MASTER THESIS | MASTER'S THESIS

Titel | Title

THE ROLE OF CONTEXT IN CONTRACT INTERPRETATION:

A COMPARATIVE AND PRACTICAL STUDY OF COMMON LAW AND CIVIL LAW SYSTEMS

verfasst von | submitted by

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angestrebter akademischer Grad | in partial fulfilment of the requirements for the degree of

Master of Laws (LL.M.)

Wien | Vienna, 2026

Studienkennzahl lt. Studienblatt | Degree programme code as it appears on the student record sheet:	UA 999 082
Universitätslehrgang lt. Studienblatt | Postgraduate programme as it appears on the student record sheet:	Europäisches und Internationales Wirtschaftsrecht (LL.M.)
Betreut von | Supervisor:	Dipl.-Jur. Dr. Maria Elisabeth Sturm LL.M.

Deutscher Abstract

Im internationalen Geschäftsverkehr sind Verträge häufig zwischen Parteien aus unterschiedlichen Rechtsordnungen geschlossen. Kommt es zu Streitigkeiten, hängt die Auslegung vertraglicher Bestimmungen nicht nur vom genauen Wortlaut, sondern auch vom weiteren Kontext ab. Dies kann zu Auslegungsschwierigkeiten führen, wenn sich Rechtsordnungen in ihrem Umgang mit kontextuellen Faktoren unterscheiden. Diese Arbeit untersucht die Bedeutung und die Grenzen des Kontexts bei der Vertragsauslegung durch einen Vergleich des englischen Common Law mit den zivilrechtlichen Systemen Frankreichs und Deutschlands. Sie beleuchtet die doppelte Funktion des Kontexts: einerseits als Mittel zur Auslegung vertraglicher Klauseln, andererseits als normativer Maßstab, anhand dessen Rechtsordnungen Fairness, Treu und Glauben fördern und Ungleichgewichte korrigieren. Die Untersuchung verbindet eine dogmatische Analyse mit praxisnahen Konstellationen, in denen kontextbezogenes Argumentieren besonders bedeutsam ist. Dazu zählen Allgemeine Geschäftsbedingungen und Adhäsionsverträge, transnationale Rechtsrahmen wie das CISG sowie internationale Schiedsverfahren und digitale Vertragsumgebungen. Trotz methodischer Unterschiede und konzeptioneller Begrenzungen gelangt die Studie zu dem Ergebnis, dass beide Rechtstraditionen auf den Kontext zurückgreifen, um sicherzustellen, dass die Vertragsauslegung den praktischen Anforderungen des Wirtschaftsverkehrs gerecht wird.

Schlagwörter: Vertragsauslegung, kontextuelle Auslegung, vergleichendes Vertragsrecht, Common Law, Zivilrecht

Abstract

In international business dealings, contracts often involve parties from different legal systems. When disagreements arise, the interpretation of contractual terms may rest not only on the precise wording, but also on the broader context. This can present interpretative difficulties when legal systems diverge in their approach to contextual factors. This thesis examines the significance and boundaries of context in contract interpretation by comparing English common law with the civil law systems of France and Germany. It explores context's dual role: as a means of interpreting contractual provisions and as a normative benchmark for legal systems to pursue fairness, good faith and rectify imbalances. The investigation integrates doctrinal analysis with practical scenarios in which contextual reasoning is particularly significant. These scenarios encompass standard-form and adhesion contracts, transnational legal frameworks such as the CISG, and international arbitration and digital contracting environments. Despite methodological differences and conceptual constraints, the study proposes that both legal traditions rely on context to ensure that contractual interpretation reflects the practicalities of commercial transactions.

Keywords: contract interpretation, contextual interpretation, comparative contract law, Common law, Civil law

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1. INTRODUCTION

1.1. Background of the Study

Contract interpretation is a key element in both private law and commercial practice. It determines how agreements are understood and enforced, which directly affects legal certainty, how risk is shared, and fairness in economic exchanges.

The process of interpretation becomes more complex in cross-border transactions. Parties frequently engage in transactions governed by distinct legal traditions, each of which assign varying degrees of significance to the explicit terms of a contract and the circumstances surrounding its formation. The extent to which interpretation prioritises the written provisions or also considers negotiations, actions, commercial objectives, and the relational dynamics between the parties profoundly influences the eventual contractual outcomes.

Understanding how these legal systems conceptualise and implement contextual factors in contract interpretation is relevant not only for maintaining theoretical consistency but also for providing practical guidance in the areas of international contracting and dispute resolution.

1.2. Research Objectives and Questions

This thesis proposes to examine the function and limitations of context in contract interpretation across common and civil law traditions, and to assess the concrete impacts resulting from their divergent methodologies. Accordingly, the study addresses three main interrelated questions:

a. The Function of Context in Interpretation: Which contextual elements, such as negotiations, conduct, commercial purpose and trade usages, are considered relevant when determining the meaning of a contract, and how do courts use them in the interpretative process?

b. Doctrinal and Methodological Foundations: In what ways do differences in legal structure and interpretative method — including sources of law, judicial reasoning and the limits of contextual evidence — influence the extent to which common law and civil law systems incorporate and rely on contextual material?

c. Practical and Transnational Implications: How do these interpretative differences affect contract drafting, risk allocation, and dispute resolution in cross-border transactions, particularly where contracts operate across multiple legal environments?

Taken together, these three interrelated questions provide a framework through which the study connects doctrinal theory, interpretative approaches, and commercial realities, with the aim of clarifying the legal significance of contextual circumstances beyond the plain words of the contract.

1.3. Methodology and Structure of the Thesis

This thesis employs a comparative doctrinal methodology, analysing legislation, case law, and academic opinions to investigate the contrasting approaches of common-law and civil-law systems to context in contract interpretation. The analysis centers on English law as the primary common-law reference point, while French and German law serve as representative civil-law models.

The comparison highlights differing balances between textual certainty and contextual reasoning, and between party autonomy and corrective fairness.

Doctrinal analysis is combined with practical scenarios — including standard-form contracts, international instruments and arbitration, and digital contracting — to demonstrate how interpretative theory operates in commercial practice within these legal systems.

2. DOCTRINAL FOUNDATIONS AND SYSTEMIC APPROACHES TO CONTEXT

Every system of contract law is based on certain doctrinal principles and assumptions that determine how promises are formed, interpreted, and enforced. In doing so, they also set the framework within which interpretation can extend beyond the text.

The doctrines of formation, validity and performance implicitly convey views about the balance between autonomy and fairness, demonstrating that the interpretative process begins long before any dispute arises.

With this in mind, this chapter examines how doctrinal foundations and systemic features — i.e. the structural and methodological characteristics of each legal tradition — shape the interpretative process and determine the role of context within it.

Starting with the philosophical premises linking freedom of contract and good faith to the role of context, it then turns to the main formation and interpretation doctrines that distinguish common law from civil law. Finally, it considers pre-contractual duties and unfair terms, in which context operates as both a factual and a normative element of contractual justice. In doing so, the chapter demonstrates that context is an inherent feature of the contract's legal architecture and not merely an external aid to construction.

2.1. Philosophical and Normative Foundations of Contract Law

In both civil and common law systems, a contract is generally defined as a legally binding agreement between two or more legal persons—whether individuals or commercial entities.[1] Yet this shared definition conceals important differences in how jurisdictions determine which agreements are enforceable, and under what conditions.

[1] Claire-Michelle Smyth and Marcus Gatto, *Contract Law: A Comparison of Civil Law and Common Law Jurisdictions* (Business Expert Press 2018) 1, 4 https://ebookcentral.proquest.com/lib/univienna/detail.action?docID=5186470 accessed 27 October 2025.

Legal interpretation is never entirely neutral. It requires judges and lawyers to justify their decisions in light of broader social values, such as ideas about justice, fairness, authority, and individual rights, and the way these value judgments are made tends to differ across legal traditions and institutional cultures.[2] Such traditions influence how the law approaches its interpretative role, determining whether it merely enforces what was said, or whether it also discerns and questions what was meant by taking into account the context, purpose, and relationship in which the agreement was made.

These foundational ideas about autonomy and solidarity in private law thus establish the normative tone through which context acquires legal significance. They provide the ethical and conceptual backdrop against which contract interpretation unfolds.

Within this framework, two principles stand out for embodying the tension between textual certainty and relational fairness: the principles of freedom of contract and good faith.[3]

2.1.1. Freedom of Contract and the Relevance of Context

The idea behind freedom of contract is that people should be free to decide what their agreements should cover and how they should be set up, without unnecessary interference from others. It is based on the ideal of private autonomy: the belief that rational individuals are best placed to determine their own interests. Accordingly, the role of the law is to give effect to the bargain the parties have struck — not to question its fairness, logic, or practicality.[4]

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[2] Ronald Dworkin, *Law's Empire* (Hart Publishing 1998) chs 1–2, 6; P S Atiyah and R S Summers, *Form and Substance in Anglo-American Law: A Comparative Study of Legal Reasoning, Legal Theory, and Legal Institutions* (Clarendon Press 1987) Introduction, pt I.
[3] The two principles highlighted here are not intended to constitute an exhaustive account of the normative foundations of contract law. Other foundational principles, such as legal certainty, protection of legitimate expectations, proportionality, and the stability of commercial transactions, also play an important role in shaping contractual reasoning. The present discussion focuses on freedom of contract and good faith because they most clearly illuminate the tension between textual certainty and contextual fairness that is central to the comparative analysis developed in this study.
[4] Smyth and Gatto, *Contract Law* (n 1), 2.

This principle has deep roots in both common and civil law traditions. In Germany, it is embedded in the concept of *Vertragsfreiheit*, encompassing freedom as to form (*Formfreiheit*), content (*Inhaltsfreiheit*) and to decide on whether or not to contract (*Abschlussfreiheit*).[5] In France, the same principle is enshrined in Article 1102 of the French *Code civil*, which affirms the parties' freedom to contract and to determine the form and content of their agreement within the limits of the law.[6] In English law, freedom of contract encompass centuries of precedent grounded in individual liberty.[7]

However, this doctrine also exposes a key challenge in the use of context. If the law assumes that all parties bargain freely and knowingly, then contextual interpretation might appear unnecessary, or even undesirable.

Courts leaning to this view may focus on the written words of the contract and resist drawing inferences from surrounding circumstances. The danger here is that such formalism can overlook real disparities in bargaining power and fail to account for the practical realities of contract formation and performance. A well-known illustration is in *Lochner v New York*, where the US Supreme Court invalidated a law limiting bakers to a 60-hour work week on the grounds that it infringed on the parties' freedom to contract.[8] The Court presumed formal equality between employer and employee, disregarding the economic compulsion and structural inequality that shaped such agreements. This decision came to symbolise a formalistic and context-blind approach to contract law and was later overruled in *West Coast Hotel Co v Parrish*.[9]

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[5] Hans G. Leser, 'Contract: Capacity, Formation and Freedom of Contract', in Norbert Horn, Hans G. Leser and Hein Kötz (eds), *German Private and Commercial Law: An Introduction* (Clarendon Press 1982) 71, 84.
[6] Code civil (France), art 1102.
https://www.justice.gouv.fr/sites/default/files/migrations/textes/art_pix/Translationrevised2018final.pdf accessed 28 October 2025.
[7] Hans-W Micklitz, 'On the Intellectual History of Freedom of Contract and Regulation' (2015) 4 *Penn State Journal of Law & International Affairs* 1, 15 (citing P S Atiyah, *The Rise and Fall of Freedom of Contract* (Clarendon Press 1985) and D J Ibbetson, *A Historical Introduction to the Law of Obligations* (Oxford University Press 1999).
[8] *Lochner v New York* 198 US 45 (1905).
[9] *West Coast Hotel Co v Parrish* 300 US 379 (1937).

While freedom of contract remains an essential element of private law, modern legal systems increasingly recognise that this freedom is not absolute. Both common-law and civil-law traditions acknowledge that contractual autonomy operates within moral and social boundaries. Agreements that violate public policy or *bonos mores*, for example, may be annulled, indicating the law's refusal to uphold agreements that violate common standards of justice or morality.[10]

Particularly when differences in bargaining power pose a threat to the legitimacy of the contractual process, modern contract law increasingly balances party autonomy with fairness considerations. This understanding is confirmed in judicial approaches that look beyond the literal text to the wider contractual context and the relative strength of the parties, acknowledging that rigid adherence to formalism may risk holding parties to obligations they did not meaningfully assume.[11]

2.1.2. The Principle of Good Faith

The principle of good faith operates as the ethical and doctrinal counterpart to freedom of contract.

Whereas autonomy enables parties to shape the content of their obligations, good faith imposes standards of honesty, fairness, and cooperative conduct. These standards ensure contractual relationships do not devolve into mere exercises of strategic self-interest.[12]

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[10] *Contra bonos mores* denotes conduct or agreements that offend accepted standards of morality. In German law, such agreements are void under § 138(1) of the *Bürgerliches Gesetzbuch* (BGB) (Sittenwidrigkeit). In French law, the principle is reflected in *Code civil* arts 6, 1102(2) and 1162, which prohibit contracts whose content contravenes *ordre public* or *bonnes mœurs*. In English law, the equivalent control arises through the common-law doctrine of illegality and public policy: see *Patel v Mirza* [2016] UKSC 42.

[11] See Helen Winkelmann, Susan Glazebrook and Ellen France, 'Contractual Interpretation' (2020) 51 *Victoria University of Wellington Law Review* 463, 511–512, noting judicial recognition of unequal bargaining power and limits on contractual freedom.

[12] Edwin Peel, 'The Common Law Tradition: Application of Boilerplate Clauses under English Law' in Giuditta Cordero-Moss (ed), *Boilerplate Clauses, International Commercial Contracts and the Applicable Law* (Cambridge University Press 2011) 134.

At its core, good faith requires parties to act honestly, fairly, and in accordance with the spirit of the agreement. It is commonly understood as comprising two dimensions: subjective good faith, referring to honesty in fact and the absence of knowledge of wrongdoing, and objective good faith, denoting an external standard of fair dealing, loyalty, and consideration of the other party's legitimate interests).[13]

While both civil-law and common-law traditions recognise the relevance of good faith, they do so in structurally different ways.

2.1.2.1. Good Faith in Civil-Law Systems

Civil-law jurisdictions generally treat good faith as a foundational principle of private law, endowed with interpretative, integrative, and corrective functions. As García Long explains, most continental European systems operate through mandatory good-faith clauses that guide interpretation, integrate obligations not expressly stated, and correct outcomes incompatible with fairness.[14]

The foundational status of good faith is explicitly reflected in Article 1104 of the *Code civil*, which requires contracts to be negotiated, formed, and performed in good faith. Similarly, § 242 of the German *Bürgerliches Gesetzbuch* (BGB) obliges parties to perform their obligations in accordance with good faith and commercial practice (*Treu und Glauben*).

In both traditions, good faith serves not only as a rule of conduct but also as a guiding principle for interpretation. It authorises courts to go beyond the literal meaning of words to uncover the parties' common intention, to fill contractual gaps, and to limit the effects of abusive or disproportionate clauses.

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[13] See Ole Lando and Hugh Beale (eds), *Principles of European Contract Law: Parts I and II* (Kluwer Law International 2000) and Ole Lando, Eric Clive, André Prüm and Reinhard Zimmermann (eds), *Principles of European Contract Law: Part III* (Kluwer Law International 2003) (PECL) art 1:201, Comments A and B, distinguishing objective good faith as fair dealing and subjective good faith as honesty in fact.
[14] Sergio García Long, 'Towards a Formalistic Approach of Good Faith in Comparative Contract Law' (2024) 35 *European Business Law Review,* 949.

Good faith therefore functions less as an exceptional corrective and more as a structural expectation governing contractual behaviour, requiring transparency, loyalty, and cooperative problem-solving in a manner that prevents contractual rights from being exercised contrary to the legitimate expectations created by the relationship.[15]

In short, good faith provides the normative lens through which contractual obligations are interpreted and adjusted in light of their relational and contextual setting.

Accordingly, in civil-law systems, the relevance of context flows naturally from the principle of good faith itself: because good faith requires attention to purpose, expectations, and conduct, interpretation necessarily takes account of the surrounding circumstances at every stage of contractual life.[16]

2.1.2.2. Good Faith in Common-Law Systems

English law, by contrast, rejects any overarching duty of good faith in contract law, reflecting a more formalistic and objective system in which fairness operates through specific doctrines rather than through a general principle. Instead of a general clause of good faith, English law more commonly refers to notions of fair dealing and honest conduct as they arise in particular doctrinal contexts.[17]

This resistance to a general duty of good faith is closely linked to the common law's adversarial orientation, which emphasises self-reliance, strategic bargaining, and the objective interpretation of contractual language.[18] As Galletti observes, English contract law starts from an adversarial approach in which each party is expected to protect its own

[15] Ibid 953
[16] Ibid 950-952
[17] Peel, 'The Common Law Tradition' 134–135
[18] See section 2.3 below.

interests.[19] Consistently with this approach, the House of Lords in *Walford v Miles* rejected a duty to negotiate in good faith as "repugnant to the adversarial position of the parties".[20]

However, as Galletti also notes, this orientation does not prevent courts from ensuring fairness:

> The fact that English contract law – with its emphasis on objective interpretation – might start from an adversarial approach and has no general duty of good faith, does not constitute an impediment for judges to apply their good sense in ensuring that the contract becomes the fair framework for people's dealings.[21]

In *Yam Seng Pte Ltd v International Trade Corporation*, Leggatt J accepted that good faith could be implied as an objective expectation of honesty and fidelity to the bargain in long-term commercial dealings.[22] Nevertheless, English law has resisted recognising a universal duty of good faith, reflecting its attachment to certainty, party autonomy, and textual primacy.

In practical terms, English courts increasingly acknowledge contextual fairness while maintaining the objective interpretative method. The contemporary judicial stance is not hostile to good faith, but cautious in generalising it, confining its operation largely to procedural fairness, that is, the regulation of the bargaining process rather than the substantive content of the bargain — for example through doctrines addressing misrepresentation, duress, undue influence, and the exploitation of known mistake.

This approach is clearly illustrated in *Cobbe v Yeoman's Row Management Ltd*, where Mummery LJ reaffirmed that "there is no general duty to negotiate in good faith," while

[19] Shida Galletti, 'Contract interpretation and relational contract theory: a comparison between common law and civil law approaches' (2014) 47(2) *Comparative and International Law Journal of Southern Africa* 257.
[20] *Walford v Miles* [1992] 2 AC 128 (HL) 138 (Lord Ackner).
[21] Galletti, 'Contract Interpretation and Relational Contract Theory' 257.
[22] *Yam Seng Pte Ltd v International Trade Corporation* [2013] EWHC 111 (QB) 135–137.

emphasising that English law contains “plenty of other ways of dealing with unacceptable conduct occurring in the course of negotiations.”[23]

The common law thus draws a firm line between supervising the fairness of negotiations and intervening in the contractual allocation of risk agreed by the parties.

2.1.2.3. Convergence of Good Faith in Civil and Common Law Traditions

Taken together, this doctrinal landscape reveals that while civil-law systems use good faith as a unifying interpretative principle, common-law jurisdictions deploy it reactively, through discrete doctrines and equitable interventions.

Despite their structural differences, both traditions show signs of convergence. Civil law increasingly tempers good-faith intervention with concerns for legal certainty, while English law has broadened its acceptance of contextual evidence—particularly where fairness, relational context, or commercial expectations demand it. Galletti notes that this convergence is visible in interpretation, where objective methods coexist with pragmatic judicial sensitivity to fairness and context.[24] García Long likewise observes a “formalistic approach of good faith” emerging in common-law jurisdictions, narrowing—but not eliminating—the conceptual gap with civil law.[25]

Both traditions thus recognise that contractual legitimacy depends on more than autonomy: it requires an interpretative framework capable of distinguishing legitimate self-interest from conduct that undermines the contractual relationship. Good faith, whether explicit or implicit, provides that normative compass.

