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This article is a summary of a dissertation I wrote as a Research Assistant at the Department of Private Law, University of Oslo. The dissertation was submitted in January 2007, and the content was updated as of December 2006. However, to my knowledge, there has been no proffered legal theory or decision by the Norwegian courts that would substantially affect the discussions herein.

1 THE ARTICLE IN CONTEXT

1.1 Introduction

A contractual relationship is commonly based on statements, expectations, acts and omissions out of which some will, and others will not, give rise to contractual obligations. To avoid uncertainty as to what is agreed, the contract parties often enter into a written contract that is supposed to express the final agreement between them.

When a written agreement is validly entered into, it would generally enhance certainty if the legal system ensured a literal interpretation of the wording and prevented the parties from relying on rights and obligations not set out in the written contract. However, a high level of certainty may be in conflict with substantial fairness in a specific case. The conflict between certainty and fairness in a specific case has been treated quite differently by legal systems in the past – with common law jurisdictions traditionally focusing more on certainty than civil law jurisdictions, and civil law jurisdictions having had a somewhat stronger emphasis on what the courts deem fair. The Norwegian Formation of Contracts Act 1918, s. 36, is an example of the latter.

The differences must, however, not be over-estimated. It is common ground in both civil and common law jurisdictions that a contractual relationship may be governed by additional terms not included in the written contract and that the wording is to be understood in a different manner than what the words literally express. This fact is in many ways evidenced by the type of clause considered in this article, the aim of which is to determine exactly what is agreed to and to rule out any claim based on alleged collateral warranties. An entire agreement clause may read as follows:

“The Contract contains the entire contract and understanding between the parties hereto and supersedes all prior negotiations, representations, undertakings and agreements on any subject matter of the Contract.”

2 Article XVIII of Standard Form Norwegian Shipbuilding Contract 2000.
1.2 Entire agreement clauses

An entire agreement clause (also named “integration clause”, “entire contract clause”, “merger clause” and “whole agreement clause”) is described in Black’s Law Dictionary as “[a] contractual provision stating that the contract represents the parties’ complete and final agreement and supersedes all informal understandings and oral agreements relating to the subject matter of the contract.” This type of clause is an example of a so-called “boilerplate” clause – a contract provision that may be included in a variety of commercial contracts not depending on a particular subject-matter. The use of boilerplate clauses is extensive in commercial practice, and they often appear at the end of contracts under the heading “miscellaneous”. One may sometimes suspect that they have been included more out of custom than from serious contemplation.3

Entire agreement clauses appear primarily in two versions, one simply stating that the contract constitutes the entire agreement, and the other also providing that no other statement or representation has been relied upon by either party when entering into the contract. The former, hereafter referred to as the “entire agreement clause simpliciter”, merely regulates the content and possibly also the interpretation of the contract; while the latter, hereafter referred to as an “acknowledgement of non-reliance”, even seeks to prevent liability for misrepresentation (a false statement inducing the other party to enter into contract)4.

Because of the potential exclusion of tortious liability for misrepresentation, the acknowledgement of non-reliance is generally considered more controversial than an entire agreement clause simpliciter. The courts have thus held that the wording must be sufficiently clear for such a clause to give rise to the intended legal effects.5 When it comes to enforceability, it is a matter of “notorious uncertainty” whether section 3 of the Misrepresentation Act 1967 applies, making the clause unenforceable as a prohibited exclusion of liability for misrepresentations in situations where it does not pass the test of reasonableness as set out in the Unfair Contract Terms Act 1977.6

1.3 Scope of article

The English regime on misrepresentations is part of tort and statutory7 law, as opposed to the law of contracts. To discuss both entire agreement clauses simpliciter and acknowledgements of non-reliance in this article would require detailed studies of liability in tort, statute and contract, and such a task would be too comprehensive considering the time available.

3 See Wood, p. 407, quoting a letter from a lawyer to his client in which the former asks the latter to review a draft contract. The lawyer’s comment to section 14 (“boilerplate”) is: “You can mostly skip this part, Al, since it’s the boilerplate”).
4 The nature of misrepresentation will be discussed in section 2.3 below.
5 Thomas Witter Ltd v TBP Industries Ltd [1996], All ER 573.
6 “[T]he law is in a bit of a mess on this issue”, cf. Peel, Standard Terms, p. 44.
7 Misrepresentation Act 1967
Since not all entire agreement clauses contain an acknowledgement of non-reliance, I will focus on entire agreement clauses simpliciter for the moment. When I use the term “entire agreement clause” in the following, it is to be understood as entire agreement clause simpliciter.

