duty when a condition precedent does not occur.⁹²⁷ In order for a party to be able to terminate a contract in the USA there has to be a total breach.⁹²⁸ Sections 236 and 237 of the Restatement (Second) draw a distinction between ‘material’ breach, which may lead only to suspension of performance, and ‘total’ breach, which entitles the innocent party to terminate the contract. The consequences in case of non-occurrence or breach of a condition would

⁹²¹ See e.g. Peel and Treitel, 2015, at 71 and also footnote 542 on the same page. See further Guest, Chitty I, 2012, at 921–922, who said with regard to conditions precedent that they are “normally contingent and not promissory, and in such a case neither party will be liable to the other if the condition is not fulfilled”.

⁹²² Treitel, 1995, at 704–705.

⁹²³ These matters have, e.g., been discussed by E. Allan Farnsworth. Farnsworth, II, 2004, at 446–487.

⁹²⁴ The definition of a condition according to §224 of the Restatement (Second) in fact amounts to a condition precedent. It may also be recalled that e.g. E. Allan Farnsworth maintained that an express condition does not even need to be material. Farnsworth, II, 2004, at 415.

⁹²⁵ §225 of the Restatement (Second): “(1) Performance of a duty subject to a condition cannot become due unless the condition occurs or its non-occurrence is excused. (2) Unless it has been excused, the non-occurrence of a condition discharges the duty when the condition can no longer occur. (3) Non-occurrence of a condition is not a breach by a party unless he is under a duty that the condition occur.” Comment a. to this section notes that the time for a condition to occur may either be fixed in the agreement or it might be supplied by the court (§204). Furthermore, it is noted that when a “discharge would produce harsh results”, this second effect may be avoided by rules of interpretation (§226, 228) or of excuse of conditions (Comment b. and §229). See also comment c. in relation to consequences for excused conditions: “...damages for breach of the duty will depend on whether or not the occurrence of the condition was also part of the performances to be exchanged under the exchange of promises... If the obligee is under a duty that the condition occur, the ground for the excuse of non-occurrence of the condition may not be a ground for discharge of that duty. He may therefore be liable for breach of the duty in spite of the excuse of the non-occurrence of the condition.”

⁹²⁶ For example Samuel Williston said that “Breach of promise subjects the promisor to liability in damages, but does not necessarily excuse performance on the other side. Breach of condition prevents the party failing to perform from acquiring a right, or deprives him of one, but subjects him to no liability.” Williston, 1924, at 1281–1282. Joseph M. Perillo, emphasizing the importance of the difference between promises and conditions, noted that non-fulfillment of a promise, if not excused, is a breach, but in general a failure for non-fulfillment of a condition is not. Perillo 2003, at 419.

⁹²⁷ Corbin, 3A, 1960, at 26–27 and Perillo, 2004, at 423.

⁹²⁸ See e.g. Perillo, 2004, at 430–431.

be based on how the parties have agreed upon the conditions and their effect, but if there is no separate agreement the conditions would be evaluated based on their nature and general interpretation principles.⁹²⁹ Therefore, if there is as such a valid contract, the parties would still be expected to act in good faith and not, for example, try to prevent fulfillment of a condition.⁹³⁰ However, if nothing is specifically agreed in the contract, conditions precedent would not give rise to any special remedies, but performance would be suspended and eventually be discharged either due to a specific contract term or based on the view that a condition cannot exist indefinitely.⁹³¹

The modern approach in the UK and in the USA, where the consequences of a breach is a factor to consider when discussing termination of contracts, may actually lead to the result that regardless of the theoretical differences, the practical outcome of a dispute is not necessarily all that different.

As stated above, the Nordic countries do not *per se* attach any special meaning to a contractual term denominated as a condition. Remedies in case of non-fulfillment of a condition or breach of condition would therefore depend on what kind of contractual term it is and whether the parties have attached some specific meaning to the term or to the remedies. Customary remedies for breach of contractual terms according to Nordic law are damages, cancellation,⁹³² termination⁹³³ or specific performance. As a general principle, a claim for cancellation of a contract requires a material breach of the contract in order to be successful in the Nordic countries.⁹³⁴ The requirement of materiality is also specifically provided for in some enacted laws.⁹³⁵ The question of materiality

⁹²⁹ See e.g. Knapp, 1996, at 224–225.

⁹³⁰ See e.g. Perillo, 2004, at 474–478.

⁹³¹ See e.g. Farnsworth, II, 2004, at 421–422.

⁹³² This term in English is the author's preferred use of the words *hävning*, *purkaminen*, *hevning* and *ophævelse* in Swedish, Finnish, Norwegian and Danish. In short, these terms mean in Nordic law that an agreement comes to an end based on a breach and it would normally be effective *ex nunc*. As to sale of goods, where the goods have been delivered the effect may rather be perceived as being effective *ex tunc*, as the goods should be re-delivered to the seller, who should repay the purchase price. It is also possible to cancel a contract only partially and yet regardless of the cancellation certain obligations may survive, e.g. confidentiality provisions. See with regard to sale of goods §64 of the Finnish, Norwegian (the only one mentioning specifically that cancellation does not affect confidential information and later dispute resolution and rights and obligations of the parties due to cancellation) and Swedish Sale of Goods Acts and §42 of the Danish Sale of Goods Act. However, an exception arises in the case of buyer's delay in payment, where – if the goods have been delivered to the buyer – cancellation is allowed only if the seller has reserved such right or the buyer refuses to take delivery. §54(4) of the Finnish, Norwegian and Swedish Sale of Goods Act and §28 (2) of the Danish Sale of Goods Act. See in general e.g. Gomard and Iversen, 2012, at 115–116 and Hellner, Hager and Persson, 2011, at 197–198, discussing cancellation in general when a contract has not been performed and contending that cancellation in fact means that the parties are not obliged to perform, but possible payment should be repaid and a right to damages might arise. See also at 198–199, discussing situations where performance has taken place. See further Hemmo, II, 2012, at 364–367 and Hagstrøm and Aarbakke, 2004, at 409 and at 426–445. Under §57 of the Danish Sale of Goods Act cancellation is possible only if the parties are able to return what they have exchanged.

⁹³³ This term in English is – with regard to the Nordic countries – used generally in this dissertation to describe the situation where a contract comes to an end *ex nunc*, the termination is not necessarily connected with a breach of contract and it is typically used in long-term contracts. In the Nordic countries the equivalent term would be *uppsägning*, *irtisanominen*, *oppsigelse* and *opsigelse* in Swedish, Finnish, Norwegian and Danish. In short, this kind of termination is used to differentiate the term cancellation in the sense that termination in this respect is based on a termination clause in the contract, the law or some Act recognizes the right of termination e.g. based on a breach of contract. For further comments see e.g. Bengtsson, 1967, at 6–7; Hemmo, II, 2012, at 376–395; Hagstrøm and Aarbakke, 2004, at 229–233 and Bryde Andersen, 2005, at 125–129.

⁹³⁴ See e.g. Bengtsson, 1967, at 104 and at 107; Hemmo, II, 2012, at 350; Hagstrøm and Aarbakke, 2004, at 410 and Gomard and Iversen, 2012, at 116 and at 122.

⁹³⁵ In this respect, and as earlier stated, here are disregarded general invalidity rules regarding, e.g., duress and fraud. See Hemmo, II, 2012, at 350, where he adds in footnote 4 several Acts where the materiality requirement is

would have to be evaluated based on a broad criteria of factors, as all relevant circumstances would be taken into account and with reference to the discussion above about main and secondary obligations the importance of the term might bear relevance.⁹³⁶ Cancellation requires a breach of contract, which however is not always the case with regard to conditions precedent. If a condition precedent does not occur and neither of the parties has assumed any liability for the occurrence or non-occurrence of the conditions precedent and/or both parties have acted in accordance with good faith in the performance of the contract, then non-occurrence might be said to lead to the situation where the contract could in fact be regarded as annulled.⁹³⁷ Annulment in general means that the contract is regarded as extinct *ex tunc*, which means that the whole contractual relationship comes to an end.⁹³⁸ However, that is not always what the parties to business acquisition contracts would want. When a binding contractual relationship has been established by the parties signing the contract including conditions precedent, the parties have probably recognized that contractual performance may not materialize due to those conditions precedent, but they may nevertheless assume, for example, that confidentiality provisions would have a continuing effect for a period after performance has been noted as being discharged. In order to attain such a state of affairs, the parties should rather specify this in their contract, as annulment often leads to the contract coming to an end in its entirety. However, in general under Nordic law, if a condition precedent has not occurred or it is anticipated that it will not occur within a reasonable time,⁹³⁹ the contract would come to an end without default by the parties, unless of course there is default based on other provisions of the contract or the parties have not acted in accordance with general contract law.⁹⁴⁰

Termination of the contract is always possible, if so agreed – not typical in business acquisitions – and termination in general does not require a breach of contract. At the very least, the parties should confirm to each other whether they regard the contract as still being in force to some extent, even though a condition precedent has not been fulfilled.

incorporated e.g. the Finnish Sale of Goods Act, the Finnish Real Estate Code and some others of less relevance to this dissertation; Ramberg and Ramberg, 2014, at 209–210 including footnote 24 at 209, referring to several sections of the Swedish Sale of Goods Act, the CISG, the Swedish Real Estate Code and several other Acts of less relevance for the present discussion; Hagstrøm and Aarbakke, 2004, at 410–411, where e.g. was referred to the Norwegian Sale of Goods Act, Leasehold Act, Companies Act; Bryde Andersen, 2003, at 401, who described materiality as a general rule which should be followed unless otherwise agreed or legislated. See also Wilhelmsson, Sevón and Koskelo, 2006, at 64, discussing the Finnish Sale of Goods Act, noting that materiality as a requirement for cancelling a contract is generally applicable. See further Clasen, Edlund and Ørgaard, 2012, at 22–23 and at 154 with regard to materiality according to the Danish Sale of Goods Act.

⁹³⁶ See e.g. Gomard and Iversen, 2012, at 122; Ramberg and Ramberg, 2014, at 209–210; Hagstrøm and Aarbakke, 2004, at 114 and at 409–411 and Hemmo, II, 2011, at 355–361.

⁹³⁷ See e.g. Taxell, 1972, at 162–168 and Hemmo, II, 2011, at 401–404.

⁹³⁸ Hemmo, II, 2011, at 401–402.

⁹³⁹ Such reasonable time could be assessed by the courts. See e.g. Bryde Andersen, 2003, at 204.

⁹⁴⁰ Bryde Andersen, 2003, at 215.

4.4.2 Breach of warranty

Under English law, as was described in the previous Chapter, a breach of warranty in general leads only to the right to claim damages.⁹⁴¹ Contractual damages for the breach of a warranty would be assessed based on expectation interest, that is, the innocent party should be put into the same situation as if the warranty had been true provided there has been a loss.⁹⁴² Section 50 of the English Sale of Goods Act 1979 furthermore contains stipulations on breach of warranties and the amount of damages. Computation of damages is a complicated matter, but it is not discussed further as such a discussion would go beyond the scope of this dissertation.

In the USA, no special meaning attaches to warranties as to their importance or to remedies in the case of breach of warranty. A breach of a warranty is in most cases breach of a promise,⁹⁴³ the customary remedy for which is damages.⁹⁴⁴ As in the UK, damages are based on expectation interest.⁹⁴⁵ Section 2-174 of the UCC sets out how a buyer's damages should be calculated in cases of breach of warranty.⁹⁴⁶ The other aspect to be considered with regard to US law is that breach of warranty was discussed in *Metropolitan Coal Co. v. Howard*, where it was said that:

... It [author's comment - warranty] amounts to a promise to indemnify the promisee for any loss if the fact warranted proves untrue, for obviously the promisor cannot control what is already in the past.⁹⁴⁷

'Indemnify', as used in this connection, means that a breach of warranty gives rise to the right to be compensated for losses incurred⁹⁴⁸ but a breach of warranty does not require that the innocent party should show inducement, materiality or justifiable reliance, as the case would be if there were a misrepresentation.⁹⁴⁹ The important matter here is the word 'indemnify', that is, there is no

⁹⁴¹ See subchapter 4.3.2 above. It was, however, also noted that the situation is no longer so clear-cut due to the introduction of innominate terms and also because opinions have been presented that termination could not be totally excluded in a serious enough breach of warranty.

⁹⁴² This statement is based on the fact that contractual damages in general are based on the expectation of interest, where the damages should put the innocent party in the same situation as if the contract was performed. See e.g. McKendrick, 2013, at 334 and Beale, Chitty I, 2012, at 1758–1759. Beale also mentioned the possibility that if the innocent party cannot prove actual loss, damages may be nominal.

⁹⁴³ Perillo, 2004, at 419.

⁹⁴⁴ Perillo, 2004, at 561.

⁹⁴⁵ §347 of the Restatement (Second). See also §352 of the Restatement (Second), which provides that damages are recoverable only to the extent of the amount "that the evidence permits to be established with reasonable certainty." See further Knapp, 1996, at 232; Perillo, 2004, at 566 and Farnsworth, III, 2004, at 149–150.

⁹⁴⁶ Note that this section refers specifically to 'accepted' goods, which again are further provided for in the UCC, but the provision on damages contains language to the effect that damages "... is the difference at the time and place of acceptance between the value of the goods accepted and the value they would have had if they had been as warranted." The section further provides that under special circumstances damages may be a different amount and also that in some cases incidental and consequential damages may be recovered. Such damages are in general provided for in §2–715 of the UCC.

⁹⁴⁷ 155 F.2d 780 (2d Cir. 1946) at 784.

⁹⁴⁸ The word 'indemnify' is defined in Black's Law Dictionary, 2014, at 886 as: "1. To reimburse (another) for a loss suffered because of a third party's or one one's own act or default; or – separately mentioned – "hold harmless" i.e." 2. To promise to reimburse (another) for such a loss. 3. To give (another) security against such loss."

⁹⁴⁹ See e.g. West and Lewis, 2009, at 1009.

indication that a breach of warranty would normally give the right to terminate a contract.⁹⁵⁰ Trying to invoke a remedy in the form of terminating the contract would be subject to the general requirement of ‘total breach’ in order to be allowed⁹⁵¹ and whether it would be possible to do so or not based on a breach of warranty would not be primarily a question of the denomination of the contract term, but on the nature of the breach and its consequences.

When contractual warranties regarding the target or the ownership of the target given explicitly by the seller to the buyer are not correct, the target of the sale is defective according to Nordic law. When the warranties include a promise or an undertaking by one of the parties as to the statements included in the warranties and that statement is not true, the liability of the warrantor is strict and the innocent party does not have to show negligence or other form of *culpa* by the warrantor.⁹⁵² The warranties given might be highly specific and the remedies in case of breach might be set out in the contract, but it is also worthwhile noticing that if the contract does not provide for remedies, guidance may be sought from secondary sources such as the Nordic Sale of Goods Acts.

When discussing warranties in general, it was mentioned that they could be regarded as specific undertakings referred to in Section 40(3) of the Finnish, Norwegian and Swedish Sale of Goods Acts. The remedies provided for in Section 40(3) are such that a buyer always has the right to compensation if the goods diverge at the time of concluding the contract from what the seller has specifically undertaken.⁹⁵³ Section 40 of the Finnish, Norwegian and Swedish Sale of Goods Acts states that a party is entitled to compensation if goods sold are defective.⁹⁵⁴ With regard to defective goods, damages based on this Section exclude indirect damages, except where the seller has been negligent, that is, the buyer would always have the right to compensation if the defect or loss is due to negligence on the seller’s part.⁹⁵⁵ The wording of the Norwegian Act is somewhat different, as the Norwegian Section 40 also mentions fraud and furthermore states that in international sales such compensation includes indirect losses.

The Finnish, Norwegian and Swedish Sale of Goods Acts additionally deal separately with so-called legal defectiveness.⁹⁵⁶ Section 41 provides for these legal defects, that is, defects in title whether through direct ownership or liens or other rights. Such defects always give rise to the right to claim damages provided that the buyer did not know or should not have known about the

⁹⁵⁰ It is a different issue that many business acquisition contracts in fact would exclude the right of termination or cancellation of the contract and provide for indemnification/damages as the sole remedy.

⁹⁵¹ Farnsworth, II, 2004, at 525–531, where he discussed termination due to total breach in general.

⁹⁵² See references in connection with discussing breach of warranties in the previous subchapter.

⁹⁵³ This may be regarded as confirming the principle of strict objective liability. See e.g. Buskerud Christoffersen, 2008, at 216.

⁹⁵⁴ The seller may avoid such compensation under certain circumstances in cases of what could be described as *force majeure* (§27 and 28 of the Acts in question). Furthermore, as to when goods are regarded as defective, §17, 18 and 19 of the Finnish, Norwegian and Swedish Sale of Goods Acts include provisions on that matter.

⁹⁵⁵ §40(2) and 40(3) of the Acts in question.

⁹⁵⁶ §30–40 of the Finnish, Norwegian and Swedish Sale of Goods Acts deal with remedies in the case of defective goods and §41 deals with legal defects i.e. defects in title.

defectiveness but this is obviously not so if the buyer actually contracted for goods with a restrictive title. The Danish Sale of Goods Act deals with the consequences of defective goods and defective title in Sections 42–54 and 59 respectively. Section 42(2) of the Danish Sale of Goods Act stipulates that if, when a party entered into the contract, the goods did not have such qualities as must be regarded as warranted, or if the lack of conformity was due to the seller's negligent behavior after the contract was concluded, or if the seller had acted fraudulently, the buyer may claim damages.⁹⁵⁷

The challenge in relation to breach of warranties is to identify what facts and circumstances actually should be regarded as defects and what the amount of damages should be. Analysis of different defects by legal scholars has sometimes been based on whether the defects are factual defects, disposition defects, or legal defects.⁹⁵⁸ These defects are of course dependent on the contract in question, but Thomas Wilhelmsson, Leif Sevón and Pauliine Koskelo gave examples of what these defects could be. For example, they mentioned as factual defects situations where the properties of the goods are not in line with what the buyer has the right to require based on the contract, while as disposition defects they mentioned an example where the buyer cannot use the goods according to the contract due to law or decisions by the authorities, and as legal defects they described situations where a third party owns the goods or there is some form of lien or other right.⁹⁵⁹ If we look at what has been stipulated in the Acts, Section 17 of the Finnish, Norwegian and Swedish Sale of Goods Acts states that goods are defective if they are not in accordance with the contract regarding description, quantity, quality and other properties.⁹⁶⁰ Warranties and contractual representations in business acquisition contracts certainly include descriptions of properties of the target. Section 42(1) of the Danish Sale of Goods Act does not include the same kind of definition of defects in relation to commercial relations, but it deals in general with goods (specific goods) which are not in conformity with the contract.⁹⁶¹ In all Nordic countries the buyer's knowledge or presumed knowledge may bear an impact on whether the buyer can actually claim in respect of such defects.⁹⁶² Whether there would be warranties which are of such importance that a breach of them would give the right to cancel a contract has to be discussed based on this requirement, but in practice other circumstances would also be taken into account, for example whether the buyer conducted a due diligence and what the parties have agreed as to the consequences in case of breach of warranty. It would not be easy to cancel a contract due to a breach of a warranty. In addition, it

⁹⁵⁷ See e.g. Egholm Hansen and Lundgren, 2014, at 285–287. The liability of the seller is objective and no *culpa* is needed if the seller has guaranteed some qualities. See e.g. Vinding Kruse, 1987, at 19.

⁹⁵⁸ Wilhelmsson, Sevón and Koskelo, 2006, at 91–93; Knabe, 1989, at 85–87 and Ramberg and Herre, 2014, at 94–98, but with reference to the CISG they also mentioned the possibility of 'intellectual property' defects.

⁹⁵⁹ Wilhelmsson, Sevón and Koskelo, 2006, at 91–92.

⁹⁶⁰ §17(1) and §17(3) of the Finnish, Norwegian and Swedish Sale of Goods Acts. These are matters which in one form or another very often would be explicitly warranted in business acquisition contracts.

⁹⁶¹ Note: the Danish Sale of Goods Act separates specific goods and generic goods. Generic goods not in conformity with the contract are covered separately in §43. Even in Denmark a similar understanding has been held as generally governing as in the other Nordic countries with regard to when the goods are defective. See e.g. Ussing, 1967, at 121–125; Bryde Andersen, 2005, at 112 and Clausen, Edlund and Ørgaard, 2012, at 152–153.

⁹⁶² See §20 of the Finnish, Norwegian and Swedish Sale of Goods Acts and §47 of the Danish Sale of Goods Act.

may also be noted that, for example, the Finnish, Norwegian and Swedish Sale of Goods Acts require – in cases of cancellation by the buyer due to seller’s delay in performance – that the breach is of material importance to the buyer and with regard to the Finnish and Swedish Acts that the seller understood or should have understood that.⁹⁶³ A similar stipulation provides for cancellation in the case of defective goods.⁹⁶⁴

If nothing is agreed in the contract about damages in case of breach of contract, compensation due to breach of warranties could be based on Section 67 of the Finnish, Swedish and Norwegian Sale of Goods Acts. Under that Section – and now disregarding the definition of indirect losses as these would not be covered in the case of warranties given except for international sales under the Norwegian Act – compensation would cover out-of-pocket expenses, price differences, loss of profit and other direct or indirect losses resulting from the breach. Damages would not cover losses due to damage to any property other than the goods sold. Furthermore, the Norwegian Act provides that “Only losses are included, which could reasonably have been foreseen as possible consequences of the breach of contract.” The fact that the other Acts do not include this specification may however be explained by the fact that even in contractual relationships there has to be some kind of causal link between a breach and the damage it has caused.⁹⁶⁵ The kind of damages allowed under Section 67 are based on positive contract interest, that is, a party should be put in the same situation as if the contract had been performed or fulfilled as agreed, which is generally how breach of contract would be compensated.⁹⁶⁶ It should also be noted that even if the contract includes limitation of liability with regard to damages based on seller’s warranties, in the Nordic jurisdictions a party cannot effectively exclude liability, if it is based on willful action or – albeit somewhat more disputed as to its meaning – gross negligence.⁹⁶⁷

⁹⁶³ See §25(1) of these Acts. For further comments see e.g. Hemmo, II, 2012, at 355–361. As to Danish law, see §(21) of the Danish Sale of Goods Act, which deals with the same issue, although the wording is somewhat more elaborate, but the most relevant difference may be regarded as the fact that this section specifically notes that in commercial sales any delay is considered to be material, unless the delay concerns only a minor part of the goods.

⁹⁶⁴ §39(1) of the Finnish, Norwegian and Swedish Sale of Goods Act, but this right is further qualified as the buyer is required – within a reasonable time after he noticed or should have noticed the defect – to inform the seller that he is going to cancel the sale. This restriction does not apply if the seller has acted grossly negligently or against good faith and honor. (§39(2)). See also Hemmo, II, 2012, at 355–361. §42(1) of the Danish Sale of Goods Act deals with the same issue and in the case of immaterial conformity the requirement is that the seller acted fraudulently.

⁹⁶⁵ See e.g. Ramberg and Herre, 2014, at 215; Hellner, Hager, Persson, II, 2011, at 221–222; Hagstrøm and Aarbakke, 2004, at 519; Wilhelmsson, Sevón and Koskelo, 2006, at 82 and Gomard and Iversen, 2012, at 229.

⁹⁶⁶ See e.g. Ramberg and Herre, 2014, at 194; Hellner, Hager, Persson, II, 2011, at 223; Bruserud, 2015A, at 276 and Wilhelmsson, Sevón and Koskelo, 2006, at 82. About positive contract interest in Danish law, see e.g. Gomard and Iversen, 2011, Chapter 12, at 195–256.

⁹⁶⁷ See e.g. Hagstrøm and Aarbakke, 2004, at 632; Hellner, Hager, Persson, II, 2011, at 242; Hemmo, II, 2012, at 287–288; Liebkind, 2009, at 130 and Adlercreutz and Gorton, II, 2010, at 117, who on the other hand note that the question of gross negligence is somewhat more doubtful. See NJA 2014.960, stating that liability limitation provisions are not effective with regard to intentional breaches of contract. See also Gomard and Iversen, 2012, at 314.

4.4.3 Misrepresentations and breach of contractual representations

Remedies for misrepresentation under common law may be based both under English and US law, on tort laws, on contract law and in the UK also based on the Misrepresentation Act 1967.⁹⁶⁸

Under English law, even if a representation which turns out to be a misrepresentation has become a contract term, this does not preclude the remedies available under the Misrepresentation Act 1967, as stated in Section 1(a) of the Act.⁹⁶⁹ Rescission of the contract for any kind of misrepresentation is possible⁹⁷⁰ and damages may be awarded based on Section 2(1)⁹⁷¹ of the same Act. However, the parties' right to rescission is somewhat limited, as Section 2(2)⁹⁷² of the Act provides the court with the discretionary power to decide whether damages should be awarded instead of rescission, if such consequences would be equitable. This Section does not apply to cases of fraud.⁹⁷³ In other words the choice of remedy in the form of rescission or damages is vested with the courts according to the Misrepresentation Act 1967.

Under English law the innocent party also has the right to rescind a contract under common law in the case of fraudulent, negligent or innocent misrepresentation.⁹⁷⁴ When a contract has been entered into based on a fraudulent misrepresentation as defined in English law, the contract could not only be rescinded, but it could also give the right to damages based on the tort of deceit.⁹⁷⁵ The aim of such damages would be to put the innocent party in the position he would have been in if the misrepresentation had not been made and the contract not entered into.⁹⁷⁶ Negligent misrepresentation at common law could also give the right of rescission and/or damages based on the tort of negligence. Damages for negligent misrepresentation based on the tort of negligence would be to put the innocent party in the same situation as if the misrepresentation had not been

⁹⁶⁸ See Beale, Chitty I, 2012, at 571 and Farnsworth, I, 2004, at 465 and at 499–500. See also Hoffer, 2014, at 166–167. See further with regard to the USA the Restatement (Second) of Torts 1977.

⁹⁶⁹ The wording of §1 of the Misrepresentation Act 1967 was described above in subchapter 4.3.3.2.

⁹⁷⁰ As to the right of rescission even when the misrepresentation has been included in the contract as a warranty, see e.g. Beale, Chitty I, 2012, at 634.

⁹⁷¹ The wording of §2 (1) of the Misrepresentation Act 1967 was described above in subchapter 4.3.3.2.

⁹⁷² §2(2) of the Misrepresentation Act 1967 provides that: “Where a person has entered into a contract after a misrepresentation has been made to him otherwise than fraudulently, and he would be entitled, by reason of the misrepresentation, to rescind the contract, then, if it is claimed, in any proceedings arising out of the contract, that the contract ought to be or has been rescinded, the court or arbitrator may declare the contract subsisting and award damages in lieu of rescission, if of opinion that it would be equitable to do so, having regard to the nature of the misrepresentation and the loss that would be caused by it if the contract were upheld, as well as the loss that rescission would cause to the other party.”

⁹⁷³ Adams and Brownsword, 2007, at 160. See also with regard to the definition of fraud Lord Herschell's statement (at 374) in *Derry v Peek* (1889) L.R. 14 App. Case 337, where he said that “... fraud is proved when it is shown that a false representation has been made; (1) knowingly; or (2) without belief in its truth, or (3) recklessly, careless whether it be true or false.” This statement is referred to by several authors discussing fraudulent misrepresentation e.g. McKendrick, 2013, at 231; Beale, Chitty I, 2012, at 602; Macdonald and Atkins, 2014, at 301.

⁹⁷⁴ See e.g. Stone, 2013, at 287; Macdonald and Atkins, 2014, at 300 and Chen-Wishart, 2012, at 223, who claimed that the common law category of innocent misrepresentation has in this connection lost most of its relevance.

⁹⁷⁵ See McKendrick, 2013, at 239; Peel and Treitel, 2015, at 420; Macdonald and Atkins, 2014, at 301 and Beale, Chitty I, 2012, at 601.

⁹⁷⁶ Beale, Chitty I, 2012, at 604. See e.g. Macdonald and Atkins, 2014, at 302, pointing out that this form of damages does not aim at putting the person in the situation he would have been in if the misrepresentation had been true.

given, but damages have to be ‘reasonably foreseeable’.⁹⁷⁷ It may also be noted that under common law there is no right to damages for innocent misrepresentation which has no contractual force.⁹⁷⁸ When damages are awarded based on the Misrepresentation Act 1967 section 2(1), it seems that it is likely that the damages would be assessed as damages based on tort, as was stated in *Royscot Trust Ltd v Rogerson*,⁹⁷⁹ which means that reliance interest would be covered. However, there has been a discussion about whether the amount/quantum of damages would be different in cases based on Section 2(2) of the Misrepresentation Act 1967, when the court uses its discretionary power to award damages instead of rescission, but the situation is not clear.⁹⁸⁰ In other words, under English law, a representee may decide to claim rescission of the contract based on a misrepresentation which has been incorporated as a term of a contract.⁹⁸¹ If that route is taken, the party could also claim damages, which could lead to damages based on expectation interest if the claim is successful.⁹⁸² Such damages are subject to the requirements for mitigation by the innocent party, not too-remote losses: there has to be causality between the breach and the loss.⁹⁸³ On the other hand, rescission and damages may also be claimed for misrepresentation based on tort law, as the consequences are to be found not only in contract law, but also in tort law.⁹⁸⁴ Whether it is possible to invoke certain remedies under the Misrepresentation Act 1967 and also invoke breach of contract, that is, combining the different paths is somewhat debated. Treitel has stated that is not a clear-cut case that a person could rescind under the Misrepresentation Act 1967 and additionally claim damages due to breach of contract,⁹⁸⁵ as rescission under the Act would presumably not allow any other liabilities. Treitel has on the other hand also pointed out that the court may declare the contract still existing based on Section 2(2) of the Act and thus allow such a combination.⁹⁸⁶ In *F & H Entertainments Ltd v Leisure Enterprises Ltd*, both rescission under the Misrepresentation Act 1967 and damages were allowed.⁹⁸⁷ In *AXA Life v Campbell Martin Ltd*,⁹⁸⁸ an entire agreement

⁹⁷⁷ McKendrick, 2013, at 239.

⁹⁷⁸ Treitel, 1995, at 338.

⁹⁷⁹ [1991] 3 All ER 294

⁹⁸⁰ See e.g. Stone, 2013, at 297 and McKendrick, 2013, at 240–241. That it should be reliance interest has been defended by McKendrick, see McKendrick, 2013, at 240.

⁹⁸¹ See e.g. Peel and Treitel, 2015, at 430 and Beale, Chitty I, 2012, at 635.

⁹⁸² The traditional definition of expectation interest is to be found in *Robinson v Harman* (1848) 1 Ex 850, 855, affirming that a party who incurs losses due to breach of the contract should be put in the same situation as if the contract had been performed. See e.g. Macdonald and Atkins, 2013, at 302. See also McKendrick 2013, at 322–358, discussing damages in cases of breach of contract. McKendrick, 2013, at 334: the “general rule is that an award of damages for breach of contract seeks to protect the claimant’s expectation interest.” See Cowper, 2013, at 3, dealing with the differences between damages depending on which route is taken. Cowper pointed out that damages in tort for misrepresentation would be to put the purchaser “... into the same economic position as if the misrepresentation had not been made, that is, usually, that no contract would have been made...”, adding “... if the purchaser paid more than the market value, it can recover not only the value of the warranted fact but also the loss suffered because the purchaser overpaid for the business in its warranted condition.”

⁹⁸³ See e.g. McKendrick, 2013, at 347–354.

⁹⁸⁴ Beale, Chitty I, 2012, at 571. See also Harperwood, 2000, at 9, stating that tort is foremost a common law subject, although there are some statutory exceptions. USA: Hoffer, 2014, at 166–167. See also with regard to the United States Restatement (Second) of Torts 1977. Subsequently a Third Restatement was published but that is focused on product liability. See with regard to equitable remedies subchapter 2.2.4.

⁹⁸⁵ Peel and Treitel, 2015, at 458.

⁹⁸⁶ Peel and Treitel, 2015, at 458. See similar comment by Mindy Chen-Wishart, Chen-Wishart, 2012, at 205.

⁹⁸⁷ [1976] 120 S. J.331. See e.g. Beale, Chitty I, 2012, at 617 and Macdonald and Atkins, 2014, at 300.

⁹⁸⁸ [2011] EWCA Civ 133, reference was made when discussing the effect of entire agreement provisions.

provision was found to be valid as a contractual undertaking, but it did not prevent the innocent party from claiming for misrepresentation under the law of tort. The same was the case in *Bikam OOD v Adria Cable*.⁹⁸⁹ When the misrepresentation is not a term of the contract but has induced a party to enter into the contract, rescission means that the contract is terminated *ab initio*. When a contract is terminated due to a misrepresentation but based on a claim for breach of contractual duty, the contract would rather be terminated as from the termination date but not regarded as never having existed.⁹⁹⁰ In general the question of excluding misrepresentations is addressed in Section 3 of the Misrepresentation Act 1967, which allows specific exclusions based on a reasonableness test, as defined in the UCTA.⁹⁹¹

In the USA the effects of misrepresentations based on contract law according to the Restatement (Second) may lead to the situation where there is no contract at all, it may lead to a contract being voidable and it may allow the courts to reform the contract.⁹⁹² It should be noted that according to the Restatement (Second) a pre-contractual misrepresentation in contract law does not give the right to claim damages, only rescission, while damages may be awarded based on tort law.⁹⁹³ Most often misrepresentations are claimed when a contract has been entered into and a claimant wants to terminate or cancel the contract and perhaps claim restitution⁹⁹⁴ or continue with the contract but claim damages.⁹⁹⁵ The remedies for misrepresentation in the USA are not only based on contract law but, just as in the UK, they may also be awarded based on tort laws.⁹⁹⁶ Joseph M. Perillo has summarized the requirements for tort actions due to fraudulent misrepresentation as (1) a representation, (2) falsity, (3) *scienter*, (4) deception, and (5) injury.⁹⁹⁷ Stephanie R. Hoffer summarized the elements for tort actions due to deceit as follows: a) there has to be a representation not in accordance with the facts, b) there has to be an intent to deceive, mislead or convey a false impression, c) there has to be intention to induce the plaintiff to act or refrain from acting based on the misrepresentation, d) there has to be justifiable reliance on the misrepresentation, and e) the misrepresentation must be material and not trivial, and f) the innocent party must suffer damage due to their reliance on the misrepresentation.⁹⁹⁸ Whilst misrepresentation claims in the USA under

⁹⁸⁹ [2012] EWHC 621 (Comm)

⁹⁹⁰ Treitel, 1995, at 342.