[23] *Cobbe v Yeoman’s Row Management Ltd* [2006] EWCA Civ 1139 [4].
[24] Galletti, ‘Contract Interpretation and Relational Contract Theory’ 257–260.
[25] García Long, ‘Towards a Formalistic Approach’ 953-955.

2.2. Methodological and Interpretative Orientations in Contract Interpretation

2.2.1. Adversarial and Cooperative Models

Comparative scholarship has described two broad orientations of how rules on contract interpretation reflect different underlying ethics of contract interpretation, relating to the way courts conceptualise contractual relations and the role of law in shaping them. Under these orientations, the contractual relationship can be perceived as mainly "adversarial" or "cooperative". [26]

An adversarial ethic of contractual relation treats contracts as arm's-length bargains between autonomous parties, where each pursues self-interest and little weight is given to broader relational duties.[27]

A cooperative ethic of contractual relations, by contrast, conceives contracts as relational undertakings grounded in loyalty, fairness and trust, placing weight on the broader relationship between the parties rather than only their self-interest.[28]

2.2.2. Formalism and Contextualism

A second set of approaches to contract interpretation can be distinguished as formalism and contextualism.

The formalist method privileges the text itself, confining interpretation to the contractual document and strictly limiting recourse to external sources of meaning. By contrast, a contextualist method situates contractual words within their broader commercial and

[26] Galletti, 'Contract Interpretation and Relational Contract Theory' 251–253.
[27] Ibid 256.
[28] Ibid 253.

factual setting, including pre-contractual negotiations, the conduct of the parties, and relevant trade usages, with the aim of reconstructing their shared intention.[29]

2.2.3. Civil Law: Cooperative Ethic and Contextualism

Civil law systems exemplify a cooperative and contextual approach to interpreting contracts. Under these systems, contracts are not simply understood as separate bargains based on their literal wording, but as expressions of a shared intention that must be reconstructed by reference to the parties' actual intentions.[30]

Interpretation in civil law is therefore purposive and principle-driven: the words are important, but they are placed within the broader context of the contractual relationship.

2.2.4. Common Law: Adversarial Ethic and Formalistic Tradition

English contract law, shaped by a liberal conception of individual autonomy, has traditionally approached contractual relationships through an adversarial lens, emphasising self-interest and arm's-length dealing rather than cooperation.[31]

This adversarial ethic is reflected in the interpretive methodology traditionally adopted by English courts. As a starting point, contracts are construed according to literal meaning of

[29] Gérard McMeel, 'Prior negotiations and subsequent conduct – the next step forward for contractual interpretation' (2003) 119 *Law Quarterly Review* 272, 280–281

[30] This cooperative and intention-oriented approach is reflected across major civil law systems and European private law instruments: Code civil, art 1188 (interpretation according to the parties' common intention); BGB, § 133 (interpretation according to the parties' actual will); PECL art 5:101, 8:101; European Commission, 'Proposal for a Regulation on a Common European Sales Law' COM(2011) 635 final, art 58.

[31] The adversarial orientation of English contract law was classically articulated in *Walford v Miles* [1992] 2 AC 128 (HL) 138 (Lord Ackner), where the House of Lords rejected a general duty to negotiate in good faith as incompatible with the parties' adversarial position. It was latter reaffirmed by the Supreme Court in *Arnold v Britton* [2015] UKSC 36, [2015] AC 1619 [15]–[23], emphasising that interpretation begins with the natural and ordinary meaning of the words used.

the language used, with primary emphasis placed on the text of the agreement rather than on the surrounding negotiations or subjective intentions of the parties.[32]

Within this tradition, the court's interpretive function is governed by a strong commitment to what has been described as "loyalty to the text": priority is given to the words actually chosen by the parties, and recourse to contextual material is restricted, save where ambiguity or recognised exceptions arise.[33]

2.2.5. The Evolution to a Contextualised Formalism in English Law

During the latter half of the twentieth century, English contract law underwent what has been described in the academic literature as a "contextual turn", marking a gradual movement away from strict literalism towards an interpretive method attentive to the factual matrix surrounding contract formation.[34]

A decisive movement towards such factual reasoning emerged in *Prenn v Simmonds*[35], where Lord Wilberforce affirmed that contracts must be read in light of the so-called "matrix of facts" in which the agreement was concluded.[36]

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[32] This formalist tendency is further reflected in the traditional parol evidence rule, under which a written contract is treated as containing the entire agreement between the parties and extrinsic evidence is generally excluded where it would contradict, vary, or add to the written terms; See Eric A Posner, 'The Parol Evidence Rule, the Plain Meaning Rule, and the Principles of Contractual Interpretation' (1998) 146 *University of Pennsylvania Law Review* 533.

[33] The expression was articulated by Lord Steyn in *Society of Lloyd's v Robinson* [1999] 1 All ER (Comm) 545, 551, where he stated that "loyalty to the text of a commercial contract, instrument or document read in its contextual setting is the paramount principle of interpretation"; Galletti, 'Contract Interpretation and Relational Contract Theory' 257.

[34] Andrew Robertson and Mindy Chen-Wishart, 'Interpretation of Contracts: Towards a Unified Approach?' (2015) 131 *Law Quarterly Review* 327.

[35] *Prenn v Simmonds* [1971] 1 WLR 1381 (HL) 1384–1386 (Lord Wilberforce).

[36] This matrix refers to the objectively ascertainable background circumstances forming the setting of the transaction, including the nature and purpose of the agreement, the market in which the parties operate, and the commercial aims apparent to both sides. However, it excludes evidence of prior negotiations and the parties' subjective intentions, which remain inadmissible for the purpose of construing meaning; *Prenn v Simmonds*.

Lord Wilberforce further emphasised that contracts are not made “in a vacuum” but must be interpreted against their factual background.[37] This reasoning laid the foundation for the modern contextual approach subsequently articulated in *Investors Compensation Scheme Ltd v West Bromwich Building Society*, where Lord Hoffmann reformulated the law, defining interpretation as the ascertainment of the meaning which the document would convey to a reasonable person having all the background knowledge reasonably available to the parties.[38]

Later authorities refined this contextual orientation, emphasising that where contractual language is capable of more than one meaning, the court is entitled to prefer the interpretation which is consistent with business common sense.[39] The interpretive process therefore requires an evaluation of both, the words used and the commercial logic of the transaction, understood within its factual background.

It is worth noting that this contextual turn does not entail a departure from loyalty to the text. English law continues to treat the words chosen by the parties as the primary source of contractual meaning.

The Supreme Court reaffirmed this position in *Arnold v Britton*, emphasising that interpretation must begin with the natural and ordinary meaning of the contractual language, even where the outcome appears commercially unattractive.[40]

This emphasis on textual primacy had earlier been articulated by Lord Steyn, who observed that “loyalty to the text of a commercial contract, instrument or document read in its contextual setting is the paramount principle of interpretation.”[41] Contextual interpretation

[37] *Prenn v Simmonds* [1971] 1 WLR 1381 (HL) 1384.
[38] *Investors Compensation Scheme Ltd* v *West Bromwich Building Society* [1998] 1 WLR 896 (HL) 912–913 (Lord Hoffmann).
[39] *Rainy Sky SA v Kookmin Bank* [2011] UKSC 50, [2011] 1 WLR 2900 [21]–[25].
[40] *Arnold v Britton* [2015] UKSC 36, [2015] AC 1619 [15]–[23] (Lord Neuberger).
[41] *Society of Lloyd’s v Robinson* [1999] 1 All ER (Comm) 545, 551 (Lord Steyn).

thus represents not a rejection of textual fidelity, but a calibrated openness to the factual and commercial background against which the contractual language was chosen.

This balance between textual primacy and contextual evaluation was later expressly synthesised by the Supreme Court, most notably in *Wood v Capita Insurance Services Ltd*, where Lord Hodge made clear that textualism and contextualism are not competing paradigms but complementary components of a single, integrated interpretative exercise.[42]

The modern English position therefore integrates textual loyalty with contextual interpretation: the words chosen by the parties remain the starting and controlling element, but their meaning is informed by the objectively ascertainable background known to both sides at the time of contracting.[43]

2.2.6. Comparative Synthesis of Interpretative Methodologies

These divergent approaches to interpretation reflect deeper ethical and methodological orientations within the two traditions. Civil law systems, grounded in cooperative ethics, interpret contracts through codified principles such as good faith and seek to reconstruct the parties' common intention. This orientation aligns with a contextualist methodology, in which contractual meaning is assessed in light of the broader relational, normative, and factual setting of the agreement.

By contrast, English contract law is shaped by an adversarial ethic and a formalist interpretative method. It continues to emphasise objectivity and the linguistic manifestation of intent, treating the written contract as the primary repository of meaning. Context, within this framework, operates as an auxiliary interpretive aid rather than as an autonomous source of contractual content.

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[42] *Wood v Capita Insurance Services Ltd* [2017] UKSC 24, [2017] AC 1173 [10].

[43] This synthesis is often described as "contextualised formalism", preserving legal certainty and party autonomy while accommodating the practical realities of commercial contracting; see Catherine Mitchell, 'Obligations in Commercial Contracts: A Matter of Law or Interpretation?' (2012) 65(1) *Current Legal Problems* 459.

2.3. Contract Formation Doctrines and the Role of Context

Building on the ethical and methodological foundations discussed in Sections 2.1 and 2.2, Section 2.3 examines the structural features of common law and civil law systems that shape contractual reasoning at the stage of contract formation.

The manner in which a legal system conceptualises contractual obligation, whether as the enforcement of an externally manifested agreement or as the juridical expression of legally protected intent, directly influences the design of contract formation doctrines and the legitimacy of relying on contextual elements within the interpretation process.

2.3.1. Common law's Precedent, Objectivity, and Contractual Reasoning

In the common law tradition, law derives from a combination of primary legislation (such as statutes), delegated legislation and judicial decisions. Case law plays a constitutive role in the development of legal rules. Rather than merely applying the law, courts actively shape it through precedent, with the reasoning in earlier cases forming binding authority for future disputes. Consequently, in the common law tradition, contract law has developed primarily through judicial practice and remedial categories rather than systematic legal theory.[44]

This historical trajectory has produced a strong emphasis on objectivity, formal manifestations of assent and legal certainty. This explains the structural reluctance to admit contextual material, such as discussions or intentions, when interpreting contractual meaning.[45]

That emphasis on certainty and objectivity is not merely conceptual, but is institutionally entrenched in the way judicial authority operates in common law systems. In particular, it

[44] See *London Street Tramways Co Ltd v London County Council* [1898] AC 375 (HL) 380–381.
[45] See *Investors Compensation Scheme Ltd v West Bromwich Building Society* [1998] 1 WLR 896 (HL) 912–913.

is reinforced by the doctrine of *stare decisis*, under which lower courts are bound by the decisions of higher courts where the material facts are sufficiently similar.[46]

Moreover, as explained by Smyth and Gatto:

> This doctrine holds that, when faced with identical or near-identical factual scenarios, judges apply uniform rules, which have been identified and articulated by judges in previous cases (precedents) in order not only to bring a resolution to the case before them, but also to ensure consistency in the legal system as a whole.[47]

Accordingly, *stare decisis* operates both as a rule of hierarchical authority and as a structural support for the broader practice of reasoning by precedent, anchoring contractual reasoning in previously articulated rules rather than in a fresh evaluation of the surrounding context.

It is worth mentioning, however, that where the social, economic, or normative context underpinning an earlier decision has changed, courts may distinguish or depart from earlier rulings, often by relying on persuasive authority — that is, decisions or materials that guide judicial reasoning without formally binding the court — rather than on binding precedent.[48]

2.3.2. Civil law's Codification, Doctrine, and Contextual Openness

In contrast, civil law systems are characterised by the primacy of codified legislation, most notably through comprehensive civil codes designed to regulate private law in a systematic and coherent manner. These codes are intended to provide both the normative framework and the methodological guidance for resolving disputes, thereby circumscribing the

[46] *Stare decisis*, Wex Legal Encyclopedia, Cornell Law School Legal Information Institute https://www.law.cornell.edu/wex/stare_decisis accessed 15 January 2026.
[47] Smyth and Gatto, *Contract Law* 8.
[48] Ibid 17; *Young v Bristol Aeroplane Co Ltd* [1944] KB 718 (CA) 729–730; Practice Statement (Judicial Precedent) [1966] 1 WLR 1234 (HL) 1234–1235.

creative role of judicial decision-making.[49] Within this structure, contracts are perceived as doctrinal creations, grounded in abstract concepts such as consent, lawful purpose and good faith.[50] As a result, contextual factors are more readily accommodated as legitimate aids in determining the scope, meaning, and effects of contractual obligations.[51]

This codified and concept-driven structure is also reflected in the judicial function. In civil law systems, judges are not formally bound by previous decisions; their primary task is to apply the provisions of the civil code, supplemented where necessary by recognised subsidiary sources. Judicial decisions do not constitute law in themselves, even when rendered by higher courts.[52]

Nevertheless, a functional analogue to the *stare decisis* exists in the doctrines of *jurisprudence constante*[53] (French for constant jurisprudence) and *ständige Rechtsprechung*[54] (German for permanent adjudication, or established case law), whereby a consistent line of decisions interpreting a particular provision acquires persuasive authority over time.[55] Unlike *stare decisis*, however, this authority is never binding, and civil law judges remain free, at least in principle, to depart from earlier interpretations.

2.3.3. Definition of Contract

These differences in institutional structure and judicial method also influence how each legal tradition conceptualises the contract itself. The definition (or absence of a definition) of contract offers an important link between formation doctrines and the role attributed to context in contractual reasoning.

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[49] Smyth and Gatto, *Contract Law* 8, 23.
[50] *Code civil* arts 1101, 1104, 1128; BGB § 242.
[51] *Code civil* arts 1188–1192; BGB §§ 133, 157.
[52] Smyth and Gatto, *Contract Law* 21; Code civil art 5; Grundgesetz für die Bundesrepublik Deutschland (GG) art 20(3).
[53] Conseil d'État (Ass), 3 October 2008, *Commune d'Annecy*, no 297931, Recueil Lebon, para 12.
[54] GG art 20(3), binding the judiciary to law and statute; on the persuasive authority of *ständige Rechtsprechung*, as a stabilising practice within German adjudication, see K Zweigert and H Kötz, *An Introduction to Comparative Law* (3rd edn, Clarendon Press 1998) 69–71.
[55] Smyth and Gatto, *Contract Law* 9; 23-25.

In common law systems, there is no codified or statutory definition of a contract. Instead, the concept has evolved through judicial practice and doctrinal exposition, reflecting the historical development of contract law through procedural actions rather than systematic legal theory.[56] In other words, its focus has traditionally been on whether an agreement could be enforced through an established legal claim, rather than on abstract or subjective conceptions of contractual intent.

Despite the absence of codification, common law systems consistently require certain core elements, such as agreement, intention to create legal relations and consideration, to establish contractual liability.[57] Whether these elements are present is often determined by contextual evaluation, particularly in borderline cases involving informal arrangements, acceptance by conduct or disputes over the seriousness of intention. Nevertheless, such contextual enquiry is filtered through an objective standard, favouring what a reasonable observer would infer from the parties' words and conduct.

Civil law systems adopt a more formal and systematic approach. civil codes explicitly situate contracts within the broader category of obligations and define them as agreements of will intended to create legal effects.[58] The French *Code civil*, for instance, defines a contract as an accord of wills designed to create, modify, transfer, or extinguish obligations[59], whereas German law views the contract as the convergence of corresponding declarations of intent that give rise to an obligation relationship.[60] As Smyth and Gatto point out, this codified, concept-driven structure embeds the contract within a coherent normative framework grounded in consent, lawful purpose, and legally permissible content.[61]

[56] Smyth and Gatto, *Contract Law* 4.
[57] Ibid 27.
[58] Zweigert and Kötz, *Introduction to Comparative Law* 366–373.
[59] Code civil art 1101.
[60] BGB §§ 145–156, 151, 116–118.
[61] Smyth and Gatto, *Contract Law* 53-55.

This conceptualisation facilitates a broader integration of contextual considerations. Since the validity and effects of a contract are evaluated using doctrinal categories such as consent, cause, and object, civil law courts are structured to consider the circumstances surrounding the transaction, including its economic purpose and relational context.

Therefore, while both traditions ultimately enforce voluntary undertakings, their differing conceptions of what constitutes a contract help to explain why context plays a more explicit and systematic role in civil law interpretation than in common law reasoning.

2.3.4. Elements of Validity

The formation of a contract is governed by foundational principles that differ between legal traditions, yet often display structural parallels. In English common law, five elements are traditionally required: offer, acceptance, consideration, intention to create legal relations, and legal capacity. Civil law systems, particularly those shaped by the French and German codes, are instead built around the requirements of consent, a defined object, and a lawful cause.

While these elements are not identical, they frequently serve comparable functions, making a comparative analysis both necessary and illuminating. Moreover, in both systems, the context in which an agreement is reached plays a critical role, not only in clarifying the existence and validity of these elements but also in shaping their interpretation.

As a result, the elements of contract validity will be examined in the sections that follow, taking into account the similarities and differences between legal systems, as well as the interpretive function of context.

2.3.4.1. Offer

An offer marks the initial step in the formation of a contract and is defined in broadly similar terms across common law and civil law systems, broadly understood as the expression of willingness to contract on specified terms.[62]

While the substance of the definition is similar, the systems diverge, for instance, in their approach to revocability and binding effect. While in English law, an offer is generally revocable at any time before acceptance, civil law systems tend to have a have a stricter view on the matter.[63]

In general, an offer can be made orally or in writing, but in some circumstances, it may be difficult to determine whether a particular statement constitutes a valid offer capable of acceptance or merely an invitation to treat (i.e., a preliminary step inviting further negotiation). In English law, this distinction is highly contextual and depends on the objective interpretation of the words used and the circumstances surrounding them. Courts routinely rely on contextual factors to resolve this question, as illustrated by the contrasting outcomes in *Storer v Manchester City Council* and *Gibson v Manchester City Council*, where nearly identical facts led to different conclusions based on subtle variations in wording and intent. [64]

Similarly, in civil law jurisdictions, the identification of a binding offer also depends on how a declaration of intent is construed in light of its context. Article 1114 of the French *Code civil*, for instance, states that "an offer made to a determined person or to the public, with sufficiently precise terms and which indicates the will of its author to be bound in case of acceptance, constitutes an offer."[65]

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[62] Code civil art 1114.
[63] For greater clarity, French law renders the revocation of an offer ineffective if it is made before the end of the time fixed by its author, or within a reasonable time, and German law takes an even stricter view, presuming that the offer is binding upon receipt unless its revocability has been expressly reserved; Code civil art 1116; BGB § 145.
[64] *Gibson v Manchester City Council* [1979] 1 WLR 294 and *Storer v Manchester City Council* [1974] 1 WLR 1403.
[65] Civil code art 1114.

Accordingly, determining whether these conditions are satisfied requires an examination of the factual circumstances and the behaviour of the parties, thereby reaffirming the role of contextual interpretation in the assessment of contractual intent.

A similar approach is adopted under German law. A declaration is considered binding if it evidences a serious intent to be legally bound, and both statutory provisions and case law underscore the necessity of interpreting such declarations considering the surrounding circumstances.[66]

Thus, although the terminology and doctrinal structures differ, both common law and civil law systems ultimately rely heavily on contextual analysis to distinguish genuine offers from preliminary communications or non-binding negotiations.