1.4 Anglo-American Contract Models Project

The dissertation of which this article is a summary is a part of the project “Anglo-American Contract Models”, organised through the Law Faculty’s Department of Private Law, University of Oslo. The aim of the project is to analyse the legal effects of contract models originating from common law systems when they are used in contracts governed by civil law jurisdictions. To avoid too many generalisations this article focuses on Norwegian and English law, the latter being preferred to American law because of the English contract law experts participating in the project.8

In accordance with the premises of the project, the article focuses on EA-clauses appearing in individually negotiated commercial agreements. Thus, consumer regulations and standard terms are outside the scope. For the discussion of Norwegian law, it is presupposed that the parties have the level of knowledge of English contract law as may be considered normal for a Norwegian legal professional.

1.5 Placing the EA-clause in a contractual context

Before considering the legal effects of EA-clauses, and before considering the differences of such under English and Norwegian law, it is necessary to analyse two basic features of such contract provisions: what they mean, and whether it is possible for a contract to constitute the entire agreement.

What does it mean that the contract constitutes the entire agreement?

The UNIDROIT Principles art 2.1.17 regarding EA-clauses operate with a distinction between the determination of the terms of the contract and their subsequent interpretation - with the consequence that, even though the writing of the contract contains all the terms of the agreement, other statements or agreements may be used “to interpret the writing”. A similar principle is set out in PECL art. 2:105(1), cf. (3), even though these rules allow for the preclusion of pre-contractual statements even for interpretative purposes when expressly stated. However, it follows from the provision that something more than an ordinary EA-clause is required to achieve this effect. The distinction between determination of terms and interpretation has also been suggested in legal theory.9

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8 Edwin Peel (Fellow and Tutor in Law, Keble College, University of Oxford) and Jim Percival (British Nuclear Fuels)
The distinction between determination of terms and their interpretation seems sensible as a tool for explaining the effects of EA-clauses superficially, but by relying on the characterisation of a question as either interpretative or substantive one runs the risk of unjustified generalisation. For, whereas the parol evidence rule, which operates under English law, has required this distinction and characterisation for a long time (by limiting the ability to submit evidence that contradicts or adds to the wording), the same cannot be said of Norwegian law. As a consequence, the Norwegian concept of interpretation may vary from that under English law. There is no inherent logic in using the same terminology to describe legal effects under two legal systems if the same terminology is understood differently in the two.

Even if one accepted the distinction between interpretation and determination of terms as a framework to describe the legal effects of EA-clauses, it is hard to see what is gained. The difficulty will still be to determine when one goes from the interpretation of ambiguous statements over to supplementing or contradicting a statement that is considered sufficiently clear. As will be shown in the following, the Norwegian courts have on several occasions claimed to “interpret” contracts in a way that would clearly be seen as contradicting or supplementing the wording under English law.

One further argument against applying the above-mentioned distinction is that its significance is disputed in relation to EA-clauses. The CISG Advisory Council, opposed to having legal effects determined by the distinction between interpretation and determination of terms, has thus stated that an EA-clause has two objectives: Firstly, “to bar extrinsic evidence that would otherwise supplement or contradict the writing” and, secondly, “to prevent recourse to extrinsic evidence for the purpose of contract interpretation”.

It seems that the distinction between determination of terms and interpretation does not get us any further in analysing the effects of EA-clauses, other than perhaps to illustrate certain points. Rather, this analysis should start with the basic approach that, because the EA-clause sets out the contract as an exhaustive regulation, one must ask the following question: Is the relevant term substantiated by the contract document itself? An answer to this question requires a more complex process than simply to ask whether the solution is a result of “interpretation”, as understood under Norwegian law.

Can a contract constitute the entire agreement?
When the contract provides a clear solution to a question, either by unambiguous wording or by the wording giving rise to an obvious deduction as to the parties’ intentions, the contract may constitute the entire agreement – the contract itself is sufficient for solving the relevant question.