⁹⁹¹ §3 of the Misrepresentation Act 1967: "If a contract contains a term which would exclude or restrict (a) any liability to which a party to a contract may be subject by reason of any misrepresentation made by him before the contract was made; or (b) any remedy available to another party to the contract by reason of such a misrepresentation that term shall be of no effect except in so far as it satisfied the requirement of reasonableness as stated in section 11 (1) of the Unfair Contract Terms Act 1977; and it is for those claiming that the term satisfies that requirement to show that it does."

⁹⁹² See Introductory Note to Chapter 7. Misrepresentation, Duress and Undue Influence, Topic 1 Misrepresentation, at 1. The relevant paragraphs with regard to the effects are to be found in §163, 164 and 166 of the Restatement (Second).

⁹⁹³ Ibid (footnote above, now 156), where the paragraph in question refers to the Restatement, Second, Torts.

⁹⁹⁴ When a party is claiming restitution in connection with terminating a contract due to misrepresentation the provisions of the Law of Restitution and subsequent Restatements of the Law of Restitution would have to be considered including provisions on misrepresentation. For further information see e.g. Sherwin, 2003, at 1017–1019.

⁹⁹⁵ For further deliberation on the different alternatives see e.g. Stark, 2006.

⁹⁹⁶ Hoffer, 2014, at 166–167. See also Restatement (Second) of Torts 1977. There may also be equitable remedies i.e. restitution. See Perillo, 2004, at 355–360.

⁹⁹⁷ See Perillo 2004, at 337.

⁹⁹⁸ Hoffer, 2014, at 166–167.

common law require that the misrepresentation is either fraudulent or material,⁹⁹⁹ under tort laws misrepresentation should be both fraudulent and material.¹⁰⁰⁰ However, in certain cases even negligent misrepresentations may lead to liability under tort laws.¹⁰⁰¹ It has also been said that in general only misrepresentation of present or existing fact may form the basis for fraud claims.¹⁰⁰² The situation is not the same in all states and in Texas promises of future performance which have been incorporated into a contract may be actionable misrepresentations.¹⁰⁰³

The Restatement (Second) does not deal with situations where a misrepresentation has been incorporated as a term in a written contract.¹⁰⁰⁴ The UCC contains provisions only on warranties and not on representations. Representations, when included in a contract and “bargained for” and assured to be correct, are regarded as warranties so that breach of a contractual representation is therefore basically a breach of contract. The question is, though, whether – regardless of inclusion – a party may still be able to claim for misrepresentation based on tort and claim for misrepresentation regarding representations not included in the contract. It seems that the states have a divergent approach to these matters.¹⁰⁰⁵ As an example, West and Lewis have mentioned Texas and referred to *Formosa*,¹⁰⁰⁶ where it was stated that “tort damages are recoverable for a fraudulent inducement claim irrespective of whether the fraudulent representations are later subsumed in a contract or whether the plaintiff only suffers an economic loss related to the subject matter of the contract”.¹⁰⁰⁷ West and Lewis have also mentioned that New York courts generally require that an allegedly fraudulent representation be “collateral or extraneous to the terms of the parties’ agreement.”¹⁰⁰⁸ Possible anti-reliance or reliance provisions as well as entire agreement provisions may affect the evaluation. It is not possible to go through the situation in all the different states, but whatever state law is applicable, the parties would need to investigate the situation in that particular state, as the situation differs between the states.

Last but not least, when a party sues for misrepresentation, the parol evidence rule is not applicable in the common law countries.¹⁰⁰⁹ This is logical to the extent that the nature of misrepresentation with the inducement and reliance elements would otherwise make it impossible for a party to prove

⁹⁹⁹ §164(1) of the Restatement (Second).

¹⁰⁰⁰ §525–530 and 538 of the Restatement (Second) of Torts 1977.

¹⁰⁰¹ §552 of the Restatement (Second) of Torts 1977.

¹⁰⁰² West and Lewis, 2009, at 1013.

¹⁰⁰³ West and Lewis, 2009, at 1014.

¹⁰⁰⁴ Compared with the situation in the UK, where the Misrepresentation Act 1967 deals with such situations.

¹⁰⁰⁵ West and Lewis, 2009, at 1001. West and Lewis mention as states not seeming willing to enforce limitation clauses on pre-contractual fraud: Massachusetts, New Hampshire, Nevada, Wisconsin, Wyoming, California, Missouri and Oregon; West and Lewis, 2009, at 1024–1025. As states where a specific disclaimer clause is enforceable and may bar these types of claim they mention New York (based on the factual circumstances), Alabama, Kansas, and Rhode Island; West and Lewis, 2009, at 1027.

¹⁰⁰⁶ 960 S.W.2d at 47.

¹⁰⁰⁷ West and Lewis, 2009, at 1014.

¹⁰⁰⁸ West and Lewis, 2009, at 1014.

¹⁰⁰⁹ See e.g. Farnsworth, II, 2012, at 245.

misrepresentation, unless that party could also refer to and use evidence from the pre-contractual stage.

Under Nordic law, the remedies available for breach of representations or pre-contractual misrepresentations would have to be dealt with somewhat differently. When representations have been included in the contract and actually amount to nothing other than warranties, the same remedies are available as in the case of breach of warranties. In other words, denominating a term as a representation is not decisive, unless of course the parties have made clear that representations are to be understood according to their English or US meaning. When contractual representations include a promise or an undertaking by one of the parties as to the statements included and such statement is not true, the liability of the warrantor is strict and the innocent party does not have to show negligence or other form of *culpa* on the part of the warrantor.¹⁰¹⁰ If the remedies are not set out in the contract, as noted above, guidance may be sought from secondary sources such as the Nordic Sale of Goods Acts. These remedies would be similar with regard to contractual representations and contractual warranties and the remedies were described above when discussing breach of warranties. Additionally, it may be recalled that when discussing representations as legal concepts, reference was also made to Section 30 of the Nordic Contract Acts as to the fraudulence and inducement aspects of common law misrepresentations. If the requirements of Section 30 are fulfilled, it means that the contract is not binding on the innocent party provided that the contract has been entered into due to the fraudulent actions.¹⁰¹¹ Furthermore, Section 33 of the Nordic Contract Acts may be invoked. Section 33 of the Finnish Contract Acts stipulates that “A transaction that would otherwise be binding shall not be enforceable if it was entered into under circumstances that would make it incompatible with honor and good faith for anyone knowing of those circumstances to invoke the transaction and the person to whom the transaction was directed must be presumed to have known of the circumstances.”¹⁰¹² It has been held that in order for this Section 33 to become applicable, the party who has given the incorrect information should have known, or must be assumed to have known, of the fact that the information the other party relied on was not correct and the other party was not aware of that incorrectness.¹⁰¹³ ‘Circumstances’ is a very broad description and can be used in a number of cases, but if this Section is employed the

¹⁰¹⁰ Schans Cristensen, 1998, at 191; Hellner, Hager and Persson, 2011, at 108; Gomard and Iversen, 2012, at 198; Hagstrøm and Aarbakke, 2004, at 514 and Wilhelmsson, Sevón and Koskelo, 2006, at 129. Clearly, if the buyer’s actions or non-actions have led to the breach, the seller’s liability would not be strict.

¹⁰¹¹ See e.g. Restatement of Nordic Contract Law, 2016, at 141–142.

¹⁰¹² This is the unofficial English text of the Finnish Contract Act, but the other Nordic Contract Acts state the same, although the wording is slightly different.

¹⁰¹³ It has been pointed out that there must be actual knowledge about circumstances “incompatible with honor and good faith”, but also that on the other hand it is sufficient according to the same section, if the other party “must be assumed” to have known about the circumstances. Hemmo, I, 2007, at 368–369. Kurt Grönfors described the differences as that the requirement of knowing should be assessed objectively, while the requirement of “must be assumed to know” should be assessed subjectively. Grönfors and Dotevall, 1995, at 207–208 and 2016, at 244–245. The fact that these circumstances attach to the time at the emergence of the legal act has been seen as quite restrictive in comparison with §36 of the Nordic Contract Acts. Grönfors and Dotevall, 1995, at 207 and 2016, at 244. See also Woxholth, 2014, at 267, pointing out that the circumstances must exist at the time of entering into the contract and that this section does not deal with subsequent circumstances and at 270, arguing that the wording of the section as such indicates that invalidity does not occur if the other party did not know about the circumstances.

contract would be set aside.¹⁰¹⁴ The threshold for invoking this Section successfully in business acquisitions is high, especially if the buyer had conducted due diligence prior to entering into the contract and/or where both parties are business entities with similar bargaining power. Section 36 of the Nordic Contract Act is broader in its application as it may also be applied to circumstances after entering into the contract, to the contents of the contract and with regard to the remedies, so not only could the contract be set aside, but the courts could also adjust the contract in whole or in part. However, Section 36 is seldom used in contracts between business parties, although there is no legal obstacle as such to using it even in commercial contracts between business parties.¹⁰¹⁵ The intention of the parties has an impact on whether Section 36 would be applied or not and as such an example has been taken a situation where a party would make a contract with the aim of gaining substantial profits and when that has not materialized the party should not have the right to claim adjustment of the contract in normal cases.¹⁰¹⁶ Section 36 of the Finnish, Norwegian and Swedish Contract Act also mentions specifically that when evaluating unreasonableness due consideration should be taken as to the position of the parties. As noted earlier, when evaluating the position of the parties, their professionalism and economic strength as well as the extent to which freedom of contract actually prevails have been mentioned as elements to consider.¹⁰¹⁷

In all contractual relationships and contracts the loyalty principle is present, but it does not necessarily have a specific impact on the remedies available for breach of contractual representations or misrepresentations. It may of course be used as an argument for defending a certain argument.

4.5 Conclusions and open questions

In the above analyses a detailed review has been carried out of conditions, warranties and representations as understood in the common law countries and how these contract terms and legal concepts could be understood under Nordic law. Based on the above detailed analysis, the following is submitted as a summarized standpoint on the possibility to find equivalent Nordic terminology.

When analyzing conditions as a contract category, it has been shown that the perception of conditions is not identical in the two common law jurisdictions. Contractual conditions according to English law entail that they are very important terms and that merely denominating or constructing contract terms as conditions entitles the innocent party to terminate the contract in case of a breach. Contemporary English law, however, tends also to analyze the remedies for breach

¹⁰¹⁴ There is a fairly old court case from the Norwegian Supreme Court (Rt. 1935.1079), where the seller not only gave incorrect information to the buyer, but also was silent about the relevant circumstances and where the court found that it would be against 'honor and good faith' to uphold the binding nature of the purchase. It is worth noting that if §33 is applied the contract is set aside and it is not possible to e.g. amend the contract.

¹⁰¹⁵ This matter was discussed under subsection 2.2.2 and several references were made.

¹⁰¹⁶ See e.g. Hemmo, II, 2012, at 76.

¹⁰¹⁷ See e.g. Hemmo, II, 2012, at 64–71 and Bruserud, 2015B, at 71.

of a contractual condition based on the consequences. In the USA the traditional English view of conditions has been questioned and the discussion on conditions under US law has been based on a more functional approach. In general, contractual conditions under US law are understood as in one way or another qualifying or limiting the undertakings by the parties. Contrary to the English understanding, there is no inherent right to terminate a contract due to breach of a contractual condition. When analyzing Nordic law based on the traditional English understanding of conditions, the closest resemblance in Nordic contract law would be the division of contractual obligations into main and secondary obligations, as preferred by some legal scholars. However, this is not completely comparable, as main obligations may be important terms, but not all of them are necessarily equally important. There is neither an inherent right to terminate or cancel the contract due to breach of a main obligation, although it may play a role in assessing the materiality of a breach under Nordic law. If understanding conditions, as in the USA, as rather just qualifying or limiting the undertakings by the parties, this understanding would be closer to how conditions in contracts are generally perceived in the Nordic countries. In the case of breach of such a condition, both in the USA and in the Nordic countries the remedies would be dependent on what the parties have agreed with regard to the conditions, that is, what kind of undertaking is reflected in the condition and whether the parties have agreed upon some specific remedy. However, contrary to the English perception, breach of condition does not imply that there would be a right to terminate the contract.

Both in the USA and in the Nordic countries conditions are often discussed based on the concept of conditions precedent. These are also the most frequently used conditions in business acquisition contracts. Conceptually, conditions precedent may have been given distinct features in the common law jurisdictions, but their use in business acquisition contracts does not substantially differ between the legal families. The remedies are also not so profoundly different, if the conditions precedent do not occur, that there would be a huge gap as to whether conditions precedent are used in the common law sense or whether they are to be interpreted under Nordic law. There is thus no inherent problem when a contract includes conditions precedent and Nordic law is governing.

Similarly to the differences between the understanding of conditions under English law and US law, the theoretical understanding of warranties shows a difference between the two common law countries. Warranties have traditionally, under English law, been perceived as less important contract terms than conditions, while in the USA this theoretical difference is not acknowledged. Nevertheless, when analyzing the nature of warranties there are more similarities between the two common law countries, as in both countries warranties can be described as promises that a certain state of affairs is true. However, under English law a breach of warranty may only lead to liability for damages, while breach based on case law in the USA leads in principle to the right for the innocent party to be indemnified. Under US law, warranties do not by their nature exclude the possibility of terminating the contract if the breach amounts to a total breach. The termination

alternative is based on general contract law and not specifically attached to the fact that a contract term is called a warranty. Warranties are not categorized as a distinctive group of contractual terms in the Nordic countries and there is no assumption, as under English law, that warranties are less important contract terms or that the remedies would be circumscribed. The Nordic Sale of Goods Acts do not use the words 'warranties', but include provisions on 'specific undertakings' in connection with available remedies in the case of breaches of these specific undertakings. There has been some discussion amongst Nordic scholars as to what the term 'specific undertaking' means, but explicit warranties as discussed here would undoubtedly be regarded as specific undertakings. It may further be noted that the Nordic Sale of Goods Acts in fact also recognize different kinds of warranties, as there are different provisions for remedies in the case of defective goods and in the case of defective title. When discussing the use of warranties in business acquisition contracts governed by Nordic law based on contract law in general, it is not decisive whether the assurances are labelled 'warranties' or not, as the analysis of what kind of contract term is involved would be based on the contents of the contract term and the interpretation of the term in question would be based on general interpretation methods. Although calling contract terms warranties gives a strong indication that the parties intended them to amount to some form of promises, the denomination is not sufficient, but the consequences depend on the contents of the warranties and contract provisions related thereto. Conceptually, however, warranties in the common law countries and the Nordic countries do not substantially differ and the difference with regard to remedies is divided between English law and the laws of the other jurisdictions. Nordic law is as such apt also to deal with warranties.

Representations were described above to mean in both common law countries statements of past or present facts, and in some instances law, which have induced the other party to enter into a contract and that party has justifiably relied on the statement. As distinct a definition of representations is not found in Nordic law, but compatible concepts may be found by using several rules and principles, for example the rules on information and defectiveness in goods under the Nordic Sale of Goods Act. On the other hand, when representations are incorporated into a contract as contractual terms, they may even in the common law countries amount to nothing more than warranties. However, such inclusion does not extinguish the risk that under certain circumstances claims for misrepresentation can still be made. Under English law this is specifically provided for in the Misrepresentation Act, but under both English law and US law such actions may be taken based on contract law or tort law. Rescission is a specific remedy available for misrepresentation under English law and under some circumstances under US law. Under Nordic law, when representations are included as contractual terms then – unless something is specifically agreed to the contrary – representations could be perceived as specific undertakings referred to in the Nordic Sale of Goods Acts. Remedies would not in the Nordic countries be tied to the denomination of the contract term, but rather to its contents and the consequences of breach. Therefore, similar considerations as put forward regarding warranties were repeated with regard to contractual

representations. The biggest difference is probably misrepresentations as dealt with in the common law jurisdictions. If the contract is governed by Nordic law, the parties have multiple alternatives as a basis for an action, for example, under the Nordic Contract Acts, the Sale of Goods Acts or by referring to good faith and loyalty. Section 30 of the Nordic Contract Acts enables an innocent party to claim remedies based on fraudulent misrepresentation as understood in Nordic law. Furthermore, the fact that misrepresentations in the common law countries are often discussed based on statements having been made prior to or on entering into a contract does not pose a problem as such in the Nordic jurisdictions, as there is no parol evidence rule governing and in general the possibilities are greater to refer to pre-contractual evidence. This whole field of law is also quite diversified in the common law countries, as is also the case law in this regard. Therefore, the effect of representations and misrepresentations is to some extent unpredictable even in the common law countries. Even though the concepts of representations and misrepresentations form an entirety in the common law countries which is not easily matched in the Nordic countries, it is not an impossible task to find equivalent means of action in the Nordic countries.

An important conclusion – based on analysis of the three common law concepts – conditions, warranties and representations, including remedies – is that there are differences between the understanding and the implications of the use of these concepts and contract terms in the UK and in the USA respectively. Further, US case law shows differences in application between the individual states. The case law both in the UK and in the USA also shows that the concepts and their implications have evolved over time. That is, of course, how law should work, that is, it has to be adjusted as the circumstances in which the legal concepts should work change. Nevertheless, on a general level there may be found either equivalent concepts or – by using more extensive interpretation methods – the essence of the common law concepts conditions, warranties and representations may be construed based on Nordic contract law. The discussion has nonetheless been on a conceptual, fairly general level and still questions remain unanswered. For example, in transactions the above-discussed contract terms, especially warranties or representations and warranties, are so often included in contracts that it may be seen as reflecting some form of market practice. This is not the same as saying that these contract terms have been given an exact, internationally accepted definition in terms of business acquisitions. Furthermore, the origin of the terms is to be found in common law, but when the contract includes a governing law provision which does not represent a common law jurisdiction, the question is: whose understanding of these legal concepts will prevail? Therefore, the following will cover the use, how other contract provisions may affect the interpretation and what other matters should be taken into consideration when analyzing how common law terminology should be interpreted in business acquisition contracts governed by Nordic law. The analyses will take into account what kind of differences appear when the situation is based on common law or on Nordic law respectively. As to other matters relevant for interpretation, the following will also cover how the use of the English

language, the cross-border element and market practice may bring additional aspects to be considered in interpretation.

5 ASPECTS TO CONSIDER WHEN INTERPRETING BUSINESS ACQUISITION CONTRACTS BASED ON NORDIC LAW

5.1 Introduction

The previous Chapter discussed conditions, warranties and representations as examples of common law terminology frequently used in business acquisition contracts. The terminology was discussed based on the meaning of the underlying legal concepts in the respective common law jurisdiction and whether compatible concepts may be found or construed under Nordic law. The conclusion was that it is not overly difficult to find equivalent Nordic concepts to conditions as understood under US law and warranties as understood in both common law jurisdictions. Representations as common law concepts were found to be more difficult to adopt directly into Nordic law and in order to find compatible concepts more elaborated constructions would have to be made. It was also concluded that concepts in themselves and the denomination of contract terms are not sufficient in contract interpretation, but the use of terminology and the contents of contract provisions put into context are essential elements. This will be further exemplified in the present Chapter by scrutinizing the use of conditions, warranties and representations in business acquisition contracts.

In the following, the underlying, conceptual understanding of the terminology will be analyzed when discussing the particularities of business acquisitions in general and by reviewing the typical structure of these contracts including the interrelation between different contract provisions. As part of this discussion the impact the cross-border element may have on such interpretation will also be reflected upon. The cross-border element was already discussed in Chapter 3, where the written contract was given status as the most important interpretation source and which was further emphasized with regard to cross-border business acquisitions.¹⁰¹⁸

In this dissertation the fact that business acquisitions are often extensive processes has been referred to. Even though the written contract has been held to be the most important interpretation source, it cannot be excluded that the surrounding circumstances of the contracting may affect contract interpretation. Therefore, in discussing interpretation of business acquisition contracts – both domestic and cross-border contracts – due consideration will be given to other typical elements of the process, for example how due diligence and other statements and actions during the pre-contractual stage may affect interpretation of these contracts.

Additional elements influence interpretation of business acquisition contracts and especially in cross-border transactions. These will be considered below. One aspect is the question of language.

¹⁰¹⁸ See subchapter 3.6.

Cross-border business acquisition contracts are often drafted in the English language,¹⁰¹⁹ but it is not unusual that even domestic acquisition contracts are drafted in English. Some of the reasons for this development were presented in Chapter 1 of this dissertation. This trend will most likely continue, as commercial activity is carried out across borders and as the business acquisition market is heavily influenced by the Anglo-American way of drafting contracts. What the parties do not necessarily reflect upon is that not only may the common law terminology impact interpretation of the contract, but use of a foreign language such as English may in general have an impact on interpretation. This issue will also be discussed below.

Some other aspects also need to be considered when discussing interpretation of business acquisition contracts drafted in English and governed by Nordic law. One is in relation to market practice or trade usage, as is the more commonly used legal term. As it has been submitted that the Anglo-American way of drafting and use of terminology having a special meaning in the common law jurisdictions is typical even when the governing law is Nordic law, it is relevant to consider whether some form of international trade usage has been created and whether it should or should not have an effect on the interpretation of these kinds of contracts.

5.2 The importance of legal concepts versus the importance of contents and use

5.2.1 Conditions

5.2.1.1 Interpretation of contractual conditions precedent

The reason for here discussing primarily conditions precedent is that these are the most typical contract terms called conditions in business acquisition contracts. Furthermore, both in the USA and in the Nordic jurisdictions legal discussions about conditions are often based on the nature of conditions precedent but they are not based on the traditional English law understanding of conditions. Inserting conditions precedent into business acquisition contracts, whether cross-border or not, is necessary and done above all when the sale and purchase for various reasons cannot take place at the signing of the contract. An agreement on conditions precedent in business acquisition contracts means that the ownership and possession of the target remain with the seller,¹⁰²⁰ but the

¹⁰¹⁹ This is not only typical of cross-border business acquisitions, but appears in other international transactions as well. See e.g. comments in Bugg, 2010 at XI. See also Lindholm, 2008, at 265. Heikki E.S. Mattila has submitted that legal English is a language whose impact is notable globally. Mattila, 2002, at 288 and at 296.

¹⁰²⁰ This on the other hand means that for technical reasons – as a long time might pass between signing and closing, especially in transactions where closing depends on approval of or non-action by competition/anti-trust authorities – contracts would often include provisions as to how the seller should manage the business between signing and closing and matters might be specified which the seller cannot do without the approval of the buyer. See comments e.g. by Knabe, 1989, at 91. However, such provisions should be drafted with care in order to avoid situations where the competition authorities would hold that the buyer in fact has had control of the target since signing. See comments e.g. by Egholm Hansen and Lundgren, 2014, at 47 and at 580–581.

parties have committed themselves to a binding contract.¹⁰²¹ The traditional legal definition of conditions in English law, that is, that they are essential contract terms entailing a right of termination in the case of breach, is not crucial for operative terms such as conditions precedent.¹⁰²²

It is typical that the signed, written contract in a business acquisition sets out highly detailed provisions on the transaction so that the rights and obligations of the parties and the contract may from a legal perspective be seen as a binding pre-contract, which is subject to certain conditions in order for the main acts of performance to take place. This typical nature of these contracts separates them from the preliminary agreements earlier discussed in this dissertation, as preliminary agreements customarily used in business acquisitions would not set out all the details of the transaction and their binding nature is often quite weak.¹⁰²³

In the previous Chapter the fact that conditions precedent may be both contingent and promissory was discussed. For example, conditions precedent dealing with competition approvals and other authority approval matters might be straightforward in the sense that a requirement is plainly attached to the condition that approval has been obtained or that possible stand-still periods have expired.¹⁰²⁴ This would in essence be a contingent condition precedent, as understood under English law. However, conditions precedent may also be agreed in a more qualified manner. For example, a condition precedent dealing with governmental approvals/standstill periods may include language to the effect that in addition to closing being dependent on obtaining an approval, a party may also, based on the wording of the contract, be obliged, for example, to accept structural undertakings such as divestment of companies/businesses or other preconditions set by the authorities for acceptance of the transaction.¹⁰²⁵ A skillful negotiator would in such cases make

¹⁰²¹ See e.g. Bryde Andersen, 2003, at 217, Schans Christensen, 1998, at 178 and Sevenius, 2012, at 127. See also Stilton, 2015, at 578–581, where one of his model contracts included a separate schedule, Schedule 7 ‘Conditional agreement’, which set out in detail what conditional character meant both with regard to identifying conditions precedent, describing the parties’ obligations to procure that the contract becomes unconditional, what non-fulfilment meant, how waivers worked and the procedure for notices of fulfilment of conditions. Part 2 of the Schedule further contained quite extensive language as to undertakings by the seller as to conduct of the business up to closing. This structure of contracts may be compared with how real transactions are often carried out, at least in Finland. It is e.g. quite typical that a real estate transaction is subject to receiving a building permit before the actual sale and purchase takes place. Regardless of such a condition, the parties are still bound by the signed contract they have entered into. See e.g. Niemi, 2016, at 145–146.

¹⁰²² For general discussion and description of conditions including conditions precedent as legal concepts, see the previous Chapter.

¹⁰²³ The binding nature of a preliminary agreement or a pre-contract clearly depends on how it is drafted and agreed. With regard to real estate transactions it has e.g. been said that ‘preparatory’ pre-contracts are weaker than conditional contracts, which again are weaker than final contracts. However, in that connection it has also been mentioned that in practice a conditional agreement may be an alternative to a pre-contract. See Niemi, 2016, at 145. In business acquisitions, on the other hand, contracts are generally titled contracts and not pre-contracts and their binding nature appears from different sections of the contract and are generally perceived as binding, although realization of the sale and purchase is subject to some conditions.

¹⁰²⁴ See e.g. Schans Christensen, 1998, at 183:

“Conditions precedent to Buyer’s obligations

05 Governmental and EU Consents

All required governmental and European Union approvals and clearances for consummation of the transactions contemplated by this Agreement shall have been obtained.”

¹⁰²⁵ These kinds of qualifications are not buyer-friendly and may be regarded as quite exceptional. However, based on my own experience, they do appear from time to time, when the seller has a very strong negotiating position and wants

the undertaking qualified by at least inserting the word ‘reasonableness’, that is, a party would have to accept reasonable structural undertakings. This way of agreeing means that the condition is contingent upon the authorities’ approval, as without the approval or expiry of a standstill period, the transaction cannot close. The condition is additionally promissory, as the buyer undertakes to carry out (reasonable) structural measures, if so required by the authorities. It is also quite common that a buyer is able to insert in the contract that the approvals of the authorities shall be to his satisfaction, perhaps qualified by some kind of reasonableness, which is another form of qualifying another plain contingent condition precedent.¹⁰²⁶

‘Reasonableness’ and ‘satisfaction’ were referred to above as qualifying the buyer’s conditions precedent. When a dispute arises as to whether the buyer is obliged to carry out the transaction or not and the buyer refers to such and similar qualification language, the main interpretation matter would not be the conditions precedent as legal concepts, but how conditions precedent are generally used in business acquisition contracts and what should be understood by ‘reasonableness’ and ‘satisfaction’ in those specific cases. Translating, for example, the words ‘reasonableness’ and ‘satisfaction’ into one of the Nordic languages is as such an easy task, but the wording would have to be analyzed more broadly. It is a question of what kind of standards can in general, and under the specific circumstances, be required when a buyer has undertaken to accept reasonable structural measures, if these are required by the competition authorities. Has the buyer been correct in refraining from closing a transaction because objectively the preconditions set by the authorities were unreasonable and/or is it objectively justifiable that a buyer, by referring to the fact that the pre-conditions set are not to his satisfaction, does not have to close the transaction? Therefore, when interpreting different kinds of qualifications, it is first and foremost a question of how to interpret the wording by using general interpretation methods such as a contextual, objective interpretation method. The wording may or may not impose some obligations on a party, but under

to secure the transactions and/or the buyer strongly wants to carry out the transaction and, hopefully, it is quite certain that the process will not cause any major requirements from the authorities.

See also e.g. Warren’s Forms of Agreements, 2, 2007, Form 8.6.01, at 8-256:

“7.4. Regulatory Consents and Approvals

All material consents, approvals and actions of, filings with and notices to all Governmental or Regulatory Authority reasonably necessary to permit the Purchaser and the Seller to perform their respective obligations under this Agreement and to consummate the transactions contemplated hereby (a) shall have been duly obtained, made or given, (b) *shall not be subject to the satisfaction of any condition that has not been satisfied or waived* [italic type added by the author] and (c) shall be in full force and effect, and all terminations or expirations of waiting periods imposed by any Governmental or Regulatory Authority necessary for the consummation of the transactions contemplated by this Agreement, including under the HSR Act, shall have occurred.”

¹⁰²⁶ See e.g. Egholm Hansen and Lundgren, 2014, at 748, providing for language regarding this kind of condition in a model share purchase agreement (in Danish) according to which approvals or consents shall have been given without such conditions which the buyer reasonably finds unacceptable burdensome for the buyer to perform.

See also Share Purchases Practice Manual, 2000, at 4.38 – 4.39:

“ 2. Conditions

2.1.3 (b) the Purchaser having received *in terms satisfactory to it* [italic type added by the author] confirmation from the European Commission (the “Commission”) either that the transactions or any part of the transactions contemplated in this Agreement do not constitute a concentration having a Community dimension within the meaning of Council Regulation (EEC) No. 4064/89 or that (being a concentration having a Community dimension within the meaning of such Regulation) the Commission has decided not to oppose it and has declared it compatible with the Common Market;”

Nordic law it is not primarily a question of the contract term called conditions precedent imposing a specific obligation or not on the party in question due to the legal concept, but how the legal concept is used in that particular contract.

As for the common law jurisdictions, the previous Chapter described that legal scholars have discussed what kind of general obligation is imposed on the parties to ensure fulfillment of a condition precedent. It has, for example, been submitted that the parties must act diligently under the contract in order to at least not prevent fulfillment of a condition, but the scope of such diligence has been subject to different views by common law legal scholars. This is an aspect which would influence the judgment in a dispute governed by English or by US law. As noted above, it is not uncommon, however, that something is stated about the parties' obligations to promote fulfillment of the conditions precedent in the contract, for example that the parties shall use their best efforts, reasonable best efforts, or reasonable efforts.¹⁰²⁷ Furthermore, under US contract law, the parties are under an implied obligation to act in accordance with good faith and fair dealing in performing a contract.¹⁰²⁸ This is also applicable in the case of conditions precedent, but this obligation may be enhanced if the parties add language regarding best efforts or similar expressions in their contract.

According to Nordic law, as noted above, the use of the term 'conditions' or 'conditions precedent' in a contract does not indicate in itself that conditions would be treated differently in contract interpretation due to the mere denomination. Conditions, including conditions precedent, would be analyzed based on how they are used and put into context. They could and would be analyzed based on Nordic law, unless the parties show that they intended to give the term some specific, for example English, meaning to the term. The parties would under Nordic law under all circumstances be obliged to act in good faith in order for the contract to be fulfilled, but stating something to the effect that they shall cooperate and act in good faith in order to fulfill the conditions precedent may of course be seen as emphasizing that duty.¹⁰²⁹

5.2.1.2 Parties' control over conditions precedent and their effect on liability

When analyzing what general interpretation rules and principles actually lead to if the parties have inserted conditions precedent in their contract, one way of approaching the matter of parties' obligations and liability for the occurrence of conditions precedent has been to divide these contract terms into conditions precedent which are more within the control of the parties, for example board

¹⁰²⁷ See Stilton, 2015, at 578–581, Precedent 1, where in §3, Part I of Schedule 7 'Conditional agreement' one of his model contracts states that "Each of the parties shall use all reasonable endeavours to procure that all the provisions of this Agreement become unconditional in accordance with their terms..." In the UK it is more typical instead of 'efforts' to use the word 'endeavours'. See also e.g. Christou, 2012, at 46 and Mendelssohn and Howley, 2000, at 2.61.

¹⁰²⁸ §205 of the Restatement (Second). See also §230(2)(a), where an 'obligor' who breaches his 'duty of good faith and fair dealing' is not discharged from his duty of performance.

¹⁰²⁹ Inserting wording about cooperation and loyal performance has been recommended, e.g., in Egholm Hansen and Lundgren, 2014, at 219.

or shareholders' approvals, and those where control is less obvious, for example authority and other third-party approvals.¹⁰³⁰ With regard to board and shareholders' approvals, it has, for example, been submitted that under Norwegian law a party may have a loyalty obligation to try to convince these entities to give such approval.¹⁰³¹ This might apply in the other Nordic countries as well, but what this means in practice is not clear. It could be understood as that the loyalty obligation is more enhanced in these cases in comparison with cases where third party-related approvals are to be obtained. Nevertheless, establishing the contents of an enhanced loyalty obligation would have to consider the factual circumstances pertaining to the case.

The analysis should include a number of factors such as what position the representative of a party has been in, for example is it a person with direct contact to the board of directors, which may furthermore have been kept informed during the transaction, or is it someone with a more distant relation, for example a junior in-house lawyer. If the representative has been working very closely with the board of directors and has kept the board informed about the negotiations and transactions, or if the representative is a person whose position may be regarded as including the right to make commitments on behalf of a company, such as a managing director, this could be seen as that person having a higher degree of loyalty to obtain board approval.¹⁰³²

Another aspect to consider is what kind of impression was given during the negotiations by the representatives of the party having more control over the condition precedent. Were any implied promises or statements given that approval is a mere formality, for example due to the fact that the board has been kept continuously informed and has not had any objections? If the board has been continuously informed – and perhaps even indicated that approval is likely to be given – and if the representatives of that party have informed the other party prior to entering into the contract, the other party may have the possibility to claim damages. The fact that a party has more control over the event being described as a condition precedent – and thus presumably has more influence over the event materializing – is a factor which may affect their liability in case the factual circumstances justify such assessment.