2.3.4.2. Acceptance

The acceptance is the second fundamental element in the formation of a contract. In both legal traditions, it can be understood as a final, unconditional and unequivocal expression of assent to the terms of an offer, made with the intention to be legally bound upon agreement.[67]

For a valid acceptance to be formed, it must correspond precisely to the offer and be communicated to the offeror through the mode contemplated by the offer itself. Any deviation, addition, or qualification of the terms will not amount to acceptance but rather constitute a counter-offer. This condition, commonly known in common law as the mirror image rule, applies substantively in both systems, albeit under different terminology.[68]

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[66] BGB §§ 133, 157; see also Dieter Medicus, *Allgemeiner Teil des BGB* (10th edn, CF Müller 2012) 92–96.
[67] Smyth and Gatto, *Contract Law* 32.
[68] Ewan McKendrick, *Contract Law* (15th edn, Oxford University Press 2023) 50. In English law, it is well established that a purported acceptance which alters the terms of the offer does not constitute acceptance but instead amounts to a rejection and counter-offer; see *Hyde v Wrench* (1840) 3 Beav 334. Civil law systems adopt a comparable approach: under *Code civil* art 1118, acceptance must be 'pure and simple', with any

Courts and legal scholars in both traditions recognise that contextual elements, particularly acceptance by conduct, may validate the conclusion of a contract even in the absence of formal communication.[69]

Thus, while the formal rules governing acceptance are grounded in strict requirements of clarity and correspondence, contextual interpretation plays a crucial role in determining whether those requirements have been met in practice. This is especially true where acceptance is inferred from performance, commercial practice, or prolonged conduct consistent with the offer, underscoring once again the shared reliance on context in both legal traditions.

2.3.4.3. Capacity

Another prerequisite for the valid formation of the contract under both legal system is contractual capacity. This refers to the legal competence of a party to enter into binding obligations.

Under common law, civil capacity is generally presumed unless the person is shown to belong to a class with limited or restricted legal competence, such as minors, persons lacking mental capacity, or those intoxicated at the time of contracting.[70] In civil law systems, by contrast, the notion of capacity is governed by specific provisions set out in the civil codes.[71]

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modification constituting a new offer, while BGB § 150(2) likewise provides that a reply containing modifications is deemed a rejection coupled with a new proposal.

[69] In English law, acceptance by conduct has long been recognised: see *Brogden v Metropolitan Railway Co* (1877) 2 App Cas 666 (HL), where the House of Lords held that a binding contract arose from the parties' consistent performance notwithstanding the absence of formal acceptance. Civil law systems adopt a comparable approach. Under *Code civil* art 1119(3), a contract may be formed by conduct where such conduct unequivocally implies acceptance, while German law likewise recognises implicit acceptance through conduct under BGB §§ 151 and 157, particularly where the offeror waives the requirement of communication or where commercial practice so implies.

[70] McKendrick, *Contract Law* 100–103; see also *Nash v Inman* [1908] 2 KB 1.

[71] In French law, capacity constitutes one of the three core requirements of contractual validity under *Code civil* art 1128, alongside consent and a lawful object. Under German law, § 104 BGB provides that persons

As with other elements of contract formation, the determination of capacity is often shaped by contextual factors—particularly when imbalances of age, understanding, or mental condition are at play. For instance, courts may examine the nature and complexity of the transaction, the apparent understanding or behaviour of the individual concerned, and whether the other party acted in good faith or took advantage of the weaker party's condition.[72]

In both common law and civil law systems, a company obtains full legal capacity upon incorporation or registration as a legal person. The question is not whether the company is capable of contracting, but whether the person acting on its behalf had the authority to bind it.

In common law jurisdictions courts often rely on contextual indicators, such as corporate practices, board resolutions, representations made during negotiations and on the doctrine of apparent authority, to assess the legitimacy of the agent's authority[73].

In civil law systems, the exercise of that authority is confined to those with formal authority to represent the company, typically its organs (e.g. managing directors).[74]. However, courts may also apply contextual doctrines to protect third parties who relied in good faith on an appearance of authority.[75]

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under the age of seven, or those permanently lacking the ability to form a rational will, are incapable of contracting, rendering their declarations of intent void. Minors over the age of seven may contract only with the consent of a legal representative under §§ 106–107 BGB, with contracts concluded without such consent being voidable.

[72] McKendrick, *Contract Law* 102–103; Medicus, *Allgemeiner Teil des BGB* 119–121.

[73] The doctrine of apparent authority applies when a principal, through their words or actions, leads a third party to believe that an agent has the authority to act on their behalf, and the third party relies on this belief. In such circumstances, the principal is estopped from denying the agent's authority even in the absence of actual authority; *Freeman & Lockyer v Buckhurst Park Properties (Mangal) Ltd* [1964] 2 QB 480 (CA) 502–503 (Diplock LJ); McKendrick, *Contract Law* 263–268.

[74] For instance, Code civil art 1145 provides that legal persons act only through their representatives, and *Gesetz betreffend die Gesellschaften mit beschränkter Haftung* (GmbHG) § 35 assigns this power to managing directors.

[75] In French law, the doctrine of appearance (*théorie de l'apparence*) allows third parties to enforce contracts where the conduct of the legal person has created a legitimate belief in the agent's authority. German law adopts a comparable solution through the doctrine of *Anscheinsvollmacht*, under § 164 BGB, whereby a

Thus, although the formal rules differ between the two traditions, the contextual evaluation of how authority was presented and exercised plays a central role in determining whether a company is contractually bound by the acts of its representatives and how contractual intent is attributed to the legal person.

2.3.4.4. Consideration (Common law)

In common law systems, a valid agreement alone is insufficient to render a contract legally binding; the doctrine of consideration operates as an additional requirement for enforceability.

Consideration refers to the exchange of something of legal value between the parties—the *quid pro quo* embodied in reciprocal promises[76], where each promise constitutes the consideration for the other —and reflects the principle that contractual enforceability presupposes that both parties assume a corresponding benefit and burden.[77] Consequently, it filters out promises that are not part of a genuine bargain or transaction.

An important characteristic of consideration in common law is that it must be "sufficient" but need not be "adequate" — that is, it must have recognisable legal value, even if it is nominal or disproportionately low. In *Thomas v Thomas*, a £1 annual rent was held to constitute sufficient consideration, demonstrating that courts generally do not inquire into the economic fairness of the exchange. [78]

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company may be bound if it has acted in a manner that reasonably led a third party to believe that authority existed.

[76] For further clarification, in unilateral contracts consideration is supplied not by a reciprocal promise but by performance, provided that such performance is undertaken with knowledge of the offer and with the intention of accepting it. This is illustrated by *R v Clarke* (1927) 40 CLR 227 (HCA), where a reward claim failed because the claimant acted without awareness of the offer.

[77] Melanie Morris, *'Chapter 4 – Consideration'*, in *Torts, Contracts & Legal Writing* (online) https://saalck.pressbooks.pub/tortscontractsandlegalwriting/chapter/chapter-7-consideration/ accessed 27 October 2025; Smyth and Gatto, *Contract Law* 34-35.

[78] *Thomas v Thomas* (1842) 2 QB 851.

However, in certain cases, especially under equitable principles, courts may examine the broader context and set aside agreements where the inadequacy of consideration is so extreme that it indicates an unconscionable bargain or abuse of power.[79] This highlights the increasing role of contextual interpretation even within the traditionally rigid confines of the consideration doctrine.

In contrast, civil law systems do not require consideration as a condition for contract formation. Instead, emphasis is placed on elements such as lawful object and cause. These elements, which will be addressed in the following chapter, operate as autonomous conditions for contract validity and help civil law systems achieve, through different doctrinal means, a function substantially similar to that of consideration in common law.[80]

2.3.4.5. Cause and object (Civil law)

The concept of cause within civil law systems relates to the fundamental reason or purpose that justifies the assumption of an obligation.[81] The object, by contrast, pertains to the tangible performance or subject matter of the obligation and serves as a complementary prerequisite for validity, requiring that the obligation be possible, lawful, and effectively determined.[82]

Consequently, civil law systems subject contractual obligations to an external normative evaluation: an obligation is not automatically enforceable simply because it mirrors the

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[79] See *Alec Lobb (Garages) Ltd v Total Oil (GB) Ltd* [1985] 1 WLR 173, where the Court of Appeal confirmed that equitable intervention may be warranted where the surrounding circumstances disclose an unconscionable bargain arising from an inequality of bargaining power or the absence of a real choice.

[80] Charles Calleros, 'Cause, Consideration, Promissory Estoppel: Causes of Enforcement in Historical and Comparative Perspective' (2014) 14(1) *Chicago-Kent Journal of International and Comparative Law* 1, 3 https://studentorgs.kentlaw.iit.edu/jicl/wp-content/uploads/sites/5/2014/01/Charles-Calleros-Cause-Consideration-Promissory-Estoppel-Calleros1.pdf accessed 2 August 2025.

[81] Smyth and Gatto, *Contract Law* (n 1) 60.

[82] *Code civil* art 1128 lists 'un contenu licite et certain' as an essential element of a valid contract, reflecting the principle that the subject matter of the obligation must be legally permissible and sufficiently determinate. In German law, although "object" is not framed as a separate element, analogous requirements are embedded in BGB §§ 134 (illegality), 138(1) (immorality) and 241 (content of obligations), under which courts refuse to enforce obligations whose subject matter is unlawful, impossible or incompatible with the legal order.

parties' accord or economic transaction, but rather, only if both its underlying purpose and its specific content align with legal precepts, including public order and moral considerations.[83]

This evaluation is necessarily contextual; the validity of an obligation's purpose, along with the legality and definiteness of its object, cannot be assessed abstractly. Instead, they must be considered within the context of the surrounding circumstances, the transaction's structure, and the practical consequences of the agreement.

Accordingly, although the terminology and doctrinal structures differ, civil law systems converge on the principle that not every promise is enforceable. Contractual obligations must be grounded in a legally acceptable and normatively legitimate purpose and relate to a lawful and sufficiently defined object, as revealed through the contextual interpretation of the contract and its economic and social setting, rather than resting solely on the parties' private intentions or commercial interests.

2.3.4.6. Intention to Create Legal Relations (Common law)

Even where offer, acceptance, and consideration are present under common law, an agreement will not be enforceable unless it is established that the parties intended to create legal relations.[84]

Courts assess the existence of such intention objectively, by asking whether a reasonable person, placed in the position of the parties and having regard to the surrounding circumstances, would conclude that the agreement was intended to have legally binding

[83] In French law, this control is now exercised through provisions replacing the former doctrine of *cause*, notably Code civil art 1128 (requiring a lawful object), art 1162 (prohibiting contracts whose purpose derogates from public order or morality) and art 1102(2) (freedom of contract limited by public order). German law reaches a comparable result through BGB §§ 134 (contracts contrary to statutory prohibitions) and 138(1) (contracts *contra bonos mores*), which invalidate obligations lacking legal or normative legitimacy notwithstanding the presence of consent.
[84] Smyth and Gatto, *Contract Law* 40.

effect. This inquiry does not turn on the parties' subjective beliefs, but on their outward conduct and the context in which the agreement was made. [85]

Although civil law systems do not recognise intention to create legal relations as an autonomous requirement, they nevertheless engage with a functionally comparable concept through the notion of indicia of seriousness (*indices de sérieux*), under which a legally binding obligation requires certain 'tests of earnestness' to be satisfied. This concept acts as a filtering mechanism, enabling courts to prevent informal, frivolous or insignificant declarations of intent from giving rise to legally binding obligations. [86]

Therefore, in both systems, courts and scholars rely heavily on the contextual elements surrounding the parties' conduct and communications. The presence or absence of a serious commitment, the language of the agreement, and the economic or personal consequences of reliance are all considered in assessing whether a declaration of will—or agreement—was intended to produce binding legal effects.

While common law isolates this inquiry into a formal legal requirement, civil law considers it as part of a broader assessment of consent and intention, with similar outcomes. Thus, context is a key interpretive tool in both legal systems for evaluating the seriousness of intent and distinguishing enforceable legal obligations from mere social conventions.

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[85] English law applies rebuttable presumptions in determining intention to create legal relations. In domestic and social contexts, the presumption is that no legal relations were intended, as illustrated by *Balfour v Balfour* [1919] 2 KB 571 (CA), where a husband's informal promise to support his wife was held unenforceable. This presumption may be rebutted by evidence of formality, reliance or conduct indicating legal commitment. By contrast, in commercial agreements there is a presumption that the parties intended legal enforceability, unless clearly displaced, as in *Rose & Frank Co v JR Crompton & Bros Ltd* [1925] AC 445 (HL), where an express honour clause rebutted the presumption.

[86] In French law, this requirement is reflected in the notion of *consentement sérieux*, according to which only serious and deliberate declarations of will are capable of producing legal effects; see *Code civil* art 1109; Jean Beudant, *Leçons de droit civil français* vol 2 (1932) 120–122. German law addresses the same concern expressly through §§ 116–118 BGB, which regulate declarations of intent made without serious intention; in particular, § 118 BGB provides that a declaration not seriously intended, but made with the expectation that it would be taken seriously, is void; see BGB §§ 116–118; Medicus, *Allgemeiner Teil des BGB* 108–110. For a systematic account of the concept, see *'Indicia of Seriousness'*, Max Planck Encyclopedia of European Private Law https://max-eup2012.mpipriv.de/index.php/Indicia_of_Seriousness accessed 17 December 2025.

2.4. Contractual Terms: Interpretation and Context

Having considered the doctrines of contract formation, the analysis now moves on to interpreting contracts.

Once a contract has been validly formed, the focus shifts from the existence of the agreement to the determination of its meaning and legal effects. It is at this stage that the law confronts the inherent limitations of contractual language, as courts must interpret contractual clauses within the complexity of commercial transactions and navigate the enduring tension between legal certainty and fairness.

Interpretation is not merely a linguistic exercise, but also a normative one. The rules on contract interpretation reflect underlying conceptions of what contracts are, how courts should approach them and the values that each legal system chooses to emphasise.

2.4.1. Express Terms

Building on the general principles and on the doctrines of contract formation discussed above, the analysis of interpretation begins with the express terms of the contract and the rules that determine their admissibility.

Express terms are the provisions which the parties have deliberately articulated and, in most commercial settings, reduced to writing. In their very nature, express terms do not call for elaborate interpretive reconstruction: they are, prima facie, the words chosen by the parties themselves to capture their agreement.

Yet, as the preceding discussion of formalism and contextualism has shown, the question is not exhausted by what appears on the page. As noted by Gatto, 'generally, parties are only entitled to rely on the expressed (written) terms of their contract';[87] however, the critical

[87] Smyth and Gatto, *Contract Law* 73.

issue is how far a court is permitted to go beyond the four corners of the written instrument, and under what circumstances extrinsic evidence may be brought to bear.

In other words, the issue turns on whether interpretation remains confined to the written text (in line with a formalist and adversarial orientation) or whether recourse to the broader commercial and relational context is permissible (consistent with a cooperative and contextualist orientation).[88]

The interaction between textual certainty and contextual fairness lies at the heart of the modern debate on contract interpretation: while both common and civil law systems recognise the primacy of written expression, they differ in the extent to which contextual evidence is admitted to elucidate its meaning.[89]

2.4.1.1. Common Law: Objective Approach to Interpretation

2.4.1.1.1. The Objective Principle and the Literal Starting Point

Within the common-law tradition, the interpretation of express terms reflects its broader adversarial and formalist orientation. Once incorporated into a written document, contractual provisions are treated as the definitive record of the parties' agreement.[90]

In this context, English contract law has traditionally adopted a literal starting point in interpretation. Literalism proceeds from the assumption that the parties' obligations are best discerned from the ordinary grammatical meaning of the words they have chosen, rather than from speculative inquiries into unexpressed intentions. As affirmed by Lord

[88] See s 2.2.
[89] Galletti, 'Contract Interpretation and Relational Contract Theory' 248, 249–252, 255–261.
[90] McKendrick, *Contract Law* ch 9; *Investors Compensation Scheme Ltd v West Bromwich Building Society* [1998] 1 WLR 896 (HL).

Neuberger in *Arnold v Britton*, reliance on the natural meaning of contractual language serves the demands of legal certainty and commercial predictability.[91]

2.4.1.1.2. The Parol Evidence Rule: From Exclusion to Qualification

While the objective principle and the literal starting point define how contractual language is interpreted, they do not exhaust the common-law inquiry. A distinct, though closely related, question concerns which material a court is entitled to consider when construing a written agreement. In English law, this issue has traditionally been governed by the so-called parol evidence rule, which delineates the boundary between the written contract and external material and thus determines the extent to which extrinsic evidence may inform the interpretative process.[92]

According to the Law Commission, where an agreement is reduced to writing and intended to be final, that writing is deemed a complete and exclusive statement of the parties' obligations.[93] On this basis, extrinsic evidence—whether oral statements, prior drafts, or parallel correspondence—cannot be admitted to contradict, vary, or supplement its terms.

Yet, as both doctrine and practice evolved, this apparently rigid rule was gradually qualified. Courts began to acknowledge that the exclusion of all contextual material could, in certain cases, defeat the parties' true intentions or operate unjustly. The Law Commission itself recognised that the rule 'now has a narrow compass and does not exclude evidence necessary for ascertaining and giving effect to the parties' true intention'.[94]

Modern English law thus treats it less as an absolute bar than as a rebuttable presumption that the written document is complete—an interpretive safeguard rather than a prohibition.

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[91] *Arnold v Britton* [2015] UKSC 36, [15]–[23].
[92] See generally *Prenn v Simmonds* [1971] 1 WLR 1381 (HL).
[93] Law Commission, *Law of Contract: The Parol Evidence Rule* (Law Com No 154, 1986) [1.2].
[94] Ibid [2.6]–[2.8].

2.4.1.1.3. The Rise of the Matrix of Fact

The evolving judicial understanding of the parol evidence rule facilitated a more context-sensitive method of interpreting contracts. Courts began to acknowledge that the rigid exclusion of extrinsic evidence could undermine the parties' true intentions. As demonstrated in *AXA Sun Life Services plc v Campbell Martin Ltd*, the Court of Appeal upheld the principle that even a comprehensive agreement clause does not preclude liability for misrepresentation, thereby highlighting the constraints of strictly textual approaches to contractual analysis.[95]

The principle of the "matrix of fact" emerged from this broader doctrinal development, most notably articulated by *Lord Wilberforce in Prenn v Simmonds*. This "matrix" encompasses the objective background facts that both contracting parties could reasonably be expected to know at the time of the contract's formation; these include the commercial context, pertinent trade practices, and the underlying objectives of their transaction. Consequently, this represented a significant departure from a strictly literal interpretation, favouring instead an understanding rooted in the commercial and factual circumstances surrounding the agreement.[96]

Although the parol evidence rule still excludes evidence of subjective intentions and the content of prior negotiations, the matrix doctrine allows the court to consider the objective context in which the contractual language was used. This does not constitute a rejection of formalism, but rather its refinement: context is admitted to clarify the meaning of the words used, not to replace or contradict them.[97]

The courts therefore remain committed to the autonomy of written contracts, while recognising that meaning is shaped by the circumstances in which language operates. Accordingly, the parol evidence rule no longer functions as a rigid rule of exclusion, but as a

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[95] *AXA Sun Life Services plc v Campbell Martin Ltd* [2011] EWCA Civ 133, [2012] 1 All ER (Comm) 623.
[96] *Prenn v Simmonds* [1971] 1 WLR 1381 (HL).
[97] *Investors Compensation Scheme Ltd v West Bromwich Building Society* [1998] 1 WLR 896 (HL) 912–913.

gatekeeping mechanism of disciplined contextualism, preserving legal certainty while accommodating the practical realities of commercial contracting.[98]

2.4.1.2. Civil Law: Express Terms and the Priority of Common Intention

In civil law systems, the treatment of express terms cannot be understood apart from the codified duty imposed on judges to seek the parties' true or common intention. Civil codes expressly mandate that judges move beyond the literal meaning of the contractual text, and to reconstruct the *common intention* of the parties.[99]

The written word of the contract still carries authority, but it is weighed against the broader relational and factual context in which the agreement was formed. In simpler words: true intention prevails over literal words. This contextual openness reflects the cooperative ethic and the principle-driven orientation that underpin continental contract law.[100]

As a result, negotiations, surrounding circumstances, trade usages, and the parties' subsequent conduct are all admissible to determine the scope and meaning of the contract.