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10 CISG AC Opinion no. 3, section 4.1.
11 Under Norwegian administrative and criminal law, there is a similar consideration in the so-called principle of legality (“legalitetsprinsippet”) by which the actions of the authorities are to be governed by law or administrative regulations laid down in accordance with law.
However, independent of jurisdiction and notwithstanding how detailed the contract is, a situation may arise that is not solved by the contract. An example would be a situation in which it is clear from the contract that one party is obliged to pay damages, but the measure of such damages seems to be uncertain. In such situations, it is a matter of some difficulty to claim that the contract is exhaustive unless one is willing to accept some form of randomness.\textsuperscript{12} To enforce the EA-clause in such situations may thus be a matter of notorious difficulty. This is discussed in more detail in section 4.2 below.

\textsuperscript{12} Høgberg, p. 57.
2 ENGLISH LAW OF CONTRACTS

2.1 Introduction
Because the EA-clause seeks to preclude evidence that is extrinsic to the contract, it is necessary for evaluating its effects initially to analyse the admissibility of such evidence without contract regulation. Thus, this section starts by providing an overview of relevant aspects of contract interpretation under English law (section 2.2). Secondly, the distinction between pre-contractual statements as contract terms and such statements as misrepresentations making the contract void will be discussed in section 2.3. Finally, the legal effects of EA-clauses are discussed in section 2.4.

2.2 Interpretation of contracts under English law.

*The distinction between “determination of terms” and subsequent interpretation*

Under English law, “interpretation” appears as a narrower concept than under Norwegian law and has traditionally been an exercise of determining the literal meaning of the words used.

English law distinguishes between determining the terms of the contract (what has been said or written) and the interpretation of such (what was meant). As to the first issue, which is considered as evidentiary, it is a fundamental question whether the parties intended the contract to be wholly in writing (such intention is objectively, not subjectively, ascertained). The reason is that the parol evidence rule prevents extrinsic evidence from being used to “add to, vary or contradict” the terms of a written contract, provided that the parties intended the writing to comprise their entire agreement.\(^{13}\) Thus, if the parties so intended, the importance of determining the terms of the written contract is obvious; evidence of other terms cannot be submitted to the courts. As a consequence, the parol evidence rule forces the judge to establish the terms before he interprets the contract. In jurisdictions without such a rule, the exercise of determining terms as a separate process is unnecessary because one may take any kind of evidence into consideration to contradict them. Taking a formal approach, it would not matter in such a system which are the terms of the written contract and which are extrinsic terms.

As shown above in this section, the operation of the parol evidence rule depends on the parties’ intentions. The EA-clause may be seen as an attempt to clarify this matter and thereby the rule’s application by providing that the contract constitutes the entire agreement. The terms of the contract are thus to be found within the “four corners” of the

\(^{13}\) See section 2.3 below
document and, in this respect, the clause ensures the application of the parol evidence rule. However, as discussed below, the parol evidence rule is now subject to “a large number of exceptions”, the application of some of which may be prevented by an EA-clause.

**Recent development within contract interpretation**

The object of contract interpretation under English law is to ascertain objectively the mutual intention of the parties as to the legal obligations each assumed by the contractual words in which they sought to express them. Thus the question is not what the parties’ subjective intentions were, but what would have been the intention of reasonable persons if placed in the same context as the parties at the time of entry into contract. This “context” may be described as the “the matrix of facts” or the background of the contract.

Words shall be given their “natural and ordinary meaning” provided that the background does not indicate that something has gone wrong with the wording. The “natural and ordinary meaning” is to be determined in much the same way as that in which any serious utterance would be interpreted in ordinary life (common sense principles). This approach may be called “contextualism” as opposed to the older approach of “literalism”.

In accordance with this development, described by Lord Hoffman in *Investors Compensation Scheme Ltd v West Bromwich Building Society*, the courts have shown an increasing willingness to interpret contracts pursuant to what is considered to be a commercially sensible construction. It may be a fine distinction between such interpretation and what can more realistically be called contradiction, and opinions among judges seem to differ on the matter. The rationale is the assumption that sensible business men would not freely undertake an obligation that appears to be sufficiently unreasonable. Such assumptions are not necessarily based on pre-contractual statements, but rather on the contract itself – thus it may be argued that such an interpretation should not be affected by an EA-clause. The recognition of assumptions concerning what the parties cannot have meant is particularly interesting in relation to Norwegian law, as this is one of the most common reasons for Norwegian judges to make an interpretation contradictory to the wording of the contract.