However, even if approval by the board of directors and shareholders might be more under the control of one party, there is a reason why approval is inserted as a condition precedent. Otherwise,

¹⁰³⁰ See Schans Christensen, 1998, at 251–252; Buskerud Christoffersen, 2008, at 349–350 and Adlercreutz and Gorton, I, 2011, at 118. Conditions which are less within the control of the parties, or such conditions may be discussed as 'not' being controlled by the parties, have also been referred to as 'causal' conditions. See Kivimäki-Ylöstalo, 1981, at 292.

¹⁰³¹ See Buskerud Christoffersen, 2008, at 350.

¹⁰³² The Norwegian Supreme Court found e.g. in Rt. 2005.268, a case which was not a business acquisition transaction but still requiring the approval of the board of directors of a company with a large shareholding in the buyer company, that the contract was binding due to the fact that even if the board had accepted the decision with two conditions, the managing director of the buyer, who was also an officially authorized representative of the shareholder, had informed the seller that the board had cancelled the conditions. The managing director was acting within his official capacity, although he had not acted in accordance with his specific authorization and therefore the contract was binding on the buyer and the seller was awarded damages. The court case has been commented on e.g. by Buskerud Christoffersen, 2008, at 350.

approval could just as well have been obtained on signing. The board of directors and shareholders have their own role and tasks under Nordic company law and therefore in general a party should not be obliged to carry out a transaction if such approval is not obtained. It is a different issue to impose other remedies, for example damages. The representatives are acting on behalf of – and are in that sense identical with – the party in question, but as noted, decision-making is carried out by independent corporate entities, who – unless specifically so having agreed in advance – cannot be forced to make a decision and accept a contract.¹⁰³³

The fact that a party has less control over, for example, authority approvals does not, on the other hand, mean under Nordic law that a party need not act loyally/in good faith when presenting the case for approval by those authorities¹⁰³⁴ and that also includes the seller in cooperating and providing, for example, necessary information for possible filings. However, even if the aspect of control based on Nordic law may have an impact on how the liability of the parties is established, it should not overturn the starting point, which is that the use of a condition precedent in business acquisition contracts – and also by what is generally understood by conditions precedent – leads to the presumption that no performance obligation arises and it is presumably not a default if the condition is not fulfilled.¹⁰³⁵

In general, the English discussion about conditions precedent has been more focused on aspects in relation to promissory and contingent conditions precedent rather than the control aspect.¹⁰³⁶ It has been claimed, for example, that even though a party may have a duty to bring about an event, as long as he has not promised that such event will occur, reasonable efforts have been required and failure to show such efforts has led to liability in damages, but not that the main obligation as such must be performed.¹⁰³⁷ With regard to the USA, the matter of control is referred to in the Restatement (Second) in the section providing for rules of interpretation¹⁰³⁸ and it has also otherwise been discussed, but rather in terms of repudiation.¹⁰³⁹ In the previous Chapter it was also described that a party should not do anything to prevent a condition of the other party from taking place and also that a party is supposed to at least try to bring about a condition, although it is not an absolute duty. However, if it is only a contingent condition precedent, there is no absolute duty

¹⁰³³ This view has also been taken e.g. in Adlercreutz and Gorton, I, 2011, at 118.

¹⁰³⁴ A similar opinion has been presented e.g. in Ramberg and Ramberg, 2014, at 89.

¹⁰³⁵ See similar opinion submitted by Buskerud Christoffersen, 2008, at 349.

¹⁰³⁶ The previous Chapter noted that promissory conditions precedent are understood as meaning that a party has undertaken outright liability for their occurrence or non-occurrence, as the case may be, while contingent conditions precedent do not comprise such specific undertaking.

¹⁰³⁷ Treitel, Chitty I, 2012, at 270–271. It may also be noted that in certain cases the English Companies Act may require approval by the shareholders. For further details, see Stilton, 2015, at 33–36.

¹⁰³⁸ Comment d. to §227 of the Restatement (Second) notes that the rule of interpretation is applicable to events which are ‘within the obligee’s control’ and when it is not e.g. in cases of third party control and it is unclear whether the duty is conditioned or not, the rules do not apply. Such cases are said to be interpreted according to general interpretation rules based on the agreement between the parties.

¹⁰³⁹ See e.g. Farnsworth, II, 2004, at 458, discussing that even if a condition is partly under the control of one party, but if the other party states that he is not going to perform, although the condition occurs, the first party does not have to do anything more to activate the condition.

on the party supposed to bring about the event, but as with any contractual provision the parties are under an implied obligation to act in accordance with good faith and fair dealing in performing a contract.¹⁰⁴⁰ This matter is by no means straightforward in the common law countries, especially considering that there is diversified case law on what these general principles mean.¹⁰⁴¹ From that perspective, it seems that if the contracting parties want predictability as to the outcome, then if a condition precedent has not been fulfilled or waived, the parties should rather agree quite specifically in the contract both with regard to the obligations and liabilities of the parties and with regard to the consequences and available remedies. If the contract is governed by Nordic law, the actual effect of conditions precedent will be based on how they have been drafted in the contract and what other contract provisions deal with non-fulfillment of conditions precedent. This interpretation would be based on a contextual, objective interpretation method in the majority of cases, as the subjective element would really only be relevant to the extent that the parties have made some specific agreement on how conditions precedent should be understood and construed.

There is still one aspect to bear in mind from a Nordic law perspective when discussing conditions precedent where a party more or less has control over the occurrence or non-occurrence of a condition. This aspect relates to so-called potestative conditions.¹⁰⁴² A potestative condition is here understood as a condition where a party has full control of the condition in the sense that fulfillment or non-fulfillment of conditions is dependent solely on whether that party takes or refrains from taking necessary action, which means that it is in fact up to that party to decide if the condition is fulfilled or not.¹⁰⁴³ As noted above, business acquisition contracts often contain conditions which are more within the control of the parties than others. It is probably less likely that there are conditions which are under the full control of one party. For the sake of argument, however, business acquisition contracts might involve conditions which are tied to the correctness of the seller's warranties. For example, could a condition stating that a buyer may withdraw from a binding contract based on material adverse changes to the warranties given by the seller be regarded as a potestative condition? This does not seem a reasonable answer, for several reasons. Withdrawal would first of all be tied to the question whether material adverse changes have occurred to the warranties or not and any such changes would as a rule in all jurisdictions be judged

¹⁰⁴⁰ §205 of the Restatement (Second). See also §203(2)(a).

¹⁰⁴¹ For example G.H. Treitel mentioned several cases where different degrees of diligence have been found. See Treitel, Chitty I, 2012, at 267–272, where he discussed the issue under the subheadings “Unrestricted right to withdraw”, “Restricted right to withdraw, Duty not to prevent occurrence of the event; Condition of “satisfaction”; “Duty of reasonable diligence to bring about the event”; “Principal and subsidiary obligation” and in these discussions mentioning a multitude of court cases where the decisions were not similar.

¹⁰⁴² Potestative conditions have been of interest to Romanist legal scholars and have been of great interest in countries such as Germany and France. The discussion has e.g. been about whether potestative conditions are purely dependent on the will of the obligor or whether the actions of the obligee may also be included under such terminology. See e.g. Ekström, 1908, at 70–81.

¹⁰⁴³ See definitions of potestative conditions e.g. in Kivimäki-Ylöstalo, 1981, at 292, describing potestative conditions as being where fulfillment of the condition depends on the action or refraining to take action by one party. See also Niemi, 2016, at 137, arguing that it is a general contractual principle that a condition whereby the contents of the agreement depend solely on the decision of one party or is dependent on one party's actions is not valid.

objectively based on general interpretation principles.¹⁰⁴⁴ Secondly, a material adverse change, whether defined or not in the contract, could not as a general rule be caused by the buyer in order for the buyer to effectively claim discharge of the contract.¹⁰⁴⁵ Thirdly, the contents and development of the circumstances underlying the warranties are not within the control of the buyer, unless of course he has wrongfully interfered. Thus the requirement for fulfillment or non-fulfillment being dependent on and controlled solely by one party is not met. Fourthly, warranties are important and a form of insurance for the buyer that the target of the purchase possesses the qualities promised by the seller. Therefore, if the warranties are not true or have adversely changed, one of the cornerstones of the whole transaction is undermined. In the case that the buyer would have succeeded in inserting language to the extent that material adverse changes would be solely based on the judgement of the buyer, the situation could be regarded as a borderline case. Even in these cases, however, the decision of the buyer would in the case of a dispute still be interpreted objectively as to what is generally meant by a material adverse change and what the factual circumstances were. The other general comment with regard to the possible application of potestative conditions in business acquisition contracts is that conditions precedent are part of the total deal. The basis is that there is a binding commitment by the parties to act in accordance with their commitment. If the parties have agreed to give extensive rights to withdraw from the contract to one of the parties, it is solely within their right to do so provided that the withdrawal right is not so extensive that it effectively means that there is no binding commitment.¹⁰⁴⁶

With regard to conditions other than conditions precedent and if conditions are understood in general as important or essential terms of the contract the breach of which gives the innocent party the right to terminate the contract, as understood under traditional English law, then the parties could in their written contract identify those essential terms and agree what the remedies are in the case of breach. The courts would customarily – and at least as a starting point – honor such provisions, but it has also been noticed that regardless of such contract provisions, it is still possible that a Nordic court would evaluate the situation as a whole and use a reasonableness test to establish whether to accept termination or not due to a breach of such essential term.¹⁰⁴⁷ Furthermore, a Nordic court may also find (in law or in fact) that certain contract terms are essential even though the parties have not specifically stated to that effect. Such terms might include, for example, the importance of co-operation by the buyer, delivery of the target and payment of the purchase price, which are all in one form or another included in the Finnish, Norwegian and Swedish Sale of Goods Acts.¹⁰⁴⁸

¹⁰⁴⁴ See subchapters 3.3.1.1 and 3.3.2.1 on the interpretation of the wording of a contract.

¹⁰⁴⁵ Subchapter 4.3.1.2 described what is expected of a party with regard to the fulfillment of conditions.

¹⁰⁴⁶ F.W. Ekström e.g. argued that under Roman-German doctrine a suspensive condition which is purely dependent upon the will of the obligor means that no binding commitment comes into existence. Ekström, 1908, at 73–74.

¹⁰⁴⁷ See e.g. Møgelvang-Hansen, 2011, at 239–240; Möller, 2011, at 259 and Hagstrøm, 2011, at 270–271.

¹⁰⁴⁸ The last point is closely related to the fact that there might be main and secondary obligations under a contract. See e.g. Wilhelmsson, Sevón and Koskela, 2006, at 19 referred to in the previous Chapter. See also Gorton, 2011, at 300–301, noting “... but some contractual provisions are regarded as rather more fundamental than others.”

5.2.1.3 *Effect of customary conditions precedent on the contractual relationship*

The contractual relationship having been established when signing a business acquisition contract is not fulfilled until the conditions precedent have materialized or been waived. When inserting conditions precedent as typical contractual terms in business acquisition contracts, an interesting question is how the legal situation between signing and closing should be understood and also what closing means.

Closing, as used in business acquisition contracts, is rather a description of an event where several legal acts are to take place after the conditions precedent have been fulfilled or waived.¹⁰⁴⁹ The main event at closing is of course the transfer of ownership to the target and payment of part or the whole of the purchase price.¹⁰⁵⁰ Closing does not, however, have a specific legal meaning in doctrine.¹⁰⁵¹ There has been a discussion in the Nordic countries of what closing means, but the discussion has not necessarily focused on binding contracts or binding pre-contracts and it seems that in these discussions market practice in relation to business acquisition contracts has not necessarily been taken into account.

For example, Kai Krüger discussed closing and defended a decision by the Norwegian Supreme Court,¹⁰⁵² but the case in question actually dealt with negotiations and whether or not a binding agreement had emerged, although no final written contract was entered into. Kai Krüger in his article thus primarily discussed ‘closing’ as part of the finalization of a transaction where there are preliminary agreements or the parties have negotiated and reached agreement on essential terms.¹⁰⁵³ He had a very strong opinion that closing, as understood by lawyers and based on Anglo-American practice, had little impact on Norwegian courts.¹⁰⁵⁴ On the other hand, when Krüger discussed closing as appearing in cross-border transactions he admitted that some scholars regard closing in that connection as reflecting that the transaction is ready to be fulfilled but not that closing is a concept reflecting the binding effect of an agreement.¹⁰⁵⁵ Krüger’s view was that closing as such is not established trade usage and that a party who claims that there is a binding contract has to prove it.¹⁰⁵⁶ Kai Krüger’s article is as such interesting, but he dealt only briefly with business acquisitions and was more concerned about closing in relation to when a binding contract has emerged and what it means that closing is merely finalization of the transaction. Therefore, his

¹⁰⁴⁹ ‘Completion’ is the term more often used in the UK. See e.g. Stilton, 2015, who consistently uses ‘completion’ throughout his book.

¹⁰⁵⁰ Matters usually of relevance and happening at closing are described in several more practical books. See e.g. Stilton, 2015, at 120–125; Doepel, Fogelholm, Karanko, Saanio and Wilkman, 2011, at 361–363 and Bryde Andersen, 2003, at 215–126.

¹⁰⁵¹ See e.g. Woxholth, 2014, at 129.

¹⁰⁵² Rt. 1998.946. This decision is also referred to in subchapters 2.2.2 and 2.2.5.

¹⁰⁵³ Krüger, 2007, at 265–267.

¹⁰⁵⁴ Krüger, 2007, at 267.

¹⁰⁵⁵ Krüger, 2007, at 268, mentioning Jan Schans Christensen, G Woxholth and M Bryde Andersen.

¹⁰⁵⁶ Krüger, 2007, at 269.

view is noted, but with regard to market practice in business acquisitions – and especially cross-border business acquisitions – his view bears less relevance.

Closing in business acquisition contracts would customarily be subject to conditions precedent that suspend fulfillment of the transaction, but the view that there is a binding agreement and that closing is merely fulfillment of the transaction has strong support from other Nordic legal scholars and practitioners.¹⁰⁵⁷ It may thus be assumed that a party should be able to rely upon the other party acting in accordance with the contract provisions during the interim period between signing and closing.¹⁰⁵⁸ It is also typical that business acquisition contracts include detailed provisions on measures that may or may not be taken by the seller during the interim period between signing and closing.¹⁰⁵⁹ This means, on the other hand, that there is an interregnum, where the ownership of the target is not fully within the control of either the seller or the buyer.¹⁰⁶⁰ This way of agreeing can be seen as confirming an understanding between the parties that the contract creates a binding commitment, where only the main performance is subject to certain conditions. This typical way of drafting contracts – and also considering the established practice of including conditions precedent in detailed business acquisition contracts when the transfer of ownership cannot for some reason take place at the same time as signing the contract – may be regarded as trade usage. This trade usage is widespread not only in the common law countries, but also within the Nordic transaction market. Trade usage has been established as a recognized element of contract interpretation in all jurisdictions¹⁰⁶¹ and such trade usage may be acknowledged when contemplating the binding character of a business acquisition contract.

The widespread trade usage of deferred closing leading to a binding contract, where only the main performance is subject to certain conditions precedent, puts the liability on commercial parties to understand that they are signing a binding commitment. The fact that it is a binding undertaking is in some cases explicitly stated in the contract or it may be stated in a reversed manner, noting which provisions are conditional upon fulfillment of conditions precedent.¹⁰⁶² The main characteristic of conditions precedent as used in business acquisition contracts is therefore submitted to be that they

¹⁰⁵⁷ Bryde Andersen, 2003, at 215; Sevenius, 2012, at 127; Egholm Hansen and Lundgren, 2014, at 46–48 and Buskerud Christoffersen, 2008, at 72, who as such did not comment on closing separately, but just noted that the parties may have agreed on conditions which have to materialize in order for the contract to be fulfilled.

¹⁰⁵⁸ This assumption has sometimes been described in terms that the party whose right depends upon the fulfillment of a condition has a vested expectation interest. See Kivimäki-Ylöstalo, 1981, at 295.

¹⁰⁵⁹ Examples of what kind of actions and measures are included and agreed upon can be found e.g. in Stilton, 2008, at 660 as Part 2 of Schedule 10; Warren's Forms of Agreements, 2, 2007, at 8-303 - 8-306 and ICC Model Share Purchase Agreement, 2004, at 18.

¹⁰⁶⁰ See comments as to the legal situation during this interim period e.g. in Kivimäki-Ylöstalo, 1981, at 295–297.

¹⁰⁶¹ See subchapter 3.3.2.1. See also Axel Adlercreutz and Lars Gorton, who discussed closing with more focus on it being part of a preliminary agreement. However, they emphasized that trade usage may be of vital importance when deciding whether the contract is binding or not. Adlercreutz and Gorton, I, 2011, at 105–106. Nevertheless, they also discussed conditions precedent in connection with business acquisitions, noting that special questions might arise in relation to the binding character of the contract; they seemed to concur that a party can be obliged to act in order for a condition precedent to take place. Adlercreutz and Gorton, I, 2011, at 117–118.

¹⁰⁶² See e.g. Stilton, 2015, at 578, precedent 1, Schedule 7, Conditional agreement, Part I, 1. Principal Conditions “The provisions of clauses 2, 3, 6, 7, 8 and 9 are conditional upon the fulfilment of all the ...” This means that the other clauses could be regarded as binding.

suspend performance of the main obligations, that is, the sale and the purchase, but not that these conditions somehow transform a signed contract into a preliminary agreement.

Regardless of whether signing and closing take place simultaneously or closing is deferred, the question is: what remedies are available to the parties in case a party is not willing to fulfill the contract? In the previous Chapter remedies were more extensively discussed and therefore here will only be mentioned the alternative of specific performance. If performance does not occur, even though conditions precedent have allegedly been fulfilled, a party could in general claim specific performance under Nordic law.¹⁰⁶³ Specific performance is less used in the common law countries. This might be owing to historical reasons due to the difference between common law and equity courts, but it also seems that at least in the USA there is a general skepticism towards this form of equitable remedy. As explained by Joseph M. Perillo, “Specific performance is an extraordinary remedy developed in Courts of Equity to provide relief when the legal remedies of damages and restitution are inadequate.”¹⁰⁶⁴ In the USA, Section 2-716 of the UCC mentions specific performance in connection with ‘unique’ goods. As to its applicability to business acquisitions, Perillo has said that “...shares in a closely held corporation, or sufficient shares to assure control of a corporation whose shares are publicly traded have been specifically enforced. Contracts for the sale of a business are also often specifically enforced as each business can be deemed unique.”¹⁰⁶⁵ In the UK specific performance is also a seldom used remedy,¹⁰⁶⁶ which traditionally was not used, if “... damages were an “adequate” remedy.”¹⁰⁶⁷ Situations where specific performance may not be granted are several; special types of contract, in general if that would cause severe hardship to the defendant, elements of unfairness and surprise, inadequacy of consideration or lack of consideration, conduct by the claimant, terminable contracts, conditional contract inutility, impossibility, vagueness, goodwill contracts specifically enforceable in part only, mistake, misrepresentation and delay.¹⁰⁶⁸ As to business acquisitions, a crucial question is whether there is a viable option for substituting the purchase, for example by buying other shares. However, it has also been said that “...a contract to buy shares which are not readily available in the market,

¹⁰⁶³ Gomard and Iversen, 2012, at 39–93; Hagstrøm and Aarbakke, 2004, at 362–373; Hemmo, II, 2012, at 192–204 and Ramberg and Ramberg, 2016, at 225–227.

¹⁰⁶⁴ Perillo, 2004, at 633. See also exception to this approach and rule regarding real property, Perillo, at 636–637.

¹⁰⁶⁵ Perillo, 2004, at 638. With regard to Perillo’s comments on shares, he referred in footnote 12 to *Armstrong v. Stiffler*, 189 Md 630, 56 A.2d 808 (1948) and with regard to businesses he referred in footnote 13 to a couple of cases e.g. *Wooster Republican Printing Co. v. Channel Seventeen, Inc.*, 682 F.2d 165 (8th Cir. 1982) and *Leasco Corp. v. Taussig*, 473 F.2d 777 /2d Cir.1972.

¹⁰⁶⁶ The exception being purchases of land, see e.g. Treitel, Chitty 1, 2012, at 1908.

¹⁰⁶⁷ Treitel, Chitty 1, 2012, at 1907, mentioning e.g. situations where a party could make an equivalent substitute contract and the claimant could be compensated by damages based on the difference between the cost of the new contract and the original contract price. However, it was also argued that that approach entails some difficulties, which could be contrary to the “mitigation requirement and be oppressive to the defendant.” Footnote 16 on the same page refers to specific performance not being used if damages were an adequate remedy: cases *Co-operative Insurance Society Ltd v Argyll Stores (Holdings) Ltd* [1998] A.C.1; *Bankers Trust Co v P.T. Jakarta International Hotels Development* [1999] 1 Lloyd’s Rep. 910 at 911.

¹⁰⁶⁸ These matters have been discussed by Treitel, Chitty 1, 2012, at 1917–1934.

even (it seems) although the directors of the company have a discretion to refuse to register the transfer” are specifically enforceable.¹⁰⁶⁹

In general, however, it is submitted that conditions precedent used in business acquisition contracts means that the parties are not obliged to fulfil the contract unless, depending on their nature, the conditions precedent occur, do not occur, if that is the contents of the specific condition precedent, or they are waived. If one party for some reason is liable for the non-occurrence of a condition precedent which describes an event occurring as a pre-condition, the most proper remedy in such cases is damages.

5.2.2 Representations and warranties

5.2.2.1 General interpretation issues with regard to representations and warranties

One of the most negotiated sections in business acquisition contracts is the section on warranties or representations and warranties given by the seller.¹⁰⁷⁰ The section is undoubtedly an important part of the transaction for the parties involved, as it has an effect on the liabilities of the seller and in many respects establishes the risk allocation between the parties.¹⁰⁷¹ The representations and warranties in business acquisition contracts customarily include some form of undertaking by the party giving such statements, that is, that the statements are true and correct at a certain time, so that that party can be held liable if that is not the case.¹⁰⁷²

It has also been established that representations and warranties are often used in these contracts with little regard to the underlying legal concepts but they are rather used in a way which makes them both warranties as understood in legal doctrine. This is irrespective of the fact that they are based on different legal concepts in the common law jurisdictions. It is just as typical that the representations and warranties given are subject to different kinds of qualifications, as noted in the previous Chapter. For example, they may be qualified by the seller’s knowledge, by a materiality requirement as to the matters appearing in the representations and warranties and/or matters appearing in a separate disclosure schedule, or they may be qualified by the buyer’s due diligence.

¹⁰⁶⁹ Treitel, Chitty 1, 2012, at 1911–1912.

¹⁰⁷⁰ In the previous Chapter was noted that the buyer also customarily makes some representations and warranties but that representations and warranties by the seller are generally more extensive and probably also more litigated.

¹⁰⁷¹ See e.g. Bryde Andersen, 2003, at 324 and Buskerud Christoffersen, 2008, at 209–210.

¹⁰⁷² Stilton, 2015, at 531, Precedent 1, §4 “Warranties and Taxation” and more specifically sub§ 4.1., which states: “With the intention of inducing the Buyer to enter into this Agreement (and acknowledging that the Buyer does so in reliance on the Warranties) the Seller represents to the Buyer in the terms of the Warranties and warrants to the Buyer that each of the Warranties *is true and accurate in all respects and not misleading at the date of this Agreement* [and will continue up to and including Completion to be true and accurate in all respects and not misleading.] [Italic type added by the author].

It is further quite common that the parties define in the contract what is meant by materiality or by seller's knowledge, buyer's knowledge or due diligence.¹⁰⁷³

The warranties and representations and the subtleties of the wording qualifying the representations and warranties are by no means sufficient when analyzing their effect on the parties' liabilities under the contract. This is due to the fact that the relevance and impact of the representations and warranties given in a contract are affected by other contract provisions such as limitation of liability and possible separate indemnification provisions, by possible reliance/anti-reliance provisions, whether included in the representations and warranties section or separately appearing in the contract, and by possible entire agreement clauses or agreements.¹⁰⁷⁴ Thus, just negotiating and interpreting the specific assurances in isolation without taking into consideration how the contract is structured and works as a whole may lead to results unintended by either of the parties. With regard to interpretation and considering the typical structure of business acquisition contracts, it is imperative that the interpretation of representations and warranties is based on a contextual method where the entirety of the contract is taken into consideration.

If a business acquisition contract would not include specific representations and warranties – which would be unusual – there are possibilities in the Nordic countries to present claims for breach of different kinds of undertakings based on legislation and general contractual principles as described in the previous Chapters. However, considering that in many business acquisitions the process leading up to the contract is complex involving a large number of people, the complexity of the target – which may include different forms of assets and liabilities – and the complexity of many contracts finalizing the transactions, detailed warranties and representations make the parties' positions clearer in the case of a dispute. The need for detailed representations and warranties is even more emphasized when the transaction involves parties from the common law jurisdictions, where for example the *caveat emptor* principle means that there is no general disclosure obligation¹⁰⁷⁵ and the parole evidence rule may impose restrictions on what the parties may use as evidence in case they want to claim under a warranty or a representation.¹⁰⁷⁶

Based on the use of representations and warranties in the contract in question and the wording of the contract, the first phase in interpretation would be to analyze the different qualifications and interpret the contract based on the contract wording and simultaneously analyze how the different contract provisions work together. In this regard the question is about normal contract interpretation, where the language of the contract and the context of the whole contract would be in focus. However, in such an interpretation proper consideration may also be given to how

¹⁰⁷³ If not defined in the contract, any qualification would require interpretation based on what the wording generally means. Even when the contract includes a definition, interpretation of the contract would in reality also lead to a need to interpret the definition, but the parties would have more influence on how the wording should be interpreted compared with leaving the qualifications totally open-ended and subject to the ordinary meaning of the words.

¹⁰⁷⁴ The different contract provisions and the totality of the contract may be found in a number of the more practical handbooks referred to several times earlier.

¹⁰⁷⁵ See subchapter 2.3.4.2.

¹⁰⁷⁶ See subchapter 3.4.1.3.

representations and warranties are customarily used in business acquisitions, as there is a certain pattern for their use and what that use entails, although such customary use always has to be put in the context of the specific case. Last but not least, the common law meaning of – especially – representations may in some cases have to be taken into account.

5.2.2.2 Other contract provisions affecting warranties, representations and misrepresentations

An example of how other contract provisions may have an effect on contractual and common law representations and on warranties is so-called reliance and anti-reliance contract provisions. These contract provisions might for example say that the buyer has relied only upon the representations and warranties incorporated in the written contract and/or has not relied on any others.¹⁰⁷⁷ These provisions might also deal with whether the buyer has the right to rely upon the contractual representations and warranties regardless of his pre-contractual knowledge or due diligence. Based on my own experience, it may be noted that reliance/anti-reliance wording are sometimes incorporated in a section where the parties have agreed in more detail on how the liability of the parties, principally the seller, is to be interpreted and in fact limited or even to some extent excluded. Anti-reliance clauses, whether saying that a party has not relied upon the contractual representations and warranties or has relied only upon them and no other, are in other words a form of limitation clauses.

English law does not as such prohibit the use of anti-reliance clauses, but they are interpreted based on the wording of the contract and on the circumstances in general.¹⁰⁷⁸ Furthermore, as anti-reliance clauses are a form of limitation or exclusion provisions, it should be noted that such provisions have in general under English law been subject to quite strict interpretation.¹⁰⁷⁹ With regard to commercial contracts the interpretation has, however, not been equally strict. For example, in *Bikam OOD v Adria Cable*,¹⁰⁸⁰ Simon, J, referred to *Tradigrain SA and others v. Intertek Testing Services (ITS) Canada Ltd and another*,¹⁰⁸¹ where it was mentioned that the traditional view of English law on construing exemption and limitation clauses restrictively has been somewhat modified and that there is an increasing willingness to accept that parties to

¹⁰⁷⁷ As to different type of reliance- and anti-reliance contract provisions, see e.g. Share Purchase Practice Manual, 2000, at 4.50:

“9.7 Reliance: The Purchaser has entered into this Agreement upon the basis of and in reliance upon the Warranties and the Indemnities.” This model form of agreement defines warranties as the ones set out in the contract including in the disclosure schedule.

See example of an anti-reliance provision in ICC Model Share Purchase Agreement, 2004, at 24:

“15.3. Non-reliance. Both Parties to this Agreement acknowledge that they could have not relied on any statement or representation (save in the event of fraud) or warranty not contained in the Agreement or contained in any of the agreed form documents and each party unconditionally waives any claims in relation to, any statement, representation (save in the event of fraud), warranty or undertaking which is not expressly set out or referred to in this Agreement or any of the “agreed form” documents.”

¹⁰⁷⁸ See e.g. McKendrick, 2013, at 242.

¹⁰⁷⁹ Lewison, 2004, at 370.

¹⁰⁸⁰ [2012] EWHC 621 (Comm)

¹⁰⁸¹ [2007] EWCA Civ 154, at 46.

commercial contracts have the right to “apportion the risk of loss as they see fit and that provisions which limit or exclude liability must be construed in the same way as other terms.” Simon, J referred to some other cases as well, but in his judgment on the dispute at hand he expressed the view that the disputed contract provisions “involved a calculated allocation of risk and remuneration.”¹⁰⁸²

In general, limitation of liability provisions are not a problem when the parties are of equal bargaining power and voluntarily conclude a negotiated contract. Under English law this was confirmed, for example, by Lord Diplock and Lord Wilberforce in *Photo Production Ltd v Securicor Ltd*.¹⁰⁸³ Based on this court case, John Adams and Roger Brownsword have commented that “Commercial contractors must be left free to apportion risks as they think fit (not as the courts think fit), and, having apportioned the risks as they see fit, commercial men must expect to have the bargain enforced in those terms (not in the terms that the court now judges to be reasonable).”¹⁰⁸⁴ Kim Lewison, on the other hand, emphasized the need for clear language and said that “... the exemption clause must cover exactly the nature of the liability in question. So a clause which excludes liability for breach of warranty will not exclude liability for a breach of condition; and a clause which excludes liability for breach of implied terms will not exclude liability for breach of express terms.”¹⁰⁸⁵

However, one of the most important aspects in the common law countries is the question of how the parties can effectively exclude liability for pre-contractual representations or actually, in the case of a dispute, misrepresentations. In other words, even if pre-contractual representations have been incorporated into a contract and even though the parties have agreed that the buyer cannot bring claims under pre-contractual misrepresentations, the question is whether these kinds of contract provisions would be fully enforced. It may be recalled that in Chapter 4 it was noted that under English law – according to Section 3 of the Misrepresentation Act 1967 – incorporating representations as contractual terms does not as such exclude the possibility for a party to claim under pre-contractual misrepresentation.¹⁰⁸⁶ It may also be recalled that excluding liability for

¹⁰⁸² Judgment, at 37, where reference was also made to *Bottin (International) Investments Ltd v Venson Group Plc* [2004] EWCA Civ 1368 and more specifically at 65.

¹⁰⁸³ [1980] A.C. 827. Lord Diplock said e.g. that “...In commercial contracts negotiated between businessmen capable of looking after their own interests and of deciding how risks inherent in the performance of various kinds of contract can be most economically borne (generally by insurance), it is, in my view, wrong to place a strained construction on words in an exclusion clause which are clear and fairly susceptible of one meaning only even after due allowance has been made for the presumption in favour of the implied primary and secondary obligation.” Lord Wilberforce said (at 843) that: “After this Act [i.e. UCTA], in commercial matters generally, when the parties are not of unequal bargaining power, and when risks are normally borne by insurance, not only is the case for judicial intervention undemonstrated, but there is everything to be said, and this seems to have been Parliament’s intention, for leaving the parties free to apportion the risks as they think fit and for respecting their decisions.”

¹⁰⁸⁴ Adams and Brownsword, 2007, at 147.

¹⁰⁸⁵ Lewison, 2004, at 373.

¹⁰⁸⁶ See Stilton, 2015, at 168, who referred to *Thomas Witter ER Ltd v. TBP Industries Ltd* [1996] 2 All E.R. 573, where a generally worded clause as to excluding pre-contractual misrepresentations was held ineffective and not reasonable under §3 of the Misrepresentation Act because it meant that fraudulent misrepresentation would also be excluded.

misrepresentations in a contract provision is – according to that same Act – subject to a reasonableness test, according to the UCTA. The exception to adherence to anti-reliance provisions is that a party always has the right to action in the case of fraudulent misrepresentation based on tort law and it has been submitted that the parties should not attempt to exclude such misrepresentations.¹⁰⁸⁷

When excluding liability for misrepresentation in negligence, the wording of the limitation clause must expressly and clearly deal with that matter under English law.¹⁰⁸⁸ If there is no express reference to negligence, the contract provision might still be construed to cover negligence, if “...a fair reading of the clause shows that the parties intended to exclude such liability.”¹⁰⁸⁹ However, the question of excluding negligence is more complicated than that, as it has also been said that “Where the only possible head of damage is negligence an exemption clause must be construed as exempting from liability for negligence. But where liability may arise otherwise than through negligence, the exemption clause should usually be construed as not exempting from liability for negligence.”¹⁰⁹⁰ A few important conclusions are to be drawn based on the above. The representation and warranty section is affected by other contract provisions and therefore a contextual interpretation has also to be used under English law. However, when doing so the importance of the language used must be emphasized, because it has an effect on the kind of exclusions covered and if ill-drafted it may even be non-effective. It may be recalled that Lord Hoffman said in one of his five principles that English law does not “... easily accept that people have made linguistic mistakes, particularly in formal documents...”¹⁰⁹¹ Finally, the underlying nature of representations and misrepresentations as legal concepts bears an impact on interpretation of the contract.