2.4.2. Implied Terms

Having examined the interpretation of express terms and the rules of admissibility, attention now turns to those contractual elements that are not explicitly articulated by the parties but are nevertheless treated as binding: the implied or supplementary terms.

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[98] Law Commission, *Parol Evidence Rule* (Law Com No 154, 1986) [1.12].
[99] Galletti, 'Contract Interpretation and Relational Contract Theory' 255–256; Smyth and Gatto, *Contract Law* ch 4; see also Code civil art 1188 ('Le contrat s'interprète selon la commune intention des parties plutôt que de s'arrêter au sens littéral de ses termes'); BGB §133 (requiring interpretation according to the parties' true intention, without regard to the literal expression).
[100] See s 2.2.3.

In commercial practice, parties often leave gaps (sometimes inadvertently, sometimes deliberately) expecting that the normative framework or judicial interpretation will fill them when necessary. The absence of a particular stipulation therefore does not invalidate the contract; instead, courts may imply terms to give effect to what the parties reasonably intended or to ensure the contract's proper operation.[101]

2.4.2.1. Common Law: Judicial Implication of Terms

The common law, faithful to its formalist heritage, limits judicial intervention in supplementing contractual terms, recognising implied terms only where necessity or justice demands it.[102]

When the written document fails to provide for a particular situation, the court may allow for the incorporation of certain implied terms to the contract to determining whether the parties have agreed, or must be taken to have agreed, to the particular clause in question.[103] This process of incorporation extends the interpretive inquiry beyond the express text to the realities of the contractual relationship, while maintaining boundaries designed to preserve certainty.

According to common law, terms may be implied into the contract under following circumstances, which the courts must carefully assess:

(a) Terms Implied "in Fact"

The terms are implied 'in fact' in situations where it is deemed necessary to give the contract practical and commercial coherence. They are inferred from what reasonable parties, in the same factual and relational context, would be expected to intend.

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[101] Smyth and Gatto, *Contract Law* 65-66,
[102] *Marks and Spencer plc v BNP Paribas Securities Services Trust Co (Jersey) Ltd* [2015] UKSC 72, [21]–[31].
[103] Peel, 'The Common Law Tradition' 132.

The implication is not based on what the parties might have intended or wished for retrospectively, but on how a reasonable person with the same background knowledge as the parties would interpret it.[104]

(b) Terms Implied "in Law"

The terms implied 'in law' operate more broadly, deriving from either statute or well-established categories of common law. They apply as a matter of legal policy, rather than by reference to the parties' manifested intention, reflecting normative judgments as to fairness, protection, or the proper functioning of certain contractual relationships.[105] Such implied terms are also recognised in particular categories of contract —such as employment, tenancy, or partnership—where obligations of trust, competence, and diligence are recognised as inherent to the relationship itself.[106]

(c) Terms Implied by Custom or Usage

Terms may also be implied by custom or usage, where a settled and well-known practice exists within a particular trade or locality. For such a term to be implied, the custom must be notorious, certain, reasonable, and consistent with the express terms of the contract, such that the parties may be presumed to have contracted against that background.[107] This principle was applied in *Cunliffe-Owen v Teather and Greenwood*, where the court implied a customary term into a contract between brokers, reflecting the established practices of the industry concerned.[108]

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[104] *BP Refinery (Westernport) Pty Ltd v Shire of Hastings* (1977) 180 CLR 266 (PC) 282–83.
[105] See *Liverpool City Council v Irwin* [1977] AC 239 (HL) 254–55 (Lord Wilberforce).
[106] See *Scally v Southern Health and Social Services Board* [1992] 1 AC 294 (HL); *Malik v Bank of Credit and Commerce International SA* [1998] AC 20 (HL).
[107] See *Hutton v Warren* (1836) 1 M & W 466, 475; McKendrick, *Contract Law* ch 11; Hugh Beale (ed), *Chitty on Contracts* (34th edn, Sweet & Maxwell 2021) para 13–006.
[108] *Cunliffe-Owen v Teather and Greenwood* [1967] 1 WLR 1421 (QB) 1432–33.

(d) Terms Implied from Prior Dealings or Statements

Courts may also infer contractual terms from the parties' prior dealings or from pre-contractual statements.[109]

However, it is important to point out that the assessment of such prior dealings or pre-contractual statements is objective in nature: intention is not inferred from the parties' subjective beliefs, but from their conduct, clearly ascertainable positions, and the surrounding circumstances known at the time of contracting.[110]

Where no clear mutual intention can be established, the court may adopt the standpoint of the reasonable person situated in the same circumstances, implying only such terms as are necessary to give effect to the presumed contractual purpose (that is, terms implied 'in fact'). This illustrates how, even within a formalist framework, common-law reasoning remains attentive to context in the interpretative process.

2.4.2.2. Civil Law: Mandatory and Supplementary Terms

In civil law jurisdictions, the treatment of implied terms is shaped by the codified and principle-driven nature of the legal system. Rather than relying primarily on judicial implication as in the common law, civil law systems integrate implied terms directly through legislative provisions and general principles.[111]

Contracts are not conceived as self-contained instruments, but as normatively embedded relationships, situated within a framework of statutory duties, recognised customs, and overarching principles such as good faith.[112] This systemic orientation reflects the

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[109] *Heilbut, Symons & Co v Buckleton* [1913] AC 30 (HL) 47–49.
[110] *Oscar Chess Ltd v Williams* [1957] 1 WLR 370 (CA) 375–76 (Denning LJ).
[111] Zweigert and Kötz, *Introduction to Comparative Law* 179–181; see also C von Bar and E Clive (eds), *Principles, Definitions and Model Rules of European Private Law: Draft Common Frame of Reference (DCFR)* (Sellier European Law Publishers 2009) I-1:102, II-1:102, on good faith and underlying principles supplementing contracts.
[112] See s 2.1.2.

cooperative ethic that underpins continental contract law: the judge is not merely an interpreter of contractual language, but a guardian of the legal and social equilibrium of the contractual relationship.

Within this framework, civil law distinguishes between two principal categories of implied terms:

(a) Mandatory terms:

Mandatory terms are non-derogable rules of law that bind the parties irrespective of their agreement, reflecting fundamental normative constraints on contractual autonomy. Rather than filling gaps left by the parties, such terms operate to safeguard core values—including public order, fairness, and the preservation of the contract's essential obligations—and thus delineate the outer limits of permissible contractual freedom.[113]

(e) Supplementary terms:

Supplementary or default terms, by contrast, apply where the parties have remained silent. They function as codified gap-fillers, designed to ensure that contracts remain workable and normatively coherent. In this sense, such terms aim to complete the parties' agreement in accordance with objective standards of equity, usage, and legal principle.[114]

The interpretive exercise is therefore principle-based yet contextual, combining deductive reasoning from general norms with sensitivity to the factual and relational setting of the contract.[115]

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[113] For illustration, French law provides that any clause which deprives the contract of its essential obligation is void (Code civil art 1170), while contractual freedom is expressly subject to the requirements of public policy (Code civil art 1102(2)). German law adopts a comparable approach, rendering void agreements contrary to good morals (*Sittenwidrigkeit*) under BGB §138 and invalidating contracts that infringe statutory prohibitions under BGB §134.
[114] See Code civil art 1194, providing that contracts bind not only as to what is expressly stipulated, but also to all consequences that equity, usage, or law give to the obligation according to its nature, and BGB §157 requiring interpretation in accordance with good faith and customary practice.
[115] See Code civil art 1104; BGB §242.

Civil-law implication thus exhibits a high degree of predictability and normative consistency, grounded in codification rather than ad hoc judicial discretion. At the same time, it remains substantively contextual, since the application of equity, usage, and good faith necessarily requires attention to the surrounding circumstances and the ongoing relationship between the parties.

2.4.2.3. Comparative Synthesis

In comparative perspective, both systems aim to prevent contractual failure by addressing incompleteness, but they do so through different conceptual routes.

The common law's use of judicial implication, which operates through specific categories like terms implied "in fact," "in law," by custom, or from past actions or statements, reflects its adversarial nature. Contextual reasoning is only allowed under strict conditions and careful judicial review, rather than being a general starting point for interpretation. In contrast, civil law incorporates contextualism at its core, including additional rules and the duty of good faith directly within the written laws of contract law.

Practically, this difference means that English courts imply terms carefully, based on the parties' presumed intentions and objective standards. French and German courts, however, regularly apply written principles and default rules to promote fairness and consistency in contracts.

In common law, implied terms often arise as a response to a contract's insufficiency. In contrast, civil law systems use supplementary rules as a built-in, anticipatory part of contracts. The difference isn't whether context matters; it's about how and when the legal system allows it to be used.

2.5. From Interpretation to Control: Construction and Validity

Throughout this chapter, context has operated primarily as an interpretative tool to shape the meaning of contractual terms. Yet its influence extends further: in certain cases, the facts surrounding the contract do not merely clarify meaning, but call into question the fairness or legitimacy of the contractual outcome. At this point, interpretation begins to merge with control—the moment when the court moves from explaining what the contract means to deciding whether it should be upheld.

In common-law jurisdictions, the boundary between interpretation and control is defined by the limits of interpretative reasoning itself. Once courts have applied interpretative canons and admissible contextual factors to construe contractual terms, any further scrutiny—particularly where the surrounding circumstances disclose a serious imbalance—falls outside interpretation and into the realm of statutory control. Instruments such as the Unfair Contract Terms Act 1977 and the Consumer Rights Act 2015 do not seek to construe meaning, but to evaluate enforceability, asking whether a clearly worded term remains reasonable or fair in light of its factual context.[116]

As illustrated by *Thornton v Shoe Lane Parking Ltd*, context may operate within interpretation through devices such as *contra proferentem*[117] to resolve ambiguity against the stronger party.[118] Had the term been unambiguous yet substantively oppressive, the same contextual factors would instead have triggered statutory review, marking the transition from context as an interpretative tool to context as a basis for contractual control.[119]

In civil-law systems, context plays an even more integrative role. The same factual circumstances that assist in identifying the parties' common intention also delineate the

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[116] McKendrick, *Contract Law* 260–262; Unfair Contract Terms Act 1977; Consumer Rights Act 2015.
[117] See n 122.
[118] *Thornton v Shoe Lane Parking Ltd* [1971] 2 QB 163 (CA) 169–170 (Lord Denning MR).
[119] See *Interfoto Picture Library Ltd v Stiletto Visual Programmes Ltd* [1989] QB 433 (CA) 439–441;

boundaries of contractual enforceability. Clauses that, in light of the surrounding facts, violate *ordre public* or *gute Sitten* are void, while those producing a 'significant imbalance' between the parties' rights and obligations are subject to judicial control. Context is therefore both interpretative and normative: it allows the court to read the contract through the lens of fairness, ensuring that its effects conform to the equilibrium required by the legal order.[120]

The same logic explains the judicial use of context-based presumptions—*contra proferentem* in common law and *in dubio contra stipulatorem* in civil law. In such cases, context protects fairness within interpretation; but when that imbalance becomes abusive, context also provides the ground for validity control.[121]

The following chapter will demonstrate how contextual imbalance—particularly in disproportionate or adhesion contracts—moves the analysis from interpretation to invalidity.

2.5.1. Pre-Contractual Liability and Negotiation in Context

The pre-contractual phase, a crucial but frequently unclear period in a contract's lifecycle, involves parties sharing information, providing assurances, and establishing initial understandings that may or may not lead to a legally binding agreement. The significance of context is especially pronounced during this formative stage; specifically, the

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[120] Code civil art 6; Code civil art 1171; BGB §§ 138 and 307; Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts [1993] OJ L95/29, art 3(1).

[121] *Contra proferentem* and *in dubio contra stipulatorem* are interpretative canons which resolve contractual ambiguity against the party responsible for drafting or proposing the clause, reflecting the presumption that the drafter should bear the risk of obscurity. In common law, *contra proferentem* operates as an interpretative rule—particularly in the construction of exclusion and limitation clauses—allocating ambiguity against the drafting party; see *Houghton v Trafalgar Insurance Co Ltd* [1954] 1 QB 247 (CA) 251–52. A parallel rule exists in civil-law systems under the maxim *in dubio contra stipulatorem*, expressly codified in Code civil, art 1190 and BGB, § 305c(2), which require ambiguous standard terms to be construed against their proponent. Civilian doctrine understands the rule as an instrument of interpretative fairness operating within construction rather than validity control; see Dieter Medicus and Jens Petersen, *Bürgerliches Recht* (27th edn, Vahlen 2019) 327–29.

communications, conduct, and expectations established during negotiations often dictate the potential for liability to arise prior to the formalisation of contractual consent.

Although negotiation is traditionally conceived as a domain of freedom—where parties are entitled to pursue, modify, or abandon their intentions—modern legal systems increasingly acknowledge that this freedom is not absolute. Statements made, conduct adopted, or reliance induced during negotiations can produce consequences that extend beyond the failure to reach agreement, especially when fairness, good faith, or reliance considerations come into play. [122]

2.5.1.1. Common law: The Restrictive Regard for Negotiation

In English law negotiations themselves remain generally inadmissible as evidence of the parties' final intention. In *Prenn v Simmonds*, Lord Wilberforce drew a crucial distinction between the admissible 'matrix of fact'—the objective background known to both parties at the time of contracting—and prior negotiations, which are excluded because they review what the parties intended to agree, rather than what they actually agreed.[123]

This position was reaffirmed and sharpened in *Chartbrook Ltd v Persimmon Homes Ltd*, where the House of Lords warned that admitting evidence of negotiations would 'collapse the boundary between interpretation and rectification'.[124] The exclusionary stance reflects a broader judicial concern: allowing negotiation evidence risks converting informal discussions or mistaken expectations into binding obligations, thereby transforming interpretation into an exercise of contractual revision rather than construction.

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[122] See s 2.1.1.
[123] *Prenn v Simmonds* [1971] 1 WLR 1381 (HL) 1384–1386 (Lord Wilberforce).
[124] *Chartbrook Ltd v Persimmon Homes Ltd* [2009] UKHL 38 [42]–[44].

2.5.1.1.1. Reliance-Based Expectations

Nevertheless, English law recognises that, even within this restrictive framework, negotiations may generate what may be described as reliance-based expectations—situations in which one party reasonably acts in anticipation of a right or benefit arising from another's assurances or conduct. This notion reflects the law's limited willingness to protect reliance interests even in the absence of a concluded contract. It acknowledges that, in certain circumstances, a party's pre-contractual statements or behaviour may create legitimate expectations of responsibility which equity or tort law will not permit to be defeated without consequence.

A notable illustration appears in *Hedley Byrne & Co Ltd v Heller & Partners Ltd*, where the House of Lords recognised a duty of care for negligent misstatements causing pure economic loss, notwithstanding the absence of contractual privity.[125] The case exemplifies how reliance itself—rather than formal agreement—can generate a limited form of responsibility grounded in fairness and reasonable expectation. Comparable reasoning is visible in estoppel-based doctrines, including *Waltons Stores (Interstate) Ltd v Maher*, where reliance created during negotiations was protected even before final agreement was reached.[126]

In this sense, reliance-based expectations operate as a conceptual bridge between the strict boundaries of contract formation and the equitable impulse to protect good-faith reliance. This logic underlies three exceptional pathways through which pre-contractual behaviour may attract legal consequences, namely misrepresentation, negligent misstatement, and estoppel.

Misrepresentation arises where one party makes a false statement of fact that induces another to enter into a contract. Liability depends on the representor's fault and the representee's reliance, with remedies including rescission and, under the Misrepresentation

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[125] *Hedley Byrne & Co Ltd* v *Heller & Partners Ltd* [1964] AC 465 (HL).
[126] *Waltons Stores (Interstate) Ltd* v *Maher* (1988) 164 CLR 387 (HCA).

Act 1967, damages for innocent or negligent misrepresentation. The inquiry necessarily reopens the negotiation context, requiring courts to examine the content, timing, and influence of statements made, as well as the surrounding circumstances in which they were received. In this way, misrepresentation transforms negotiation context—from a legally neutral background—into a source of liability.[127]

Negligent misstatement, as recognised in *Hedley Byrne*, extends tortious responsibility for careless words causing economic loss where a special relationship of reliance and a duty of care can be established. Context is decisive: the parties' relative expertise, the purpose of the statement, and the commercial setting determine whether such a duty arose. This doctrine reflects judicial recognition that economic expectations formed during negotiations may warrant protection, even absent a contract.[128]

Estoppel, finally, prevents a party from denying a representation or assumption on which another has reasonably relied to their detriment. While it does not create new contractual obligations, it enforces the expectations generated by the parties' contextual interaction, intervening where withdrawal of assurances would be inequitable.[129] In this sense, estoppel accords normative weight to contextual fairness, while formally preserving the distinction between pre-contractual dealings and contract formation.

Taken together, these doctrines demonstrate that context becomes indispensable in assessing whether one party's conduct or statements generated a reasonable expectation of responsibility in the other, and thus whether pre-contractual liability may arise.

It is important to emphasise, however, that such contextual assessment is not aimed at reinterpreting the contract, but at controlling the fairness of pre-contractual conduct and protecting reliance-based expectations.

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[127] Misrepresentation Act 1967; see *Bisset v Wilkinson* [1927] AC 177 (PC).
[128] *Hedley Byrne v Heller* 486–487; *Caparo Industries plc v Dickman* [1990] 2 AC 605 (HL) 617–618.
[129] *Central London Property Trust Ltd v High Trees House Ltd* [1947] KB 130 (KB).

2.5.1.1.2. The Principle of Caveat Emptor and the Contextual Minimalism

This restrained approach to pre-contractual responsibility finds its philosophical anchor in the principle of *caveat emptor.*[130] The maxim encapsulates the idea that each party must safeguard its own interests during negotiations and prior to the conclusion of a binding contract. Absent fraud, misrepresentation, or another recognised exception, negotiators act at their own risk, and the law presumes that commercially competent parties are capable of self-protection.[131]

The principle thus underpins the common law's preference for transactional certainty and party autonomy over relational fairness, reflecting a market-oriented conception of private responsibility in which legal intervention is exceptional rather than routine.[132]

2.5.1.2. Civil Law: Emerging Responsibilities in the Context of Negotiation

Civil-law systems approach the negotiation phase through the prism of good faith and reliance on legitimate expectations, viewing the pre-contractual stage not as a legal vacuum but as part of a continuous process of consensual formation. Negotiations are thus situated within an evolving legal relationship, and rights and obligations may arise even before an agreement is concluded.[133]

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[130] *Caveat emptor* literally means 'let the buyer beware', expressing the common-law presumption that parties bear responsibility for protecting their own interests in the absence of fraud, misrepresentation, or other recognised exceptions.
[131] *Smith v Hughes (*1871) LR 6 QB 597, 607 (Blackburn J).
[132] See *Walford v Miles* [1992] 2 AC 128 (HL) 138 (Lord Ackner).
[133] See BGB, §§ 311(2) and 241(2); Code civil, art 1112; Ministère de la Justice, *Rapport au Président de la République relatif à l'ordonnance n° 2016-131 du 10 février 2016 portant réforme du droit des contrats, du régime général et de la preuve des obligations* (2016).

The Principles of European Contract Law (PECL), for instance, confirm that, although parties remain free to negotiate, that freedom is not absolute, and liability may arise where negotiations are conducted or terminated contrary to good faith.[134]

The German legal system has long provided the archetype of pre-contractual liability through the doctrine of *culpa in contrahendo* (fault in contracting), codified in §§ 311(2) and 241(2) BGB. Under these provisions, an obligation to observe good faith and to protect the other party's interests arises as soon as contractual negotiations begin or a contractual relationship is initiated. A breach of this obligation—by providing misleading information, abusively breaking off negotiations, or otherwise acting in bad faith—may result in liability for reliance loss (*Vertrauensschaden*).[135]

The *Bundesgerichtshof* (BGH) has consistently applied this doctrine to hold parties accountable for pre-contractual misconduct. In a leading decision reported at BGHZ 51, 91 (1972), for example, the court recognised liability where one party induced the other to incur expenses in reliance on the apparent conclusion of a contract that was later arbitrarily withdrawn. The judgment illustrates the contextual nature of the inquiry: the court assessed not only the parties' communications, but also their economic behaviour and the degree of trust objectively created through the negotiation process.[136]

Thus, pre-contractual liability in German law functions as a contextual corrective mechanism, ensuring that freedom of contract does not degenerate into opportunistic withdrawal.