English judges are, however, still reserved when it comes to deviating from the plain meaning of the wording and, to avoid giving a misleading picture of English interpretation principles, reference may be made to Justice Park in *Breadner v Granville-Grossman*: “[a]lthough I appreciate that the modern approach to construction of a legal document has

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14 Anson, p. 132
15 Lewis p 18-19, *Pioneer Shipping Ltd v BTP Tioxide Ltd* [1982] AC 724
16 Prenn v Simmonds [1971], 1 W.L.R. 1381 p 1384
17 Lewis p 19, *Reardon-Smith Line Ltd v Hansen-Tangen* [1976] 1 WLR 989
18 Ibid.
19 [1998] 1 WLR 898
20 McKendrick, p. 420.
loosened to quite some degree from a formal syntactical approach ... it remains the case that the starting point, and usually the finishing point as well, is to identify the natural and ordinary meaning of the words which the draftsman has used.”

Rectification

English law operates with yet another distinction between interpretation and rectification. While the former seeks to determine the meaning of the words used, the latter makes it possible under certain circumstances to amend the wording if it is a mistaken expression of the agreement between the parties. Thus, rectification may be considered mainly as an evidentiary issue and not a matter of interpretation. A classic example is two parties who have orally agreed on a monthly rent of £200 but, by mistake, write £100 in the contract. Provided that it is proved that both parties intended the amount to be £200, the contract may be rectified.

Rectification is founded on equity, as opposed to common law and, because the parol evidence rule only applies within the common law, extrinsic evidence, including statements of subjective intent, is accepted by the courts to justify rectification. However, the courts have been very restrictive in their approach to rectification. Possible effects of EA-clauses on rectification are discussed below under section 2.4.

Express and implied terms

Because a contract normally will not be apt to cover all future situations, a doctrine of “implied terms” – terms of the contract which are not expressly stated – has been elaborated. Under English law, such terms have traditionally been deduced from the intention of the parties. However, it is now recognised that the connection to such intentions is pure fiction in some situations because the parties have plainly never thought of the matter.

Terms may be implied by statute, custom or by the courts as an operation of law. Within the latter category, there is a distinction between terms “implied in fact” based on the presumed intention of the parties and terms “implied in law”, which are based on case law in which similar terms have been implied in similar situations. While terms implied in fact are only implied when necessary to achieve business efficacy to the contract, the courts are somewhat less restrictive when it comes to terms implied in law.

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22 It should though be taken into account that the recent development within contract interpretation from literalism to contextualism may entail that the borders are more unclear than before, cf. McKendrick, p. 647.
24 Lord Steyn, p. 441-442.
The parol evidence rule

Because the parol evidence rule only applies if the parties intended the contract to comprise all the contract terms, an entire agreement clause has a function in ensuring that the parol evidence rule applies unabridged to the contract. To understand the function and aim of an EA-clause, it is therefore a prerequisite to have knowledge of this rule.

The parol evidence rule may be considered as a rule of evidentiary law with the substantive consequence that the contract is given effect as the final expression of the agreement between the parties. The purpose of the rule is to promote certainty, sometimes even at the expense of justice, and to uphold the value of written proof. It is sometimes alleged that it serves the purpose of saving expenses in litigation. EA-clauses arise from exactly the same purposes.

In the decision in Jacobs v Batavia and General Plantations Ltd, Judge P.O. Lawrence stated the parol evidence rule as “a rule of law that parol evidence cannot be admitted to add to, vary or contradict a deed or other written instrument.” Despite the name, the operation of the rule is not confined to oral evidence but to all evidence extrinsic to the “written instrument”. Because the “rule” is subject to many exceptions and because its application depends on the intention of the parties to comprise their entire agreement in the written contract, it has been questioned whether the “rule” actually is a rule of law or, rather, a consequence of the intention of the parties.

When determining the admissibility of extrinsic evidence, there are two issues involved. Firstly, whether it is permissible to adduce extrinsic evidence of other terms than those included in the written document and, secondly, whether extrinsic evidence may be adduced to interpret or explain the words used. The first issue is undoubtedly within the scope of the parol evidence rule, but views differ when it comes to the second.