With regard to the USA, it has been noted several times that regardless of the Restatement (Second) and the UCC, implementation of contract law varies between the different states. This statement is also true with regard to contractual reliance and anti-reliance clauses and therefore the effect of such clauses in any particular case would always have to be reviewed based on court practice in the state whose laws govern the contract. In general, the parties are as such allowed to make disclaimers in a contract under US law and also explicitly agree on waivers of reliance. However, there is a difference between the states as to what kind of limitations or exclusions would be acceptable based on an anti-reliance clause.

¹⁰⁸⁷ See Stilton, 2015, at 168.

¹⁰⁸⁸ See e.g. Lewison, 2004, at 373: “An exemption clause will not relieve a party from liability for negligence unless it does so expressly or by necessary implication, or unless that party has no liability other than a liability in negligence.” See also his comment at 375: “... it is likely that it must contain the word “negligent” or “negligence” or some synonym for those words.”

¹⁰⁸⁹ Lewison, 2004, at 377.

¹⁰⁹⁰ Lewison, 2004, at 380. See further his comment at 390–391 on that the courts would not interpret a contract in such a manner that there would be no remedy based on the undertakings of a party.

¹⁰⁹¹ See subchapter 3.3.2.1.

Anti-reliance clauses excluding pre-contractual representations between sophisticated parties have often been accepted when the governing law has been New York or Texas law.¹⁰⁹² However, for example in New York, an anti-reliance clause has to be specific enough in order to exclude tort-based misrepresentation claims.¹⁰⁹³ Other states have taken a more restrictive view and more easily allow claims for pre-contractual misrepresentations. It has been said that, for example in Massachusetts, the courts would not uphold an anti-reliance clause with regard to fraudulent pre-contractual misrepresentations whether incorporated as representations in the contract or not.¹⁰⁹⁴ The same has been said to be the case in California.¹⁰⁹⁵

In Delaware, as under New York state law, general limitation of liability clauses are mostly actionable between commercial parties, at least if they are sophisticated. However, ‘outright’ lies with regard to the representations and warranties in a contract would not be covered by such limitation clauses as was affirmed in the following case. In *ABRY Partners V, L.P. et.al. v. F&W Acquisition LLC et.al.*,¹⁰⁹⁶ where Delaware law was applied, the buyers requested that they should have the right to rescind a stock purchase agreement because contractual representations and warranties were false due to the seller’s alleged fraud. The contract included limitation provisions according to which the only remedy for breach of contractual representations and warranties was damages. The case is quite complicated and the decision is long, but the important part in this connection is that the court stated that the buyer would have the right to rescind regardless of the other provisions of the contract, including an exclusive remedy provision, if the buyer could prove that the seller knew that the representations and warranties given in the contract were false or clearly lied to the other party about a contractual representation or warranty.¹⁰⁹⁷ The definition of fraud or fraudulent misrepresentation could entail more, but this decision clarifies Delaware law as to which elements have to be present in order to act based on fraud in regard to contractual representations and warranties, even if the contract includes limitation language. The court also stated that in the case of negligent misrepresentation a limitation clause similar to the one in the contract in dispute would have been acceptable. It may furthermore be noted that this decision seems to say that limitation even for fraudulent misrepresentations may be included in a contract, at least between highly sophisticated parties. The decision also seems to indicate that anti-reliance clauses with regard to other representations outside a contract would be upheld.¹⁰⁹⁸ The fact that

¹⁰⁹² See e.g. *Aetna Cas. & Sur. Co. v. Aniero Concrete Co., Inc.*, 4040 F. 3d 566, 584 (2d Cir. 2005) as to New York law and *Steinberg v. Brennan*, No. CIV A. 3:03-CV – 0562, 2005 WL 1837961 (N.D. Texas, 2005) as to Texas law.

¹⁰⁹³ See West and Lewis, 2009, at 1027.

¹⁰⁹⁴ See West and Lewis, 2009, at 1024. See also e.g. *Sound Techniques, Inc. v. Hoffman*, 737 N.E. 2d 920, 925 (Mass. App. Ct. 2000).

¹⁰⁹⁵ See West and Lewis, 2009, at 1024. This is also relevant even if the contract includes an entire agreement clause. See e.g. *Ron Greenspan Volkswagen, Inc. v. Ford Motor Land Development Corp.*, 32 Cal.App.4th 985(1995), 38 Cal. Rptr. 2d 783 (Ct. App. 1995).

¹⁰⁹⁶ 891 A.2d 1032 (Del.Ch.) 2006

¹⁰⁹⁷ Ibid. at 1064.

¹⁰⁹⁸ See West and Lewis, 2009, at 1028. See also Hoffer, 2014, at 133, footnote 117 *MBIA Ins. Corp. v. Royal Indem. Co.*, 426 F.3d 204, 211-12 (3d Cir. 2005), where reliance on a representation was not found reasonable as the innocent party had explicitly waived all defenses based on reasonable reliance.

the parties were highly sophisticated, in this case private equity parties, was mentioned in the decision.¹⁰⁹⁹

In *RAA Management, LLC v. Savage Sports Holdings, Inc.*,¹¹⁰⁰ the Delaware Supreme Court dismissed a fraud claim based on non-contractual representations because, a non-disclosure agreement having been entered into during the negotiations, which were aborted, contained a specific anti-reliance clause. In *Anvil Holding Corp. v. Iron Acquisition Co., Inc.*,¹¹⁰¹ the rule established in the decisions referred to above concerning *ABRY Partners and RAA Management* was confirmed, but the *obiter dicta* part of the decision mentioned that too broad carve-outs for fraud could nullify the effects of anti-reliance clauses.

In other words, practice between the states varies, but in all the states the wording of the exemption or restriction clause is decisive and interpretation of this kind of clause may additionally be affected by whether it is to be regarded as a boilerplate clause or specifically negotiated.¹¹⁰²

When a business acquisition contract is governed by Nordic law, it may be noticed that an anti-reliance provision does not as such have the same legal meaning in relation to excluding other factors outside the contract as in the common law countries. Firstly, misrepresentation as a concept based on tort law is not the same in the Nordic countries.¹¹⁰³ Secondly, the relevance of an anti-reliance clause is also to be considered based on the fact that the Nordic countries do not accept the parole evidence rule and an anti-reliance provision, even though it should be adhered to as a matter of honoring the written contract of the parties, does not exclude the possibility that a party may show evidence that some pre-contractual statement actually has to be taken into account.¹¹⁰⁴

It is typical in the Nordic countries to include different kinds of limitation of liability clauses, including anti-reliance clauses in business acquisition contracts.¹¹⁰⁵ In the kind of transactions discussed here it is important to bear in mind that limitation of liability clauses are in most deals thoroughly negotiated and the parties or representatives of the parties can be assumed to have the necessary knowledge to understand the implication that an anti-reliance and/or limitation of liability clause may have.¹¹⁰⁶ A limitation of liability clause under those circumstances should normally be upheld by the Nordic courts,¹¹⁰⁷ but the parties add to the likelihood of the court

¹⁰⁹⁹ *ABRY Partners V, L.P. et.al. v. F&W Acquisition LLC et.al.* 891 A.2d 1032 (Del.Ch.) 2006) at 1057–1059 and at 1063.

¹¹⁰⁰ 45 A.3d. 107 (Del. 2012)

¹¹⁰¹ 2013 WL 2249655 (Del.Ch. 2013)

¹¹⁰² West and Lewis, 2009, at 1027–1028.

¹¹⁰³ For example §30 of the Nordic Contract Acts and the definition of fraudulent representation may affect interpretation but it does not incorporate exactly the same requirements as misrepresentation under tort laws in the common law jurisdictions.

¹¹⁰⁴ These matters were discussed in subchapter 3.4.2.

¹¹⁰⁵ Schans Christensen, 1998, at 250.

¹¹⁰⁶ Hemmo, II, 2012, at 286.

¹¹⁰⁷ Buskerud Christoffersen, 2008, at 390.

upholding such clauses by making them specific enough.¹¹⁰⁸ If the contract includes a very general anti-reliance/limitation clause, a party could try to claim that it should be held unreasonable based on Section 36 of the Contract Acts.¹¹⁰⁹ However, as earlier stated, Section 36 has very seldom been applied in cases where the parties are business enterprises and of more or less equal strength. Even if limitation of liability contract terms in principle is acceptable under Nordic law, intent may not generally be effectively excluded and – depending on how gross negligence is defined – nor is gross negligence.¹¹¹⁰ Very general limitation clauses would also have to be analyzed on the basis of the total situation when entering into the contract. What did the parties know or what should they have known, what are the economics behind the acquisition – is the agreed purchase price very low, which may have been compensated by the buyer in practice getting no – or very few – warranties? Has there been misleading on anyone’s behalf or is it just poor business judgment that has led to risks materializing which the buyer did not foresee? These are aspects which need to be considered when interpreting such provisions.

As noted above, considering that anti-reliance and limitation of liability clauses in most deals are specifically negotiated and when the question is about business parties, the assumption must be that they understand what they are committing themselves to. Therefore, in my opinion reliance/anti-reliance contract provisions and limitation of liability contract provisions should in general be given high evidentiary value. These kinds of clauses may be analyzed based on the fact that they are included in the contract as part of a total deal. There is give and take in any deal and the totality is reflected in the price agreed by the parties. From that perspective, a rather broad freedom should be given to the parties to include such provisions, unless there has been some kind of misleading behavior, duress or similar acts, which could effectively limit their scope. Certainly, it may be required that the parties evaluate the totality either themselves or by engaging external advisors. The need for protection due to an imbalance in the contract or because the contract appears unfair¹¹¹¹ is an argument which should be substantiated by other facts and which is hard to assign an independent role in these kinds of transactions. The main point here with regard to reliance and anti-reliance clauses is to emphasize that contractual representations and warranties must be set in the whole framework of the contract in order to understand what the protection is for the buyer and in order to understand how the seller’s liability has been limited, if at all.

¹¹⁰⁸ Buskerud Christoffersen, 2008, at 381.

¹¹⁰⁹ Hemmo, II, 2012, at 285 and Liebkind, 2009, at 127. The other reason for a limitation clause not being applicable, as Liebkind pointed out, is that a party has acted with gross negligence or intentionally, at 130. See also Buskerud Christoffersen, 2008, at 390–393.

¹¹¹⁰ See e.g. Hemmo, II, 2012, at 287–288; Liebkind, 2009, at 130; Gomard, Godsk Pedersen and Ørgaard, 2009, at 276 and Adlercreutz and Gorton, II, 2010, at 117, where it was noted that the question of gross negligence is somewhat more doubtful. See also NJA 2014.960, where it was held that liability limitation provisions are not effective with regard to intentional breaches of contract.

¹¹¹¹ As to the question of protecting weaker parties in contracts between commercial parties of equal strength, this is probably quite acceptable as a statement for all Nordic countries. However, in terms of protection of weaker parties in general in commercial contracts, it has been said that there is “a clear reluctance against the use of an independent legal principle of protecting the weaker party in B2B relations” in Danish, Norwegian and Swedish legal doctrine in comparison with Finnish practice. See Bärlund, 2015, at 105.

When discussing representations and warranties, anti-/reliance provisions and limitation of liability provisions, one additional contract term which often has relevance in the interpretation of these contract terms is the entire agreement provision. This was, for example, a provision which affected the decision referred to above in *Ron Greenspan Volkswagen, Inc. v. Ford Motor Land Development Corp*, where California law was applicable. Under English law, even an entire agreement provision may be avoided in the case of misrepresentation based on the Misrepresentation Act 1967.¹¹¹² In the Nordic countries, even though an entire agreement provision should be given due consideration, pre- and non-contractual material would not necessarily be excluded based only upon such a provision. However, when judging the effect of an entire agreement provision, it has been shown that it has been relevant when the courts have analyzed the same whether the provision was included as a boilerplate provision or separately negotiated.¹¹¹³ This was also earlier said to be the case with regard to US law.

The relevance of entire agreement provisions in connection with representations and warranties and the other provisions just mentioned has to be viewed from the perspective that the written contract should be interpreted as a whole. If several contract terms in fact limit the responsibility of the seller and the buyer's remedies including presenting evidentiary material and if the contract furthermore includes an entire agreement provision, the presumption with regard to contracts between professional parties could be seen as a very strong indication of the parties' intention to comprehensively summarize their agreements in the written contract. Therefore, in general, a high threshold for adjusting such a written contract based on elements not appearing in the written contract is defensible.

5.2.2.3 Due diligence, information and knowledge – effect on representations and warranties

Last but not least, the discussion to follow will include some other aspects of business acquisitions. These will show that only analyzing representations and warranties as legal concepts is markedly insufficient when interpreting business acquisition contracts. When a buyer carries out due diligence, that is, examines the target and other issues of importance for the acquisition,¹¹¹⁴ the legal impact of due diligence is related to questions concerning information provided and the parties' knowledge.¹¹¹⁵ These issues will be discussed below and especially their effect on the

¹¹¹² See e.g. Stone, 2013, at 299–300.

¹¹¹³ See subchapter 3.4.2.3 above.

¹¹¹⁴ Subchapter 2.3.4.2 noted that there is no exact, concise legal definition of due diligence. However, it is typical that some form of examination of the target is carried out by the buyer in business acquisitions and especially if these are of a cross-border nature.

¹¹¹⁵ Knowledge in common law countries is often discussed based on whether it is actual, constructive or imputed. As to English law and actual and constructive knowledge see e.g. Christou, 2012, at 30–31. Richard Christou also notes that under English law the knowledge of one director would mean in normal circumstances that the company in question also knows. He referred to the Court of Appeal decision in *Jafari-Fini v. Skillglass Ltd* [2007] EWCA Civ 261. Christou, 2012, at 29. Actual knowledge could be translated into Nordic law as that a party “knows” the fact of a particular matter. Constructive knowledge could be translated into Nordic law as that a party “should or could be assumed to know.” Imputed knowledge is somewhat more difficult to exactly define under Nordic law, but the

interpretation of contractual representations regarded as warranties, of warranties and of misrepresentations as understood in the common law jurisdictions. The parties may or may not have provided for the effect in the contract.

With regard to the common law jurisdictions, it was already established that due diligence by a buyer in a private sale is primarily a fact-finding investigation in order to understand the value of the company, to get a better position in the negotiations and perhaps also to facilitate post-acquisition integration. However, due diligence is not a substitute for warranties and will thus in general not affect the buyer's right to rely on warranties given.¹¹¹⁶ Based on my own experience, when common law lawyers draft contracts, they quite frequently exclude the effect of due diligence.¹¹¹⁷ This is perhaps not so surprising considering the general approach to due diligence just described.

Due diligence, knowledge and information may have an effect on remedies in the case of breach of a representation or warranty. For example, knowledge in the common law jurisdictions generally excludes the right to have recourse to misrepresentations.¹¹¹⁸ With regard to information, it may be recalled that the basic contractual principle in the common law jurisdictions is that there is no general disclosure obligation and especially not in the transactions discussed in this dissertation. This means, on the other hand, that it is up to the buyer to ensure that he has sufficient information and knowledge of the target when entering into the contract. Nevertheless, there are

question is about whose knowledge will actually amount to knowledge of the party in question. These matters are often specifically provided for in acquisition contracts by defining e.g. seller's knowledge and buyer's knowledge as to whose knowledge is regarded as a party's knowledge and whether such knowledge is judged based on due inquiry or not.

¹¹¹⁶ See subchapters 2.3.4.2 and 4.3.2. As to US law, note the wording of the decision in *Metropolitan Coal Co. v. Howard* (155 F.2d 780 (2d Cir. 1946), where New York state law was applied), which has often been used as a precedent by US legal scholars and judges, about the rationale behind due diligence and warranties: "...It [author's comment: warranty] is intended precisely to relieve the promisee of any duty to ascertain the fact for himself; ..."

¹¹¹⁷ See also e.g. Warren's Forms of Agreements, 2, 2007, Form 8.6.02, at 8-303. The article is only partly quoted.

"Article VII Covenants and Agreements of the Parties Effective prior to Closing. 7.1. Business Examinations and Physical Investigations of Assets. Prior to the date of executing this Agreement ... *No investigation by Purchasers shall, however, diminish or obviate in any way, or affect Purchaser's right to rely upon, any of the representations, warranties, covenants or agreements of the Selling Shareholders contained in this Agreement or in any other Selling Shareholders Document unless Purchasers have knowledge of a breach of a representation, warranty, covenant, or agreement of the Selling Shareholders. ...*" [Italic type added by the author.]

See further Share Purchases Practice Manual, 2000, at 4.49:

"9.3 Investigation by Purchaser. None of the Warranties or the Indemnities or the Tax Deed shall be deemed *in any way modified or discharged by reason of any investigation or inquiry made or to be made by or on behalf of the Purchaser, and no information relating to the Company or to any of the Subsidiaries or the Associated Companies of this the Purchaser has knowledge (actual or constructive) other than by reason of its being Disclosed shall prejudice any claim* [italic type added by the author] which the Purchaser, the Company or any Subsidiary shall be entitled to bring or shall operate to reduce any amount recoverable by the Purchaser, the Company or any Subsidiary under this Agreement." According to one comment on this example clause, "The effectiveness of this clause is doubtful. Courts are reluctant to compensate a Purchaser with damages for breach of a warranty it knows to be false, and a safer course is for the Purchase to negotiate specific indemnities against breaches of which it is aware." In general as to this assumption, see e.g. Stilton, 2015, at 53–54. This approach evidently also influenced the drafting at the ICC. See ICC, Model Share Purchase Agreement, 2004, at 19: "Article 8 – Warranties. 8.3: The right to damages and/or any other available remedy for breach of any of the warranties, covenants and obligations in this Agreement *will not be affected by any investigation conducted with respect to, or any knowledge acquired (or capable of being acquired at any time, whether before or after the execution and delivery of this Agreement or the Closing Date)* [italic type added by the author] with respect to the accuracy or inaccuracy of or compliance with any such warranty, covenant or obligation."

¹¹¹⁸ Knowledge would in such a case counter the requirement for 'justifiable reliance' which is part of the definition of misrepresentations under common law, as further discussed in the previous Chapter.

situations in both common law countries where liability might arise due to non-disclosure depending on the specific type of contract in question, on the special relationship between the parties and, of course, under certain circumstances telling half-truths, not correcting information and similar matters may amount to misrepresentations.¹¹¹⁹ Furthermore, knowledge may have an impact on how successful a claim for breach of warranty is. How these matters – that is, due diligence, information and knowledge – are analyzed together as part of the totality a written contract represents is reviewed below in light of a few court cases from the UK and the USA.

Here will first be described a few cases where English law was applied. In *Eurocopy Plc v. James Daniel Teesdale and others*,¹¹²⁰ the Court of Appeal dismissed an application for leave to appeal against a decision whereby an application by the (plaintiff) buyer to strike out certain parts of the defense of the (defendant) sellers had been dismissed. The question was about a share sale agreement and the (plaintiff) buyer had required – amongst other things – that the (defendant) sellers should not be allowed to use the fact that the buyer had knowledge of the matter in question as a defense against a claim for breach of warranty. Several contractual terms dealt with qualifying the representations and warranties in the form of disclosures and about material facts having been disclosed, but other than information contained in the disclosure letter, the (plaintiff) buyer's knowledge (actual, constructive or imputed) should not according to the contract restrict the (plaintiff) buyer's right to claim for breach of warranties.¹¹²¹ The factual circumstances were, according to the decision, such that the contents of the disclosures had been extensively discussed between the parties, but the (plaintiff) buyer claimed that material facts had been omitted from those disclosures. The buyer had also carried out an examination of the target that is a due diligence. The (defendant) sellers, however, claimed that the facts referred to by the (plaintiff) buyer in the dispute had actually been known to the buyer prior to entering into the contract. The application for leave to appeal was dismissed. The conclusion based on this decision could be that buyer's actual knowledge of a certain matter on entering into of the contract could impede his right to claim for breach of seller's warranty. However, this decision was, as stated, not final and so is not a binding precedent.

The question of knowledge was also an important part of the decision in *Infiniteland Ltd and another v Artisan Contracting Limited and another*.¹¹²² In this case the buyer was able to sue for breach of warranty, as the court found that a contractual provision pertaining to buyer's knowledge deliberately referred only to actual knowledge of the buyer and that the parties should have included imputed knowledge, if that had been their intention. In this case, knowledge of the buyer's accountants was regarded as not having reached the buyer.

¹¹¹⁹Atiyah and Smith, 2006, at 243; Peel and Treitel, 2015, at 361–373; Chen-Wishart, 2012, at 211–216; McKendrick, 2013, at 215–225; Collins, 2008, at 198 and Beale, Chitty I, 2012, at 582. As to the USA see e.g. Farnsworth, 1987, at 277–279 and Perillo, 2004, at 348.

¹¹²⁰ [1992] B.C.L.C. 1067. This decision was not final but decided separately upon some of the legal issues involved.

¹¹²¹ The relevant clauses were described in Lord Justice Nourse's judgment (1992 WL 895057).

¹¹²² [2005] EWCA Civ 758; [2006] 1 B.C.L.C. 632

In both these cases the contractual provisions regarding knowledge, disclosure and reliance were the focus of the decisions. The drawback with these decisions is that it is hard to draw any general conclusions based on these decisions as to what the impact would have been if the contracts had not contained such provisions. It may also be noted that in *Springwell Navigation Corporation v JP Morgan Chase Bank*¹¹²³ it was said that “... there is no legal principle that states that parties cannot agree to assume that a certain state of affairs is the case at the time the contract is concluded or has been so in the past, even if that is not the case...”¹¹²⁴ This decision referred to several other decisions where it had been accepted that the parties can agree upon “a state of affairs” as being the basis of their dealing, even if the parties know that that basis is not correct.¹¹²⁵

Based on the above case law, it is imperative under English law to define in a contract what kind of knowledge – and whose knowledge – is relevant if the intention is that knowledge will not restrict a buyer from bringing claims for breach of warranty. Whether actual pre-contractual knowledge may bar the right to claim for breach of contractual representations or warranties if nothing is said in the contract, is not clear.

When discussing misrepresentations above, it was mentioned that under English law, if the prospective buyer actually has examined the target, that is, carried out a due diligence, this might have an impact on the buyer being able to have recourse to a misrepresentation.¹¹²⁶ For example, in *Attwood v Small et al.* (1838) the buyers’ right to rescind based on alleged misrepresentation was not accepted due to the fact that the buyers had carried out an investigation and had said that they were satisfied with the results.¹¹²⁷ In general, knowledge could be seen as contradicting the inducement element of representations and also justifiable reliance, which are both required in order for a party to be able to act under a misrepresentation. However, if the contract specifically excludes the impact of knowledge and due diligence from the buyer’s right to claim for breach of contractual representations and warranties in a commercial setting of the kind discussed in this dissertation, the courts would as a starting point honor such a contract provision.¹¹²⁸

With regard to the USA it is impossible within the frame of this dissertation to give a full account of how buyer’s due diligence and prior knowledge may influence a successful claim for breach of a contractual representation or warranty, as practice varies between the individual states. The question of knowledge has sometimes been reviewed from the perspective of whether a party has relied on the warranties or not. This might be somewhat confusing as reliance is mostly discussed

¹¹²³ [2010] EWCA Civ 1221

¹¹²⁴ Ibid. at 143.

¹¹²⁵ Ibid. at 156–169. The discussion actually also includes discussion on estoppel, but to pursue the discussion about different kinds of estoppel would extend the scope of this dissertation too much.

¹¹²⁶ See e.g. Peel and Treitel, 2015, at 416: a “...person who himself tests the accuracy of the representation can be said to rely on his own judgement, rather than on the representation. Accordingly, he cannot obtain relief for innocent (or probably for negligent) misrepresentation. But this rule does not apply in cases of fraud.”

¹¹²⁷ (1838) 6 CI&F, 232. According to the decision “... the contract could not be rescinded, first, because there was no proof of fraud...; and secondly, because the purchasers did not rely on A’s [author’s comment: the seller’s] statements, but tested their accuracy, and after having knowledge declared that they were satisfied of their correctness.”

¹¹²⁸ See e.g. the court decision in *Springwell v JP Morgan* referred to above.

in connection with representations and misrepresentations, but on the other hand knowledge and examination effectively leads to the question whether a party has relied upon the warranties or not.

In order to describe the US situation, a few examples have been taken where the state law of New York, Delaware, Minnesota and Washington DC has been applied in order to describe how courts in different states have reasoned. The common element in these decisions is that any analysis would start with how the written contract is drafted and what the parties have stated about representations and warranties, the effect of due diligence, knowledge and other undertakings in the written contract.

In terms of the interrelation between due diligence and warranties or representations and warranties, the rules set out by the courts with regard to New York state law are quite nuanced. The definition of a warranty as in *Metropolitan Coal Co. v. Howard* has been followed up in other cases, for example *CBS Inc. v. Ziff-Davis Publishing Co.*,¹¹²⁹ where it was held that the right to indemnification depended only on establishing that the warranty was breached and in this case the express warranties concerned material facts, they were relied upon and part of the basis for the bargain.¹¹³⁰ A buyer does not have to believe that the warranty is true and, as stated in *CBS v. Ziff-Davis*, one reason for including warranties was to relieve the parties from determining the truthfulness of a warranted fact.¹¹³¹ It should be noted that if the warranty in *CBS v. Ziff-Davis* had been regarded as a representation, the outcome would have been different, as fraudulent misrepresentation is not actionable if the other party knew that the statement is false.¹¹³² It should also be noticed that in this case the buyer actually had reserved in the contract a right to claim under warranties and representations regardless of his doubts regarding the financial accounts.

Another case where New York state law was applied is *Galli et al. v Metz et al.*,¹¹³³ where the court said that when a buyer closes a contract knowing and accepting a seller's disclosed fact, which would be a breach of a contractual warranty, the buyer does not have the right to claim under the breach unless he expressly reserves that right.¹¹³⁴ This approach has been further fine-tuned in *Rogath v Siebenmann*,¹¹³⁵ where the court explained that a buyer cannot claim under a warranty if the seller disclosed that it is not correct before the closing of a transaction, but if the buyer had 'independently' found out that the warranty was not true or if the incorrectness was 'common knowledge', the buyer would have the right to claim for breach of warranty regardless of such

¹¹²⁹ 533 N.E.2d 997 (N.Y.) 1990

¹¹³⁰ Ibid. at 503–505.

¹¹³¹ Compare with *Metropolitan Coal Co. v. Howard*, where it was stated that: "... It is intended precisely to relieve the promisee of any duty to ascertain the fact for himself."

¹¹³² See subchapter 4.3.3 on misrepresentations.

¹¹³³ 973 F2d 145 (2d. Cir.1992)

¹¹³⁴ Ibid, at 151.

¹¹³⁵ 129 F3d 261 (2d. Cir., 1997)

knowledge.¹¹³⁶ This should also be reflected in any wording in a contract dealing with due diligence, knowledge and reliance matters in relation to warranties.

Under Delaware law, on the other hand, unless otherwise provided for in the contract, a buyer may rely upon the contractual representations and warranties regardless of knowledge acquired in due diligence, as stated in *Interim Healthcare, Inc. et al. v. Spherion Corporation*.¹¹³⁷

The divergence in opinions and practices in the different states is challenging even for US lawyers, as may be shown by the following case. In *Lyon Financial Services Inc. and others v. Illinois Paper and Copier Company*¹¹³⁸ the question was whether a representation of law made in a contract was actionable or not, and more specifically whether Minnesota law required an element of reliance in order to allow an action for breach of an express warranty. The US Court of Appeals for the Seventh Circuit of Illinois approached the Minnesota Supreme Court and asked about the reliance element, including if reliance was found, whether it would be tort-based or contract-based. The Minnesota Supreme Court issued an opinion on July 2, 2014,¹¹³⁹ where it reformulated the question to “Is a claim for the breach of a contractual representation of future legal compliance actionable under Minnesota law without proof of reliance?” The Supreme Court held that the answer is affirmative, that is, such a breach is actionable without proof of reliance.¹¹⁴⁰ The Court of Appeals made the necessary decisions based on the Minnesota Supreme Court’s opinion.¹¹⁴¹

With regard to representations, whether contractual or not, one of the cases referred to in connection with what will happen if the innocent party is given an opportunity to discover the misrepresentation according to the law of the District of Columbia, that is, Washington, D.C. nowadays, is *Sununu v. Philippine Airlines, Inc.*¹¹⁴² Stephanie R. Hoffer submitted that this case indicates that reliance is not reasonable “..., when the truth could have been discovered by perusal of publicly available financial filings and through conversations with counterparty.”¹¹⁴³ It has also been said that business partners may be entitled to rely upon one another’s representations based on the parties’ course of negotiation and course of dealing.¹¹⁴⁴ On the other hand, Hoffer also mentioned cases where a party is carrying out his own investigations and where courts have not found reliance due to those investigations. As an example she mentioned *Re v. Diamond*,¹¹⁴⁵ where no justifiable reliance was found due to the fact that the plaintiff relied on investigation by his own

¹¹³⁶ Ibid at 265.

¹¹³⁷ 884 A2d 513 (Del Supreme Court 2005). See more specifically Part II A. 4 of the decisions, at 69–70. The court stated (at 70) e.g. that “To the extent Spherion warranted a fact or circumstance to be true in the Agreement, plaintiffs were entitled to rely upon the accuracy of the representation irregardless of what their due diligence may have or should have revealed in this regard.”

¹¹³⁸ 732 F3d 755 (7th Cir. 2013)

¹¹³⁹ *Lyon Fin. Serv., Inc. v Ill. Paper & Copier Co*, 848 N.W.2d 539 (Minn Supreme Court 2014).

¹¹⁴⁰ Ibid at 545.

¹¹⁴¹ Fed. R. App. P.32.1

¹¹⁴² 792 F. Supp.2d 39, 56 (D.C.2011)

¹¹⁴³ Hoffer, 2014, at 132–133 and footnote 111 at 133.

¹¹⁴⁴ Hoffer, 2014, at 133.

¹¹⁴⁵ 292 N.Y.S. 54, 54 (N.Y. App. Div. 1936)

lawyer and not on a misrepresentation by the other party.¹¹⁴⁶ The same view has been taken by Joseph M. Perillo, who stated that “... where the party receiving the representation in fact makes a personal investigation, many courts have ruled that, as a matter of law, there is no reliance.”¹¹⁴⁷ The relationship between mistake and misrepresentation has been discussed and some criticism has been presented as to how the division is made in the Restatement (Second).¹¹⁴⁸ This is a valid point, as misrepresentation and mistake are closely connected or, as has been said, “Because a misrepresentation induces the recipient to make a contract while under a mistake, the rules on mistake stated in Chapter 6 [author’s comment: Chapter 6 of the Restatement (Second)] also apply to many cases of misrepresentation.”¹¹⁴⁹

The diversified legal situation in the USA makes it quite understandable that the parties rather specifically agree in business acquisition contracts what impact due diligence, knowledge and also reliance should have on the representations and warranties. However, as a matter of principle the parties in the USA are free to restrict and limit the effect of due diligence in their contract, but whether it will affect claims for breach of warranties or misrepresentations is a different issue.

When looking at the Nordic situation, it is fair to say that a Nordic lawyer would probably be more inclined than his common law colleagues to include in a business acquisition contract, whether cross-border or not, some wording to the effect that the representations and warranties are in one form or another qualified by knowledge of the buyer and by due diligence carried out by the buyer.¹¹⁵⁰ In the Nordic countries, if the contract is mute on the effect of buyer’s due diligence and prior knowledge, whether actual or constructive, there are secondary sources which could be resorted to. As described above, the Nordic Sales of Goods Acts deal with the question of disclosure of information and the effect of buyer’s examination of the goods.¹¹⁵¹ One of the basic provisions in this connection is Section 20 of the Finnish, Norwegian and Swedish Acts, according to which a buyer may not claim compensation for a defect which he can be presumed to have known about when entering into the contract. The wording of the respective Nordic Sale of Goods Act differs somewhat, but in essence they all refer to the fact that a buyer who knew or should have known about a defect cannot ordinarily successfully make a claim on the basis of that matter.¹¹⁵² The time of knowledge is tied to the ‘time of sale’. The second part of Section 20 states that a buyer who has examined the target¹¹⁵³ or has failed without due cause to comply with a seller’s invitation to examine the target in question and he claims for defect is not able to refer to defectiveness in the

¹¹⁴⁶ Hoffer, 2014, at 133 and footnote 116.

¹¹⁴⁷ Perillo, 2004, at 340.

¹¹⁴⁸ See e.g. Hoffer, 2014, at 115–174.

¹¹⁴⁹ Chapter 6, Introductory Note, at 1–2 of the Restatement (Second).

¹¹⁵⁰ Such a clause could e.g. say that “The buyer has prior to this agreement conducted a due diligence and received all requested information and answers to questions in a manner satisfactory to the buyer. All representations and warranties in this agreement are qualified by any fact, risk, circumstance or other matter [fairly/clearly] disclosed in the due diligence material or in this agreement, including the attached disclosure schedule.” Drafted by the author.

¹¹⁵¹ See subchapters 4.3.2 and 4.4.2 above.

¹¹⁵² Compare with the common law concepts of actual and constructive knowledge.

¹¹⁵³ The word used in the Acts are equivalent to “goods”, but the Acts are also applicable to business acquisitions.

business sold if he should have discovered the defect in the examination. However, regardless of examination the buyer may claim compensation based on a defect if the seller has not acted honorably and in good faith, for example not told the buyer of a defect that the seller is aware of.¹¹⁵⁴ Even so, the knowledge of the buyer is relevant, as knowingly accepting defectiveness may limit the buyer's possibilities to claim damages or cancel the contract.¹¹⁵⁵ The Danish Sale of Goods Act has a somewhat different structure from the Finnish, Norwegian and Swedish Acts, but the same principle as to the effect of examination may be found in Article 47 of the Danish Act.¹¹⁵⁶ In order to decide whether a buyer has known or should be presumed to have known about a matter under a due diligence, the decision would have to be based on the factual circumstances in relation to the whole due diligence exercise, the expertise of the parties, seller's behavior and of course the buyer's actions.¹¹⁵⁷

Buyers are of different professionalism. If the buyer is, for example, in the same business as the target and for whatever reason carries out a due diligence, he can be expected to be more careful and look out for typical risks connected with that kind of business. He can also more easily be expected to understand the consequences of different information appearing in the due diligence.¹¹⁵⁸ For example, if the buyer is purchasing a chemical plant and the seller represents that it has all necessary environmental permits, it could be assumed that a diligent buyer should check at least the most material permits himself, as they would be one of the basic presumptions for the buyer being able to continue the operations as a going concern. In other words, a certain prudence could be required.¹¹⁵⁹ Furthermore, during the process leading up to the contract, due diligence is ongoing while the final wording of the representations and warranties is still being negotiated. Therefore, a prudent buyer could not rely upon the representations and warranties until their final wording and other contract provisions thereto related have been finally agreed.