A comparable principle governs French law, where the duty to negotiate in good faith is expressly codified in Article 1112 of the *Code civil* following the 2016 reform. The provision affirms that the "initiative, conduct and breaking off of pre-contractual negotiations are free, but must meet the requirements of good faith." A violation gives rise to liability under

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[134] PECL art 2:301.
[135] BGB §§ 311(2), 241(2), 280(1).
[136] Bundesgerichtshof (BGH), 26 September 1968, BGHZ 51, 91

the general regime of extracontractual fault, though not to the forced conclusion of the contract, thereby preserving contractual autonomy while recognising the moral and economic significance of reliance generated during negotiations.[137]

The *Cour de cassation* has repeatedly held that abrupt or abusive termination of negotiations may entail liability for the loss sustained through reasonable reliance on the prospective agreement.[138]

In assessing such cases, courts examine contextual indicators—such as the stage of advancement of the discussions, the parties' professional background, and prior dealings—to determine whether the break-off was contrary to *bonne foi*. Context thus serves both as evidence of reliance and as the normative framework through which fairness is assessed.

2.5.2. Unfair Terms and Contextual Triggers of Invalidity

Having considered how contextual elements may generate responsibility even before a contract is concluded, attention now turns to the opposite effect of context: its potential to undermine or invalidate a contract once formed.

Whereas pre-contractual liability concerns the fairness of conduct during negotiations, the present section examines how the circumstances surrounding contract formation or performance may affect the validity of the resulting agreement. In this respect, context operates not as a source of obligation, but as a trigger of invalidity, revealing situations in which external or relational factors compromise the autonomy of consent.

2.5.2.1. Common Law: Context as a Vitiating Element of Consent

Several doctrines in English law illustrate how contextual pressures surrounding the formation of the contract can undermine the validity of consent. The first is duress, which

[137] Code civil, art 1112.
[138] Cass com, 20 June 2001, Bull civ IV, no 237.

renders a contract voidable where one party's agreement is obtained through illegitimate pressure.[139]

Historically confined to cases of physical coercion, the doctrine of duress was later expanded to encompass economic duress, notably in The Siboen and The Sibotre, where the court acknowledged that threats of financial harm — including the withdrawal of credit or threatened breach of supply — could also vitiate consent.[140] The concept recognises that coercion may be commercial rather than physical, where one party leverages economic power to compel another to contract on disadvantageous terms.[141]

This concept was later refined in *DSND Subsea Ltd v Petroleum Geo Services ASA*[142], where Dyson J identified three cumulative elements of economic duress: (i) compulsion or the absence of practical choice; (ii) the illegitimacy of the pressure applied[143]; and (iii) a causal link between the pressure and the contract. Because of this, the evaluation of duress is intrinsically contextual: courts consider the commercial context, the relative strength of the parties involved in the negotiations, and whether the party under duress had a viable alternative to acceptance. Therefore, context establishes whether pressure was present and whether it was severe enough to violate consent.

Undue influence is a related doctrine that emphasises the relational context in which consent is obtained rather than external pressure. It deals with circumstances in which the

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[139] *Duress*, Legal Information Institute (Cornell Law School), available at https://www.law.cornell.edu/wex/duress accessed 19 January 2026;
[140] *The Siboen and The Sibotre* [1976] 1 Lloyd's Rep 293 (QB).
[141] See *DSND Subsea Ltd v Petroleum Geo Services ASA* [2000] BLR 530 (QB) 547–548, where Dyson J identified three cumulative elements of economic duress: (i) compulsion or lack of practical choice, (ii) illegitimacy of the pressure, and (iii) a causal connection between the pressure and the conclusion of the contract.
[142] *DSND Subsea Ltd v Petroleum Geo Services ASA* [2000] BLR 530 (QB) 547–548.
[143] The notion of illegitimacy of pressure refers not to the mere existence of strong bargaining tactics, but to pressure that the law considers unacceptable—such as threats to breach existing legal obligations, to act in bad faith, or to exploit the other party's financial vulnerability. In other words, the threat must be contrary to fair or lawful dealing, crossing the line from permissible negotiation to coercion.

authority, trust, or confidence of one party overrides the will of the other, rendering the resulting contract void.[144]

According to *Royal Bank of Scotland plc v Etridge* (No 2), the question revolves around the type of relationship and whether it creates a presumption of influence, such as in situations involving emotional, familial, or fiduciary dependence.[145] Where such a presumption arises, the court examines the totality of the circumstances to determine whether the consent was genuinely free and informed.

The idea that contractual autonomy depends on the relational context in which consent is given and can be jeopardised by imbalance, dependency, or dominance based on trust is reflected in the doctrine of undue influence.

2.5.2.1.1. Context as a Corrective Mechanism

Where duress and undue influence address defects in consent, the doctrine of unconscionability engages with concerns of fairness in both the substance and the context of the transaction. It examines not only how the contract was concluded, but also the nature of the resulting bargain, asking whether one party has exploited the other's weakness or ignorance in a manner that offends equity and conscience.[146]

The English legal system has developed context-sensitive responses, in both equity and statute, to address specific manifestations of unconscionable conduct. These responses operate where one party has taken unconscientious advantage of another's vulnerability, even in the absence of duress or undue influence. Classic situations involve inequality of

[144] *Undue influence*, Legal Information Institute (Cornell Law School), available at https://www.law.cornell.edu/wex/undue_influence accessed 19 January 2026.
[145] *Royal Bank of Scotland plc v Etridge (No 2)* [2002] 2 AC 773 (HL) [13]–[18].
[146] Oxford University Comparative Law Forum, 'The Doctrines of Unconscionability and Abusive Clauses: A Common Point between Civil and Common Law Legal Traditions' available at https://ouclf.law.ox.ac.uk/the-doctrines-of-unconscionability-and-abusive-clauses-a-common-point-between-civil-and-common-law-legal-traditions/ accessed 19 January 2026.

bargaining power combined with the absence of independent advice, particularly where the stronger party knowingly exploits the weaker party's ignorance, distress, or dependency.[147]

As articulated in *Alec Lobb (Garages) Ltd v Total Oil (GB) Ltd*, courts assess whether a transaction is unconscionable by reference to contextual factors, including the parties' experience, access to independent advice, and the commercial setting of the bargain. The inquiry is inherently contextual, examining both procedural impropriety (the circumstances of formation) and substantive imbalance (the fairness of the contractual terms).[148] Therefore, if, for instance, a small retailer under economic pressure signs a long-term lease with punitive penalties imposed by a dominant supplier, without independent advice or negotiation, a court could deem the contract voidable on equitable grounds due to the unconscientious exploitation of vulnerability.

At the statutory level, context reappears through legislative control of unfair terms. The Unfair Contract Terms Act 1977 (UCTA) and the Consumer Rights Act 2015 (CRA) embed contextual evaluation within their respective tests of reasonableness and fairness. Under section 11 of UCTA, a term's reasonableness is assessed "in light of the circumstances which were, or ought reasonably to have been, known to or in the contemplation of the parties when the contract was made", directing courts to consider bargaining power, availability of alternatives, and the extent of negotiation.[149] Similarly, section 62 of the CRA provides that a term is unfair if, contrary to the requirement of good faith, it causes a significant imbalance in the parties' rights and obligations to the detriment of the consumer.[150]

The fairness test thus introduces an element of substantive evaluation that goes beyond textual interpretation, requiring courts to evaluate contractual terms against their social

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[147] See *Commercial Bank of Australia Ltd v Amadio* (1983) 151 CLR 447 (HCA), concerning elderly guarantors whose lack of understanding and absence of independent advice were knowingly exploited by the bank and *Lloyds Bank Ltd v Bundy* [1975] QB 326 (CA), where a guarantee was set aside where the bank relied on a relationship of trust and failed to ensure independent advice, both illustrating equitable intervention based on inequality and contextual exploitation rather than duress or misrepresentation.
[148] *Alec Lobb (Garages) Ltd v Total Oil (GB) Ltd* [1983] 1 WLR 87 (CA) 94–96.
[149] Unfair Contract Terms Act 1977, s 11.
[150] Consumer Rights Act 2015, s 62.

and economic context, and thereby reinforcing context as a mechanism of validity control, rather than interpretation alone.

2.5.2.1.2. The Limits of Contextual Intervention

Despite the foregoing, English law remains cautious about recognising a general doctrine of unconscionability in contract law. As emphasised by Lord Scarman in *National Westminster Bank plc v Morgan*, English law has "set its face against" the adoption of an open-ended principle permitting judicial review of contracts merely on the basis of substantive unfairness, insisting instead that intervention be confined to established and limited categories. The decision underscores the view that freedom of contract cannot be displaced by a broad judicial discretion to invalidate disadvantageous bargains, even where the outcome appears harsh.[151]

As a result, the prevailing philosophy still favours contract sanctity, predictability, and certainty.Courts don't recalibrate agreements just because they seem harsh or biased; they only step in when contextual factors seriously jeopardise consent or fairness. Therefore, the results of contractual autonomy may occasionally be invalidated by context, but this should not be done on a regular basis.[152]

In sum, English law's treatment of contextual invalidity operates within deliberately narrow confines. Context functions primarily as a diagnostic device, identifying situations in which consent or fairness is fundamentally undermined, rather than as a basis for judicial rebalancing of contractual outcomes. Courts may acknowledge the disruptive force of context in exceptional cases, but they do not treat contextual unfairness as a licence to

[151] *National Westminster Bank plc v Morgan* [1985] AC 686 (HL) 708–709 (Lord Scarman).
[152] See *Arnold v Britton* [2015] UKSC 36 [15]–[20] (Lord Neuberger), rejecting judicial departure from contractual language merely because the outcome is onerous; *Rock Advertising Ltd v MWB Business Exchange Centres Ltd* [2018] UKSC 24 [12]–[15], affirming certainty and the sanctity of contractual form; *Times Travel (UK) Ltd v Pakistan International Airlines Corp* [2021] UKSC 40 [56]–[60], confirming that inequality of bargaining power or harsh outcomes do not justify intervention absent vitiation of consent.

rewrite or redistribute contractual obligations, thereby preserving a formal conception of contractual freedom alongside limited corrective intervention.[153]

2.5.2.2. Civil Law: Context as a Framework of Validity

Civil-law systems adopt a broader and more integrated view of the contextual factors capable of affecting contractual validity. Whereas the common law confines invalidity largely to vitiating elements of consent or statutory control, civil law embeds the assessment of fairness and legitimacy within its general principles of good faith, public order, and lawful cause.

2.5.2.2.1. Vices of Consent

Civil-law systems recognise three principal vices of consent capable of invalidating a contract: error, fraud, duress, each of which rests upon contextual evaluation.[154]

In French law, consent is vitiated where error concerns an essential quality of the object or of the person and was determinant of the decision to contract.[155] Fraud extends beyond active misrepresentation to include silence or concealment where good faith required disclosure, while duress encompasses not only physical coercion but also moral or economic pressure capable of inspiring reasonable fear.[156] In each case, the assessment is inherently contextual, requiring examination of the parties' communications, their relationship of confidence, and the economic and relational setting of the transaction.

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[153] See Zhong Xing Tan, 'Beyond the Real and the Paper Deal: The Quest for Contextual Coherence in Contractual Interpretation' (2016) 79 *Modern Law Review* 623, 631–633, 644–646, where the author analyses English courts' resistance to using contextual considerations as a basis for substantive rebalancing of contractual outcomes, emphasising the priority accorded to certainty and the limited role of context in questions of contractual validity.
[154] Oxford University Comparative Law Forum, 'The Doctrines of Unconscionability and Abusive Clauses: A Common Point between Civil and Common Law Legal Traditions' available at https://ouclf.law.ox.ac.uk/the-doctrines-of-unconscionability-and-abusive-clauses-a-common-point-between-civil-and-common-law-legal-traditions/ accessed 19 January 2026
[155] Code civil art 1132.
[156] Ibid arts 1137 and 1140.

German law follows a comparable rationale. A declaration of intent is voidable where it was induced by deceit (*arglistige Täuschung*) or an unlawful threat (*widerrechtliche Drohung*), with unlawfulness assessed by reference to social and moral standards (*sozialethische Wertung*) rather than purely formal criteria.[157] The inquiry likewise focuses on the surrounding circumstances in which consent was obtained, reflecting the central role of context in determining contractual validity.

These doctrines illustrate how contextual pressures and informational asymmetries are central to the civil-law conception of consent.

2.5.2.2.2. Context as a Condition of Lawful and Legitimate Cause

Beyond the individual's state of mind, civil law also subjects the content and purpose of the contract to a test of lawful cause and lawful object, which functions as a substantive control of contractual validity.[158] Under this approach, a contract is enforceable only if the obligations undertaken pursue a legitimate purpose and do not conflict with public order or good morals.

Lawful cause thus serves as the normative justification of the contractual obligation, while the lawful object concerns the permissibility of the contractual performance itself. Where either the cause or the object of the contract is illicit—because it undermines public policy, offends moral standards, or circumvents mandatory legal norms—the contract is denied legal effect, irrespective of the parties' formal consent.

This substantive control is explicitly reflected in statutory provisions. Under Article 1162 of the *Code civil*, a contract may not derogate from ordre public or bonnes mœurs, while Article

[157] BGB § 123.-
[158] Mihaela Bercea, 'Cause and Illicit Purpose in Civil Law Contracts' (2018) *Studii şi Cercetări Juridice* 180-183 https://sserr.ro/wp-content/uploads/2018/08/5-1-180-186.pdf accessed 19 January 2026.

6 provides that agreements contrary to public policy are null and void. Similarly, BGB § 138(1) declares void any legal transaction that offends good morals (*Sittenwidrigkeit*).

While *ordre public* and *bonnes mœurs* operate as external limits ensuring that private agreements do not contravene societal norms, the doctrine of unlawful cause (*cause illicite*) focuses on the internal purpose of the transaction. A contract may therefore be lawful in form yet invalid in substance where its underlying aim or motivating purpose is contrary to law or morality. [159]

French jurisprudence provides clear illustrations of contextual invalidity grounded in unlawful cause. In cases involving contracts designed to evade taxation or to remunerate influence-peddling, the Cour de cassation has annulled agreements notwithstanding the apparent validity of their formal structure. In these decisions, the Court looked beyond the contractual wording to the economic function and underlying purpose of the transaction, holding that agreements whose real aim was to circumvent public policy or to monetise improper influence were incompatible with the requirements of lawful cause. The invalidity thus derived not from any defect in consent, but from the illicit objective pursued within the contractual arrangement.[160]

More recently, French law has reinforced this contextual approach through Article 1143 of the *Code civil*, which introduces the doctrine of abuse of dependency (*abus de dépendance*), rendering a contract voidable where one party exploits a position of weakness to obtain a manifestly excessive advantage. German law reaches comparable outcomes under BGB § 138(2), which invalidates contracts concluded under exploitative conditions (*Ausbeutung einer Zwangslage*).

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[159] See Dickinson Law Review, 'Illegality and Immorality in Contract Law' (University of Pennsylvania) 3–6 https://insight.dickinsonlaw.psu.edu/cgi/viewcontent.cgi?article=1543&context=dlra accessed 19 January 2026.

[160] *Cass. com.*, 7 February 1984, annulling a contract whose underlying purpose was to evade fiscal obligations, on the basis that an agreement pursuing an illicit objective is deprived of lawful cause; *Cass. civ. 1re*, 6 July 1988, holding that a contract providing remuneration for influence-peddling was void, as its purpose offended *public order* and *bonnes mœurs*, irrespective of the parties' formal consent.

Both systems require courts to evaluate a number of contextual factors, including the age, experience, economic dependence, and proportionality of each party's performance.

2.5.2.2.3. Context as Public Control: Fairness and Social Function

The social function of contract (*fonction sociale du contrat / soziale Funktion des Vertrags*) is a foundational concept in modern civil-law theory. It expresses the idea that contractual autonomy is exercised within, and limited by, the social and economic purposes of the legal order, rather than as an isolated manifestation of private will. In this perspective, context assumes a normative role: the contract is not assessed solely by reference to the parties' intentions, but also by its compatibility with broader requirements of fairness, solidarity, and social utility.[161]

Accordingly, the social function of contract provides the conceptual framework through which civil law translates contextual considerations into legally binding limits on contractual validity. It explains why private agreements may be restricted or invalidated where their effects conflict with the social values and normative expectations protected by the legal order.

Within this framework, the principle of good faith (*bonne foi / Treu und Glauben*), codified in *Code civil* Article 1104 and BGB § 242, operates not only at the stage of interpretation and performance, but also as a criterion of validity control. Contracts concluded or structured in a manner incompatible with good faith—whether due to the circumstances of their formation or the effects they produce—may therefore be requalified or declared void. Civilian doctrine emphasises that this approach integrates considerations of fairness and

[161] For the French doctrine of *fonction sociale du contrat*, see Philippe Stoffel-Munck, 'La fonction sociale du contrat' (Université Paris-Panthéon-Assas) https://www.paris2.fr/Recherche/Publications-en-ligne/La-fonction-sociale-du-contrat accessed 19 January 2026; for the German concept of *soziale Funktion des Vertrags*, see Claus-Wilhelm Canaris, 'Die Bedeutung der Sozialbindung des Privatrechts' (1984), and Universität Heidelberg, 'Soziale Funktion des Vertrags' https://www.jura.uni-heidelberg.de/md/jura/instprofrat/ss_2016_soziale_funktion_des_vertrags.pdf accessed 19 January 2026.

equity into the architecture of contractual validity, rather than treating them as external corrections.[162]

This logic materialises in the judiciary's assessment of substantive imbalance, particularly in standard-form and consumer contracts. In German law, BGB § 307 invalidates clauses that unreasonably disadvantage one party contrary to good faith, requiring evaluation of all the circumstances attending the conclusion of the contract. In French law, consumer protection legislation adopts a comparable contextual test, rendering void terms that create a significant imbalance between the parties' rights and obligations[163] (*Code de la consommation, Article* L212-1).

Together, these mechanisms illustrate the civil-law conviction that contractual fairness and legitimacy must be assessed by reference to the economic and relational context in which agreements are embedded, giving concrete legal effect to the social function of contract.

2.5.2.3. Comparative Synthesis

The comparative analysis reveals that context plays fundamentally different roles in the two traditions. In the common law, contextual invalidity is conceived as an exception to autonomy: doctrines such as duress, undue influence, or statutory unfairness operate as narrowly defined safety valves, justified only when consent or fairness is gravely impaired. Context therefore functions as a limit—a diagnostic mechanism identifying extreme cases of coercion or imbalance, but never a general source of judicial control.

By contrast, in civil-law systems, context forms an intrinsic framework for evaluating the legitimacy of contracts. Good faith, public order, and the social function of contract are not exceptional correctives but structural principles shaping both formation and validity.

[162] Oxford University Comparative Law Forum, 'The Doctrines of Unconscionability and Abusive Clauses: A Common Point between Civil and Common Law Legal Traditions' https://ouclf.law.ox.ac.uk/the-doctrines-of-unconscionability-and-abusive-clauses-a-common-point-between-civil-and-common-law-legal-traditions/ accessed 19 January 2026.
[163] Code de la consommation (France) art L212-1

Context operates simultaneously as a diagnostic tool—revealing defects of consent—and as a normative standard, expressing the legal order's moral and social boundaries.

Thus, while the common law tends to protect contractual freedom from contextual interference, civil law redefines freedom through context, understanding autonomy as relational and socially conditioned. Both systems, however, converge on a shared premise: that contract law cannot remain entirely insulated from its factual and ethical environment. The divergence lies in degree, not in recognition—context is either the outer limit (common law) or the inner architecture (civil law) of contractual validity.