As for contract interpretation, a distinction has traditionally been maintained between clear and unequivocal wording, on the one hand, and wording that is ambiguous or makes no sense, on the other. When the wording is ambiguous, extrinsic evidence has long been deemed admissible by the courts as an aid for interpretation, but when the wording is clear, the traditional approach has been that extrinsic evidence cannot be used to explain its

27 Chitty 12-096, Poole, p. 167
28 Cf. Treitel, p. 194
29 Chitty 12-096
30 Jacobs v Batavia and General Plantations Ltd [1924] 1 Ch. 287
31 Chitty 12-096
33 Chitty 12-095
34 McKendrick, p.335, Treitel p. 192, Chitty, 12-096, Anson p 132
35 Chitty, 12-117. See also the considerations made by the Law Commission (cf. footnote 32) in para. 1.2
36 Treitel, p 197
37 Shore v Wilson (1842)
meaning. This point of view may be seen as a corollary to the main rule stated above; when the words are clear, evidence that seeks to attach to them another meaning may be said to contradict them. On the other hand, this proposition depends on who considers the wording as “clear”. In the context of the factual circumstances that were known to the parties when entering into the contract, one meaning of the wording may have appeared as “clear” to them (and any other reasonable person placed in the same context), while the judges may deem another meaning as “clear” when a dispute comes before the courts. Therefore, it is now recognised that the court must place itself in the same “matrix of fact” as that in which the parties were placed when entering into contract,38 and “the words do not have to be vague, ambiguous or otherwise uncertain before extrinsic evidence will be admitted”.39

The modern English approach to contract interpretation was summed up by Lord Hoffman in the Investors Compensation Scheme40 case, where he suggested that, since interpretation is the ascertainment of the meaning that the document would convey to a reasonable person having all the knowledge that would reasonably be available in the situation in which the parties were placed when entering into contract, the evidence of the background must be admissible when interpreting the contract. And as he later states in the same judgment: “The background may not merely enable the reasonable man to choose between the possible meanings of words which are ambiguous but even (as occasionally happens in ordinary life) to conclude that the parties must, for whatever reason, have used the wrong wording or syntax”. The background being “absolutely anything ... relevant” that would have “affected the way in which the language of the document would have been understood by a reasonable man”,41 it is difficult to see how the parol evidence rule can have any material impact on the interpretation of contracts.42

The parol evidence rule has become subject to numerous exceptions during the last two centuries, the most important being that extrinsic evidence can be admitted to prove that the parties did not intend the contract to comprise their entire agreement and – as a corollary – that extrinsic evidence may be admitted to substantiate the existence of a collateral contract. A collateral contract is a separate agreement that “neither alters nor adds to the written one, but is an independent agreement”.43 It is recognised in legal theory that the doctrine of collateral contracts followed from the potential harsh outcomes of the parol evidence rule.44 In City and Westminster Properties v Mudd, a lease contained a provision that the lessee should only use the premises for business purposes and not for lodging.45 The lessee balked at the provision, whereupon the lessor assured the lessee that he would

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38 Prenn v Simmonds [1971] 1 W.L.R. 1381, p. 1384
39 Chitty 12-118
40 Investors Compensation Scheme Ltd v West Bromwich Building Society[1998] 1 WLR 896
41 Bank of Credit & Commerce International v Ali[2001], 1 AC 251, para 39
42 However, there is a related rule which precludes recourse to self-serving statements of subjective content like extrinsic evidence of negotiations, preliminary contract drafts and subsequent behaviour, cf. Chitty 12-119, Poole, p 167, Lewison p 89.
44 Chitty 12-004.
45 City and Westminster Properties v Mudd [1959] Ch. 129
not enforce it. This promise was considered as a collateral (oral) contract operating on the side of the main lease, and thus the lessor was bound by his statement.

2.3 The distinction between terms and (mis)representations

Even though acknowledgements of non-reliance are not considered in this article, it is necessary to give an overview of the impact of the doctrine of misrepresentations under English law in order to understand the legal effects of an EA-clause. The relation between terms and misrepresentations is placed in an interesting context for our topic in *Inntrepreneur Pub Co Ltd v East Crown Ltd*: “An entire agreement provision does not preclude a claim in misrepresentation, for the denial of contractual force to a statement cannot affect the status of the statement as a misrepresentation”.46

It is submitted that pre-contractual statements have a far more significant role as a basis for rendering contracts void under English law than under Norwegian law, particularly in practice but also in judicial theory. As EA-clauses *simpliciter* do not affect liability for misrepresentations, the extent to which this legal basis is applied affects the practical significance of EA-clauses. Liability for misrepresentations can be tortious and statutory, and must be distinguished from contractual liability.47

Traditionally, a misrepresentation was a false statement of fact48 that was sufficiently clear and induced another party to enter into a contract.49 Recent developments open up statements of law as constituting a misrepresentation.50 A contract term may constitute both a term and a misrepresentation. However, as opposed to terms, contractual intention is not required for a statement to constitute a misrepresentation. Misrepresentations are most often statements from the pre-contractual phase that have not been included in the contract.