Another aspect which might have an impact on the liability of the buyer is the circumstances under which the due diligence has been carried out.¹¹⁶⁰ Has the buyer in fact been given enough time to

¹¹⁵⁴ This is in line with the general principle that fraud and gross negligence by a party have an impact on available remedies. See e.g. §33 of the Finnish, Norwegian and Swedish Sale of Goods Act, which allows a buyer the right to claim that goods are defective, even if he has not inspected the goods after delivery or given notice (§31 and 32) provided that the seller has acted in bad faith/in conflict with good faith and honesty/ or been grossly negligent. A similar provision is included in the Danish Sale of Goods Act, §53, where fraud and gross negligence are mentioned and also that this causes the buyer significant damage. See also §30 of the Nordic Contract Acts regarding fraudulent misrepresentations.

¹¹⁵⁵ See e.g. Håstad, 2009, at 88.

¹¹⁵⁶ See comments by Egholm Hansen and Lundgren, 2014, at 254, arguing that a buyer normally cannot claim for such matters which appeared during examination of the target.

¹¹⁵⁷ See e.g. Hagstrøm and Aarbakke, 2004, at 332–333; Jonsson and Liljegren, 2002, at 89–92; Sivenius, 2013, at 339–340 and Blomquist, Blummé, Lumme, Pitkänen and Simonsen, 2001, at 17–18.

¹¹⁵⁸ For example a decision by the Finnish Supreme Court (KKO 1985 II 58) emphasized that the buyer of shares must have had certain knowledge about the value of the shares due to his previous position and activity in the target company.

¹¹⁵⁹ See e.g. Buskerud Christoffersen, 2008, at 159, noting that it seems Norwegian scholars are fairly unanimous that there is a certain requirement for prudence on the buyer's side. Buskerud Christoffersen's statement was preceded, at 158–159, by her analysis of two Supreme Court cases in Norway; Rt. 2002.1110 and Rt. 2002.696.

¹¹⁶⁰ See e.g. Wilhemsson-Sevón-Koskelo, 2006, at 101.

analyze the documents made available? If the period for carrying out the due diligence has been very short considering the available information, has the buyer been allowed to bring enough resources to examine the information?¹¹⁶¹ How has the data been presented? Is it made available in a logical way? Important information may be disclosed in a way that it is not easy to find, in other words it might be hard to understand its relevance or it might be more or less concealed. This may be done by including a massive amount of data which really bear no relevance for a buyer but which a prudent buyer may not dare to overlook, or in a transaction with very low enterprise value would lead to unreasonably high transaction costs.¹¹⁶² The seller has a crucial position in providing at least all the private information and may also influence whether the relevant information is accessible in a sensible way. An example of how the seller's actions and provision of information may affect the decision could be a situation where the seller has provided copies of a material contract in the due diligence material to the buyer and the contract is as such in force for a certain period of time. The seller does not disclose that the other party to the contract has orally stated that it is unlikely that the contract will be renewed. If the question is about a material contract and the buyer is carrying out a due diligence, one could discuss whether the buyer should have asked about possible renewal. However, if there is no indication that such renewal is not likely and the contract may have been renewed before, the buyer does not necessarily understand the need to ask about it.¹¹⁶³ Evaluation of the situation has to take into account the importance of the contract, the remaining term of the contract and more generally the volume of the due diligence material and the time for the due diligence. In this example, the seller has as such provided correct information but his actions may be regarded as, if not directly misleading, on the borderline of what is accepted as good and honest business practice.

The other issue to reflect upon in this connection is whether the contractual representations and warranties could relieve the buyer from examining the target. In the common law countries this is basically the case, as due diligence has been described as a fact-finding mission. It has also amongst Nordic scholars been argued that if the seller gives express warranties, the buyer should not have to confirm such information, or such examination could at least be modified due to the

¹¹⁶¹ This comment is more relevant if the information is gathered in a physical data room rather than in an electronic dataroom, as access in the latter case is often less restricted with regard to the number of people examining the material provided they are covered by a confidentiality agreement accessing such documentation or the time during which the exercise may be carried out.

¹¹⁶² The Finnish Government Bill (HE 93/1986, at 65) refers to unreasonableness of inconvenience and costs for the buyer e.g. if the goods are at another location or such examination would require some other special measures. The first example is hardly of much relevance for acquisitions of the kind being dealt with herein and it is also hard to understand what the reference to special measures would entail in an acquisition. However, some kind of reasonableness with regard to costs might be invoked as an argument in a dispute.

¹¹⁶³ For example in U 2014.1474 H, which concerned a contract about the sale and purchase of shares, the seller was found to be responsible for breach of warranties due to the fact that the buyer had incurred losses, as the target company had to make certain payments to an IT-provider to the target company. Several factors affected this decision, e.g. the wording of the warranty in the sale and purchase contract, the fact that the disagreement between the target and the IT-provider existed already at the time of the sale, but it was also noted that this disagreement had not been brought to the buyer's attention during the due diligence.

representations and warranties.¹¹⁶⁴ On the other hand, it could be – and indeed has been – argued that if the seller has encouraged the buyer to verify the information and conduct a due diligence, the buyer would, as a rule, based on Section 20(2) of the Finnish, Norwegian and Swedish Sale of Goods Acts, have to do that and not merely rely upon information provided and warranties in the contract.¹¹⁶⁵ From a practical point of view it may be repeated that when due diligence is carried out in business acquisitions, it is quite typical that several actions are going on at the same time including negotiations for the draft contract. The final contents of the written contract may be agreed at a very late stage close to the signing of the contract and the final representations and warranties are agreed upon very late and when the due diligence has actually been finalized. In such situations, it would really not be a viable option for the buyer to rely only upon possible contractual representations and warranties. The situation is admittedly different if the due diligence takes place between signing and closing the transaction.

Nevertheless, due diligence is to a large extent based on information provided by the seller. Considering that the information provided by the seller should be true and correct and that the seller – at least concerning non-public information – is the only one able to provide relevant information, the question is what added value is there in the buyer having to examine such information in addition to explicit representations and warranties? Furthermore, a seller giving explicit and detailed representations and warranties may be assumed to have reviewed their correctness. That is his responsibility, not the buyer's. Even with regard to publicly available information, if the seller gives specific representations and warranties, the above comments are valid. If the seller has given specifically worded and detailed representations and warranties, it seems from a transactional point of view a waste of time and resources that the buyer under all circumstances should be obliged to examine and confirm information assured by the seller to be true and correct. Therefore, very detailed representations and warranties should rather limit the scope of the buyer's due diligence. If the buyer chooses to carry out a comprehensive due diligence, such due diligence could, as

¹¹⁶⁴ Hultmark, 1992, at 187, who referred to Swedish court decision NJA 1976.341. See also Hagstrøm and Aarbakke, 2004, at 331–332, who asserted that a buyer's examination obligation may at least be modified due to the information the seller gives and they referred to a Norwegian court case Rt. 1928.1057. They also referred to another court decision Rt. 1959.581, where the issue about the buyer's examination obligation was not specifically discussed, but where the court assumed that the buyer without doubt could rely upon the warranty given. Hagstrøm and Aarbakke, 2004, at 332. See also Egholm Hansen and Lundgren, 2014, at 293–295, who criticized a Danish court decision U 2005.761 SH, where even though the seller had given warranties the buyer could not rely only upon such warranties, as the buyer knew that there were uncertainties regarding the circumstances the warranty concerned. Egholm Hansen and Lundgren found that the decision put too much risk on the buyer. They also referred to another court decision, U 2009.1598 H, where the court held that the seller is liable for warranties even when these were of a very general nature. Egholm Hansen and Lundgren, however, submitted that in the case of standard warranties a buyer may have to conduct due diligence and not only rely upon the seller's warranties.

¹¹⁶⁵ This was also asserted by Viggo Hagstrøm and Magnus Aarbakke. See Hagstrøm and Aarbakke, 2004, at 332. See further Buskerud Christoffersen, 2008, at 233 and at 236, who maintained more generally that the seller's warranties do not as such free the buyer from conducting due diligence. See further Lindholm and Hakoranta, 1997, at 90, who asserted that seller's warranties may limit the examination obligation of the buyer, but where the seller encourages the buyer to examine the goods, the buyer may still have to carry out the examination. See also Wetterstein, 1982, at 255, who submitted that when specific warranties have been given, but the seller at the same time requests the buyer to conduct an examination, the legal situation is not quite clear and he argued that [author's comment – at that time] it depends on the circumstances and that the buyer should *in dubio* conduct such research.

described above, in fact limit the buyer's possibilities to claim under the representations and warranties.¹¹⁶⁶ Representations and warranties might be quite generally worded and in such cases a prudent buyer, if not successful in negotiating more specifically worded representations and warranties or indemnifications, should rather ask specific questions of the seller about the most important matters relating to the target and other matters affecting the transaction. Such questions may obviously lead to a situation where due diligence is carried out, which again may affect the liability of the parties.

It would be beneficial to all parties if the matter of whether representations and warranties as a rule excludes the buyer's obligation to examine the target or not were clear-cut, but for the moment that is not the situation in the Nordic countries. Therefore, leaving the issue of due diligence open is not a good option if Nordic law governs the contract. Predictability is enhanced if the parties agree upon the effect of due diligence in the written contract including relevance of information and knowledge.

In order to summarize the Nordic situation, the following is submitted. The Nordic Sale of Goods Acts contain provisions which limit the buyer's right to claim for defects in goods if the buyer knew or should have known about those defects when he entered into the contract and also if he examined the goods or refrained from examining them without cause regardless of a request from the seller.¹¹⁶⁷ However, regardless of possible examination the buyer may claim compensation based on a defect if the seller has not acted honorably and in good faith, for example by not telling the buyer of a defect that the seller was aware of.¹¹⁶⁸ Even if the Sale of Goods Acts are non-mandatory, they reflect general principles. The situation where a buyer could claim under contractual representations and warranties regardless of knowing they were untrue when he entered into the contract and when the contract does not explicitly provide for that possibility, could be held to be in conflict with those general principles. It could be claimed that a reason for the buyer not being able to rely upon such information is that his knowledge in fact precludes the rightness of claiming damages.¹¹⁶⁹ However, as the Sale of Goods Acts are subsidiary in nature it also means that the parties should be able to agree otherwise in the contract.

Another twist in the discussion about excluding the effect of due diligence are representations and warranties on information provided. For example, such representations and warranties might include wording to the effect that the information is not misleading and/or that no material information has been withheld.¹¹⁷⁰ These kind of warranties are more important in the common

¹¹⁶⁶ See also Egholm Hansen and Lundgren, 2014, at 295 about the different aspects to consider when due diligence is carried out and the relation to the seller's warranties and seller's obligation to provide information.

¹¹⁶⁷ §20 of the Finnish, Norwegian and Swedish Sale of Goods Acts and §47 of the Danish Sale of Goods Act.

¹¹⁶⁸ See §33 of the Finnish, Norwegian and Swedish Sale of Goods Acts and §53 of the Danish Sale of Goods Act.

¹¹⁶⁹ Håstad, 2003, at 92, discussed this possibility describing a situation where the buyer is uncertain about a certain state of affairs and therefore asks for seller's confirmation as to information pertaining thereto. In such situations the parties' agreement could be regarded as superseding the provisions of the Sale of Goods Acts.

¹¹⁷⁰ See e.g. Warren's Forms of Agreements, 2, 2007, Form 8.4.05, at 8–173.

law jurisdictions due to the fact, as stated above, that there is no general disclosure obligation on sellers under common law, but there is still a risk that not disclosing information in some cases or telling ‘half-truths’ may amount to misrepresentation.¹¹⁷¹ With regard to the Nordic countries the necessity of these provisions may be questioned, although I think they emphasize the seller’s responsibility for information provided and especially if application of the Nordic Sale of Goods Acts is excluded in the contract. However, if the applicability of these Acts is not excluded, several provisions are relevant for information provided in connection with entering into a contract and when such information in fact makes the goods defective, as has already been discussed above, such as Sections 17, 18 and 19 of the Finnish, Norwegian and Swedish Sale of Goods Acts. The Danish Act does not include exactly the same language, but the same kinds of principles apply as shown above. In other words, information provided by the seller should as a rule be true and accurate according to these Acts.

Even though the Nordic Sale of Goods Acts deal with information which is material or important for the deal in question, a wider approach might be taken, as one could discuss whether withholding information actually could be a form of disloyal behavior, which in general is not acceptable.¹¹⁷² The Nordic Contract Acts do not as such stipulate anything about the disclosure or examination obligations of the parties. However, the whole concept of good faith and acting honestly in accordance with the loyalty principle is reflected in Section 33 and in Section 36 of the Nordic Contract Acts. As already noted, both Section 33 and Section 36 are rarely applied in commercial transactions between equally strong business parties, although these Sections reflect the general principles of good faith and loyalty and could be applied when contemplating the consequences for a buyer who has entered into a contract knowing that a warranty is not correct. If a party has entered

“Section 3.33 Full Disclosure, No representation or warranty of Seller hereunder or information supplied by Seller or Owners to Buyer in connection herewith (including, without limitation, information supplied in the Disclosure Schedule) is false or misleading with respect to any material fact, and Seller has not omitted to state any material fact required to be stated herein or therein necessary to make the statements herein and therein, in light of the circumstances under which they are made, not misleading.” See also Stilton, 2015, Precedent 2, Schedule 5, at 641–642: “10.1 Disclosure letter. All information contained in or referred to in the Disclosure letter is true and accurate, and the Disclosure Letter does not omit anything which renders any such information misleading or which might reasonably affect the willingness of an acquirer to acquire the Shares on the terms (including without limitation as to price) of this Agreement.”

See also ICC Model Share Purchase Agreement, 2004, at 19:

“Article 8 – Warranties. 8.1: The Seller warrants to the Buyer that as at the date of this Agreement: ... (b) neither the Seller nor any of the Seller’s agents has deliberately withheld any information from the Buyer which would be material to a prudent buyer for evaluating the Company.”

¹¹⁷¹ See discussion on representations and misrepresentations in subchapter 4.3.3. Amongst statements amounting to misrepresentations was mentioned e.g. concealment, i.e. a seller who tries to hide or make it difficult or hinder the buyer from finding out the facts may be guilty of misrepresentation in common law jurisdictions. Similarly misrepresentation may consist of telling half-truths or partly disclosing facts. A seller will also have to disclose to the buyer if previously given information, which was given in good faith, is no longer correct and the seller knows that the buyer is relying upon such disclosure. However, when the information is warranted and true and correct and not misleading, the buyer would not have to prove justifiable reliance or that he has been induced to enter into the contract based on this information, which would be the case if the buyer wants to allege misrepresentation. Furthermore, in order for a statement to be actionable as a misrepresentation, it must relate to past or present facts.

¹¹⁷² The Danish Supreme Court held in U 2004.1784 H that a seller had materially breached his information obligation based on the loyalty principle, as the seller had not informed the buyer about the fact that a very important customer had decided not to buy certain products during the next six months for several, different reasons. The buyer was allowed to cancel the contract. However, this case is not all that standard, as the parties had agreed that the buyer would not conduct a due diligence.

into a contract knowing that the other party has given incorrect statements and then claims compensation thereafter, that party could be regarded as not acting in good faith and according to the loyalty principle during the negotiations and during performance of the contract.¹¹⁷³ Considering both the provisions of the Sale of Goods Acts, the Contract Acts and general contractual principles, if nothing is agreed in the contract about the effect of buyer's knowledge and/or due diligence in the contract, it seems unlikely that a buyer would be able to claim for breach of contract if he was aware of the defect in question when entering into the contract or at closing, if the warranties and representations were repeated at closing.

Whether the buyer or the seller has the primary obligation to examine or disclose has been of interest in some Nordic discussions,¹¹⁷⁴ but it is not necessarily even a very fundamental issue under Nordic law, as it may be recalled that the parties in the Nordic countries should act loyally before and during the implementation of a contract. Thus, providing misleading information may very well be seen as going against that reciprocal principle in addition to the matter being regulated by the Nordic Sale of Goods Acts. The parties are also assumed to bear the risk that their own assumptions may not be fully fulfilled¹¹⁷⁵ and customarily they cannot be relieved from their contractual duties only because a party has entered into a contract based on his own incorrect assumptions.¹¹⁷⁶ That should, on the other hand, motivate the buyer to ensure that he has what he deems to be sufficient and relevant information prior to signing the final acquisition contract.¹¹⁷⁷

Last but not least, subchapter 2.3.2.1 described the kind of material a seller may provide especially in controlled-auction transactions such as information memoranda and vendor due diligence reports. It is typical that these documents include strict limitation of liability language, which means that neither the seller nor its advisors take responsibility for information provided. The effect of these limitation of liability provisions may be seen in light of the general discussion on interpretation of such clauses, but in addition, it has to be recognized that unless the information is referred to in the contract or has been warranted by the seller, it is in practice overturned by the

¹¹⁷³ See similar comments by Tomas Lindholm and Eeva Hakoranta. Lindholm and Hakoranta, 1997, at 90. See also Egholm Hansen and Lundgren, 2014, at 293–294, who maintained with reference to the decision in U 2005.761 SH that a buyer cannot rely upon the seller's warranties if the buyer knows that there are uncertainties with regard to the matter the seller has warranted. With regard to the case in question, it may be noted that even though there had been uncertainties in the due diligence, the buyer had not followed up on them, but just relied upon a general warranty. Johannus Egholm Hansen and Christian Lundgren also proposed that based on U 2009.1598 H a seller is responsible for his warranties, even if the warranties are fairly generally worded. Egholm Hansen and Lundgren, 2014, at 294.

¹¹⁷⁴ See e.g. Lindholm and Hakoranta, 1997, at 79.

¹¹⁷⁵ See e.g. Hemmo, I, 2007, at 405.

¹¹⁷⁶ See e.g. Hemmo, I, 2007, at 391.

¹¹⁷⁷ When Peter Wetterstein discussed §33 of the Finnish Contract Act, and the relevance of good faith on behalf of the seller and its implications, he contended that on a principle level the seller should bear the consequences if the goods are defective and the purchaser's assumptions are therefore wrong. This is because the seller and the buyer both thought the goods were better than they were and if the sale and purchase is cancelled, the seller gets back the goods and may sell them for their real value. If the buyer were to bear the risk the seller would get an over-price for the goods and thus an unconscionable advantage. Wetterstein, 1982, at 66–67. The difficulty in returning businesses in unchanged form is much too severe to accept this principle as a general rule. In all fairness Wetterstein also stated that the rule he described was of principle nature and that the circumstances are relevant (what kind of parties and what kind of transaction are involved) and that a reasonable allocation of the risk between the parties should be the goal. Wetterstein, 1982, at 67–68.

final contract. Therefore, such information does not give rise to any other implication than information provided in general and its effect.

Business acquisition contracts – especially cross-border contracts – are typically detailed, heavily negotiated documents and the parties often use lawyers to draft the contracts. Business parties engaging in business acquisition negotiations ending up in a written contract are investing in future revenues whether from the presumption of the target’s ability to create such revenues, whether by synergy effects due to the previous business of the buyer, whether by buying out competitors or for the seller by receiving funds to be freely used for its needs or by acquiring an important partner for the future development of the target business or by divesting a non-core or non-profitable business. There are usually strong economic arguments for entering into a business acquisition contract.¹¹⁷⁸ Businesses – or in this case the parties – have a responsibility towards their stakeholders such as shareholders and financiers and the parties have to consider general business judgement rules appearing in the Nordic Companies Acts. Additionally, they might have to consider provisions of financing documentation and they might have their own corporate governance regulations to adhere to. There is no reason to limit the liability of the parties when entering into such contracts not to act diligently and responsibly, as the economic benefit from their dealings will come into their hands. A diligent and responsible party should – to the extent they are not able to evaluate or analyze a contract draft itself – rather have recourse to professional advisors, which is also often done. Knowingly agreeing to a provision according to which the buyer’s due diligence will not limit the seller’s warranties and representations is a good example of the parties accepting a certain risk division, which they are entitled to do based on the freedom of contract principle. This is of course providing the parties are of equal strength and neither party misuses information or its position.

5.2.3 Interdependence of contractual provisions – representations and warranties and other contract provisions – the need to use a contextual interpretation method

The reason for focusing on common law court practice in the following is that more public, relevant material is available than in the Nordic countries. Furthermore, here will be shown the interdependence of contractual provisions, which are also typical in Nordic business acquisition contracts, and even if a Nordic court may have reached some other solutions than the common law courts, these cases show the necessity to interpret business acquisition contracts according to a contextual interpretation method.

Some of the court cases described below were referred to earlier, but these examples are repeated to the extent they show the interdependence of the different contract terms and legal issues which

¹¹⁷⁸ The reasons might of course also be due to authority or financiers’ requirements, where the parties might have to accept that a transaction is carried out, but nevertheless they would still attempt to make as good a deal as possible.

have been considered by a court. It will also be shown that under common law whether a misrepresentation is due to a pre-contractual misrepresentation or due to a breach of a contractual representation may have severe economic consequences for a party.

In order to exemplify the different effects of whether a statement is regarded as a representation or a warranty and how they are to be interpreted based on the whole contract, an English case, *Sycamore Bidco Ltd v. Breslin*,¹¹⁷⁹ will be examined and discussed. In this case, the buyer claimed that warranties in a share purchase agreement also amounted to representations. The buyer was not successful in his claim and the wording of the contract was decisive. The warranty section (Section 5 of the contract “5. Seller Warranties”)¹¹⁸⁰ of the contract only used the term “warranties” and it was said that the sellers were warranting certain matters.¹¹⁸¹ The warranties were throughout the contract referred to as Warranties with a capital W. The possibilities to claim under the Warranties were limited in Section 8 of the contract.

In Section 8.1 was agreed that

“Neither the Sellers nor the Warrantors (as applicable) shall be liable under Warranties... in respect of any claim under the Warranties:

8.1.1 if the fact, matter, circumstance or event giving rise to such claim under the Warranties ... is fairly disclosed by this agreement, the Disclosure Letter or any documents disclosed in the Data Room (and for this purpose, "fairly disclosed" means disclosed in such manner and detail as to enable the Buyer to make an informed assessment of the matter concerned and its significance);...¹¹⁸²

8.1.10 to the extent that the Buyer (having made due and reasonable enquiries of Giles Derry and Jonathan Ma, confirmation of which is evidenced by the Buyer's execution of this agreement) is actually aware of any fact, circumstances or matter at the Completion Date, which it is aware actually constitutes a claim for breach of the Warranties....”¹¹⁸³

The only mention in the contract of representations was in clause 16.3 “Entire Agreement”:

“16.3.1 The written terms of the Transaction Documents constitute the entire understanding, and constitute the whole agreement in relation to their subject matter and supersede any previous agreement between the parties with respect thereto.”¹¹⁸⁴

¹¹⁷⁹ [2012] EWHC 3443 (Ch)

¹¹⁸⁰ Regarding all sections of the contract: Original wording from the contract, cited in the judgment.

¹¹⁸¹ The wording of §5.1 was: “The Sellers severally warrant to the Buyer in the terms set out in Part B of Schedule 4, and the Warrantors severally warrant to the Buyer in the terms set out in Part C of Schedule 4, subject to the provisions of clause 8.”

¹¹⁸² As mentioned before, there is no general disclosure obligation of the seller under common law, but the wording of this subsection emphasizes that if a matter is disclosed as specified the buyer would have no right of recourse.

¹¹⁸³ This is something of a hybrid, because on the one hand it refers to actual knowledge, but on the other hand some kind of examination obligation is put on the buyer, as he is supposed to have made “due and reasonable enquires.”

¹¹⁸⁴ In other words, this subsection effectively sets out the entire agreement provision.

16.3.2 Each party acknowledges that it has not relied on or been induced to enter into this agreement by a representation other than those expressly set out in the Transaction Documents.¹¹⁸⁵

16.3.3 A party is not liable to the other party (in equity, contract or tort, under the Misrepresentation Act 1967 or in any other way) for a representation that is not set out in the Transaction Documents.

16.3.4 Nothing in this clause 16.3 shall affect a party's liability in respect of fraud or fraudulent misrepresentation.”¹¹⁸⁶

The judge, Mann, J., described as reasons for not giving the warranties dual quality, for example, that the “clear distinction in law” between representations and warranties would have been understood by the “draftsman” of the contract, which is likely in the type of transaction involved,¹¹⁸⁷ but that distinction is also clear from the contract itself as representations are only referred to in one clause (under the Entire Agreement clause) and warranties (the judge noticed that warranties were spelt with a capital ‘W’) are referred to in other parts of the contract. He further emphasized the consistency in the use of warranties throughout the contract and especially in the clause on Warranties.¹¹⁸⁸ The judge further found that there is “no reason to extend the words beyond their natural meaning.” This is as such not surprising, as the objective interpretation method is strongly dominant under English law. The judge said that it is not sufficient that the subject matter of a warranty could be a representation, but there has to be something in the contract to make the matter a representation.¹¹⁸⁹

The judge referred to a disclosure schedule attached to the main agreement and referred to in the main agreement and made note of the fact that the disclosure schedule actually also distinguished between representations and warranties as therein was stated: “The disclosure of any matter shall not imply any representation, warranty or undertaking not expressly given in the Agreement.” The fact that the contract in question contained a limitation clause (clause 8), which limited the seller’s liability for the Warranties, the judge found important as that clause was said to be “a significant part of the overall structure of liability.” He said that if warranties in this case were regarded as also being construed as representations, then the wording of the limitation clause would not apply to misrepresentations, which would lessen the seller’s protection. The judge commented on this situation that: “That would be a strange and uncommercial state of affairs and can hardly have been intended.”¹¹⁹⁰ The judge reasoned about the nature of representations and misrepresentations in general and the difficulty with the timing issue, as such concepts are actionable if they have induced a party to enter into the contract. In this case a witness stated that the statement in dispute had not

¹¹⁸⁵ This wording reflects an anti-reliance provision. This is noteworthy, as the heading of the clause is Entire Agreement. On the other hand, it shows that an anti-reliance or reliance agreement may appear in different sections of a contract.

¹¹⁸⁶ Anti-reliance language was specified in 16.3.3, but the parties had excluded fraud and fraudulent misrepresentation in 16.3.4, which can be seen in light of the fact that too broad anti-reliance language may in fact lead to the provision being unenforceable.

¹¹⁸⁷ This could be understood as referring to some kind of market practice.

¹¹⁸⁸ Ibid at 203.

¹¹⁸⁹ Ibid at 205.

¹¹⁹⁰ Ibid. at 203.

been made earlier during the negotiations. The judge also made note of the fact that if representations included express provisions, this issue is taken care of.

The judge dealt at length with the clauses (16.3.2 and 16.3.3) where the word ‘representation’ appeared. However, the wording of those clauses was such that they excluded reliance on and liability for representations not expressly set out in the transactional documents. This was a very important part of the decision, because the amount of damages which would have been allowed under a misrepresentation claim could have been as high as approximately 17 million pounds sterling, while damages under a warranty claim were capped under section 8 of the contract at 317,000 pounds sterling. This was not as such based on the different nature of misrepresentation and breach of contractual warranties, but based on what matters were governed by the limitation clause. The judge found that representations could normally be found in the warranty section, but for the reasons presented above the judge did not find that the warranties were also to be regarded as representations.

The judge clearly said that he disagreed with a previous judgment¹¹⁹¹ of Arnold, J., in *Invertec Limited v. De Mo Holding BV and Henricus Albertus De Mol*,¹¹⁹² where Arnold, J., actually accepted that warranties also amounted to representations. In this case Judge Arnold assigned great importance, when giving the statements a dual quality, to the fact that the information was supplied by the seller during the negotiations and the buyer relied on the representations made prior to the share purchase agreement. The fact that the warranties were negotiated over a considerable time prior to execution of the contract was also given relevance.¹¹⁹³

Comparing these two cases leads to the observation that two judges have come to completely different results with regard to warranties in share purchase agreements and how to interpret the situation as to whether additionally representations have been given or not and what their effect is.

Another case, which has caused some interest, is *Bikam OOD v Adria Cable*.¹¹⁹⁴ In this case, the share purchase agreement defined Warranties as ‘representations and warranties of the Sellers contained in Schedule 2...’.¹¹⁹⁵ Furthermore, in the warranty section the seller “represents and warrants” that the Warranties are true and accurate,¹¹⁹⁶ and it was said that the sellers acknowledge that the buyer had entered into the contract ‘in reliance’ on the Warranties given by the sellers.¹¹⁹⁷ The share purchase agreement also included a clause 9 on indemnification, which covered any breach of sellers’ Warranties and where in clause 9.10 the buyer acknowledged and agreed that the sole remedy against the sellers for breach of sellers’ Warranties was set out in clause 9, with some

¹¹⁹¹ Ibid at 209.

¹¹⁹² [2009] EWHC 2471 (Ch)

¹¹⁹³ Ibid at 362 and 363.

¹¹⁹⁴ [2012] EWHC 621 (Comm)

¹¹⁹⁵ Clause 1.1 definition of ‘Warranties’ as referred to at p. 8 of the judgment.

¹¹⁹⁶ Clause 7.1 of the agreement as referred to at 9 of the judgment.

¹¹⁹⁷ Clause 7.3 of the agreement as referred to at 9 of the judgment.

exceptions.¹¹⁹⁸ The agreement further included a clause on cumulative rights and remedies, which stated that these were not exclusive of any rights or remedies provided by law,¹¹⁹⁹ and a clause on entire agreement including a provision that the parties waived their rights against each other in respect of warranties and representations “not expressly set out in this Agreement.”¹²⁰⁰

The buyer, that is, Adria Cable, had brought a counterclaim for misrepresentation (under Section 2(1) of the Misrepresentation Act 1967). As noted above, the contract included both representations and warranties by definition, which was furthermore confirmed in the warranty section. Thus, the question was more about whether other provisions of the contract actually barred the buyer from bringing claims based on misrepresentation in general. The judge in the case, Simon, J., held that the representations in this case were included in the Warranty section and thus any breach was governed by clause 9.10 according to which claims for breach were ‘confined to Clause 9’ and that this clause “together with other terms indicate that such claims are to be confined to contractual claims.”¹²⁰¹

Simon, J., seems to have taken a contextual approach in analyzing the contract. He said, for example, when discussing the contents of clause 17, that even though the agreement provides that contractual rights do not exclude rights and remedies under law this does not mean that the parties may not exclude such rights including claims for misrepresentation and “[t]he issue is whether viewed as a whole the SPA has that effect.”¹²⁰² When Simon, J., discussed the entire agreement clause, he emphasized that this clause clarified that any rights were waived (not based on fraud) regarding representations and warranties which were not expressed in the SPA.¹²⁰³ Simon, J., said that it would be an “uncommercial reading” of the entire agreement clause to permit a claim without limitation of liability based on an ‘infraction’ of the obligations set out in the schedule containing representations based on the Misrepresentation Act 1967.¹²⁰⁴

This judgment contained several other statements which will be or have been referred to in other parts of this dissertation. For example, regarding the principles for how exclusion clauses (excluding or limiting liability) should be construed in commercial contracts, Simon, J., made

¹¹⁹⁸ Judgment at 11.

¹¹⁹⁹ Clause 17 ‘Cumulative Rights and Remedies’ as referred to at 12 of the judgment provided that “The rights, powers and remedies provided in this Agreement are cumulative and not exclusive of any rights and remedies provided by law and no single or partial exercise of any right or remedy under this Agreement or provided by law shall hinder or prevent further exercise of such or other rights or remedies.”

¹²⁰⁰ Clause 21 ‘Entire Agreement’ and clause 21.2 included the waiver presented, all to be found under p. 13 of the judgment, Clause 21.1 stipulated that “This Agreement (together with all the documents to be entered into under it) contains the complete agreement between the parties on the matters to which it related, and supersedes all prior agreements and understandings (whether written or oral) between the parties in respect of such matter.” Clause 21.2 stated that “Each party waives its rights against the other in respect of warranties and representations (whether written or oral) not expressly set out in this Agreement.” Finally, clause 21.3 stated that “Nothing in this Clause 21 limits or excludes the liability of any party for fraud or willful misconduct.”

¹²⁰¹ Judgment at 43.

¹²⁰² Judgment at 44.

¹²⁰³ Judgment at 45.

¹²⁰⁴ Judgment at 46.

reference to some general principles regarding the construction of commercial agreements as set out in the Supreme Court judgment in *Rainy Sky SA v. Kookmin Bank*,¹²⁰⁵ that is, the court must consider the language used and what a reasonable person – that is, a person who has all the background knowledge which would reasonably have been available to the parties in the situation in which they are at the time of the contract – would have understood the parties to have meant. It was also stated in that judgment that a court must consider all relevant surrounding circumstances and if there are two possible constructions, the court may prefer the construction which is “consistent with business common sense” and reject the other.¹²⁰⁶ Simon, J., further referred to another case, that is, *Tradigrain SA and others v. Intertek Testing Services (ITS) Canada Ltd and another*¹²⁰⁷, where it was mentioned that the traditional view of English law on construing exemption and limitation clauses restrictively has been somewhat modified and that there is an increasing willingness to accept that parties to commercial contracts have the right to “apportion the risk of loss as they see fit and that provisions which limit or exclude liability must be construed in the same way as other terms.” Simon, J., made reference to some other cases as well, but in his judgment regarding the particular share purchase agreement, he expressed the view that the provisions in question “involved a calculated allocation of risk and remuneration.”¹²⁰⁸ The one matter that is left open in the judgment is that Simon, J., said that he was “doubtful that a representation which only appears in a contract can fall within the terms of s.2(1) of the Misrepresentation Act 1967 in the light of the wording of the statute”, but he found that it was not necessary to decide this issue in the case before him.¹²⁰⁹ However, it may be noted that even that statement does not per se exclude the possibility of claiming breach of warranty and breach of misrepresentation under the Act if it cannot be certain that representations as such have been excluded from the sphere of the contract.