3. CONTEXTUAL INTERPRETATION IN STANDARDISED AND IMBALANCED CONTRACTING

In commercial practice, contracts are rarely the product of equal participation. Standard-form contracts, typically drafted by economically stronger or more experienced parties, are widely used in business-to-business relations to streamline transactions, reduce negotiation costs, allocate risk in advance, and promote legal certainty and operational efficiency, as exemplified by internationally used standard forms such as the FIDIC construction contracts.[164]

At the same time, the unilateral nature of standard forms may produce disproportionate clauses that systematically favour the drafting party. Where contractual terms are imposed rather than negotiated, they may restrict the counterparty's rights or remedies in ways that exceed what is commercially necessary, thereby raising questions about the limits of contractual autonomy and the legitimacy of enforcing the resulting allocation of risk.[165]

Standard and disproportionate clauses therefore represent a particularly relevant area in which textual autonomy visibly collides with context. The resulting tension exposes a deeper methodological divide between common law and civil law systems: while the former tends to prioritise certainty anchored in the written text, the latter is more receptive to contextual evaluation grounded in fairness and contractual equilibrium.

This chapter examines how this tension manifests in three recurring scenarios in modern commercial contracting. The first concerns boilerplate clauses, through which parties seek to insulate their agreement from external influence. The second addresses the battle of the

[164] FIDIC contracts are internationally used standard-form contracts in commercial construction projects, intended for repeated application and uniform risk allocation. By providing pre-drafted contractual frameworks with established mechanisms for performance, administration, and dispute resolution, they are designed to reduce negotiation costs, streamline transactions, and promote predictability and efficiency in complex business-to-business contracting; International Federation of Consulting Engineers (FIDIC), *Why Use FIDIC Contracts?* https://fidic.org/books/why-use-fidic-contracts accessed 19 January 2026 accessed 19 January 2026.
[165] Peel, 'The Common Law Tradition' 130-131.

forms, where conflicting standard terms reveal the limits of classical offer-and-acceptance logic and invite contextual resolution based on conduct and commercial practice. The third focuses on adhesion-type commercial contracts, where disparities in bargaining power and information transform context from a mere interpretative aid into a mechanism for safeguarding fairness and genuine consent.

3.1. Boilerplate Clauses

Boilerplate clauses occupy a paradoxical position in modern contractual architecture. Typically located at the end of the contract — often under headings such as “Miscellaneous” or “General Provisions” — they may appear non-controversial and detached from the core commercial exchange.[166] Yet they play a decisive role in shaping the contract’s interpretative and operative framework.

The range of clauses typically classified as boilerplate illustrates the various dimensions of context that parties seek to manage. Clauses such as entire agreement or merger clauses attempt to exclude pre-contractual context, stipulating that the written contract embodies the complete agreement and supersedes all prior negotiations or representations. No waiver and no oral amendment provisions regulate the behavioural or post-formation context, ensuring that silence or informal communications do not modify contractual rights. Force majeure clauses address the factual context of performance, defining in advance the consequences of external events beyond the parties’ control. Severability clauses govern the legal context of validity, providing that an unlawful term does not vitiate the remaining provisions. Finally, governing-law and jurisdiction clauses determine the institutional and interpretative context in which the contract will be read and enforced.

These clauses function as the *infrastructure* of the contract, regulating the relationship’s procedural and remedial framework (rather than its substantive economic exchange) and

[166] Reuters Practical Law, ‘Boilerplate’ (Glossary) https://content.next.westlaw.com/Glossary/PracticalLaw/I03f4d931eee311e28578f7ccc38dcbee?utm_source=chatgpt.com&transitionType=Default&contextData=(sc.Default) accessed 19 January 2026.

aiming to make the contract self-contained, to control or even exclude the influence of external context on interpretation and performance.[167]

In international commercial practice, the widespread and standardised use of boilerplate clauses is closely linked to the predominance of common-law drafting models. As Andersen observes, contemporary international contracts are, with few exceptions, drafted on the basis of common-law templates, even where the contract is governed by a civilian legal system.[168] Boilerplate clauses are a particularly visible expression of this phenomenon: they are frequently transplanted wholesale from common-law precedents and incorporated into contracts subject to civil law, notwithstanding the fact that the interpretative assumptions underlying such clauses may not fully align with the governing law.

3.1.1. Private Textual Autonomy v. Contextual Interpretation

This standardisation in the use of boilerplate clauses conceals a deeper interpretative problem, described by Ulrich Magnus as a "clash of legal cultures", in which the textual style of the contract reflects one legal system while the applicable interpretative method belongs to another.[169]

This tension becomes particularly visible once courts are called upon to interpret such clauses. A merger clause, typically drafted within a common-law framework, presupposes the exclusionary logic of the parol evidence rule. By contrast, a civil-law court guided by principles of consent and good faith may still take pre-contractual negotiations into account in order to determine the parties' true common intention. Similarly, force majeure clauses transplanted from common-law precedents may not align with civilian conceptions of force

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[167] Ulrich Magnus, 'The Germanic Tradition: Application of Boilerplate Clauses under German Law' in Andersen and Schroeter (eds), *Boilerplate Clauses* (CUP 2010) 192.
[168] Catherine Andersen, 'Introduction to Part 3' in Catherine Andersen and Ulrich Schroeter (eds), *Boilerplate Clauses, International Commercial Contracts and the Applicable Law* (Cambridge University Press 2010) 115.
[169] Magnus, 'The Germanic Tradition' 179–180.

majeure, which tend to assess impossibility and non-performance through statutory criteria.[170]

Context, in this sense, reasserts itself not only as a factual matrix but as a normative framework from which the parties cannot fully contract out. Attempts to neutralise context through drafting techniques may therefore paradoxically invite its judicial reinsertion, since every agreement, including an international commercial contract, necessarily remains attached to a particular legal order and is interpreted in accordance with that system's interpretative principles and mandatory norms.[171]

In this sense, boilerplate clauses are not merely devices of procedural convenience, but instruments through which the interplay between text and context, autonomy and control, becomes most sharply visible.

3.1.2. Boilerplate Clauses in Common and Civil Law Systems

Despite their structural uniformity, boilerplate clauses acquire profoundly different meanings depending on how each legal system positions itself toward the contextual elements.

In English common law, boilerplate clauses may be understood as the culmination of the system's preference for textual autonomy in commercial contracting. Their drafting operates as a form of context management: by defining in advance what counts as relevant evidence, amendment, or allocation of risk, such clauses are designed to channel interpretative reasoning towards the written text and away from extrinsic circumstances. This approach reflects the orthodox assumption that commercial contracts are the product

[170] ibid 180–181; Xavier Lagarde, David Méheut and Jean-Michel Reversac, 'The Romanistic Tradition: Application of Boilerplate Clauses under French Law' in Andersen and Schroeter (eds), *Boilerplate Clauses, International Commercial Contracts and the Applicable Law* (Cambridge University Press 2010) 211.
[171] Messageries Maritimes, Cass. Civ, 21 June 1950, RCDIP 1956.609, note Batiffol; Siret 1952.1.1 note Niboyet: 'Tout contrat international est ne´cessairement attache´ à la loi d'un Etat.'

of deliberate linguistic choice, such that effect should, as far as possible, be given to the language actually used by the parties.[172]

Nevertheless, context is not entirely excluded from the interpretation of boilerplate clauses under English law. Instead, context plays an evidentiary role. The background or "factual matrix" may be taken into account to elucidate the meaning of the contractual language, but not to contradict or override it. This approach is classically articulated in *Investors Compensation Scheme Ltd v West Bromwich Building Society*, where interpretation was described as the ascertainment of the meaning the document would convey to a reasonable person with the relevant background knowledge.[173] Similarly, in *Rainy Sky SA v Kookmin Bank*, the Supreme Court confirmed that considerations of "business common sense" may assist in choosing between competing interpretations, provided that such considerations do not displace clear contractual wording.[174]

In this sense, English common law does not eliminate context, but subordinates it to the text. Boilerplate clauses thus exemplify a model of interpretation in which context serves to illuminate linguistic meaning, while the written contract remains the primary and controlling source of obligation.

In contrast to the common-law emphasis on textual autonomy, civil-law systems treat context as an inherent component of contractual meaning. Boilerplate clauses are therefore not read as self-sufficient textual devices, but as provisions whose operation is shaped by broader normative standards.[175]

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[172] Peel, 'The Common Law Tradition' 131–136.
[173] *Investors Compensation Scheme Ltd v West Bromwich Building Society* [1998] 1 WLR 896 (HL) 912–913 (Lord Hoffmann).
[174] *Rainy Sky SA v Kookmin Bank* [2011] UKSC 50, [2011] 1 WLR 2900 [21]–[30].
[175] Code civil, arts 1103, 1104 and 1188; BGB, §§ 133 and 157; see also Ulrich Magnus, 'The Germanic Tradition: Application of Boilerplate Clauses under German Law' in Catherine Andersen and Ulrich Schroeter (eds), *Boilerplate Clauses, International Commercial Contracts and the Applicable Law* (Cambridge University Press 2010) 179–81; Lagarde, Méheut and Reversac, 'The Romanistic Tradition' 210–212..

Clauses imported from common-law templates, such as entire agreement or indemnity clauses, are accordingly given their foreign meaning only where the parties' intention to adopt that meaning is sufficiently clear. In the absence of such clarity, they are integrated into the civil-law interpretative framework, which functions as a structural constraint on purely textual constructions.[176]

Civil-law courts thus approach boilerplate clauses as starting points rather than barriers to interpretation. The surrounding legal, factual, and normative context remains decisive in determining their ultimate effect.[177]

3.2. Battle of the Forms

The so-called Battle of the Forms arises where commercial parties exchange standard-form documents — such as purchase orders, confirmations, or acknowledgements — each incorporating its own boilerplate terms that are partially or wholly inconsistent with those of the counterparty. Despite the absence of a negotiated convergence on these standard terms, the parties typically proceed with the (commercial) deal, thereby revealing a practical commitment to the transaction notwithstanding unresolved textual conflict regarding the respective standard-form.[178]

The central legal question in such cases is not whether a contract exists, but which terms govern once performance has taken place in the presence of conflicting forms. This recurring scenario exposes the conceptual limits of a strict offer-and-acceptance analysis based on the mirror-image rule, which requires that an acceptance correspond exactly to the offer,[179] and underscores the need for contextual interpretative techniques that take

[176] Code civil, art 1190; BGB, § 305c(2); Zweigert and Kötz, *Introduction to Comparative Law* 397–398
[177] Code civil, art 1188; BGHZ 40, 91; PECL art 5:101.
[178] Arthur Taylor von Mehren, 'The "Battle of the Forms": A Comparative View' (1990) 38 *American Journal of Comparative Law* 265, 267.
[179] The operation and limits of the mirror-image rule in English law to be further discussed in section 3.2.1 below.

account of the parties' conduct, prior dealings, trade usage, and shared commercial purpose.[180]

In this sense, the Battle of the Forms constitutes a paradigmatic illustration of how contractual consensus may coexist with normative disagreement, compelling legal systems to decide whether to prioritise the chronological order of exchanged forms as the basis for contractual content, or the broader contextual reality of the transaction as revealed by the parties' conduct, commercial practice and the functional logic of the exchange once execution of the contract has begun.[181]

3.2.1. The Last Shot Rule

The two common-law doctrines traditionally applied to battle of the forms' disputes are the so-called mirror-image rule and the last-shot doctrine.

The mirror-image rule requires that an acceptance correspond precisely to the offer; any deviation operates as a counter-offer and thereby extinguishes the original offer.[182] Building on this logic, courts developed what became known as the last-shot doctrine, which functions as a practical application of the mirror-image principle in commercial exchanges where multiple standard forms are exchanged before a contract is formed.

On this basis, where parties exchange forms containing conflicting terms, English courts have traditionally presumed that the governing terms are those contained in the last communication that is not expressly objected to prior to performance. In other words, under the last-shot rule, the party firing the "last shot" (that is, the last counteroffer left

[180] von Mehren, 'Battle of the Forms: A Comparative View' 273–275, on the limits of classical offer-and-acceptance analysis in battle-of-forms cases and the relevance of conduct and commercial context.
[181] Ibid 271-272.
[182] Henry D Gabriel, 'The Battle of the Forms: A Comparison of the United Nations Convention for the International Sale of Goods and the Uniform Commercial Code' (1994) 49 *Business Lawyer* 1053.

unanswered before performance begins) dictates the contractual terms and thereby prevails in the "battle of the forms".[183]

Silence is thus construed as tacit assent, a presumption that reflects a formalistic conception of agreement while simultaneously relying on contextual inference drawn from the parties' conduct.

This classical formulation was applied in *British Road Services Ltd v Arthur V Crutchley Ltd*, where a warehouseman's stamped acknowledgement—"received under our conditions"—was treated as a counter-offer accepted by the consignor's act of delivery.[184] A decade later, *Butler Machine Tool Co Ltd v Ex-Cell-O Corp (England) Ltd* illustrated both the persistence and the limits of the last-shot logic: despite Lord Denning MR's suggestion that courts should "look at all the documents passing between the parties and glean from them, or from the conduct of the parties, whether they have reached agreement on all material points," the majority resolved the dispute by adhering to the orthodox sequence of offer and acceptance.[185]

Yet even within this formal framework, contextual reasoning was not entirely excluded. Courts occasionally inferred acceptance or term incorporation from course of dealing or trade usage, as in *Hardwick Game Farm v Suffolk Agricultural Association*, where repeated transactions justified implying contractual terms from prior conduct.[186] Such pragmatic devices reveal that English law, though formally committed to textual sequencing, cannot dispense with contextual interpretation without undermining commercial reality. As Gabriel observes, common-law courts "continue to use the mirror-image rule … while at the same time relying on trade usage and course of dealing to resolve battle of the forms disputes."[187]

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[183] Ibid 1054.
[184] *British Road Services Ltd v Arthur V Crutchley Ltd* [1968] 1 All ER 811 (QB) 816–817.
[185] *Butler Machine Tool Co Ltd v Ex-Cell-O Corp (England) Ltd* [1979] 1 WLR 401 (CA) 404–405.
[186] *Hardwick Game Farm v Suffolk Agricultural Association* [1968] 2 All ER 444.
[187] Henry D Gabriel, 'The Battle of the Forms: A Comparison of the United Nations Convention for the International Sale of Goods and the Uniform Commercial Code' (1994) 49 *Business Lawyer* 1055–1056, noting that, notwithstanding continued reliance on the mirror-image rule, common-law courts regularly resort to trade usage and course of dealing in resolving conflicts between standard forms.

3.2.2. From the Last-Shot Rule to Contextual Evaluation

More recent case law suggests a gradual shift towards a more holistic and context-sensitive approach. In *Tekdata Interconnections Ltd v Amphenol Ltd*, the Court of Appeal reaffirmed the last-shot principle, while emphasising that its application depends on the factual matrix and the "objective intention of the parties" as evidenced by their communications and conduct.[188]

This trajectory was further developed in *TRW Ltd v Panasonic Industry Europe GmbH*. In that case, the court declined to apply the last-shot rule in a purely mechanical manner and instead examined the entire course of negotiation and correspondence, concluding that the first shot prevailed because the initiating party's terms expressly precluded any subsequent conflicting conditions.[189] In doing so, the court cited *Butler* and *Tekdata*, yet moved away from a strictly sequential analysis, indicating that the decisive factor is not necessarily which form was sent last, but which terms the parties can objectively be said to have accepted in light of all the circumstances.

This emerging line of reasoning demonstrates that English courts increasingly mediate between formalism and contextual inquiry, focusing less on the mere chronology of forms and more on the parties' mutual intention as revealed by their behaviour, course of dealings, and the commercial purpose of their exchange.

The persistence of these contextual correctives illustrates that English contract law, while formally committed to certainty, has developed a measured tolerance for factual context. Courts assess whether a party's silence, performance, or habitual acquiescence constitutes acceptance, acknowledging that commercial actors rarely intend the absence of a binding contract solely because of conflicting boilerplate terms. Thus, context acts as an invisible corrective to formalism, ensuring that the law remains responsive to the commercial environment it regulates.

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[188] *Tekdata Interconnections Ltd v Amphenol Ltd* [2009] EWCA Civ 1209, [2010] 1 Lloyd's Rep 357 [22]–[27] (CA).
[189] *TRW Ltd v Panasonic Industry Europe GmbH* [2021] EWHC 19 (TCC), [2021] BLR 363 [44]–[60].

3.2.3. The Knock-Out Rule as a Contextual Approach in Civil Law Systems

Civil law systems take a much more contextual approach to the battle of forms. In Germany and France, conflicting standard terms are typically neutralised under the so-called *knock-out rule*, with any resulting contractual gaps filled by statutory default provisions or, where relevant, trade usage.[190]

This method, closely connected to the principle of *Treu und Glauben* (good faith), treats the parties' common intention, as objectively manifested through their conduct, as the decisive criterion for determining contractual content. German case law has long affirmed that a contract may arise even where each party insists on its own standard terms, provided that the parties proceed with performance, in which case conflicting clauses are displaced by the applicable background law.[191]
Similarly, under French law conflicting standard terms are ineffective to the extent of their inconsistency, and that only terms on which the parties have agreed are incorporated into the contract.[192]

Under the Knock-out rule the conflicting terms are disregarded in their entirety ("knocked out"), and the contract then consists only of the terms in common by parties. and the contract consists solely of the provisions common to both parties. Any gaps created by the exclusion of incompatible clauses are then filled by default rules of the applicable legal system.

This approach reflects a shared contextual orientation within civil law traditions, whereby courts tend to prioritise the parties' mutual consent and the functional coherence of the

[190] von Mehren, 'Battle of the Forms: A Comparative View' 265, 295–296; PECL Art 2:209.
[191] Bundesgerichtshof, judgment of 20 March 1985, BGHZ 94, 195, 198–201; NJW 1985, 1838, holding that where parties perform despite conflicting standard terms, a contract is formed, and incompatible clauses are replaced by statutory default rules.
[192] Code civil, Art. 1119.

transaction, rather than adhering to the mechanical sequencing of offer and acceptance characteristic of classical common-law analysis.

3.3. Adhesion Contracts

Adhesion contracts, also known as standard-form or take-it-or-leave-it agreements, represent the modern tendency towards contractual standardisation and mass contracting.[193] They are characterised by one party, typically a professional or economically dominant actor, unilaterally drafting contractual terms and leaving the other party with no realistic opportunity to negotiate their content.[194]

The contextual dynamics of adhesion contracts differ fundamentally from those of individually negotiated agreements. The structural inequality of bargaining power, combined with informational asymmetries, renders consent largely formal rather than deliberative, thereby shifting interpretative attention from subjective intention to concerns of fairness, transparency, and public control.[195]

Such contracts expose the limits of strict textual autonomy due to the circumstances in which the agreement is concluded. Although standard-form contracting promotes efficiency and predictability, courts are increasingly recognising that, where terms are imposed on a take-it-or-leave-it basis, conditions such as economic dependence, lack of

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[193]Friedrich Kessler, 'Contracts of Adhesion—Some Thoughts about Freedom of Contract' (1943) 43 *Columbia Law Review* 629, 631.

[194] Ibid 632–634. It is worth clarifying that standard terms exchanged in so-called "battle of the forms" situations are not, strictly speaking, contracts of adhesion, since both parties typically rely on their own pre-formulated conditions rather than accepting a unilaterally imposed set of terms; *see* Smyth and Gatto, *Contract Law* 50–52, discussing the logic of competing standard terms under UCC § 2-207. However, where one party's standard terms ultimately prevail in the absence of genuine negotiation or realistic alternative choice, the resulting agreement may functionally approximate an adhesion contract and therefore warrant comparable contextual and protective scrutiny; *cf* Helen Winkelmann, Susan Glazebrook and Ellen France, 'Contractual Interpretation' (2020) 51 *Victoria University of Wellington Law Review* 510–512.