The legal effects of a misrepresentation are that the contract may be rescinded and, depending on whether there is an innocent, negligent or fraudulent misrepresentation, an obligation to pay damages.51 When it comes to damages, the measure is different for misrepresentations compared to contractual liability: While damages in contract seek to place the claimant in a position as if the statement were true, damages for misrepresentations seek to place the claimant in the position as if the statement had never been made.

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47 See Misrepresentation Act 1967
48 Treitel p. 335, McKendrick p. 659.
50 *Kleinwort Benson Ltd v Lincoln City Council* [1999] 2 AC 349 and *Brennan v Bolt Burden* [2004] EWCA Civ 1017.
51 The Misrepresentation Act 1967 (only applicable if the misrepresenter is a party to the contract) significantly lowered the hurdles for claiming damages for misrepresentations, cf. s. 2(1), by allowing compensation for an innocent misrepresentation as if it was made fraudulently. The rule has been severely criticized in judicial theory.
It is submitted that the doctrine of misrepresentation can be seen as “softening” the potential harsh effects arising from the contractual rules that render evidence of additional or contradictory terms inadmissible. As EA-clauses *simpliciter* do not purport to restrict liability for misrepresentations, it is important that their effects are considered in the context of this doctrine.

2.4 Legal effects of EA-clauses under English law

*The parol evidence rule applies*\(^52\)

The modern practice of inserting EA-clauses may be seen as a “reaction to the relaxation of the parol evidence rule” and their purpose has been stated as “to shut out evidence that the parol evidence rule would probably have excluded in the past”.\(^53\)

In the case of *McGrath v Shah*\(^54\) in 1987, it was held that an entire agreement clause made an “insuperable hurdle” to an allegation that the written contract did not contain all the terms of the contract.\(^55\) Consequently, the clause ensures the applicability of the parol evidence rule. Today, this effect of the clause seems to be so obvious that it is neither raised before the courts nor particularly discussed in theory.

*Does the clause have any impact on the admissibility of extrinsic evidence for the purpose of interpretation?*

It was stated above that the parol evidence rule has little impact on interpretation. However, despite the close connection between EA-clauses and the parol evidence rule, it is a matter of some uncertainty whether such clauses have an impact on interpretation. In *The Rugby Group Ltd v. Proforce Recruit Ltd* it was held by the High Court that the clause made pre-contractual statements inadmissible as evidence even for the purpose of interpretation.\(^56\) However, the exclusion of the evidence was appealed to the Court of Appeal, which reversed the exclusion: “There is a reasonably arguable distinction between, on the one hand, ascertaining the contents of a written contract or setting up a collateral or side contract by reference to prior representations, agreements, negotiations and understandings and, on the other hand, ascertaining the meaning of a term contained in a written contract by reference to pre-contract materials. It is reasonably arguable that in clause 9.2 [the EA-clause – author’s comment] the parties intended to exclude the former, but not to inhibit the latter”.\(^57\)

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\(^{52}\) See Adlercreutz, festskrift til Jan Ramberg, p. 23.
\(^{53}\) Cf. McKendrick pp. 340 and 441.
\(^{56}\) *The Rugby Group Limited v. Proforce Recruit Limited* [2005] WL 62287, para. 22 (High Court).
\(^{57}\) *The Rugby Group Limited v. Proforce Recruit Limited* [2006] WL 2794075, paras. 41 and 59 (Court of Appeal).
The Court of Appeal has thus stated that it is “reasonably arguable” that the EA-clause does not have any impact on “ascertaining the meaning of a term”. On the other hand, it may be argued that since interpretation seems to be increasingly contextual, cf Investors Compensation Scheme, with potential to lead to results remote to the wording, EA-clauses should have some effects also on interpretation. Thus, it could be argued that the more liberal the view one has on interpretation, the more questionable it would be to render the EA-clause without any impact on this process. However, after the Court of Appeal’s decision in the Rugby Group v. Proforce Recruit case, a heavy burden seems to be laid on the one claiming that an EA-clause also applies for the purpose of interpretation.