An example of reasoning by US courts is a case where Delaware law was applied as it shows the issues which have to be considered when a party claims that an actionable misrepresentation exists regardless of the contract wording. In *ABRY Partners V, L.P. et al. v. F&W Acquisition LLC et al.*,¹²¹⁰ the buyers claimed that they should have the right to rescind a stock purchase agreement due to the seller’s alleged fraud because the target company had failed to disclose certain material facts.

The stock purchase agreement Section 7.8 stated that:

“Acquiror acknowledges and agrees that neither the Company nor the Selling Stockholder has made any representation or warranty, expressed or implied, ... as to the accuracy or completeness

¹²⁰⁵ [2011] UKSC 50; [2011] 1 W.L.R. 2900

¹²⁰⁶ These statements are to be found in the Supreme Court judgment at 21 and were issued by Lord Clarke of Stone-cum Ebony JSC and the other members of the Supreme Court agreed with such statements.

¹²⁰⁷ [2007] EWCA Civ 154, at 46.

¹²⁰⁸ Judgment at 37.

¹²⁰⁹ Judgment at 39.

¹²¹⁰ 891 A.2d 1032 (Del.Ch.) 2006

of any information ... furnished or made available to the Acquiror and its representatives, except as expressly set forth in this Agreement ... and neither the Company nor Selling Stockholder shall be subject to any liability to the Acquiror or Use of or reliance on any such information ...”¹²¹¹

The court’s opinion states that this is a ‘critical provision’ as it showed what kind of information the buyer relied upon when executing the agreement.¹²¹² The stock purchase agreement also included indemnification provisions, which gave limited recourse due to breach of representations and warranties and it included an indemnity cap: Section 9.1 (a).

Section 9.1 (a) read as follows:

“[T]he Selling Stockholder agrees that, after the Closing Date, the Acquiror and the Company and ... each controlling shareholder of the Acquiror or the Company ... shall be indemnified and held harmless by the Selling Stockholder from and against, any and all claims, demands, suits, actions, causes of actions, losses, costs, damages, liabilities and out-of-pocket expenses incurred or paid, including reasonable attorneys’ fees, costs of investigation or settlement, other professionals’ and experts’ fees, and court or arbitration costs but specifically excluding consequential damages, lost profits, indirect damages, punitive damages and exemplary damages ... to the extent such Damages ... have arisen out of or ... have resulted from, in connection with, or by virtue of the facts or circumstances (i) which constitute an inaccuracy, misrepresentation, breach of, default in, or failure to perform any of the representations, warranties or covenants given or made by the Company or the Selling Stockholder in this Agreement ...”

Furthermore, the stock purchase agreement included an exclusive remedy clause and according to Section 9.9(a):

“Except as may be required to enforce post-closing covenants hereunder ... after the Closing Date the indemnification rights in this Article IX are and shall be the sole and exclusive remedies of the Acquiror, the Acquiror Indemnified Persons, the Selling Stockholder, and the Company with respect to this Agreement and the Sale contemplated hereby; provided that this sentence shall not be deemed a waiver by any party of its right to seek specific performance or injunctive relief in the case of another party’s failure to comply with the covenants made by such other party.”

In the ruling by the court it was established that in Delaware contractual reliance and limitation language is not effective and the other party may rescind a contract if it can be proven that the representor knew that the representations and warranties given in the contract were false, or outright lied to the other party about a contractual representation or warranty. What is furthermore important in this ruling is that a buyer who acknowledges and accepts an explicit non-reliance clause – that is, the buyer is not relying on representations not included in the contract when signing the same – may not rescind the contract in other cases, that is, due to even intentional misrepresentation by the seller on matters which are not contained in the representations and warranties in the final written contract. If the buyer relied only upon the contractual representations

¹²¹¹ Ibid. at 14 of the judgment. Regarding all sections of the contract: Original wording from the contract, cited in the judgment.

¹²¹² Ibid. at 14 of the judgment.

and warranties, the buyer may not rescind the contract due to non-intentional misrepresentations. The ruling also contained several references to the fact that in this case the parties were “highly sophisticated commercial parties” (the seller and buyer were both private equity firms) and furthermore the fact that the clauses were heavily negotiated and were not boilerplate clauses was part of the reasoning. As to the case itself, the buyer was allowed to pursue a claim for rescission.

The same kind of comprehensive analysis and decisions as presented above is hard to find in any publicly available court cases in the Nordic countries. Many business acquisition contract disputes, especially disputes in relation to cross-border transactions, have been resolved in confidential arbitration proceedings. However, bearing in mind that in the Nordic countries Anglo-American contract drafting is typical in business acquisitions regardless of whether one of the parties is from the common law jurisdictions or not,¹²¹³ the above-discussed common law court cases are interesting at least to the extent they show how the importance of consistency in the wording of the contract and the need to take into consideration the whole of the contract has to be emphasized in the interpretation of business acquisition contracts. Thus, the need for a contextual interpretation method of business acquisition contracts is very clear.

It may be more difficult to directly apply the reasoning of the decisions in common law court cases to the extent they deal with, for example, the different nature of representations and warranties and how anti-reliance/limitation contract provisions should be interpreted. That question is to be dealt with in the following, where amongst other things, how common law practice may or may not influence interpretation of business acquisition contracts governed by Nordic law will be discussed.

5.3 Use of common law terminology and the English language in business acquisition contracts governed by Nordic law

5.3.1 Challenges when interpreting contracts in English – a Swedish court case

As indicated above, it is hard to find publicly available Nordic court cases dealing with cross-border business acquisition contracts and specifically with the question of how common law terminology and contracts in English have been interpreted. There is, however, one fairly recent interesting case in Sweden regarding interpretation of a cross-border business acquisition contract in English. This case was tried by one of the Swedish Courts of Appeal, Svea Hovrätt.¹²¹⁴

The primary question was whether an arbitration contract term was applicable to the parties appearing in the court proceedings who were not the same as when the share sale and purchase contract was entered into, and secondly whether the plaintiff, who was not an original party to the

¹²¹³ See e.g. Calissendorff and Calissendorff, 1999, at 75–76.

¹²¹⁴ Svea Hovrätt T9588-11 (October 2, 2012).

contract, had the right to claim under warranties in the share sale and purchase contract.¹²¹⁵ The plaintiff claimed that it had such a right because three corporate reorganizations carried out in Denmark after entry into the contract were general – they could also be named universal – successions and covered by a certain provision in the share sale and purchase contract.¹²¹⁶ The Svea Court of Appeal, applying Danish law with regard to the corporate matters, found that one of these reorganizations (*betalningserklæring*) was not a general succession according to Danish law.¹²¹⁷ Therefore, the court turned to the contract and specifically clause 8 D of the share sale and purchase contract, where the assignability of the contract was agreed upon.¹²¹⁸

When interpreting this contract section, the court focused on the words ‘successors’, ‘assigns’ and ‘assignable’ used in the provision in question. The court said that clause 8 D was a boilerplate clause which had not been separately negotiated and it was not possible to find any special intention of the parties or the circumstances attached to that clause, wherefore the clause should be interpreted objectively.¹²¹⁹ The court also held that as the contract was drafted in the English language according to an Anglo-American model, the words used should be interpreted according to the Anglo-American legal technical meaning.¹²²⁰ The court in fact interpreted the words and especially the word ‘successors’ according to US law.¹²²¹ It is not clear from the decision whether the court had actually investigated what the same words would have meant under English law. Not all the details of the case and the contract were described in the decision, so there might be an underlying reason why the interpretation was carried out based on how these words were understood in US law. It is also unclear why the fact that the contract was drafted in English led the court to decide that the contract provision in question should be interpreted according to an Anglo-American legal, technical meaning.

Nevertheless, the Svea Court of Appeal was not unanimous in its decision and the dissenting opinion dealt with how to understand the English words ‘successors’, ‘assigns’ and ‘assignable’. The dissenting opinion suggested that the English language probably does not have a similar adjective to ‘assignable’ derived from the word ‘successors’.¹²²² It was also said that ‘assign’ in English legal language contains several forms of transfer and not only singular successions as understood in Swedish law.¹²²³

¹²¹⁵ Ibid. at at 3–4 and 5–6.

¹²¹⁶ Even though Swedish law was applicable to the dispute, the corporate reorganization measures were governed by Danish law. As to the factual circumstances, the three different forms of reorganizations were according to Danish law *fullständig spaltning*, *partiell spaltning* and *betalningserklæring*.

¹²¹⁷ At 12 of T9588–11.

¹²¹⁸ Ibid. at 3.

¹²¹⁹ Ibid. at 4–5.

¹²²⁰ Ibid. at 5.

¹²²¹ Ibid. at 5.

¹²²² Ibid. at 8.

¹²²³ Ibid. at 8.

The decision of the Court of Appeal was appealed and the Swedish Supreme Court issued its decision on April 26, 2016.¹²²⁴ Unfortunately, the Supreme Court did not state anything about the interpretation of the wording of clause 8 D of the share sale and purchase contract, as it found that the claim for compensation due to breach of an environmental warranty had successfully been passed on to the plaintiff in the case of the reorganization identified as *betalningserklæring*.¹²²⁵ The dispute as to the merits of the case with regard to the claim under the warranty was to be decided in arbitration.

Reviewing how the interpretation of the words was explained in the Court of Appeal decision it is not only surprising that without further explanation the court used US law, but also that the decision referred to only one source, that is, one book.¹²²⁶ Although the book as such is informative and reliable, a more extensive use of sources is advisable when a court is referring to and using the common law understanding of English wording and terminology used. This is due to the fact that when interpreting the wording of a contract in a foreign legal technical sense, as done by the Svea Court of Appeal, the question is clearly not only about looking at the language in a mere linguistic sense. When the intention is to look upon the wording in a ‘legal technical’ sense, it is appropriate to review a wider selection of sources in order to find out the background of the wording and terminology used and what the governing opinion is in the respective jurisdiction.

The Court of Appeal referred to the fact that the contract was drafted according to the Anglo-American way of drafting, but did not explain why it examined the wording of the contract provision in question based on how certain words were understood in US law. As has been shown above, legal concepts in the UK and the USA are not always similar, so the court should rather have clarified why it chose to interpret the words in question according to the US and not the English understanding. That aspect would have been especially interesting in this case considering that the plaintiff’s registered office was in the UK. It is also unclear why the fact that the contract was drafted in English led the court to decide that the contract should be drafted according to the Anglo-American legal, technical meaning. If the Svea Court of Appeal had used more extensive sources and explained the questions set out above, the decision would have been more informative and reliable with regard to future similar cases.

5.3.2 Another example of challenges in translating contracts based on common law understandings – ‘best efforts’

Except for the discussion about the above court case, considerable focus in this dissertation has been on the understanding of conditions, representations and warranties as important terms of

¹²²⁴ NJA 2016.288.

¹²²⁵ Ibid. at 8.

¹²²⁶ P. 5 of T9588-11, where reference is made to Stark, 2003, at 88–.

business acquisition contracts. It has been submitted that these contract terms might be qualified differently and with regard to conditions precedent it was mentioned that the parties' obligation to act and co-operate in order for the conditions precedent to be fulfilled may be qualified by words such as 'best efforts', 'reasonable best efforts' or 'reasonable efforts'.¹²²⁷ The challenge with translations and employing a common law understanding of the contractual wording is well exemplified by these expressions. The main characteristic is that expressions such as best efforts, reasonable best efforts or similar expressions impose a certain standard of performance or behavior on the parties to the contract.¹²²⁸ There is, however, a multitude of expressions dealing with the same kind of issues¹²²⁹ but there is no precise definition of them. Therefore, one has to analyze the case law in order to understand what the contents of these expressions might entail in the common law jurisdictions.

When analyzing best efforts provisions in the USA, it has been claimed that different kinds of best efforts provisions may according to contemporary law impose a higher degree of effort than good faith.¹²³⁰ Furthermore, the discussion and case law in relation to such provisions in the USA include several nuances in relation to reasonableness and diligence in combination with good faith.¹²³¹ It is hard to draw any firm conclusion based on US case law on what kind of standard is actually required and to what degree adding words like 'reasonable' adds to the level of effort needed.¹²³² In the UK, too, many court cases deal with these matters under English law and there is case law

¹²²⁷ See subchapter 5.2.1.1.

¹²²⁸ See with regard to UK definitions by Mendelssohn and Howly, 2000, at 2.61: "Best endeavours. An obligation to use best endeavours imposes a duty to do what can reasonably be done in the circumstances: "the standard of reasonableness is that of a reasonable and prudent board of directors, acting property in the interests of their company" (*Terrell v Mabie Todd & Coy Ltd* [1952] 69 RPC 234). Reasonable endeavours. An obligation to use reasonable endeavours is less burdensome than best endeavours and has been described as "appreciably less than best endeavours" (*UBH (Mechanical Services) Ltd v Standard Life Assurance Co.* The Times, 13th November, 1986). Case law suggests that the obligation to use reasonable endeavours means an obligation to take action but only to the extent that such action does not disadvantage the obligor." With regard to the USA see e.g. Farnsworth, II, 2004, at 402, who noted that best efforts may not only be based on the parties' explicit agreement, but the courts may also imply or impose a duty of best efforts. Farnsworth also noted that both the UCC (§2-306 (2)) and the Restatement (Second) (Introductory Note to chapter 11) refer to best efforts, although "infrequently". Farnsworth, II, 2004, at 404.

¹²²⁹ See Adams, 2004, at 12, who identified ten different effort expressions used in contracts filed with the US SEC.

¹²³⁰ Farnsworth described best efforts as "Best efforts is a standard that has diligence as its essence and is imposed on those contracting parties that have undertaken such performance." He wanted to emphasize the difference between good faith and best efforts in this regard. Farnsworth, II, 2004, at 405. In general Farnsworth held that there is great uncertainty as to the meaning of best efforts and gave as practical advice that the contract should state quite extensively what it means. Farnsworth, II, 2004, at 410. See also Adams, 2004, at 13, who referred to e.g. *Kroboth v Brent*, 215 A.D.2d 813, 814 (N.Y.App. Civ.1995), where it was held that best efforts is more than good faith, as good faith is implied in all contracts. Adams noted that some courts have earlier held that the standard is the same for good faith and best efforts.

¹²³¹ See Adams, 2004, at 13–14. See further §2-306(b) of the UCC, which Adams also referred to, which holds that there is an implied obligation to use best efforts, described as that the parties should "use reasonable diligence as well as good faith in their performance of the contract."

¹²³² It may be recalled that e.g. Farnsworth suggested that there is no firm standard and the parties should rather agree to the standard in their contract. See Farnsworth, II, 2004, at 410. See also comment by David Shine, who asserted that "... there is little support under New York law for the view that best efforts is a different commitment standard than reasonable efforts." He mentioned as the only case where the difference is really clear is *LTV Aerospace and Defense Company v. Thomson-CSF S.A.*, but he held on the other hand that the case has little precedent value, as it was a bankruptcy court decision. Shine, 2004, at 16. It is worth noting, however, that his article was published in 2004, and it has not been checked whether other court cases since then have applied different standards. Furthermore, the article dealt only with New York state law.

where the differences between best and reasonable endeavors have been described.¹²³³ The importance of the wording of the contractual provision in question, but also of the whole contract, was apparent in *Rhodia International Holdings Ltd v Huntsman International LLC*.¹²³⁴ For the purpose of the discussion, here is only noted one comment regarding endeavors. When discussing the difference between using reasonable endeavors and best endeavors the court found that reasonable endeavors “... probably requires a party to take one reasonable course, not all of them, whereas an obligation to use best endeavours probably requires a party to take all the reasonable courses he can. In that context, it may well be that an obligation to use all reasonable endeavours equates with using best endeavours.”¹²³⁵ So in this case there was a fairly concrete approach as to the difference between ‘best’ and ‘reasonable’ endeavors. However, it has also been submitted that the standard of ‘diligence’ between these two expressions, not to mention all kinds of variants in between, is not clear.¹²³⁶

The intention here is not to comprehensively describe or discuss the different views on best efforts or best endeavors, but rather to show the difficulty even within the respective common law jurisdiction to establish what exactly these expressions mean and require from the parties. It should also be duly observed that these expressions do not have the same meaning under English law as under US law.¹²³⁷ It is thus important for a Nordic court which has to or decides to interpret these expressions according to common law to acknowledge that these words and expressions do not have a specific definition even in the respective common law country, but the expression rather describes some kind of standard of effort a party has committed himself to. Therefore, as is also emphasized in the common law jurisdictions, the standard of care, diligence and reasonableness will to a great extent have to be analyzed based on the factual circumstances and how the contract has been drafted.

When using expressions like ‘best efforts’ or ‘best endeavors’ in contracts governed by Nordic law and claiming that interpretation should be carried out based on the common law understanding of these expressions regardless of the reason, several difficulties will arise. It was described that in the common law countries best efforts, reasonable best efforts and similar expressions are transaction-specific and it is hard to find a precise definition of the expressions or consistent common law case law.

A direct translation of best efforts or reasonable best efforts would in most cases not be sufficient for a Nordic court to decide upon the level of care and diligence required, although the expressions

¹²³³ For example Richard Christou has described a fair amount of case law when discussing the difference between best and reasonable endeavours. Christou, 2012, at 46–49. These cases will not be described with the exception of one more recent case i.e. *Rhodia International Holdings Ltd v Huntsman International LLC*, where, as Christou stated (at 47), previous case law was also discussed.

¹²³⁴ (2007) EWHC 292 (Comm.)

¹²³⁵ Ibid. at 76.

¹²³⁶ Christou, 2012, at 48–49.

¹²³⁷ As already noted, British and US legal English are not identical. See e.g. Mattila, 2002, at 465.

could easily be translated into the Nordic languages.¹²³⁸ First, the vagueness and diversified practice in the common law countries would require a substantial amount of background information in order for the court to have an understanding of the different ways in which these expressions have been understood in common law.¹²³⁹ This information may still give a divergent basis for how the expressions should be interpreted. Secondly, at the very least in situations where the courts want to refer to the common law understanding of terms and expressions used, they should make a motivated decision on whether they employ English or US law. With regard to US law the courts should also establish whether they find that there is a consistent practice in the US which justifies not taking into account possible divergent practice in the different states. The Restatements are of course valuable instruments in such an exercise, but additionally contemporary state court practice would have to be reviewed. Unless the contract is so specific in referring to a certain common law understanding of these expressions that the respective Nordic court would be obliged to at least try to find out the “true” common law meaning of the expressions, this kind of exercise seems over-zealous in most cases.

It is doubtful whether common law parties or even the lawyers that drafted the contracts always contemplate all the different aspects of using, for example, best efforts, reasonable best efforts or reasonable efforts. There might be a discussion and negotiation of whether the standard should be ‘best’ or ‘reasonable best’ efforts as to the level of effort and care expected from the parties. Based on my own experience, however, some fairly general observations on the differences are often the basis for motivating why one or the other should rather be used. Therefore, it would probably be hard to find a party-specific intention with using such expressions,¹²⁴⁰ unless of course the contract contains further definitions of their meaning and requirements.

If there is no reason to employ the common law understanding and Nordic law is applicable, then best efforts, reasonable best efforts and similar expressions used in contracts governed by Nordic law may be interpreted as actually reflecting nothing else than a certain – depending on the wording – higher degree of good faith and loyalty, principles which as such are widely accepted in the Nordic legal community as governing in contractual relationships.¹²⁴¹ There is in other words equivalent terminology which deals with the same kind of issues as in the common law jurisdictions, although application of the terminology would be different in the different countries. It may be recalled that in the common law jurisdictions loyalty as a principle is not used, but good faith or good faith and fair dealing is required in the USA in the performance and enforcement of

¹²³⁸ See e.g. Mattila, 1999, at 108–109 and at 111, who discussed the problems with concepts and language in general in comparative law, but who also explained the risks in general with using pure translations without taking into consideration the background of the concepts or terminology used.

¹²³⁹ If foreign law is applicable the Nordic courts should in principle try to use the legal sources and interpretation methods used in such jurisdictions. See NJA 2016.288, at 7, where it was also said that the court does not have an obligation to know foreign law and if the court does not know such law, the parties may be required to present information/evidence about the law in question.

¹²⁴⁰ This was also said to be the case with the words translated in the Svea Court of Appeal decision T9588-11.

¹²⁴¹ See discussion in subchapter 2.2.2.

a contract,¹²⁴² but just above was noted that it has been claimed that e.g. best efforts may impose a higher standard on the parties than good faith. In the United Kingdom good faith is not established as an undisputed general contractual principle even in the performance of contracts.¹²⁴³ In principle the legal construction could nevertheless be tied to how Nordic contract law would perceive such efforts based on the loyalty and good faith principle and in some cases on legislation.

5.4 Differences in drafting style and possible effects when interpreting contracts according to Nordic law

Both the use of common law terminology and the use of the English language make interpretation of business acquisition contracts governed by Nordic law demanding, but there is one additional challenge which the Anglo-American drafting style has brought to the Nordic countries. Namely, in these contracts the same matter may be described by using several words, where in the Nordic languages and under Nordic law such matter could be described by using only one word.¹²⁴⁴

For example, a model contract based on the common law way of drafting may say that “... Seller will sell, convey, assign, transfer and deliver to Buyer, and Buyer will purchase, acquire and assume, all of the right, title and interest of Seller in, to and under, all of Seller’s properties, assets claims, Assumed Contracts...”¹²⁴⁵ In all fairness, the difference in drafting is sometimes not only due to style, as for example title guarantee has a certain meaning under English law (Law of Property (Miscellaneous Provisions) Act 1994). Nevertheless, as to the example used, a Nordic lawyer would be more inclined to use instead of “convey, assign, transfer and deliver” simply a statement that the seller ‘sells’ or perhaps ‘sells and transfers’.¹²⁴⁶

This way of drafting, however, leads to quite interesting questions, if and when the words are translated separately even if put in context, This was also the issue and problem for the Svea Court of Appeal when the court dissected the different meanings of ‘successors’, ‘assigns’ and ‘assignable’. As noted above in subchapter 5.3.1, the dissenting opinion noted that from the word

¹²⁴² Good faith is confirmed as concepts both in the UCC and in the Restatement (Second) as good faith and fair dealing. See subchapter 2.2.2 above.

¹²⁴³ See subchapter 2.2.2 above. It may further be recalled that e.g. in *Mid Essex Hospital Services NHS Trust v Compass Group UK & Ireland Ltd* [2013] EWCA Civ 200, it was stated that there is no general duty of good faith, but parties may agree expressly on imposing good faith in their contract. However, the situation is not static, as may be seen by an earlier decision that same year, as in *Yam Seg Pte Limited v International Trade Corporation Limited* [2013] EWCH 111 (QB) Leggatt, J., said that “I respectfully suggest that the traditional English hostility towards a doctrine of good faith in the performance of contracts, to the extent it still persists, is misplaced.”

¹²⁴⁴ See e.g. Warren’s Forms of Agreements, 2, 2007, 8.6.01, at 8–244, Art. II Sale of Shares and Closing, “2.1 Purchase and Sale. The Seller agrees and the Purchaser agrees to purchase from the Seller, all right, title and interest in and to the Target Shares, on the ...” See also Stilton, 2015, at 529, 2 [Conditional] Agreement for Sale and Purchase. “2.1 Sale and purchase. On Completion the Seller shall sell the Shares with full title guarantee and the Buyer shall buy them free from any Encumbrance and together with all rights now or hereafter attaching to them, on...” In a typical Nordic contract ‘all right, title and interest in and to’ would easily be replaced by just stating “agrees to purchase from the Seller the Target Shares.” See another example of similar nature in Schans Christensen, 1998, at 165.

¹²⁴⁵ Warren’s Forms of Agreements, 2, 2007, Form 8.4.05, at 8-147 – 8.148, Art. II Acquisition and Disposition of Assets. “Section 2.1 Purchase and Sale of Assets.(a).

¹²⁴⁶ See e.g. Schans Christensen, 1998, at 166.

‘successors’ can hardly be derived an adjective as in the case of ‘assigns’, which can be transformed into the word ‘assignable’. That these kinds of analysis and discussions may be carried out by the courts is not necessarily what the parties have in mind when they sign a contract based on the Anglo-American way of drafting the contract. However, the parties, especially commercial parties, bear responsibility for the wording and contents of the contract. Therefore, if it is not necessary to use multiple words to describe a certain notion under Nordic law, the parties would be wise to avoid wording which actually makes the contract unclear as to what the parties intended. If they use such multiple wording there is a risk, as in the case of the Svea Court of Appeal, that a court will try to translate the words based on a common law concept and the result might be unexpected.

The official versions of Nordic Acts and other laws appear in the respective local language or languages and the courts issue their decisions in Danish, Finnish, Norwegian or Swedish. Furthermore, doctrine plays an important part in contract law and the works of renowned legal scholars are often used by the courts, but there is still limited material available in English. There are some noteworthy exceptions, as recently not only have legal scholars started to publish more in English, but there has also been published other useful material such as the Restatement of Nordic Contract Law,¹²⁴⁷ and in connection with the 100 year anniversary of the Nordic Contract Acts a book in English was published including translations of the Nordic Contract Acts.¹²⁴⁸ However, if a dispute is brought to a public court regarding a contract drafted in English, that contract would have to be translated into one of the local, official languages, which is seldom a simple linguistic exercise. This is exactly where situations – like using several English words to describe basically the same notion under Nordic law – could give rise to confusion and insecurity as to the outcome of the dispute. The courts may allow evidence and hear witnesses in other languages, but the courts or the other party may require that documents and witness statements are translated into the same language as used in the court proceedings. The difficulty with translating contracts from the English language into a Nordic language is often in fact mitigated by the widespread custom that the parties to cross-border business acquisition contracts have agreed to take any dispute to arbitration. The arbitrators would have to conduct the proceedings in the language the parties have agreed to in the governing law provision, if that provision includes the question of language.¹²⁴⁹ However, the inherent problem remains even in arbitration, that is, how should the wording of a contract drafted in English be understood under Nordic law?

One additional tool in translation of English contracts is the possibility to use EU legislation and compare how that legislation has been translated into the respective local language and thus gain a

¹²⁴⁷ Published in 2016.

¹²⁴⁸ Published in 2015.

¹²⁴⁹ If the parties have not agreed upon the language, the arbitrators may decide. See e.g. §17 of the Danish Rules of Arbitration Procedure (in force 1 May 2013); §27 of the Arbitration Rules of the Finland Chamber of Commerce (in force 1 June 2013); §11 of the Rules of the Arbitration and Dispute Resolution Institute of the Oslo Chamber of Commerce (in force 1 January 2017) and §26 of The Arbitration Rules of the Arbitration Institute of the Stockholm Chamber of Commerce (in force 1 January 2017).

better understanding of how certain terminology and expressions could be translated into local legal concepts. Even in this regard there might be difficulties, for example in the sense that translations into the different European languages do not necessarily lead to the same result.¹²⁵⁰ It is as such not a novelty that Nordic courts have to interpret contracts in foreign languages, nor is it a novelty that the courts sometimes refer to non-mandatory internationally agreed frameworks such as the UNIDROIT Principles.¹²⁵¹

However, many disputes regarding business acquisitions are not necessarily such that regulations or statutory acts deal with the possible meaning of the terminology used. Furthermore, even though words might be directly translated from English into the respective Nordic language, this does not necessarily lead to a result which actually accomplishes what is generally understood by those words when used in business acquisition contracts, and especially not if the acquisition is cross-border, or what the parties intended by using those words.

When a business acquisition dispute is brought to a Nordic court, general interpretation methods and principles apply, that is, a contextual interpretation method is applicable.¹²⁵² Commercial contracts like the ones discussed here would primarily be interpreted based on an objective interpretation method. This also means that, if there is no specific party-related intention to the words used, the words will be given their ordinary meaning in the language in question. The ordinary meaning would be the ordinary legal meaning, which may differ from the everyday meaning of some words. The ordinary meaning might also be influenced by what kind of business the parties and/or the targets are involved in, while other technical and trade-related circumstances might lead to the meaning of the word being given a very specific meaning which is fairly far from what the word means in daily life. Obviously if the parties have intended and given the wording some specific meaning, this could also lead to an interpretation of the wording which does not equal how the wording would be understood ordinarily. This also means that even though a court might review the wording of the contract initially based on a linguistic exercise and interpret the meaning according to the applicable law, the court will also have to put the translation and interpretation into context, taking into account the whole contract, the fact that it is a business acquisition contract, and evaluate whether there are trade-specific or other custom-based

¹²⁵⁰ See e.g. Karapuu, 1999, at 175–177, who used as an example the translation of art. 6:1 of the European Convention on Human Rights, the Finnish translation of which Karapuu found to be actually wider than the English and French version of the article in question.

¹²⁵¹ For example with regard to Norwegian practice, Johan Giertsen has mentioned that Rt. 2008.969 referred to the UNIDROIT Principles, Giertsen, 2014, at 34. As to Swedish practice, Torgny Håstad has mentioned that the Swedish Supreme Court in 8 cases since 2009 has referred to DCFR, but he also noted that he is not aware that the Supreme Courts in Denmark, Finland or Norway would have made such references. Håstad, 2015, p. 179.

¹²⁵² The different dimensions of the contextual interpretation method were described above in subchapter 3.3.2.1. Many of the common law court cases described show the necessity to look at the contract as a whole when interpreting the contract in the case of a dispute. See, e.g., *AXA Life v Campbell Martin Ltd* [2011] EWCA Civ 133; *Bikam OOD v Adria Cable* [2012] EWHC 621 (Comm); *ABRY Partners V, L.P. et.al. v F & W Acquisition LLC et.al.* 891 A.2d 1032 (Del.Ch.) 2006; *CBS Inc. v. Ziff-Davis Publishing Co.*, 553 N.E.2d 997 (N.Y.) 1990. Even though the contextual interpretation method governs in the Nordic countries, court cases actually dealing with cross-border business acquisition contracts are scarce, but nothing has been presented as to why the same method would not be applied to these contracts.

interpretations which should be taken into account.¹²⁵³ In this context, trade usage may be understood as how matters are dealt with in business acquisition contracts. If it is a cross-border acquisition contract, that may also have an impact on the interpretation.

When considering how drafting style may affect interpretation of contracts, Nordic courts cannot ignore the fact that detailed acquisition contracts are now a custom in the Nordic countries as well. It has, for example, been submitted that Danish courts would most likely take at least as a starting point that such detailed contracts exhaustively regulate the rights and obligations of the parties.¹²⁵⁴ This is a defensible assumption, because the detailed contracts used in the Nordic countries are often based on how the contracts would be drafted according to English or US practice, and the contracts therefore mostly consider all relevant aspects of the transactions. This is ignoring for the moment the fact that use of these ‘templates’ may also cause problems, as the compatibility between terminology and expressions used in the contract and the governing law has not always been considered. Nevertheless, these detailed contracts are not necessarily as complete as the parties have assumed and general contract law may influence interpretation of the contracts. Giuditta Cordero-Moss has, for example, submitted that generally – even in cases of very detailed contracts – interpretation is based on the governing law and one cannot assume in the Nordic countries that a detailed contract is totally detached from the governing law.¹²⁵⁵ There is no substantial conflict between these statements, because even if, as in this dissertation, the primary interpretation source with regard to business acquisitions is the detailed written contract, the governing law provision does in practice influence interpretation in several ways. The terminology and expressions are translated or transformed so as to be compatible with the requirements of the legal system represented by the governing law. Mandatory provisions in enacted legislation affect interpretation, but not necessarily only provisions of the governing law in cross-border transactions. Furthermore, contract interpretation is seldom a purely ‘technical’ exercise, but generally accepted principles in the respective jurisdictions also have an impact on interpretation. Therefore, even if detailed contracts are regarded as the primary interpretation source and even if they comprehensively set out the rights and obligations of the parties and other terms and conditions of the transaction, interpretation is also a balance between weighing the importance of fundamental principles between each other. In this dissertation, the freedom of contract principle has been emphasized for several reasons. For example, it enhances predictability and commercial parties of equal strength may be presumed to look out for their own interests, but the loyalty principle is held in very high regard in the Nordic countries and this principle may have an effect on the interpretation of detailed business acquisition contracts.

¹²⁵³ In other words, if the governing law does not provide for equivalent concepts and absent some contract-specific intention, the courts may have to look upon the contract terms based on their common law origin. This situation has in general been described as a situation of hybrids and that based on *lex mercatoria* the terms should be interpreted as they are customarily understood in the trade in question. See Klami and Kuisma, 2000, at 16.

¹²⁵⁴ Schans Christensen, 1998, at 159.

¹²⁵⁵ Cordero-Moss, 2014, at 132–133.

5.5 Intention and understanding of the parties in the battle between common law terminology and governing Nordic law

5.5.1 Intention and the wording of the contract

As stated several times, the aim of contract interpretation is to find the mutual intention of the parties and such intention is presumed to be reflected in the written contract. To find an expressed mutual intention of the parties with the use of common law terminology in business acquisition contracts governed by Nordic law may prove quite difficult. Possible conflict between the common law and the Nordic understanding of the terminology used based on the underlying legal concepts¹²⁵⁶ is rarely a major concern for negotiators, as the Anglo-American drafting style and contract models are so frequently used in business acquisitions, whether cross-border or not. Contract terms reflecting common law terminology are often incorporated into the contract just as a matter of routine, even when the terminology used has been inserted by the lawyers who drafted the contracts. However, a Nordic judge should rather try to find out whether the reason for using a common law term was intentional or just out of “ignorance.”¹²⁵⁷

There are court cases in the common law countries where the fact that the contract was drafted by experienced lawyers had an effect on how the contract was interpreted, but it did not relieve the parties as such from responsibility.¹²⁵⁸ Personally, I have defended the view that regardless of the use of advisors, the parties are primarily responsible in their relationship for what the contract stands for and the use of advisors does not lessen the responsibility of the parties to read and understand what they are committing themselves to, thus the contract should be held to represent the intention of the parties.¹²⁵⁹

When a contract incorporates an express and valid governing law provision, the assumption in the Nordic countries is that the chosen law is the basis for interpretation of the contract.¹²⁶⁰ There are exceptions, for example the statutory provisions of a country including EU legislation might have to be applied even though the parties have agreed upon another governing law in the contract. Typical examples are provisions regarding labor law matters, real estate matters, some company

¹²⁵⁶ Terminology describes the name used for different matters and contract provisions, but concepts entail what is behind such wording. As to the differences between terminology and concepts, see e.g. Mattila, 1999, at 107.