[195] Helen Winkelmann, Susan Glazebrook and Ellen France, 'Contractual Interpretation' (2020) 51 *Victoria University of Wellington Law Review* 464, 510–512

real choice or informational imbalance must be taken into account when interpreting and assessing the validity of those terms.[196]

The interpretative challenge therefore lies in reconciling commercial efficiency with the protection of weaker parties whose assent is presumed rather than negotiated, a tension that requires courts to take account of the circumstances of contract formation and that has prompted the development of corrective interpretative techniques and substantive control mechanisms in both common-law and civil-law systems.

3.3.1. Common Law: Formal Consent and Contextual Safeguards

Traditionally, English law approaches adhesion contracts within the paradigm of freedom of contract, presuming that assent — even to standard terms — is binding once objectively manifested.[197] However, over time, judicial and legislative developments have introduced contextual safeguards to temper the rigidity of this presumption, while still maintaining formal consent as the organising principle.

A key principle governing standard terms is incorporation by notice, whereby terms are only binding if the proponent has taken reasonable steps to bring them to the other party's attention before or at the time of contracting.[198] In *Thornton v Shoe Lane Parking Ltd*, Lord Denning MR emphasised that the more onerous or unusual the term, the clearer the notice required for its incorporation.[199]

[196] Smyth and Gatto, *Contract Law* 82–84; Code civil art 1190; German BGB §§ 305–307.
[197] See *Smith v Hughes* (1871) LR 6 QB 597, 607, where Blackburn J affirmed that contractual assent is determined objectively by the parties' words and conduct, irrespective of their uncommunicated subjective intention; *L'Estrange v F Graucob Ltd* [1934] 2 KB 394 (CA) 403, holding that a party is bound by signed standard terms notwithstanding non-reading.
[198] See *Parker v South Eastern Railway Co* (1877) 2 CPD 416 (CA), where the Court of Appeal confirmed that incorporation of standard terms depends on whether reasonable notice was given prior to or at contracting, rather than on proof that the adhering party actually read the clause.
[199] *Thornton v Shoe Lane Parking Ltd* [1971] 2 QB 163 (CA) 169–170 (Lord Denning MR).

Context is therefore paramount: courts must evaluate whether the adhering party was given a fair opportunity to become aware of the clause's existence and content.[200]

Beyond incorporation, English law controls adhesion contracts through statutory instruments that operationalise contextual fairness. Both the UK's Unfair Contract Terms Act (footnote) and the Consumer Rights Act (footnote), for instance subject exclusion or limitation clauses to tests of reasonableness or fairness, requiring evaluation of "all the circumstances attending the conclusion of the contract".[201]

Thus, while English law maintains a formally objective and text-based foundation, it increasingly recognises that the circumstances of adhesion condition both the incorporation and the meaning of contractual terms.

3.3.2. Civil Law: Context as Structural Control

Civil-law systems have long acknowledged that adhesion contracts pose inherent risks of imbalance arising from structural asymmetries rather than individual misconduct, and have therefore integrated contextual evaluation into both interpretation and validity control as a matter of principle. Through codified mechanisms that combine good faith, transparency, and corrective control of contractual equilibrium, the French and German systems serve as excellent examples of this approach.

Article 1110(2) of the *Code civil*, which defines adhesion contracts (*contrats d'adhésion*) as contracts whose fundamental terms are predetermined by one party and are not subject to negotiation, expressly defines and regulates them under French law. According to Article 1171, any non-negotiated clause that significantly distorts the rights and obligations of the parties is considered *non écrite*.

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[200] See *Interfoto Picture Library Ltd v Stiletto Visual Programmes Ltd* [1989] QB 433 (CA) 439-440, where the Court of Appeal refused to enforce a disproportionately onerous charge printed in small type, holding that such clauses must be "fairly and reasonably drawn to the attention" of the adhering party.
[201] Unfair Contract Terms Act 1977, s 11(1); cf Consumer Rights Act 2015, s 62

Taken together, these provisions establish a substantive fairness control that is structurally anchored in the circumstances of contract formation, requiring judges to assess the parties' respective positions, the nature of the transaction, and the transparency and intelligibility of the clause in question.

This contextual orientation is reinforced by French jurisprudence. In *Chronopost SA v La Poste*, the *Cour de cassation* ruled that a limitation of liability clause that stripped an essential contractual obligation of its substance was unconstitutional because it violated both the requirements of good faith and the binding force of the contract.[202] The decision demonstrates how, even in formally concluded agreements, French courts incorporate relational context and economic function to protect contractual balance.

German law achieves comparable results through a more systematic and generalised framework. The BGB declares void any clause that unreasonably disadvantages the other party, "contrary to the requirement of good faith," and explicitly mandates consideration of the circumstances attending the conclusion of the contract. It is important to point out that this control is not confined to consumer contracts but extends, with calibrated intensity, to business-to-business relationships.[203]

German jurisprudence has consistently treated the interpretative assessment of General Terms and Conditions (*Allgemeine Geschäftsbedingungen* - AGB) as an inquiry into the objective understanding of a reasonable contracting party in the same position, taking into account trade usage, sector-specific practice, and informational asymmetries.[204] The principle of *Treu und Glauben* thus operates simultaneously as a hermeneutic guide and as a substantive corrective mechanism: the context of adhesion—pre-formulation, lack of

[202] *Chronopost SA v La Poste* (Cass com, 22 October 1996) Bull civ IV, no 261; D 1997, 121, note Ghestin; JCP G 1997, I, 4003, obs Viney.
[203] BGB, § 307(1) and (2).
[204] BGH, 31 March 1999, NJW 1999, 3252, 3253–3254.

negotiation, and economic dependence—conditions both the validity and the interpretation of standard terms.

4. CONTEXTUAL INTERPRETATION IN TRANSNATIONAL CONTRACT LAW

The interpretation of contracts increasingly transcends national boundaries. As trade, digital communication, and dispute resolution become more global, interpretative reasoning itself acquires a transnational dimension. Principles traditionally associated with domestic contract law—such as good faith, party intent, and contextual assessment—now operate across jurisdictions and institutional settings, contributing to a shared discourse on how contractual meaning is identified and justified.

Within this evolving landscape, context has emerged as a unifying interpretative element. Whether through uniform substantive instruments, digitally mediated contracting environments, or international dispute resolution mechanisms, context functions as the means by which legal systems reconcile predictability with fairness, and formal consent with the realities of modern contracting.

Accordingly, this chapter examines how contextual interpretation manifests in three key international settings: first, in uniform substantive law through the interpretative framework of the CISG; second, in transnational dispute resolution, particularly international arbitration; and third, in digitally mediated contracting environments, where online interfaces reshape the conditions under which context is formed and assessed.

4.1. CISG: A Contextual and Convergent Interpretative Framework

The United Nations Convention on Contracts for the International Sale of Goods (CISG) is widely regarded as a major instrument aimed at promoting uniformity in international trade.[205] Adopted in 1980 within the framework of the United Nations Commission on International Trade Law (UNCITRAL) and currently in force in over ninety Contracting States,

[205] Jan M Smits, *Problems of Uniform Sales Law – Why the CISG May Not Promote International Trade* (Maastricht University Faculty of Law Working Paper No 2013/1, 2013) 5.

the Convention was designed to provide a uniform yet flexible legal regime for international sales, combining elements drawn from both common-law and civil-law traditions.[206]

This hybrid design is particularly visible in the Convention's interpretative framework. While the CISG reveals an explicit commitment to contextual reasoning, placing party intent, good faith, and surrounding circumstances at the core of contractual analysis,[207] it also it tempers this contextual openness through objective standards of interpretation and through structured rules on contract formation.[208]

4.1.1. Intent and Circumstantial Interpretation

At the core of the CISG's interpretative philosophy lies a strong commitment to contextual reasoning, which is most clearly articulated in Article 8. According to Article 8(1), statements or conduct are to be interpreted according to the actual intent of the party in question, provided that the other party was aware of, or ought to have been aware of, that intent. This rule closely mirrors the civil law emphasis on the parties' true or common intention, prioritising subjective meaning over literal expression when mutual understanding can be established.[209]

Where such subjective intent cannot be ascertained, Article 8(2) introduces an objective fallback standard, requiring interpretation according to the understanding that a reasonable person of the same type as the other party would have had in the same

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[206] United Nations Convention on Contracts for the International Sale of Goods (Vienna, 11 April 1980) (CISG), authentic English text (CISG-online) https://cisg-online.org/Text-of-the-Convention/Authentic-English-text-of-the-CISG accessed 23 October 2025; UNCITRAL, 'Status: United Nations Convention on Contracts for the International Sale of Goods (CISG)' https://uncitral.un.org/en/texts/salegoods/conventions/sale_of_goods/cisg/status accessed 23 October 2025.

[207] CISG art 7(1); UNCITRAL, *Digest of Case Law on the United Nations Convention on Contracts for the International Sale of Goods* (2022) para 7; see also Ulrich Magnus, 'General Principles of UN-Sales Law' in Peter Mankowski (ed), *Research Handbook on the CISG* (Edward Elgar 2020) 45–47.

[208] CISG arts 8(2) and 14; Stefan Kröll, Loukas Mistelis and Pilar Perales Viscasillas (eds), *UN Convention on Contracts for the International Sale of Goods (CISG)* (Beck/Hart/Nomos 2011) 229–233, on art 14; Ulrich Magnus, 'The CISG's Interpretation System' in Franco Ferrari (ed), *The CISG and Its Impact on National Legal Systems* (Sellier 2008) 92–94.

[209] CISG art 8(1).

circumstances. Article 8(3) then stipulates that, when establishing intent or reasonable understanding, 'due consideration must be given to all relevant circumstances of the case', including negotiations, established practices, usages and subsequent behaviour.[210]

It is worth noting that Article 9 extends contextual reasoning beyond bilateral intent to the broader environment of international commerce. Under Article 9(1), parties are bound by any usage to which they have agreed and by any practices established between them. Article 9(2) adds that, absent express agreement, parties are considered to have made applicable any trade usage "widely known to, and regularly observed by, parties to contracts of the type involved in the particular trade concerned." These provisions integrate the mercantile context into the interpretative process, embedding *lex mercatoria* within the CISG's normative structure. [211]

Judicial practice confirms this contextual orientation. Courts applying the CISG rely on pre-contractual correspondence, trade customs, and performance behaviour in order to ascertain the parties' shared understanding. This approach is illustrated, for example, in *CLOUT Case No 123* (Oberlandesgericht Köln, 1997), where the court relied on negotiations and subsequent conduct to determine contractual intent, and in *CLOUT Case No 303* (US District Court, Illinois, 2002), where the parties' correspondence and course of performance were treated as decisive interpretative elements.[212]

The explicit incorporation of pre-contractual negotiations and post-contractual behaviour marks a clear divergence from traditional common-law principles, such as the parol evidence rule, which typically restrict reliance on extrinsic material when interpreting written contracts.

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[210] CISG art 8(1)-(3).

[211] *Lex mercatoria* — literally "law of merchants" — refers to the body of transnational commercial customs, principles, and usages developed through international trade practice and arbitral jurisprudence. It operates as a non-state source of law guiding the interpretation and supplementation of international commercial contracts. See Berger, K.P. (2010) *The Creeping Codification of the New Lex Mercatoria*, 2nd edn. Alphen aan den Rijn: Kluwer Law International, pp. 15–18; and Goldman, B. (1964) 'Frontières du droit et "lex mercatoria"', *Archives de Philosophie du Droit*, 9, 177–192.

[212] *CLOUT Case No 123* (Germany, Oberlandesgericht Köln, 21 May 1997); *CLOUT Case No 303* (United States, District Court, Northern District of Illinois, 7 December 2002).

However, the CISG does not entirely abandon these principles: while Article 8 CISG recognises the primacy of the parties' actual intent, it also confines the proof and operation of such intent within objective limits, thereby preventing purely subjective or uncommunicated intentions from prevailing.[213]

Therefore, under the CISG, tribunals cannot rewrite the terms of the agreement based on contextual interpretation alone. In this respect, the Convention aligns with common-law practice, whereby surrounding circumstances may be considered in order to establish intent, provided that the interpretation is grounded in objective reasonableness and does not undermine contractual certainty.[214]

4.1.2. Reception and Use of the CISG in Common and Civil Law Jurisdictions

Notwithstanding its broad ratification as an international sales convention, the CISG's interpretative reception has varied significantly across legal traditions. While civil-law jurisdictions have generally embraced the Convention as a natural extension of their codified and purposive interpretative culture, many common-law jurisdictions exhibit a cautious or even exclusionary stance.

The United Kingdom, for instance, despite its central role in international commercial contracting, has still not acceded to the CISG. This continued non-ratification is often cited as reflecting a preference for the established domestic sales framework (notably the Sale of Goods Act 1979). Even in common-law jurisdictions that have ratified the CISG, practitioners frequently seek to avoid it through contractual opt-outs[215], particularly due to unfamiliarity with CISG doctrine and the perceived uncertainty of its interpretative methodology.[216]

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[213] CISG arts 8(1)–(3); Fritz Enderlein and Dietrich Maskow, *International Sales Law* (Oceana Publications 1992) 63.
[214] See s 2.4.2.3 and s 2.2.5.
[215] *CISG*, Art. 6: "The parties may exclude the application of this Convention or, subject to Article 12, derogate from or vary the effect of any of its provisions."
[216] Lisa Spagnolo, 'The Last Outpost: Automatic CISG Opt Outs, Misapplications and the Costs of Ignoring the Vienna Sales Convention for Australian Lawyers' (2009) 10 *Melbourne Journal of International Law* 141; see also

In common-law jurisdictions, scepticism towards the CISG is usually rooted in broader concerns about the way in which the Convention approaches contractual interpretation. These concerns often follow a similar pattern and can be illustrated by three main points, which help to explain both judicial hesitation and frequent decisions to opt out of the Convention.

First, the CISG's interpretative method—anchored in subjective intent (Art. 8(1)) and contextual reasoning (Arts. 8(3), 9)—is perceived as inconsistent with the common law's objective approach and evidentiary discipline. English practitioners, trained under the parol-evidence rule and the primacy of textual certainty, view the Convention's openness to negotiations and subsequent conduct as a source of unpredictability and evidential complexity.[217]

Second, common-law lawyers tend to regard the CISG as an intrusion into the autonomy of domestic precedent. Common-law adjudication is structurally shaped by the discipline of precedent, which can sit uneasily with interpretative methodologies oriented toward uniform transnational coherence.[218]

Third, the Convention's contextual methodology is often criticised for undermining the predictability prized in commercial transactions. In *Downs Investments Pty Ltd v Perwaja Steel Sdn Bhd* the Supreme Court of Queensland applied the CISG and, consistent with Article 8(3), considered the parties' negotiations and conduct as part of the relevant

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O Girard, 'Is the Law Too Complicated for Such a Popular Choice?' (2017) 6 *Manchester Review of Law, Crime and Ethics* 23, arguing that insufficient knowledge, awareness and learning costs encourage parties to exclude the CISG.

[217] CISG Advisory Council Opinion No 3, *Parol Evidence Rule, Plain Meaning Rule, Contractual Merger Clause and the CISG*; Chan Leng Sun, 'Interpreting an International Sale Contract' in Celebrating Success: 25 Years United Nations Convention on Contracts for the International Sale of Goods (SIAC/UNCITRAL Conference Papers, Singapore International Arbitration Centre 2005) 79, https://iicl.law.pace.edu/sites/default/files/bibliography/chan_leng_sun.pdf accessed 23 January 2026.

[218] Michael Bridge, 'Good Faith, the Common Law, and the CISG' (2017) 22 *Uniform Law Review* 98; Sir Michael Furmston, 'Contract Law in Commonwealth Countries: Uniformity or Divergence?' (2019) 31 *Singapore Academy of Law Journal* 170.

interpretative circumstances.[219] This broader evidentiary perspective—contrasting with the traditional common-law emphasis on textual discipline—has been identified in the literature as one factor encouraging practitioners in some common-law jurisdictions to contract out of the CISG in favour of familiar domestic interpretative techniques.[220]

It is worth pointing out, however, that even within the common-law world attitudes are evolving. In the United States, federal courts have increasingly treated the CISG as an autonomous body of sales law and emphasised the Convention's own interpretative instructions—particularly the duty to promote uniformity under Article 7—thereby supporting a more consistent and Convention-oriented methodology.[221]

4.1.3. The Civil Law Perspective: Compatibility and Endorsement

By contrast to common law traditions, civil law jurisdictions have generally perceived the CISG as an extension of their own interpretative practices.[222] The Convention's approach to the party intent, good faith, and trade usages is closely aligned with traditional civilian doctrines such as that of the *volonté commune* in French law and *Treu und Glauben* in German law.[223] Consequently, courts in countries such as Germany, France, Italy, and

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[219] United Nations Convention on Contracts for the International Sale of Goods (adopted 11 April 1980, entered into force 1 January 1988) 1489 UNTS 3 (CISG) art 8(3); *Downs Investments Pty Ltd (ACN 010 729 567) (in voluntary liquidation) (formerly known as Wanless Metal Industries Pty Ltd) v Perwaja Steel Sdn Bhd* [2000] QSC 421 (Supreme Court of Queensland, 17 November 2000).

[220] Bruno Zeller, 'The Parol Evidence Rule and the CISG – a comparative analysis' (2003) 36(3) *Comparative International Law Journal of South Africa* 308, 312–313 (discussing the common-law preference for certainty/predictability and the general exclusion of pre-contract negotiations and subsequent conduct as interpretative aids)

[221] CISG, art 7(1); see e.g. Larry A DiMatteo, Lucien Dhooge, Stephanie Greene and Virginia Maurer, 'The Interpretive Turn in International Sales Law: An Analysis of Fifteen Years of CISG Jurisprudence' (2003) 24 *Northwestern Journal of International Law & Business* 299; *Chicago Prime Packers Inc v Northam Food Trading Co* 408 F 3d 894 (7th Cir 2005).

[222] Ingeborg Schwenzer and Pascal Hachem, 'The CISG – Successes and Pitfalls' (2009) 57 *American Journal of Comparative Law* 457, 460–463.

[223] Ulrich Magnus, 'The Vienna Sales Convention (CISG) between Civil and Common Law' in Reiner Schulze and others (eds), *European Contract Law and the CISG* (Sellier 2010) 35, 38–41

Switzerland tend to treat the CISG as an appropriate interpretative framework for international sales contracts, rather than as a disruptive or foreign methodology.[224]

German courts, for instance, interpret the CISG through BGB §§133 and 157, integrating its contextual directives into domestic hermeneutics. The BGH has repeatedly confirmed that Articles 8 and 9 require consideration of the factual and commercial matrix to reconstruct the parties' true intent.[225]

French courts adopt a similarly contextual interpretative approach. Article 1188 of the *Code civil*, like Article 8 CISG, prioritises the parties' common intention over a purely literal reading of contractual language. This convergence is reflected in the jurisprudence of the Cour de cassation, which treats CISG interpretation as an exercise in reconstructing the parties' shared intent within their commercial context.[226]

Moreover, civil-law practitioners value the Convention's role in reducing transaction costs by providing a uniform and predictable contextual framework, thereby minimising the need for domestic choice-of-law disputes.[227]

Nevertheless, civil-law users also recognise limits of the CISG. Some scholars criticise the Convention's hybrid nature for introducing ambiguity when reconciling differing legal cultures and linguistic variants, which can make uniform interpretation difficult in practice. The absence of an explicit hierarchy among the factors of interpretation — text, intent and usage — can lead to divergent outcomes, even within civil-law jurisdictions. [228]

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[224] John O Honnold and Harry M Flechtner, *Uniform Law for International Sales under the 1980 United Nations Convention* (4th edn, Kluwer Law International 2009) 87–90; Franco Ferrari, 'Uniform Interpretation of the 1980 Uniform Sales Law' (1994) 24 *Georgia Journal of International and Comparative Law* 183, 200–203.
[225] BGH, 24 March 1999, NJW 1999, 3252 (CISG).
[226] Cass com, 13 December 1995, Bull civ IV No 316.
[227] UNCITRAL, HCCH and UNIDROIT, *Legal Guide to Uniform Instruments in the Area of International Commercial Contracts, with a Focus on Sales* (United Nations 2022) 6 https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/tripartiteguide.pdf accessed 26 January 2026; Gilles Cuniberti, 'Is the CISG Benefiting Anybody?' (2006) 39 *Vanderbilt Journal of Transnational Law* 1511, 1513-14.
[228] Larry A DiMatteo and André Janssen, 'Interpretive Methodologies in the Interpretation of the CISG' in Larry A DiMatteo (ed), *International Sales Law: A Global Challenge* (Cambridge University Press 2014) 79; See

These challenges, however, are generally characterised by commentators as interpretative complexities rather than structural defects of the Convention itself. Scholars acknowledge that while flexible, context-sensitive interpretation under Articles 7 and 8 may yield different results across legal systems, this openness can be managed through doctrinal tools, comparative analysis, and continued development of case law and secondary materials without undermining the CISG's fundamental aim of uniformity.[229]

4.1.4. Contextual Interpretation as a Dividing and Bridging Element

At its core, the divergent reception of the CISG reflects the wider dichotomy between formalism and contextualism which forms the basis of this thesis.

For common-law lawyers, the CISG's embrace of context appears to blur the boundary between interpretation and evidence, which could undermine the stability associated with textual certainty. By contrast, for civil-law jurists, it reflects the cooperative ethic of contracting and the integrative function of good faith within a broader contextual framework.

Paradoxically, these differences also highlight the CISG's potential to bridge the gap between the two traditions. By codifying a method of contextualism that is both disciplined and inclusive, in which subjective intent is assessed through objective standards of reasoning, the Convention invites both traditions to converge towards a shared interpretative middle ground, promoting an internationalised form of contextual reasoning

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generally Alexander S Komarov, 'Some Remarks on Article 7(1) CISG' (2005-06) *Journal of Law and Commerce* 75.

[229] Larry A DiMatteo, 'Uniform Interpretation of the CISG: Where Are We and Where Do We Go from Here?' in DiMatteo (ed), *International Sales Law* 130–32; Ingeborg Schwenzer, 'Article 7' in Ingeborg Schwenzer (ed), *Schlechtriem & Schwenzer: Commentary on the UN Convention on the International Sale of Goods (CISG)* (4th edn, Oxford University Press 2016) 8–15.

and transforming context from a domestic doctrinal feature into a transnational interpretative principle.[230]

In this sense, the CISG's mixed reception can be seen not only as resistance to harmonisation, but also as an ongoing dialogue between two interpretative cultures. While common law seeks certainty through the text of the law and civil law seeks fairness through the context, the CISG proposes a synthesis: a contextual approach designed to make the interpretation of international contracts both principled and practical.

4.2. International Arbitration

Arbitration occupies a distinctive position within transnational contract interpretation. Unlike domestic courts, arbitral tribunals are not bound by the procedural, evidentiary, or interpretative constraints of any single national legal system.

Arbitral awards benefit from near-global enforceability under the New York Convention, which obliges Contracting States to recognise and enforce foreign awards subject only to narrowly circumscribed defences.[231] This enforcement framework, combined with arbitration's institutional autonomy, enables tribunals to operate within a genuinely transnational normative space.[232]

4.2.1. The Transnational and Hybrid Character of Arbitral Interpretation

Against this background, arbitral practice — particularly within leading institutions such as the International Chamber of Commerce (ICC)[233] — has evolved into a hybrid interpretative

[230] Schwenzer, 'Article 8' in *Schlechtriem & Schwenzer* paras 1–6; DiMatteo and Janssen, 'Interpretive Methodologies' in DiMatteo (ed), *International Sales Law* 79.
[231] Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York, 1958) arts III–V; Nigel Blackaby and others, *Redfern and Hunter on International Arbitration* (7th edn, OUP 2023) 75–79.
[232] Gary B Born, *International Commercial Arbitration* (3rd edn, Kluwer Law International 2021) vol II, 2660–2663, on arbitration's detachment from national procedural and evidentiary constraints.
[233] For more on the ICC, see International Chamber of Commerce (ICC) *About the ICC*. Available at: https://iccwbo.org/about-us (Accessed: 24 October 2025).

culture that blends civil-law contextualism with the commercial pragmatism traditionally associated with common-law reasoning. Rather than adhering rigidly to domestic interpretative canons, arbitral tribunals routinely draw upon multiple legal traditions, reflecting both the international composition of tribunals and the transnational character of the disputes submitted to them.[234]

In this respect, international arbitration mirrors the functional convergence observed under the CISG. However, unlike the CISG, arbitration does not displace domestic substantive contract law. Even when disputes are resolved in a transnational forum, parties remain free to designate the governing law. Arbitration therefore internationalises dispute resolution while preserving doctrinal continuity, legal certainty, and practitioner familiarity with domestic legal regimes.[235]

4.2.2. Contextual Interpretation in International Arbitral Practice

The arbitral method typically privileges the context of the contractual relationship over rigid textualism. Tribunals often begin with the contractual wording but proceed to interpret it in light of the surrounding circumstances, the parties' intent, and the commercial purpose of the transaction.[236]

The ICC, which administers thousands of international disputes under its Arbitration Rules (the ICC Rules)[237], offers a representative reference point for contemporary arbitral reasoning.[238]

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[234] Blackaby and others, *Redfern and Hunter on International Arbitration* 3–6.
[235] Born, *International Commercial Arbitration* vol I, 88–94; *Schlechtriem & Schwenzer* 98–101.
[236] Gaillard, E. & Savage, J. (eds) (1999) *Fouchard, Gaillard, Goldman on International Commercial Arbitration*, The Hague: Kluwer Law International, p. 475.
[237] ICC (2021) ICC Rules of Arbitration (ICC Rules) https://iccwbo.org/dispute-resolution-services/arbitration/rules-of-arbitration (Accessed: 24 October 2025).
[238] *Oxford Public International Law, International Chamber of Commerce: Dispute Resolution Services (Arbitration)* (OUP) https://opil.ouplaw.com/display/10.1093/law-mpeipro/e1703.013.1703/law-mpeipro-e1703 accessed 26 January 2026; *Queen Mary University of London School of International Arbitration and White & Case LLP, International Arbitration Survey: The Path Forward: Realities and Opportunities in Arbitration* (Report, Queen Mary University of London 2025)

While the ICC Rules do not prescribe a specific methodology of contractual interpretation, they explicitly orient tribunals toward contextual evaluation by providing that the tribunal shall "decide in accordance with the terms of the contract and taking into account any relevant trade usages". This formulation simultaneously anchors interpretation in the contractual text and legitimises recourse to the broader commercial context. Consistently with this approach, arbitral tribunals generally admit negotiation history and post-contractual conduct where such material assists in identifying the parties' common intention.[239]

In ICC Award No. 7375 (1994), the tribunal held that even apparently clear contractual wording could not prevail where the parties' correspondence and subsequent conduct demonstrated a shared understanding to the contrary.[240] Similarly, in ICC Case No. 12111 (2003), , the tribunal rejected a literal interpretation that defeated the commercial purpose of the agreement, emphasising that contractual provisions must be construed in a manner consistent with the transaction's economic rationale.[241] Even where English law is chosen, tribunals tend to apply it with broader contextual latitude than domestic courts, given arbitration's transnational commercial orientation.[242]

This formulation signals a deliberate openness to extra-textual sources of meaning. Rather than treating the text as a closed system, arbitral reasoning conceives the contract as a living instrument embedded within its transactional environment. Meaning is thus derived not solely from the words used, but from the matrix of conduct, purpose, and shared expectations within which those words were negotiated and performed.[243]

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https://www.qmul.ac.uk/arbitration/media/arbitration/docs/White-Case-QMUL-2025-International-Arbitration-Survey-report.pdf accessed 26 January 2026.

[239] Born, *International Commercial Arbitration* vol II, 2785–2790, confirming the admission of extrinsic evidence and rejection of strict parol-evidence reasoning in arbitral practice.

[240] See *ICC Award No. 7375 (1994)*, *ICC International Court of Arbitration Bulletin*, Vol. 6, No. 2, pp. 64–68.

[241] ICC International Court of Arbitration (2003) *ICC Case No. 12111 (2003)*, *Journal du droit international (Clunet)* (2005) 132, pp. 151–153.

[242] Born, *International Commercial Arbitration* vol II, 2881–2882.

[243] ICC Rules Art 21 (2).

4.2.2.1. The IBA Rules on Evidence and the Management of Context

While arbitral institutions set their own procedural framework for the conduct of proceedings, the International Bar Association (IBA) has played a complementary role in harmonising evidentiary practice across these diverse systems.[244]

The IBA Rules on the Taking of Evidence in International Arbitration are among the most influential soft-law instruments in international arbitration and further institutionalise the contextual approach already characteristic of arbitral interpretation, namely an approach that privileges the parties' intent, conduct, and commercial purpose over purely literal readings of contractual text.[245]

It is worth noting that, although these Rules are not binding, they are routinely adopted or used as guidance in arbitral proceedings—particularly within institutions such as the ICC—providing a transnational benchmark for evidentiary fairness and procedural efficiency.

4.2.2.2. Methodological Restraint

This openness to context, however, is not without limits. Although arbitral tribunals do not treat the contract as a closed textual system, they also do not approach interpretation as an open-ended enquiry. Context is used to clarify the parties' agreement, not to replace the contractual framework they have chosen.[246]

In practice, arbitral interpretation takes a balanced approach. While the contractual text remains the starting point, contextual elements such as trade usages, negotiations and

[244] International Bar Association (IBA), 'About the IBA' https://www.ibanet.org/about-the-iba accessed 24 October 2025.
[245] IBA, *IBA Rules on the Taking of Evidence in International Arbitration* (2020) arts 3, 9 (2)(f).
[246] Born, *International Commercial Arbitration* ch 13

subsequent conduct are taken into account to resolve ambiguity or avoid outcomes that conflict with the commercial purpose of the transaction.[247]

In this sense, the ICC restrains the use of context by requiring tribunals to decide in accordance with the terms of the contract, while taking relevant trade usages into account, thereby structuring contextual reasoning without conferring a free-floating authority to apply external normative sources.

[247] Julian D M Lew, Loukas A Mistelis and Stefan M Kröll, *Comparative International Commercial Arbitration* (Kluwer Law International 2003) 424–426

5. CONTEXTUAL INTERPRETATION IN THE DIGITAL WORLD

5.1. Online Contracts

The rise of online contracting represents one of the most profound transformations in modern contract law. Whether through e-commerce platforms, mobile applications, or automated clickwrap and browsewrap agreements, digital contracting challenges traditional means of interpret offer, acceptance, and the manifestation of consent.

Moreover, the instant and standardised character of digital transactions increases information and power imbalances, raising doubts about whether context still matters for interpretation when a contract is formed with a simple click.

5.1.1. The Digital Context and Formation

The issues with adhesion contracts are exacerbated by online contracts, which are typically standard-form, drafted by a single party, and widely accepted without discussion.

The digital environment also presents unique difficulties. User perception and comprehension of contractual terms can be influenced, or occasionally obscured, by features like interface layout, hyperlink structures, and automated communications. As a result, courts have had to adapt the conventional notions of notice and consent to apply to online transactions, particularly when determining when a digital contract is truly formed.

In English law, contract formation still depends on the objective expression of assent, even when this happens electronically. Electronic communications are legally recognised,[248] but key question, however remains contextual: would a reasonable user have understood that clicking “I agree” meant accepting binding terms?

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[248] Electronic Communications Act 2000, s 7; Law Commission, *Electronic Commerce: Formal Requirements in Commercial Transactions* (Law Com No 322, 2001) paras 3.7–3.12.

Recent cases on online terms show continuity with older case law on notice, confirming that digital presentation does not remove the requirement to take reasonable steps to draw terms to a user's attention.[249]

In this regard, it is worth noting that the U.S. Court of Appeals held that mere availability of terms below a download button did not constitute sufficient notice.[250] English courts have adopted similar reasoning, focusing on interface clarity and pre-contractual visibility rather than mere textual existence.[251] These cases show that, although assent may be formally expressed through a simple click, courts continue to assess the surrounding digital context in order to determine whether genuine consent was present at the moment of formation.

Civil-law systems follow a similar path, but through codified rules on consent and good faith. French law expressly recognises contracts concluded electronically and focuses on whether the user had a real chance to access and review the terms before accepting.[252] German law also accepts electronic declarations of intent and adds specific information duties in online consumer contracts, especially where a payment obligation is involved.[253] In both systems, the design and structure of the digital interface play an important role in assessing whether consent was informed and freely given, in line with broader principles of *bonne foi* and *Treu und Glauben*.

In addition, the German Federal Court of Justice (*Bundesgerichtshof*) and the French *Cour de cassation* have emphasised that electronic terms must be not only accessible but also presented in a clear and intelligible manner to allow effective understanding by the user.[254]

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[249] *Parker v South Eastern Railway Co* (1877) 2 CPD 416 (CA); *Green v Petfre (Gibraltar) Ltd (t/a Betfred)* [2014] EWHC 842 (QB).
[250] *Specht v Netscape Communications Corp* 306 F3d 17 (2d Cir 2002).
[251] See eg *Parker v South Eastern Railway Co* (1877) 2 CPD 416 (CA); applied by analogy in online-terms cases such as *Green v Petfre (Gibraltar) Ltd (t/a Betfred)* [2014] EWHC 842 (QB).
[252] *Code civil* arts 1127-1 and 1127-2.
[253] BGB §§ 145 ff, 312j(3).
[254] BGH, Urteil vom 31 October 2001 – VIII ZR 60/01; Cass civ 1re, 3 July 1996, no 94-14.800.

Accordingly, the legal test for contract formation has not changed dramatically, but the focus of contextual analysis has shifted. Instead of examining a signed paper document, courts now consider screen design, visibility of terms, ease of access, and the structure of the acceptance process. In digital contracting, the interface effectively becomes the new place where contractual notice — and therefore interpretative context — is assessed.

5.1.2. Contextual Control: Transparency and Fairness

Beyond questions of formation, online contracts present interpretative challenges related to the power imbalance and opacity inherent in digital interfaces. Many platforms incorporate clauses relating to arbitration, limitation of liability or data sharing within complex hyperlinks or multi-layered screens. Such designs are increasingly being questioned by courts through the contextual principles of fairness and transparency.[255]

Under EU law, Directive 93/13/EEC on unfair terms in consumer contracts and Directive 2011/83/EU on consumer rights establish an explicit contextual test: terms must be "drafted in plain, intelligible language" and presented so that the consumer "can, before concluding the contract, know the terms."[256] These directives have been integrated into national legal frameworks[257], guiding courts to consider not only textual clarity but also the circumstances surrounding digital contracting.

The Court of Justice of the European Union has also emphasised that the assessment of unfairness requires examining "all the circumstances attending the conclusion of the contract," thereby confirming that context operates as a substantive criterion in the review of consumer contract terms.[258] This approach contrasts with the more restrained Anglo-

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[255] See eg *Content Services Ltd v Bundesarbeitskammer* (C-49/11) EU:C:2012:419; *Amazon EU Sàrl v Verbraucherzentrale NRW eV* (C-191/15) EU:C:2016:612; BGH, Urteil vom 28. Juli 2016 – I ZR 68/15; Cass civ 1re, 12 juillet 2012, no 11-18.807.
[256] Council Directive 93/13/EEC on unfair terms in consumer contracts [1993] OJ L95/29, art 5; Directive 2011/83/EU on consumer rights [2011] OJ L304/64, art 6(1).
[257] E.g. *Code de la consommation* arts L212-1 and L221-5; BGB §§ 305c(2), 307(1)–(2), and Einführungsgesetz zum Bürgerlichen Gesetzbuche (EGBGB) art 246a.
[258] *Pereničová and Perenič v SOS financ spol s r o* (C-453/10) EU:C:2012:144, para 32.

American tradition, where contextual inquiry often focuses primarily on notice and incorporation. By contrast, civil-law systems, through the integration of good faith and fairness, permit a more holistic scrutiny, encompassing the design of the digital interface and the informational imbalance between parties.

5.2. Automation and the Limits of Context

Automation and algorithmic contracting pose the most radical challenge to contextual interpretation. Smart contracts, blockchain-based agreements, and AI-driven execution systems often eliminate traditional indicators of intent and negotiation. Their code-based language, while precise, resists contextual interpretation because meaning is embedded in programming logic rather than natural language.

English courts, grounded in the objective theory, may treat such contracts as self-sufficient texts, with context confined to verifying consent and operation.[259] The UK Law Commission has observed that “the legal interpretation of smart contracts remains subject to general principles of contractual interpretation, including an objective test of intention.”[260]

Civil-law systems, by contrast, may still integrate contextual evaluation through doctrines of cause, good faith, or *ordre public*, drawing on established corrective jurisprudence where formally valid contractual mechanisms produce unfair or unintended results. Thus, the evolution of online and automated contracts illustrates the erosion of contextual reasoning as digital precision increases and interpretative flexibility declines. However, where opacity or imbalance persists, context reasserts itself as a means of achieving justice. [261]

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[259] See the objective approach to contractual interpretation reaffirmed in *RTS Flexible Systems Ltd v Molkerei Alois Müller GmbH & Co KG* [2010] UKSC 14, [2010] 1 WLR 753 [45] (Lord Clarke).
[260] Law Commission, *Smart Legal Contracts: Advice to Government* (Law Com No 386, 2021) para 3.18.
[261] Eg Cass com, 22 octobre 1996, no 93-18.632 (*Chronopost*); BGH, Urteil vom 16. Juli 2013 – VIII ZR 268/12.

6. CONCLUSION

This thesis examined the role and limits of context in contract interpretation by comparing English common law with the civil-law systems of France and Germany. The study showed that context operates in two interrelated ways: as an interpretative tool that clarifies contractual meaning, and as a normative standard through which legal systems address fairness, good faith, and imbalance.

The comparative analysis identified clear methodological differences. English law maintains a strong commitment to textual primacy and structured limits on the use of contextual evidence, admitting context mainly to clarify how a reasonable person would understand contractual language in its commercial setting. Civil-law systems, by contrast, integrate contextual evaluation more explicitly through codified doctrines of good faith and the search for the parties' common intention, allowing surrounding circumstances to play a more direct role in shaping contractual meaning.

Despite these structural differences, the analysis demonstrates functional convergence: both traditions rely on contextual reasoning to prevent interpretations that would distort the commercial purpose of the agreement.

The practical chapters confirmed that these interpretative approaches extend beyond doctrinal theory. In standard-form and adhesion contracts, context informs judicial control of imbalance and transparency, although through different mechanisms and with different degrees of intensity across legal systems. In transnational settings, instruments such as the CISG and practices in international arbitration illustrate how contextual interpretation operates across legal traditions by combining textual discipline with circumstantial evaluation, even if efforts at harmonisation continue to encounter uneven reception, particularly in some common-law jurisdictions. In digital contracting, the locus of context shifts from physical negotiation to interface design and informational structure; nevertheless, courts continue to assess consent, transparency, and fairness through contextual standards.

Taken together, these findings show that context is inherent to, rather than external to, contractual interpretation. At the same time, the study also highlights the limits of contextual reasoning. In common law, context remains constrained by the primacy of the written text, the objective standard of interpretation, and evidentiary rules that restrict the use of prior negotiations and subjective intent. In civil-law systems, although contextual evaluation is structurally embedded, it is bounded by codified frameworks, doctrinal coherence, and the need to preserve legal certainty and the binding force of the contract. In both traditions, therefore, context operates within structured legal limits rather than as an open-ended licence for judicial revision.

The comparative perspective thus suggests that the central issue is not whether context should play a role in contract interpretation, but how its use is methodologically framed and legally controlled within each system.

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