¹²⁵⁷ See e.g. Schans Christensen, 1998, at 160.

¹²⁵⁸ See e.g. *Petromec Inc v. Petroleo Brasileiro S.A. Petrobras* [2005] EWCA Civ 891, [2006] 1 Lloyd's rep. 121. See also *Infinitel Ltd and another v Artisan Contracting Limited and another* [2005] EWCA Civ 758; [2006] 1 B.C.L.C. 632, where LJ Carnwarth at 88 stated that “In the context of a professionally drawn legal document such as this, the court should start from a strong presumption that such expressions are used in their ordinary legal meanings.” Lord Justice Carnwarth did not specifically mention that external lawyers had been used, but the words “professionally drawn” may well be understood as including such lawyers or lawyers from an in-house department

¹²⁵⁹ See subchapter 3.3.1.2 above for a more elaborate discussion on why this standpoint has been taken. See also Hov and Høgberg, 2009, at 285.

¹²⁶⁰ See e.g. Mogelvang-Hansen, 2011, at 245–246; Möller, 2011, at 254–255; Hedwall, 2004, at 132–133; Giertsen, 2014, at 18 and Krüger, 1989, at 891.

law provisions, securities law, consumer protection laws and generally that the contract has to comply with *ordre public*.¹²⁶¹ When a dispute is taken to a Nordic court, the courts are also obliged to apply foreign law to the extent a certain matter is dependent on the interpretation of that law, even though the court *ex officio* just has to know its own law.¹²⁶² This is not the primary issue involved, but it has to be considered in analogy whether this could also be applied with regard to common law terminology, which the parties have used out of their own free will.

In subchapter 3.3.1.1 the fact that it is somewhat arbitrary whether interpretation according to Nordic law is defined as primarily objective or subjective was discussed and the conclusion was that it is better described as a mixed method. However, in commercial settings the primary method is objective. Nevertheless, if a specific intention of the parties attaches to some contents of the written contract and if that intention can be proved – whether it is correctly reflected in the written contract or not – that intention will govern interpretation. It is therefore logical to assume that, if the parties have agreed that the common law legal technical understanding of common law terminology is to be applied, the Nordic courts would honor such agreements. However, as explained above, it is quite customary that no specific intention of the parties involved in use of common law terminology. Bearing that in mind, it may be recalled that it has been shown in this dissertation that it is not impossible to find in Nordic contract law equivalent concepts or through the use of several concepts find equivalents for typical common law terminology used in business acquisition contracts such as conditions, representations and warranties.¹²⁶³ This means that in most cases Nordic law is apt to deal with the terminology and wording used in business acquisition contracts. Even so, this does not mean that common law and Nordic concepts are identical.

If there is a governing law provision in the contract and if the parties have not agreed in the contract specifically and there is also no other way of proving that they intended to use the legal technical meaning of common law terminology, such terminology and expressions would as a starting point be analyzed according to Nordic law. The *pacta sunt servanda* principle is well-established in all the jurisdictions discussed in this dissertation, which also means that the parties should stand by

¹²⁶¹ For example, the Nordic countries are parties to the Rome I (Regulation (EC) No 593/2008 of the European Parliament and of the Council of 16 June 2008 on the law applicable to contractual obligations). Art. 3 of the Regulation allows parties to a contract to freely choose the applicable law, but limitations are set out in several Articles as to the effect such choice will have in certain areas. For example Art. 8 deals with individual employment contracts and provides that choice of law may not lead to deprivation of an employee's right, if such rights would be granted if the law were defined based on the Regulation and another example is Art. 9, which deals with overriding mandatory provisions. Denmark has opted out from certain other parts of the Regulation. The UK is also bound by the Regulation for the time being. How the UK's position will change due to it leaving the EU is too early to say. With regard to Denmark, see comments by Jan Schans Christensen with regard to the fact that matters such as real estate, a company's internal circumstances and intellectual property rights could not exclusively be removed from a competent court's jurisdiction. Schans Christensen, 1998, at 98. See also UNIDROIT Principles Art. 1.4 and 1.5.

¹²⁶² This is clearly stated in the Finnish Procedural Code 17:4 and in the Swedish Procedural Code 35:2. If the content of the foreign law is not available, domestic law would apply. The Norwegian Procedure Code does not exactly refer to foreign law, but 11:3 states that the courts must ensure that there is a "satisfactory basis upon which to apply the law", which has been seen as incorporating foreign law, see e.g. Rt. 2009.1537. As to the Danish situation, the Procedural Code also includes no provision on foreign law and its applicability, but it has been held that the courts are obliged to apply foreign law, if that is applicable. See comments by Salung Petersen, 2014, at 6.

¹²⁶³ See subchapter 4.5.

their contract, including an agreement on governing law.¹²⁶⁴ The written contract may in most cases be seen as the finalization of all the agreements and pre-contractual actions and negotiations of the parties. When there is a dispute and the contract is not detailed enough to clarify whether the parties had some specific intention by using common law terminology and expressions, the courts would interpret the same on the basis of the governing law. A governing law provision could be regarded as of higher interpretation source value than, for example, referring to trade usage/market practice, even though such trade usage may bear an impact on interpretation to be carried out based on the governing law provision of the contract. Trade usage may, for example, also be relevant in situations where the contract is mute upon an issue and it is therefore not only a question of the possible tension between common law terminology and Nordic law.

5.5.2 No specific intention or understanding – interpretation in sequence

The Nordic courts would use a contextual interpretation method, which with regard to commercial contracts is primarily objective but which may include subjective elements. The contextual interpretation method means that the wording and terminology used would be analyzed based on the entirety of the contract, that is, how the expressions and terms work separately and together. The contextual interpretation method may also mean that there is a greater willingness to take into account other circumstances affecting interpretation of the contract than if a purely literal interpretation method is employed. However, a detailed business acquisition contract is often the most reliable source in interpretation.¹²⁶⁵

The objectivity element is present as the wording would be given its ordinary legal meaning, but whether such objectivity means that the wording should be given its common law meaning is a different question. Ordinary legal meaning could just as well be understood as the meaning the wording has under applicable law. When, on the other hand, the governing law does not provide an answer to the dispute, and after having employed the applicable interpretation methods and techniques the courts still have not been able to reach a conclusion in the dispute, the alternative of interpreting the terminology and expressions based on a common law understanding will have to be explored.

In case the governing law does not provide the necessary answers, Nordic courts may in general also look upon and present argumentation based on jurisprudence, theories and statements in other countries, including foreign court judgments.¹²⁶⁶ This is typically done between the Nordic

¹²⁶⁴ See subchapter 2.2.3.

¹²⁶⁵ There are of course exceptions, as not all contracts are well-drafted. Mads Bryde Andersen noted e.g. that poorly drafted contracts may have an impact on contract interpretation. Bryde Andersen, 2005, at 334.

¹²⁶⁶ See e.g. Pecznik, 1995, at 265–268. See also Eckhoff, 1993, at 246, who described that in a Norwegian case Rt. 1952.1217, the decision referred to Danish, Swiss and US law.

countries¹²⁶⁷ and some doubt has been presented that it is a viable option to have recourse to such materials from legal systems, which are more different from the Nordic ones.¹²⁶⁸ This is a valid theoretical point, but considering that business acquisition contracts are often drafted in English according to an Anglo-American style and the contracts are full of common law terminology, it may well be argued that this is a sufficient reason for relying upon common-law material, when terminology or expressions have a special meaning under common law and when the governing law and the factual circumstances do not provide sufficient means for a solution.

Even if this is acceptable in theory, it is by no means an easy route to take, as discussed above. There are inconsistencies in case law and there are even bigger challenges with regard to US law as the case law shows more varieties depending on which state law governs. Last but not least, as we have seen, there are differences between the English and US systems and the concepts underlying typically used terminology. Regardless of these difficulties, when Nordic interpretation methods are not sufficient to reach conclusions with regard to disputes about business acquisition contracts, having recourse to common law practice with a much wider case law on these matters should not be excluded merely by referring to differences between legal systems. The fact is that contracts and practice have been developed in these jurisdictions. Contracts are often structured in a way that – without recognizing certain typical features of the whole process as factual circumstances affecting the rights and obligations of the parties – interpretation would be difficult to carry out. Additionally, when the governing law does not provide an answer and no other interpretation methods and techniques are sufficient to reach a conclusion in the dispute, the alternative of interpreting terminology and expressions based on a common law understanding should be explored, as the written contract is assumed to reflect the intention of the parties.¹²⁶⁹

A Nordic court that chooses to resort to case law or legal scholars of the common law jurisdictions should decide at the beginning whether to follow English or US practice and consistently use the chosen approach.¹²⁷⁰ For example, how reliance/anti-reliance provisions, limitation of liability and entire agreement provisions are perceived in the different countries was discussed above.¹²⁷¹

¹²⁶⁷ Bryde Andersen and Runesson, 2015, at 26–27; Lando, 2009, at 196; Høgberg, 2006, at 182 and Hemmo, I, 2007, at 43–44.

¹²⁶⁸ Pecznik, 1995, at 268, pointed out that there has to be a certain system of common values and he took a fairly restrictive approach to the extent English and US court practice may be used due to differences in basic concepts.

¹²⁶⁹ With regard to Sweden it has been claimed that courts so far, in general, have applied the method of first trying to find out what the contents mean under Swedish law and thereafter they may adjust it under how it is understood in the non-Swedish jurisdiction. This approach has been criticized, as it may lead to a situation where the courts disregard the will of the parties regarding the contract in question. It has also been claimed that court practice in Sweden seems to indicate that it is not the parties' will which has been decisive, but rather whether the result is reasonable. See Svernlöf, Bergstedt Sten, Bessman, Ramberg, Rudenstam and Westin, 2013, at 27. On the other hand the case in the Svea Court of Appeal discussed in subchapter 5.3.1 gives an indication that practice may be changing, as in this case the Svea Court of Appeal stated that there was no specific party intention, before discussing alternative meanings of the English expressions used.

¹²⁷⁰ My criticism of the Svea Court of Appeal decision was that at least in the publicly available part of the decision it was not explained why they used the US understanding and not the English. I have not examined whether it would have made a difference and it might be that there are other factors justifying use of the US perception. However, I did notice that the plaintiff's registered office was in the UK.

¹²⁷¹ See subchapter 5.2.2.2.

Treatment of such provisions varies within the common law legal family and it is not sufficient merely to refer to Anglo-American practice in general. Secondly, if the courts choose to follow US contract law, they should analyze whether the matter in question is such that there are differences between the different states and should at least explain whether it has taken into consideration these differences or whether, for example, it has relied upon the presentations in the Restatement (Second). This could be quite an extensive and expensive exercise.

It may also be noticed that when foreign law is applicable to a contract which is primarily governed by the law where the court resides and the court does not know the contents of the foreign law, the Nordic courts have discretionary powers as to how much information they require and there is no absolute guideline in this case.¹²⁷² The parties involved are primarily responsible for providing information on the matter of foreign law, but the courts may also require more information if they find that they need it.¹²⁷³ Under all the circumstances, even if Nordic law is the primary source for interpreting a written contract and even if a contextual interpretation method is utilized, the courts may still reach a stage where the decision would have to take into account the common law meaning of terms and expressions in order to reach a decision in a case. That should be allowed.¹²⁷⁴ International treaties or conventions might of course also include provisions which may be helpful when interpreting the contents of contracts.¹²⁷⁵

Contextual interpretation of contracts means that the courts would take due notice of the surrounding and factual circumstances. Consequently, the courts should recognize when interpreting business acquisition contracts that not only are contracts drafted and structured in a certain way, but they are in general milestones of processes where the parties have been engaged in negotiations, carried out due diligence and might have entered into preliminary agreements. These characteristics are even more emphasized if the transaction is of a cross-border nature. If contracts are prudently drafted, the processes preceding the contract would in one form or another be reflected in the final written contract. Many Nordic lawyers are inclined to refer to loyalty and good faith and may try to question contracts based on their being “unreasonable,” when there is a contract dispute. However, with regard to business acquisition contracts, the freedom of contract principle should be emphasized and commercial parties of equal strength should have extensive

¹²⁷² In a recent Swedish Supreme Court case (NJA 2016.288) – an appeal against the decision of the Svea Court of Appeal – it was stated e.g. at 17 that when a Swedish court applies foreign law it must in principle interpret and apply such law as a court in the foreign country would have done and thus also the Swedish court should try to use that country’s legal sources and interpretation methods. Secondly the Supreme Court said at 19 that it is not always possible to uphold the same standard on the application of foreign as of Swedish law. This is because the rules are from a different jurisdiction. Foreign rules might not be clear and decisive court decisions about the interpretation may be missing. In other cases there might not exist explicit rules with regard to the question to be decided.

¹²⁷³ See NJA 2016 at 288, at 18.

¹²⁷⁴ See e.g. Lando, 2009, at 198–199, arguing that even if there are cultural, practical and cost arguments in relation to retrieving information on foreign law, the courts and the attorneys should co-operate in trying to find guidance from foreign law and especially in matters of great principle or economic importance.

¹²⁷⁵ UNIDROIT Principles are referred to quite often with regard to international commercial agreements and in some cases, depending on their nature, the CISG.

freedom to agree upon the transaction as they see fit in the contract.¹²⁷⁶ For example, contract provisions on limitation of liability or the effect of due diligence should be respected, as even if strict limitation of liability clauses or clauses excluding the effect of due diligence may seem unreasonable under Nordic law, the parties in business acquisitions have several possibilities to compensate such provisions, for example by including wording to the effect that actual or constructive knowledge has an impact on the buyer's right to claim under contractual representations and warranties. The contract should always be analyzed in its entirety and when reviewing the contract as a whole, it may appear that it is a balanced risk allocation document where certain imbalances have been taken into consideration, for example in the purchase price.

That said, interpretation would initially be based on the governing law. Whether the cross-border element and the fact that the market is heavily influenced by Anglo-American practice should have an impact on the interpretation of the contract require some further discussion.

5.6 Relevance of the cross-border element

In this dissertation it has been argued that the written contract is the primary source of interpretation, especially in cross-border transactions, and that the interpretation method is contextual and primarily objective with regard to business acquisitions. It has also been established that the Anglo-American way of contracting, drafting and use of terminology based on concepts which have a special meaning in the common law jurisdictions is typical, even when the governing law is Nordic law.

This dissertation has defended the applicability of Nordic law as the primary basis for interpretation, when so provided in the contract. As to the practical implications of this statement with regard to business acquisition contracts, it may be recalled that, for example, as to conditions precedent, which are the most common conditions in transactions, the effect of such contract terms is in practice quite similar in all the jurisdictions discussed here. When warranties and representations and the effect of breaches or misrepresentations were discussed, it was shown that there are more differences between the common law jurisdictions and the Nordic jurisdictions. However, these concepts are also subject to diversified opinions and court practice within and between the common law jurisdictions. Furthermore, with regard to contractual representations and warranties and their use in business acquisition contracts, the application of Nordic law may just as well result in solutions which actually have been contemplated by the parties.

Nordic contract law is general in nature and when reviewing the sources of Nordic contract law, it has to be acknowledged that the traditional sources have not been discussed and developed with

¹²⁷⁶ See e.g. comment by Giuditta Cordero-Moss, discussing contracts between "equally strong and professional parties," which are the focus of this dissertation, that in general "...it does not seem necessary, nor does it contribute to predictability, that the terms be supplemented or disregarded." This statement was after she had discussed the need for supplementing and disregarding contract provisions in some cases. Cordero-Moss, 2016, at 1317.

business acquisitions – even less so with cross-border business acquisitions – in focus. On the other hand, interpretation will start, also in the Nordic countries, from the written contract and its significance when the contract is comprehensive and detailed may be assumed to be of vital importance.¹²⁷⁷ Contracts set out the rights and obligations of the parties in detail and customarily include provisions on pre-contractual actions and statements. Therefore, regardless of Nordic contract law not having been developed with business acquisitions in focus, Nordic law provides ample means of dealing also with business acquisition contracts, as interpretation would – or at least should – be concentrated on the contents of the contract.

It has also been submitted that objectivity as an interpretation method does not mean that common law terminology and expressions would necessarily be interpreted according to the common law understanding. A governing law provision could in fact be seen as enhancing the predictability of the parties as to the contents of their agreements and to the outcome of likely disputes.¹²⁷⁸

Some concerns have been expressed with regard to the assumptions of parties from different jurisdictions when entering into a contract which has been drafted based on the Anglo-American style and where there is at least in theory a discrepancy between the terminology used and the governing law provision. One way of approaching this concern is to discuss whether one of the parties is more liable for knowing the terminology or governing law. The question could be compared with the *contra proferentem* rule, which basically states that in case of ambiguities in the contract a greater burden may be placed on the draftsman.¹²⁷⁹

If the parties have explicitly agreed to the laws of a specific jurisdiction governing the contract, the assumption is and should be that the contract is interpreted according to the laws of that jurisdiction. Generally, there is no reason to allow a defense that a party did not know the law.¹²⁸⁰ More concretely, if the parties have opted for one of the laws of the Nordic countries, there is no reason

¹²⁷⁷ The importance is sometimes clouded in legal discussions, because Nordic legal scholars tend very easily to start to discuss the relevance of other circumstances affecting interpretation of contracts. This is also the reason why throughout this dissertation has emphasized the importance of written contracts in cross-border business acquisitions. Such contracts are mostly not only comprehensive documents, but they are negotiated documents, where the parties have, in most cases, an educated view of what they are agreeing to.

¹²⁷⁸ See also comment by Giuditta Cordero-Moss, asserting that “... there are no real alternatives to a state governing law when it comes to principles of general contract law upon which the interpretation and application of the agreed wording is based.” Cordero-Moss, 2011, at 350.

¹²⁷⁹ See subchapter 3.5. There are also other dimensions of this rule, which was explained in that same subchapter.

¹²⁸⁰ The question about knowing the law has been discussed by several Nordic legal scholars and misunderstandings as to the contents of law have sometimes been described as an error or mistake of motive i.e. a party having entered into the contract has entered into it or accepted such contract terms which he might not otherwise have done. See e.g. Adlercreutz, I, 2011, at 297, who noted that whether this kind of mistake should be given relevance or not has not been thoroughly investigated. Adlercreutz also noted that with regard to §30 and 33 of the Nordic Contract Acts it does not matter whether the question is about the contents of the law or not and the same applies in cases where the other party actively caused the mistake e.g. through wrongful information about the legal situation. Juha Mäkelä also found that mistakes of law may lead to invalidity in cases where the other party should have been aware of such mistake, at a time where §30 or §33 of the Nordic Contract Acts could be applied and under some more exceptional circumstances even §36 of the same Acts. Mäkelä, 2010, at 260–266. However, Mäkelä further noted that if a party wants to take recourse to the invalidity possibility, that party’s own actions and blameworthiness could have an impact on such right. As an example he mentioned a situation where a party refuses to receive information about the contents of law or when a party has not taken care to familiarize himself with important rules of law, unless the other party has noted the lack of knowledge in the latter case. Mäkelä, 2010, at 263–265.

why a commercial party from a common law country should not make sure what the contents and terminology used mean from a Nordic perspective. The wide use of Anglo-American contract drafting in cross-border business acquisitions may lure a party into thinking that the use of common law terminology also means that the terminology is understood according to the common law understanding and a party may pay less attention to the possibility that the governing law does not treat this terminology in the same manner. This, on the other hand, reflects the problem with emphasizing that subjective intention should play a strong role in contract interpretation. If it is not a question of mistake, misrepresentation or if a wrongful understanding has come to the other party's knowledge, the fact is that objectively speaking the parties have agreed to a governing law provision and the assumption must be that the parties are responsible for understanding that the contract will be interpreted according to that law.

A similar reasoning could be used when the parties have used the English language and/or a Nordic party has accepted that the English or the US understanding of certain terminology prevails. It could be required that Nordic parties retrieve sufficient knowledge of the meaning of the English language and the common law terminology used. "I didn't know or I didn't understand" explanations should not be given any consideration when the parties to a dispute are commercial business entities of equal bargaining power.¹²⁸¹ There might be situations where a party has not acted correctly in the sense that that party has tried to convince the other party of the meaning of common law terminology or of the content of the governing law. In such cases, that party could clearly be responsible for his actions or statements during the negotiations – being a misrepresentation, an act falling under Sections 30, 33 or 36 of the Nordic Contract Acts, or liability due to *culpa in contrahendo* – which could not only lead to liability for damages but it could of course also affect the validity and interpretation of the contract.¹²⁸² However, trying to solve in general the question of the interrelation between the terminology used and the governing law by attempting to establish who is more responsible for discrepancies between legal systems or non-knowledge of some concepts used is not in general a reliable way in interpretation of contracts when the parties are of equal bargaining power and should be assumed to take responsibility for the contracts they enter into.¹²⁸³

The cross-border element enhances challenges both in the practical carrying out of the transaction and in interpretation of the contract in terms of the understanding and intention of the parties. When the parties come from different legal systems, their understanding of what the negotiations entail

¹²⁸¹ See discussion above in subchapter 3.6.

¹²⁸² Juha Mäkelä also pointed out that mistakes regarding law, especially non-mandatory law, may also have an impact on the interpretation of a contract, if the other party should have noted such mistakes. Mäkelä, 2010, at 267.

¹²⁸³ If the parties are not of equal bargaining power and, e.g., one of the parties is a private equity house used to buying and selling businesses, while the other party is doing a once-in-a-lifetime transaction, it may be presumed that the professional acquisition party would have a higher degree of knowledge. This statement may be seen as an acknowledgement of the principle that even in business to business contracts it might – depending on the factual circumstances – be justifiable to protect the weaker party. It has been suggested that in Finland the inclination to accept as a general principle that the weaker party should be protected even in business to business contracts is stronger than in the other Nordic countries. Bärlund, 2015, at 105–106.

from a legal perspective may well be profoundly different. A good example is the loyalty principle regarded as prevailing in the Nordic jurisdictions, which is not matched by a general good faith principle in the common law jurisdictions. This is a factual circumstance in cross-border transactions where the parties represent different legal systems and this circumstance may be taken into account when a court has to judge whether negotiations have been carried out in an acceptable manner or not. The loyalty and good faith principles are also perceived differently regarding performance of the contract, where in fact Nordic and US views are more similar than US and English views. In terms of the contents of a contract, for example, the impact of limitation of liability and entire agreement clauses, as well as the effect of due diligence show many differences between the legal systems, but also, again, differences between the US and English legal systems. To find a reasonable and reliable solution in such cases based on an understanding and intention which is not reflected in the written contract would, except for flagrant cases of misuse, misrepresentations and other dishonest business conduct, lead to quite unpredictable legal situations and outcomes. Therefore, the cross-border element of business acquisitions involves giving written contracts in those transactions significance as the primary interpretation source reflecting the understanding and intentions of the parties.

The cross-border element in business acquisitions is also tied to the question whether international trade usage exists, which from a legal point of view could be applied in the interpretation of cross-border business acquisition contracts. This issue will be discussed in the following subchapter.

5.7 Relevance of trade usage/market practice

The strong influence of Anglo-American practice in business acquisitions has been taken as a fact, which appears in contracting and how acquisitions are carried out as processes, but also how written contracts are drafted and finalized as summarizing the agreements between the parties. It has been said that much of this practice has been adopted in the Nordic countries regardless of the kind of business acquisition involved – Nordic, domestic or involving also parties/targets from the common law countries – and without recognizing possible common law origins as to the concepts underlying the terminology and expressions used. Three elements – use of the English language, contracts drafted in an Anglo-American way and use of terminology and expressions having special meanings in the common law jurisdictions – may be claimed to represent prevailing trade usage. The way of drafting and the use of English were actually mentioned as reasons by the Svea Court of Appeal when it decided that certain sections of a contract in dispute should be interpreted according to how the wording in a “legal, technical” sense is understood under US law.¹²⁸⁴

¹²⁸⁴ See the decision at 5.

Contract interpretation is primarily based on the contents of the written contract and the interpretation is supplemented with how the governing law provides for the different matters in the contract.¹²⁸⁵ It has been shown that Nordic law is apt for interpreting contracts where common law terminology is used. Much contracting originates from the common law jurisdictions, for example with regard to due diligence and preliminary agreements, a practice that has been embraced by the Nordic market. This shift in contracting does not mean that the Nordic market has accepted, at least knowingly, the common law understandings of these elements and it has also been shown that both with regard to the examples of due diligence and preliminary agreements Nordic contract law provides solutions. Therefore, trade usage in this respect rather means that it is typical that due diligence is carried out. However, for example the question of knowledge and information received during the due diligence and how it affects the buyer's and the seller's liability is another, legal issue which would have to be taken into consideration based on how the contract in question deals with such matters and based on Nordic law. Another phenomenon typical of many business acquisitions is that the contract, if necessary, provides for separate signing of the contract and closing of the transaction. The signing-closing concept is well established as trade usage and it has been submitted that once having signed a business acquisition contract, the parties have committed themselves to a binding contractual relationship. Whether finalization of the transaction takes place or not will have to be analyzed based on the wording of the contract and other circumstances. Last but not least, it has been established that it is typical in business acquisition contracts that some form of assurances are given by the parties to each other, but these contract terms might be called just warranties or representations and warranties. The differences as to the common law legal concepts behind this denomination are not necessarily discussed by the parties.

Trade usage or market practice may be a factor to consider in terms of interpreting the wording of a contract. Should the common law terminology prevail in such a situation and be regarded as market practice? As a general comment I would like to submit that it would be presumptuous to think that the business acquisition market has accepted common-law understandings of terminology as market practice merely because contracts have been drafted based on Anglo-American contract models and the use of certain common law terminology. If it has not been agreed that English or US law is the governing law regarding contract disputes, the legal meaning of the wording should rather be assessed based on the governing law, whether that law is expressly agreed in the contract or established based on private international law.¹²⁸⁶ When that law is not

¹²⁸⁵ See discussion in subchapter 5.4.

¹²⁸⁶ The M&A market is not as standardized as e.g. the shipping industry, where contract documentation is far more standardized and where the terminology is also often based on English law. However, even in such disputes there is no automatic solution that English concepts will prevail. In NJA 154.573 the Swedish Supreme Court did find that even if the contract was governed by Swedish law, the fact that it was an English standard contract gave reason to take English law into account. The contract itself did not have a governing law provision. On the other hand, in NJA 1971.444 the Swedish Supreme Court noted that the contract pertaining to the shipping industry had a governing law provision (Swedish law) and that there was no established international trade usage as to the dispute in question. Therefore, English law was not used.

adequate to deal with the wording of the contract, other sources could be used and recourse might be taken to common law understandings of the wording in dispute.

When a business acquisition contract is to be interpreted by Nordic law, the question of trade usage nevertheless becomes relevant. In such cases, the fact that the contract deals with business acquisitions and especially the particularities of cross-border business acquisitions in general should be taken into account. The fact that the contract is drafted according to the Anglo-American style also makes it justifiable to at least explore the common-law understanding of the disputed wording if interpretation according to the governing law does not provide a solution. However, as earlier stated, this is by no means a simple exercise in practice. Not only legal doctrine but also case law from the common law jurisdictions, especially from the USA, shows that divergent opinions and approaches exist as to the effect of and remedies for representations and warranties and that concepts such as best efforts and good faith are also subject to divergent practice. Furthermore, case law is constantly evolving and it is a challenge for any Nordic lawyer to have a full grasp of all the dimensions of contemporary views on different concepts. These difficulties can as such be overcome, but it requires an honest attempt to examine the different nuances in the common law understanding. It is just as important to take into account the differences between English and US law when contemplating the common law understanding of concepts underlying the terminology and wording used.

As to trade usage in general, in the common law jurisdictions with a much larger case base, trade usage or market practice in terms of business acquisitions is more easily established. There are examples of court cases in the common law jurisdictions where reference has explicitly been made to practice in relation to business acquisitions.¹²⁸⁷ Practice in relation to the type of contracts used in business acquisitions and to the processes as such may be established, but in terms of their legal meaning it may be harder to establish in the Nordic jurisdictions. Considering the limited amount of public cases in the Nordic jurisdictions and the fact that the sophistication of the market is not at the same level as in the common law countries, it would be quite hard to establish reliable market practice with regard to business acquisitions, whether cross-border or not.

Market practice is also often used as an argument in negotiations, but the challenge with that argument is that market practice may be described very differently depending on whether it is the seller or the buyer who defends his position and what the general economy looks like at the moment. The fact is that market practice varies quite considerably, as sometimes the acquisition market is clearly a buyer's market, sometimes it is a seller's market and the playing field is quite different under those changeable circumstances. Furthermore, in most cases the individual positions of the parties have far more impact on the outcome of negotiations and the final contract

¹²⁸⁷ For example although a more elaborated market practice was in fact referred to both in *Petromec Inc. v Petroleo Brasileiro SA Petrobras* [2005] EWCA Div 891, [2006] 1 Lloyd's rep. 121 and in *Gorodensky v. Mitsubishi Pulp Sales (MC) Inc.*, 92 F. Supp.2d 249, (S.D.N.Y. 2000).*

than market practice as such. When the question is about a cross-border transaction, it is also likely that a party from a common law country would have a different view on market practice in comparison with his counterparty/parties from the Nordic countries. Furthermore, a buyer and a seller would probably bring evidence to support completely different views on market practice. In order for market practice or trade usage to bear relevance, it has to be defined.

Defining trade usage with legal implications for business transactions should rather be carried out based on whether international practice exists which may be established with a sufficient degree of certainty. Contemplating possible international market practice raises the question whether international acquisition market practice actually exists or whether it is rather Anglo-American market practice. It has been established that it is common for business acquisition contracts to contain certain contract terms such as conditions, warranties and perhaps representations, all of which are typical common law concepts. It has also been established that contracts are often structured in a certain way. It has been established that the whole process of contracting has been greatly influenced by the Anglo-American way, for example the conduct of due diligence. If the Nordic courts would see a need to refer to trade usage in a legal sense applicable to business acquisitions including cross-border business acquisitions, international trade usage would more likely be established based on practice in the UK and/or in the USA, as there is no equivalent international practice or *lex mercatoria* which would be applicable. However, practice between these countries varies. Factual circumstances such as where the parties and the target carry out their business and where they are resident may be an argument for whether it is English or US law that should in such a case become applicable.

Considering the above, it seems that it would be highly beneficial for all involved in business acquisitions – including judges and arbitrators – that international standards for interpreting business acquisition contracts should be drawn up. Obviously many political and cultural elements influence such a development project. It would also require true will to try to meet half-way, that is, a dogmatic approach from the different legal communities would not benefit such development work. Nevertheless, by establishing international standards created by a highly qualified group of experts representing the business community, advisors, university professors, legislators and the judicial elite would ensure consistent practice, enhance predictability and ultimately enhance the functioning of a cross-border business acquisition market.

5.8 Conclusions

This Chapter has in many ways substantiated observations made in previous Chapters regarding the assertion that interpretation of business acquisition contracts should be carried out primarily by using a contextual, objective interpretation method, where the written contract is the most significant interpretation source. This Chapter has also discussed the differences between the

jurisdictions in terms of certain terminology and underlying legal concepts as understood in the respective jurisdictions.

The discussion about how terminology such as conditions, warranties and representations is used in business acquisition contracts has shown the awkwardness in interpreting contracts merely based on the legal concepts behind such terminology. An example of how a legal concept in itself is not necessarily the most important aspect, but rather the functionality of the term, may be taken from the discussion on conditions. When discussing conditions above – and especially conditions which are most relevant for business acquisition contracts, that is, conditions precedent – the functionality of the concepts appeared to be a vital factor, even under English law. Inserting conditions precedent into any business acquisition contract leads to a situation where actually the question of what is meant by a condition or a condition precedent as a legal concept in itself is not as crucial as the question of what impact conditions precedent have on the whole contractual relationship. Furthermore, it has been shown that even if there is a certain pattern or trade usage with regard to conditions precedent in cross-border business acquisitions, the interpretation of such contract terms is still dependent on the wording of the contract put into context. The legal consequences of using conditions precedent are not clear-cut in the sense that it depends on the nature of conditions precedent as to what kind of liability may arise if they are not fulfilled. Nor can any absolute rules be laid down as to how long the parties are bound by a contract containing such conditions. Therefore, it is in the parties' interest to be as specific as possible with regard to whether they have undertaken some express liability or not for conditions precedent, for how long the parties will be bound by the contract waiting for a condition precedent to occur or not to occur, and what will happen if the conditions precedent are regarded as not going to be fulfilled.

With regard to warranties, a similar comment may be made. Even if warranties under English law are understood as less important contract terms, their relevance in business acquisition contracts depends on how they are used and what their contents are in a particular contract. In general, warranties in business acquisition contracts were held to be statements regarding certain matters which are assured to be true and correct at a certain time. It was furthermore shown that even if the content of warranties as expressed in the contract is an important factor, it is just as important in interpretation to take into account what other contract terms limit or expand the warranties and these have to be interpreted simultaneously in order to understand the functionality of the use of warranties in a particular contract.

The one exception with regard to the relevance of legal concepts underlying the terminology used in business acquisition contracts is the common law concept of representations – or actually, misrepresentations. Representations and misrepresentations are understood in a fairly similar manner in the two common law jurisdictions discussed here, but in terms of how the parties may agree, for example, on how to limit the right to have recourse to misrepresentations, there is a difference between the two jurisdictions. This is not primarily a difficulty in relation to using

representations in contracts, but what is understood by a representation under common law in general and how tort law may affect the liability of the parties and the interpretation of a contract as a whole. Here, the legal concept behind the terminology plays an important role in the common law countries. When a contract is governed by Nordic law, on the other hand, the common law understanding of representations and misrepresentations is not exactly matched under Nordic law. It was, however, shown that by using different rules and principles applicable in the Nordic jurisdictions, even representations and misrepresentations as understood in common law could be dealt with under Nordic law. From a practical point of view, the underlying differences between misrepresentations and warranties could to some extent be avoided if the contract is governed by Nordic law, by the parties using only 'warranties' as an expression for the different statements assured in a cross-border business acquisition contract. Even though this form of drafting may not be sufficient in the common law countries, it would give a strong indication to a judge or arbitrator analyzing the contract in retrospect that the parties did not intend to introduce the common law concepts of representations and misrepresentations.

In all the above-mentioned three example cases of common law terminology used in business acquisition contracts, the effect of such terminology is based on their functionality and under what factual circumstances they have been used. It has to be admitted, though, that remedies in the common law jurisdictions are different based on what legal concepts this terminology represents under common law. It may also be noticed that in business acquisition contracts representations and warranties are often used interchangeably. Therefore, when the contract is governed by Nordic law drawing conclusions as to the consequences of using common law terminology strictly based on legal concepts has been shown to be inadequate. When the contract is governed by Nordic law, there is as such no immediate need to have recourse to common law legal concepts. Even if it may be regarded that use of common law terminology is more or less established trade usage in cross-border business acquisition contracts, this is not the same as saying that when there is a governing law provision and when the terms can be translated into that legal system the common law understanding prevails.

Regardless of the conclusions about the use of conditions, warranties and representations in domestic and cross-border business acquisition contracts and that Nordic law can found or construe concepts which for the most part cover aspects of common law terminology, the question still remained as to what importance should be given to the fact that this terminology originates from common law. Furthermore, the issues of interpreting these contracts which are mostly drafted in the English language and whether the cross-border element should affect interpretation were also discussed.

As to the trade usage of using common law-based terminology, this question was partly addressed in connection with observations on challenges in translating terminology into one of the languages of the Nordic countries. Problems with translating English-worded contracts into one of the Nordic

languages was also more generally discussed, as it was shown that in terms of interpreting legal documents such as a business acquisition contract, a simple linguistic translation is not sufficient. This is also applicable in terms of representations, warranties and conditions, as the difficulty is also not only related to translation of the wording as such, but the question is to what extent, if at all, the common law understanding of these terms should be taken into account.

The fact that there are other challenges than merely certain legal concepts in such translation was exemplified by referring to expressions such as ‘best efforts’ and ‘reasonable best efforts’, which as such could be translated, but the meaning of which is different whether these expressions are analyzed based on common law or on Nordic law. This matter, as well as other matters, has been approached based on a strong defense for translating the whole contract in accordance with what the governing law stipulates. By choosing this solution, the situation would be unambiguous as to what the primary rules and principles are for interpreting the contract and in that sense it would enhance predictability, which is important for parties to complex contracts of often high economic value. In this discussion the relevance of the wording is also important in another sense, as it was claimed that parties using Anglo-American contract models may often use several words for a situation which according to Nordic law could be summarized in one single word. The recommendation was and is that in order to avoid confusion as to what the parties intended, they should rather use a single word or words which reflect how Nordic law perceives the situation. Using several words to describe a situation could otherwise raise the question whether the parties actually intended to adhere to a common law understanding of the words in question, which could have an effect on whether the common law background will influence interpretation and perhaps even whether the common law background should be taken into account when interpreting the whole contract.

The governing law was submitted as taking precedent over trade usage. Common law terminology and the English wording used, having a specific meaning under English or US law, were nevertheless given a secondary position in interpretation based on Nordic law. This was submitted as being the case when the parties have intentionally used terminology or expressions according to their common-law meaning, when Nordic law does not have an equivalent term or the term cannot be construed and when interpretation based on the governing law cannot find solutions to the dispute at hand. In such a case, the common-law understanding should be examined and common law may be used as a source of interpretation. When that is the situation it may be recalled that throughout this dissertation it has been shown that not only may terminology and expressions have different meanings in the common law and in Nordic law jurisdictions respectively, but there are also differences within the legal families. Due to the fact of differences between English law and US law both with regard to different legal concepts and other expressions and with regard to implementation as evidenced by case law, a Nordic court would therefore at the beginning of any interpretation also have to decide which common law it would choose and for what reasons.

In other words, if the common law understanding of terminology and expressions is to be used when the contract is governed by Nordic law, such interpretation has to be carried out in sequence, where the starting point has to be motivated decisions as to which common law legal system is used and the background information as to the use of such terminology would have to be extensive enough for the courts to actually be able to make an educated decision on what such terminology and expressions mean.

Trade usage was also discussed based on whether such international practice exists as could be of importance in the interpretation of business acquisition contracts. It was held that such international practice is in fact what is called Anglo-American practice. This is in many ways a misleading expression, as differences between English and US practice should not be ignored. Therefore, it was submitted that appointing an expert group in order to create international guidelines for the interpretation of business acquisition contracts would be beneficial for all parties and authorities involved.

When the question of how the cross-border element may affect interpretation of business acquisition contracts was analyzed, the conclusion was that in these transactions the significance of the written contract as the primary interpretation source should be emphasized. The parties' intention certainly guides all interpretation and should also do so in the case of cross-border business acquisition contracts, but considering the extensiveness in many transactions involving different elements and the number of representatives of the parties, the fact that contracts are mostly heavily negotiated and the fact that parties from different jurisdictions may have different understandings of the terminology and wording used in the contract, the written contract is the most reliable source to show that intention. This conclusion was also based on the assumption that commercial parties to cross-border transactions are themselves responsible for ensuring that the contract correctly reflects their understanding and intentions. If the parties have used a certain common law term in its common-law technical sense – which has to be proven and which has to be identified as to whether it is used according to English or US law – the Nordic courts should in principle follow that agreement. This is part of the freedom of contract principle allowing parties to agree how the contract should be interpreted. In the more likely scenario that the parties have not agreed upon the use of certain terminology or wording in a legal-technical common law sense, but rather have used them as a matter of general practice, the governing law provision is decisive. Only when the application of Nordic law cannot give an answer to the dispute at hand should the courts resort to the common law understanding.

Regardless of these statements of principle, from a practical point of view considering that Nordic commercial contract law is primarily developed in legal doctrine and confirmed in court practice and considering that such discussions and court practice have not evolved based on how complex business acquisitions are carried out or the balancing that often has to be performed between different provisions in the contract, the parties are more likely to get a reasonable judgment if they

have sufficiently specified their rights and obligations in a detailed written contract. That is the best way of ensuring that the parties' intentions will be duly recognized and applied in any possible dispute governed by Nordic law.

6 RESEARCH RESULTS AND RECOMMENDATIONS

6.1 Introduction

Throughout this dissertation conclusions have been drawn after discussions in the separate Chapters including from time to time leaving open some questions, which have been answered in subsequent Chapters. In this Chapter the previous discussions and conclusions will be used to summarize the results of the research and answer the research questions set forth in subchapter 1.2. The questions were: 1. What parts of general contract law are of special interest for parties negotiating business acquisitions? 2. What is the typical process for carrying out business acquisitions and what matters are typically agreed upon in such contracts? 3. What relevance do and should the particularities of business acquisitions have in contract interpretation? 4. What should be the impact of the use of English and/or US common law terminology when interpreting business acquisition contracts governed by Nordic law? 5. What are the challenges when using the English language in business acquisition contracts governed by Nordic law? 6. Do or should cross-border elements have an impact on the answers to the questions set out above? 7. Is there some established international trade usage which could effectively resolve the questions set out in 3–6 above? This Chapter and this dissertation will end with some recommendations.

6.2 Research results

When introducing the research questions it was noted that there are very few mandatory provisions in enacted legislation on general contract law which would be applicable to the kind of business acquisitions discussed in this dissertation, where the assumption is that the parties are commercial parties of equal bargaining power. Consequently, the parties have, as a starting point, quite wide possibilities to tailor their contracts to meet their objectives, which is clearly an important aspect for parties negotiating both domestic and cross-border business acquisitions.

However, as contract law is much more than legislation, and since legal principles which have been developed by legal doctrine and ultimately by the courts are an important part of general contract law, the parties to business acquisitions cannot ignore the likelihood that such principles may influence any subsequent interpretation of their transaction. Principles are not as distinct in character as rules provided by legislation but, once reaching a certain level of general acceptance, they set out the framework for what is acceptable both in contracting and in contracts. It has been shown that Nordic courts have referred to general legal principles in their decisions, while the use of general legal principles in court practice in the common law jurisdictions seems to be more restrictive. However, regardless of whether their use is explicitly mentioned or not, legal principles generally accepted in the respective jurisdictions are bound to influence how courts perceive different actions and statements during negotiations and how courts interpret contracts.

When discussing what parts of general contract law are of special interest for parties negotiating business acquisitions, two major principles should be mentioned. One is the freedom of contract principle, which in all jurisdictions is accepted as the cornerstone for contracting and contracts. The other is the good faith/loyalty principle, which has been applied quite differently in the legal families. In the Nordic countries the good faith/loyalty principle has been held in high regard and it has in fact circumscribed the scope of the freedom of contract principle. This loyalty principle is also applicable to negotiations, while a general principle of good faith in negotiations has not been accepted in the common law countries. The materialization of these differences may be seen in how aborting or continuing negotiations is judged and the likelihood that liability is incurred based on allegations that a party have unjustifiably aborted or continued negotiations.

These differences are therefore of relevance for parties negotiating cross-border acquisitions, where the negotiation phase may be quite prolonged considering all the actions customarily taking place during a business acquisition. Additionally, parties from the common law jurisdictions and the Nordic jurisdictions do not necessarily have the same understanding of what is allowed or not during negotiations. Furthermore, which law is applicable to the negotiations is not necessarily clear while the negotiations are taking place. Therefore, it seems reasonable that pre-contractual liability should not be easily incurred under these circumstances. This conclusion also emphasizes the freedom of contract principle. The principle is as such important in transactions in general, as it increases parties' willingness to engage in negotiations, where the outcome cannot be certain until all the details of the transaction are agreed. On the other hand, without the parties being able to rely upon each other's sincerity during the negotiations, that would also in the long run adversely affect a functioning transaction market. Therefore, even if the freedom of contract principle is emphasized, it does not eliminate the requirement for good and sound business practice, where the parties are supposed to act in an honest and decent manner. In other words, even in negotiations for business acquisitions of a cross-border nature a combination of the freedom of contract principle and a requirement for honesty and decency is the optimal solution.

When the parties have entered into a written contract for a business acquisition, the differences between the legal families change as to the good faith/loyalty principle. This is due to the fact that performance of a contract is subject to the principle of good faith and fair dealing in the USA and good faith/loyalty in the Nordic countries. However, a similar general principle has not been accepted under English law, where a requirement to act in good faith would be subject to something to that effect having been said in the contract.

The above observation reflects a crucial aspect that the parties to cross-border business acquisitions should consider with regard to general contract law, that is, differences and similarities exist not only between the two legal families, but also within the legal families. The differences between how contract law is perceived and implemented in the UK and the USA should not be ignored. Good faith was mentioned, but in this dissertation other examples have also been given where

terminology and principles may have the same names but the effect is not similar. With regard to Nordic law, it is fair to say that there are more similarities than differences in commercial contract law. Nonetheless, there are also differences, for example the loyalty principle and the doctrine of failed assumptions have not been given the same weight in the separate Nordic jurisdictions.

This dissertation has described how business acquisitions are typically conducted and what matters are typically incorporated and agreed in such contracts. These descriptions and discussions were in order to present the factual environment of business acquisitions, which as noted above can have an impact on liability due to negotiations, but which may also have an impact on interpretation of contracts. The conduct of business acquisition processes does not show significant differences between the jurisdictions. It is another issue that the elements of these processes, whether pertaining to oral or written statements or to other actions or non-actions during the pre-contractual stage, do not have the same legal meaning nor do they have similar consequences in all jurisdictions. The other typical characterization of business acquisitions as processes is that during the pre-contractual stage several actions are taking place simultaneously. One observation in this regard was that it is typical that due diligence is carried out at the same time as the contract is being negotiated, unless of course for some reason due diligence by the buyer is allowed to be carried out only after signing. This factor was mentioned in the discussion about whether warranties and representations of the seller make due diligence unnecessary. It was noted that a buyer cannot be absolutely sure what kind of protection he will receive based on the seller's warranties and representations until they have been finalized together with other contract provisions having an effect on such assurances. This finalization may take place at a very late stage of the negotiations and therefore the question is often in practice quite irrelevant.

The business acquisition process is a dynamic process and the positions of the parties may change during that process. Changes may be due to findings in the due diligence, but also due to the fact that the contract is a risk allocation document, where parties may have to concede certain points in order to reach other goals. Therefore, it is typical that there are several exchanges of draft documentation and such drafts often include statements and proposals which are not definitive, but rather reflect the negotiating position of the parties at the different stages. The final position of the parties is confirmed in the final written contract. The contract has to be customized based on what kind of transaction is involved, that is, whether it is an asset transaction, a share transaction or a combination of both assets and shares. This has an effect, for example, on the nature and extent of representations and warranties, but also very much on how the target of the sale and purchase is identified. Additionally, the parties would have to take into consideration legislation concerning transfer formalities. The contents – including the wording of the contracts – are obviously very much dependent on the bargaining position of the parties.

Nevertheless, these contracts have been submitted as typically including certain contract provisions and it has to be admitted that the internal structure of such contracts has benefited from the Anglo-

American drafting style. This style has ensured that in most business acquisition contracts all relevant aspects of a transaction are dealt with in one way or another. This has not always been appreciated by the Nordic legal community. However, contract law has not been developed with business acquisitions and even less with cross-border business acquisitions in the focus and contract law comprises legislation, general principles, legal doctrine and case law and is thus quite elusive. Therefore, detailed written contracts in business acquisitions protect the interests of the parties, as the contract clarifies their rights and obligations and all the terms and conditions of the transaction. This kind of contract also enhances the predictability of the outcome of possible disputes. Detailed contracts are also an advantage for the courts, because without detailed contracts, the courts would have a much more laborious task to evaluate, for example, how deficiencies in the target should be assessed and what the consequences should be.

When a business acquisition contract has been concluded but when there is a dispute which the parties have not been able to resolve amicably and the parties take to court or arbitration, the question is to what extent is or should the interpretation of the contract be influenced by the fact that the contract deals with a business acquisition. It has been said in this dissertation that business acquisitions are typically quite extensive and complex transactions both with regard to the contracting process and with regard to the documentation comprising the agreements between the parties. It has also been submitted that this is the case whether the transaction is of a cross-border nature or not, although cross-border transactions tend to be even more extensive and complex. The process from initiating an acquisition to finalization of the transaction including closing was described above and it was said that this whole process gives a different framework for contract interpretation than many other typical cases. The extensive and complex process is one good reason for documenting final agreements between the parties in detailed written contracts. Another noteworthy element of business acquisitions is that these transactions as processes often involve a large number of persons of different expertise and with different tasks. It is not uncommon that there are separate groups of representatives and advisors engaged in due diligence, preparation of draft documentation, and negotiations. It is a challenge for the parties to keep the communication and the steering of such groups transparent in order to make sure that all the separate groups have relevant information, for example what to look out for in the due diligence or how the findings in the due diligence should be taken into account in the negotiations and ultimately in the contract. These challenges are even more demanding in cross-border transactions, where there might be people working in and from different jurisdictions and where the understanding of the relevance of information and legal issues may not automatically have common ground. Therefore, it is not only surprising but also advisable that the parties in their final contract agree upon how the actions and statements should, if at all, affect the contents of the contract. This is done, for example, by using entire agreement clauses, reliance- or anti-reliance clauses with regard to representations and warranties, by agreeing upon the effect of due diligence or by inserting limitation of liability clauses into the contract. Even though it has been shown that these clauses may not always have the

intended legal effect, the fact that commercial parties have agreed upon such contract provisions of their free will should be a reason to keep the threshold high for using pre-contractual material as evidence in disputes. In business acquisitions generally the parties have had the opportunity to thoroughly negotiate their detailed contracts. During the process preceding the contract the parties have also had the possibility to consult with their legal advisors on the meaning of the contents of the contract including limitation language affecting the use of pre-contractual material in disputes. The written contract is the finalization of an often extensive process and its significance as the primary interpretation source cannot be over-emphasized. Commercial parties may be required to honor the contract and adhere to the *pacta sunt servanda* principle and contracts may be presumed to exhaustively set out the rights and obligations of the parties.

In terms of written contracts typical of business acquisitions, it has been submitted that these contracts are complex and represent an entirety where terms and conditions are interlinked and dependent on each other. It might be challenging for the parties to fully understand all the implications and consequences of their commitments in complicated business acquisition contracts, but that may not be used as a defense to withdraw from their commitments. Instead, it rather enhances the parties' responsibility to use whatever means necessary in order to understand their own commitments. When the parties have gone through the whole process including the negotiations and agreed upon a transaction in a detailed contract, the likelihood that important aspects of the transaction including the rights and obligations of the parties have not been set out in the contract is minimal. Commercial parties may be presumed to look out for their own interests, especially when they are of equal strength and consequently they may also be presumed to look out for possible imbalances between the risks and benefits of the parties in the contracts. Therefore, a fairly restrictive view has been taken of the act of supplementing such contracts whether by implying contract terms or by adjusting contracts based on requirements for reasonableness. Furthermore, the likelihood that oral agreements should have been concluded and not recorded in the written contract is slight.

As to interpretation of the wording and contents of a business acquisition contract, whether cross-border or not, a contextual, objective interpretation method of business acquisition contract has been preferred in this dissertation. At the same time it has been noted that no interpretation method is unaffected by the other methods. Even if a contextual interpretation method has been preferred, a fairly restrictive view has been taken as to the use of other interpretation material, as the issue involves heavily negotiated and detailed business acquisition contracts. Recourse to pre-contractual material prepared, used or negotiated by the parties was held to be allowed primarily when it is imperative in order to reach a conclusion on ambiguous wording or in cases where the contract does not provide sufficient information as to the dispute involved and the agreements between the parties. With regard to typical terminology in cross-border business acquisition contracts, the use of pre-contractual material may nevertheless have to be considered if it is claimed that the parties intended to give the typical terminology a common-law meaning and, for example,

deciding upon possible misrepresentations may have to include pre-contractual material. The objective element of contract interpretation was regarded as relevant in terms of wording being interpreted as it is ordinarily understood and based on the fact that the contract deals with a business acquisition. Subjective elements were found to be relevant in some cases and it was concluded that interpretation of business acquisition contracts cannot be described as purely objective, even though the main method should be based on an objective approach.

Interpretation of business acquisition contracts is tied to the fact that even when Nordic law has been agreed as the governing law, contracts customarily include common-law terminology. The discussion about common law terminology used in business acquisition contracts was carried out by taking as examples conditions, warranties and representations. This terminology is based on certain legal concepts in the common law jurisdictions, but it was also shown that the terminology is not homogenous in the two jurisdictions. In general, English legal doctrine has been more focused on terminology from a conceptual basis, while US legal doctrine has taken a more functional approach. It was concluded that in the case of interpretation of business acquisition contracts in general, a concept-based interpretation is inadequate and the functionality of the terminology put in context is more important. It was also shown that regardless of the English traditional understanding of concepts, the functionality of the concepts appeared to be important in practice. Examples included conditions precedent, which are the most relevant conditions from a business acquisition perspective. It was also shown that although warranties under English law are understood as less important contract terms, the impact of warranties in business acquisition contracts depends on how they are used and what their contents are in a particular contract. The one exception with regard to the relevance of legal concepts underlying the terminology used in business acquisition contracts is the common-law concept of representations, or actually misrepresentations. Representations and misrepresentations are understood in a fairly similar manner in the two common-law jurisdictions discussed here. However, there are differences both in legislation and in practice as to remedies in the case of misrepresentations and also in how the parties may agree on limitation of claims for misrepresentation. Additionally such differences also appear between the different states in the USA.

When the contract is governed by Nordic law, conditions precedent and warranties do not pose a problem from a legal perspective, but the common law understanding of representations and misrepresentations is not exactly matched under Nordic law. Nevertheless, it was shown that by using different rules and principles applicable in the Nordic jurisdictions, even representations and misrepresentations as understood in common law could be dealt with under Nordic law. The conclusion was that Nordic law as such is suitable to deal with the common law terminology of conditions, warranties, and representations. It was also noted that representations as used in business acquisition contracts in fact often amount to the same as contractual warranties and also that warranties and representations in such contracts are often used interchangeably.

There are some differences between the Nordic jurisdictions in the application of contract law, but in general when the contract is governed by Nordic law, there is no immediate need to have recourse to common law legal concepts. Even if it may be regarded that the use of common law terminology is more or less established trade usage in business acquisition contracts, this is not the same as saying that when there is a governing law provision and when the terms can be translated into that legal system the common law understanding prevails. Even if business acquisition contracts are to be interpreted primarily objectively and the wording would be given its ordinary legal meaning, this does not mean that the wording would automatically be given its common-law meaning. Ordinary legal meaning could just as well be understood as the meaning the wording has under applicable law. When, on the other hand, the governing law does not provide an answer to the dispute at hand, and after having employed the applicable interpretation methods and techniques the courts would still not have been able to reach a conclusion in the dispute, the alternative of interpreting the terminology and expressions based on a common law understanding will have to be explored.

Nordic legal scholars have presented doubts as to use theories and case law from the common law jurisdictions, but it cannot be ignored that the Nordic business acquisition market in many respects follows Anglo-American models for contracting and contracts in business acquisitions. Therefore, when terminology or expressions have a special meaning under common law and when the governing law and the factual circumstances do not provide sufficient means for a solution, the Nordic courts should be allowed to have recourse to common law practice.

In practice such an alternative may prove quite burdensome. First of all, the case law with regard to the terminology and its effects is not always consistent. Secondly, the differences between the English and US approach also cannot be ignored. Thirdly, the difference in practice between the states of the USA is another factor to consider. These are all aspects a Nordic court would have to consider when interpreting terminology based on a common law understanding. The first task of a Nordic court would be to decide whether to follow English or US practice and consistently apply such practice. Furthermore, if a Nordic court is to apply US contract law, it should also clarify whether possible differences between the different states have been taken into account and the court should at least explain whether it has taken these differences into consideration or whether for example it has relied upon the presentations in the Restatement (Second). Additionally, the court would have to consider case law.

In other words, if the common law understanding of terminology and expressions is to be used when the contract is governed by Nordic law, such interpretation has to be carried out in sequence, where the starting point has to be motivated decisions as to which common law legal system is used and background information as to the use of such terminology would have to be extensive enough for the courts to actually be able to make an educated decision on the meaning of the terminology and expressions.

The challenge with use of common law terminology is also closely connected with the use of the English language. Many words and expressions may be directly translated from English to the respective Nordic language, but that does not necessarily lead to a result which actually accomplishes what is generally understood by those words when used in business acquisition contracts or what the parties intended by using those words. Direct translations may also be insufficient, as they do not match the situation in another legal system. Examples were taken from a decision by the Svea Court of Appeal, where especially the dissenting opinion shows the challenges with translations to fit another legal system. In this case the court had to decide what the words ‘successors’, ‘assigns’ and ‘assignable’ as used in the contract meant. The dissenting opinion proposed that ‘assign’ in English legal language contains several forms of transfer and not only singular successions as understood in Swedish law.

Another example of difficulties with direct translation was the use of expressions such as ‘best efforts’ or ‘reasonable best efforts’, which are the focus of much debate in the common law countries. Best efforts, reasonable best efforts, reasonable efforts and similar expressions are often used as a matter of routine in business acquisition contracts and there is seldom any party-specific intention attached to these expressions. If the contract is governed by Nordic law, such expressions may be interpreted as actually reflecting nothing other than a certain – depending on the wording – higher degree of good faith and loyalty, principles which as such are widely accepted in the Nordic legal community as governing in contractual relationships. Therefore, the translation of these expressions would actually be carried out by transforming them into how Nordic contract law would perceive such efforts based on the loyalty and good faith principle and in some cases on legislation, at the same time recognizing that the strength and application of these principles varies between the Nordic countries.

There is one additional challenge which the Anglo-American drafting style has brought to the Nordic countries. Namely, in these contracts the same matter may be described by using several words, whereas in the Nordic languages and under Nordic law the matter could be described by using only one word. This is a nuisance. If a notion expressed in multiple words is in fact self-evident from a legal perspective, it does not necessarily have an impact on the interpretation of the contract even if multiple words are used. However, this style of drafting can be used by a party as an argument and even by the courts to justify why the wording of a contract governed by Nordic law should be interpreted taking into account the common law meaning of the wording.

The cross-border element of business acquisition has been considered throughout the dissertation. When transactions are of a cross-border nature they generally tend to be more complex and involve a larger number of experts and advisors. This has more to do with project management than with distinct legal issues, although it increases the difficulties of proving, for example, parties’ intentions diverging from the intention expressed in the contract or to prove pre-contractual promises or representations as understood in common law and made during the pre-contractual stage. There

are, however, also other legal issues appearing in these transactions. The fact that a business acquisition contract is governed by Nordic law is not without exceptions when interpreting the contract, as the transaction may cover actions and transactions in other jurisdictions as well. Interpretation of the contract would be based on Nordic law, but foreign law may have to be applied regarding certain parts of the transaction. For example, assets and shares in other jurisdictions may have to be transferred according to the formalities laid down in those jurisdictions. Likewise, there might be legislation relating to labor, environmental or competition matters which are mandatory regardless of the governing law of the business acquisition contract. Such matters are customarily acknowledged and dealt with in the acquisition contract, but if not the mandatory provisions of foreign law would still have to be applied in order to fully effect the transaction contemplated in the main contract. Therefore, in terms of interpretation of cross-border contracts, knowing the governing law may not be enough, but the parties may have to provide the courts with additional information on applicable law in some specific matters. When the parties represent the common law and the Nordic jurisdictions respectively, it cannot be excluded that regardless of a governing law provision the background of the parties may influence a decision on whether terminology and expressions should be given their common law meaning or not, especially if it is somewhat unclear what the parties intended.

Another challenge in cross-border business acquisitions relates to the pre-contractual stage. Above, negotiations where parties representing different legal systems may well have profoundly different views on what is allowed or not were discussed. Due diligence is another element of business acquisitions where views on its impact and relevance differ substantially between jurisdictions. Even if private international law eventually confirms the applicable law, the fact that the parties have different views on the negotiations could be used as an argument why, for example, there should be a more lenient approach against finding pre-contractual liability. As there is a difference between how the pre-contractual stage is perceived in the two legal families, it is more reliable for the parties if they agree upon the effect of that stage in their final contract – bearing in mind, however, that agreements in the contract on excluding pre-contractual statements and actions may not always be effective to their full extent in a dispute.

The written contract has been submitted as being of utmost importance in business acquisitions, as even if the parties are supposed to know the law, general contract law provides less guidance as to how such contracts should be interpreted. The significance of the written contract has been considered even more important in cross-border transactions. Cross-border business acquisitions have customarily been thoroughly negotiated. Contracts set out the rights and obligations of the parties and other terms of the transaction in detail and would often include provisions on pre-contractual actions and statements. When the parties do not have the same understanding of general law including the relevance of pre-contractual actions and statements, the cross-border element emphasizes the need to concentrate interpretation on the contents of the contract and to give the written contract significance as the primary interpretation source.

If the parties used a certain common law term in its common law technical sense – which has to be proven and which has to be identified as to whether it is used according to English or US law – the Nordic courts should in principle follow that agreement. This is part of the freedom of contract principle allowing parties to agree how the contract should be interpreted. In the more likely scenario that the parties have not agreed upon the use of certain terminology or wording in a legal-technical common-law sense but rather used them as a matter of general practice, the governing law provision is decisive. Only when the application of Nordic law – where the factual circumstances play an immensely important role – cannot give an answer in the dispute at hand should the courts resort to the common law understanding.

The fact that business acquisition contracts are mostly drafted based on an English or US style, that terminology and expressions included in the contract have a special meaning in the respective common law jurisdiction and the fact that contracts are often drafted in English may be claimed to represent prevailing trade usage in the merger and acquisition market. These typical elements appear in different kinds of transactions, that is, domestic and cross-border transactions. Trade usage is also a component of interpretation according to Nordic law. When a business acquisition contract is to be interpreted by Nordic law, the fact that the contract deals with business acquisitions and the particularities of cross-border business acquisitions in general should be taken into account. However, in terms of the wording of the contract and having recourse to the common law meaning of the wording the situation is different. It has been and it is submitted that a governing law provision sets the framework for interpretation. Furthermore, contract interpretation is primarily based on the contents of the written contract and interpretation is supplemented with how the governing law provides for the different matters in the contract. It has been shown that Nordic law is apt for interpreting contracts where common law terminology is used. Much of the contracting originates from the common law jurisdictions, for example with regard to due diligence and preliminary agreement, practice that has been embraced by the Nordic market. This shift in contracting does not mean that the Nordic market has accepted, at least knowingly, the common law understandings of such elements and it has also been shown that Nordic contract law provides for solutions both with regard to the examples of due diligence and preliminary agreements. However, if the governing law does not provide solutions, alternative methods for reaching a solution to the dispute at hand should be allowed. The fact that the contract is drafted according to the Anglo-American style makes it justifiable to at least explore what the common law understanding of the disputed wording is, if interpretation according to the governing law does not provide a solution.

Defining trade usage with legal implications for business transactions is tied to the question whether international practice exists which may be established with a sufficient degree of certainty. In this dissertation the conclusion was that such international practice consists more or less in use of the Anglo-American way of drafting including using certain terminology. It has been established that it is common for business acquisition contracts to contain certain contract terms such as

conditions, warranties and representations, which are typical common law concepts. It has also been established that contracts are often structured in a certain way. It has been established that the whole process of contracting has been greatly influenced by the Anglo-American way. If the Nordic courts would see a need to refer to trade usage in a legal sense applicable to business acquisitions, international trade usage is in practice to be established based on Anglo-American practices. This is, however, not a simple solution, as the practice between the UK and the USA varies. Therefore, my conclusion is that a coherent international trade usage – with regard to cross-border business acquisition contracts which would resolve interpretation issues concerning terminology and practices of common law origin in contracts governed by laws of jurisdictions representing other legal systems – does not exist.

6.3 Recommendations

At the beginning of this dissertation the author predicted that the global mergers and acquisitions market is likely to continue to grow in the long-term perspective, although the market is affected by general economic development as well as by protectionist tendencies from time to time. Even though the political situation has changed in some of the major economies since my work started, my original statement is still included and valid. Protectionist decisions by politicians and slow-downs in economies may certainly lead to the focus on the cross-border business acquisition market shifting between countries, but not that cross-border transactions as a whole would decrease permanently. There are too many businesses for which the idea of only focusing on domestic markets is not an option if they want to prosper. This applies even more so to businesses in smaller jurisdictions. Therefore, cross-border business acquisitions are also bound to play an important role in the future.

In terms of the dominance and penetration of common-law practice in the business acquisition market generally, it is hard to see how that would decrease. The only alternative would be to create some international standards for interpretation of business acquisition contracts. Such a task could be given to a group of experts representing the business community, advisors, university professors, legislators and the judicial elite. If it were possible to establish these international standards, it would have a positive effect on the functioning of the business acquisition market – particularly the cross-border market.

Acceptance in the Nordic market of practices and contracts originating from the UK and the USA has brought in new elements to contracting and in contracts pertaining to business acquisitions. This acceptance has both advantages and disadvantages. In my opinion, the biggest advantage is that the English and US contract models are structured in a way which makes the contracts comprehensive and these contracts include all relevant aspects of the transactions. Considering, however, the differences between contract law in the common law jurisdictions and the Nordic countries, my sincere wish is nevertheless that Nordic lawyers would take a more critical view as

to how they implement these practices and contract models, when Nordic law has been agreed to be the governing law. Nordic lawyers should take the time and make the effort to customize contracts to meet the requirements of Nordic law.

This dissertation has discussed conditions, warranties and representations at length. Even though, for example, representations and warranties are also used interchangeably by common-law lawyers, that is no excuse for repeating terminology without considering what it means under Nordic law. For example, instead of naming the parties' assurances both representations and warranties, the parties could just name them warranties if the contract is governed by Nordic law. By using both expressions, the inclination of third parties to look at the common-law meaning may increase although the parties actually have not intended that to be the case. Another example may be taken from the use of conditions precedent including the thereto-related closing. There is no absolute truth with regard to these contract provisions under Nordic law and contracts should rather be specific enough as to the meaning of these contract terms and what the consequences are in the case of breach or non-fulfillment. It should also be noted that these situations cannot be resolved by resorting to some kind of homogenous understanding under common law.

It is of course understandable that when drafting contracts in English it is also easy to use the terminology and expressions customarily appearing in such contracts in the international market. However, it is in the interest of the parties that such contracts are as unambiguous as possible and by using plain language and refraining from overusing language which has a special meaning according to common law, the risk of creating conflicting interpretation situations decreases. There are enough possibilities in any case for diversified interpretations of any contract. When the transaction in one way or another involves parties from the common law jurisdictions, it is even more important to have a discussion between the parties and their lawyers of what the different terminology and contract provisions mean according to Nordic law, if that is the applicable law. By doing so, the parties understand what they are committing themselves to and there are fewer surprises as to the consequences if there is a dispute.

As a general recommendation, considering that Nordic commercial contract law is primarily developed in legal doctrine and confirmed in court practice and considering that such discussions and court practice have not evolved based on how business acquisitions – whether domestic or cross-border – are carried out or on how the contracts are complex documents resulting from an extensive process, the position of the parties is much more secure, if they sufficiently specify their rights and obligations in a detailed written contract.

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