Collateral contracts
In the above-mentioned case of McGrath v Shah, it was held that an EA-clause would not be sufficient to prevent the allegation of a collateral contract. However, the courts’ view of these clauses has changed over the last twenty years, and after two recent cases, the point of view in McGrath v Shah can no longer be upheld. Thus the wording “entire agreement” is sufficient to preclude alleged collateral agreements from the having legal effect.

Does an EA-clause have any impact on rectification?
In JJ Huber (Investments) Ltd v Private DIY Co Ltd, an inexperienced solicitor had forgotten to insert a provision in a lease that would have obligated the lessee to pay interest. When the lessor claimed rectification, the lessee asserted the EA-clause. The judge alleged that an EA-clause governed the question of the sources on which the terms of the contract must be based but that it had no impact on rectification. This seems to be in line with the parol evidence rule not having any impact on rectification and that rectification is based on the more flexible principles of equity and not common law.

Implied terms
Yet to be discussed is whether an entire agreement clause may be interpreted so that it prevents terms from being implied in the contract. This is a complex question because implied terms can be hard to put into the two categories of interpretation and determination of the content of the contract. Because the EA-clause will presumably have minor impact
on contract interpretation, it may be argued that implied terms following from the interpretation of the contract as a whole will not be excluded by such a provision.

For the discussion below, I distinguish between terms implied by statute or custom, on the one hand, and terms implied to achieve business efficacy, on the other. The distinction is suggested in The Helene Knutsen\(^63\) case, with the rationale that terms implied to achieve business efficacy may be seen as already existing within the contract because of the strong presumption that the parties have intended their agreement to become effective. If the EA-clause was held to prevent the implication of such terms, the insertion of an EA-clause must be seen as an expression of an intention for the contract to regulate all imaginable and unimaginable future scenarios. Most commercial persons are aware that such contract regulation is neither possible nor desirable, and it should therefore not be assumed that they have had such intentions with an EA-clause.

Terms implied by statute or custom will presumably have a more distant relation to the intention of the parties, and it has been\(^64\) held that an EA-clause was able to prevent the implication of such terms. The relevant EA-clause contained an express reference to terms implied by custom being superseded by the contract. There is in my opinion no reason why a reference to statutory law should be treated differently (provided that such law is not mandatory).

Under American law, the UCC § 1-304 contains a general obligation to fulfil and enforce an agreement in accordance with good faith: “Every contract or duty within [the Uniform Commercial Code] imposes an obligation of good faith in its performance and enforcement”. It seems to be a matter of common consent that an EA-clause cannot eliminate an obligation to perform in good faith because “[p]olicy considerations of good faith and fair dealing trump even the most restrictively drafted merger clause”\(^65\). This is interesting in relation to Norwegian law, as Norwegian law has the same mandatory principle of performance in accordance with good faith.

2.5 Do entire agreement clauses have conclusive or only persuasive effect?

Whether the contract is meant to be wholly in writing and whether there exists a collateral contract depends on the mutual intention of the parties. An entire agreement clause indicates the parties’ intentions regarding these questions, so that evidence of collateral contracts and extrinsic terms are not admitted. However, in practical life, it happens that the written agreement does not fully correspond to the intention of the parties. Thus, if an entire agreement clause, despite its clear wording, was not intended to exclude allegations of, e.g., a collateral warranty, the question arises whether the courts in this situation will

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\(^63\) Exxonmobil Sales & Supply Corp v Texaco Ltd [2003] 2 Lloyd's Rep. 686 p 690-691, para 27 (the Helene Knutsen)

\(^64\) Exxonmobil Sales & Supply Corp v Texaco Ltd [2003] 2 Lloyd's Rep 686.

\(^65\) Alle-Murphy p. 150 -151 (under reference to Farnsworth). See also Amoco Oil Co. v. Ervin 908 P.2d 493, s. 499 (Supreme Court of Colorado,1995): “The merger and integration clauses do not permit Amoco to breach the implied covenant of good faith and fair dealing”.

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preclude evidence of such terms as a result of the EA-clause. This question may also be formulated as whether the EA-clause has a conclusive rather than a persuasive effect.\textsuperscript{66}

The Law Commission concluded that such a clause only has “\textit{a very strong persuasive effect}”.\textsuperscript{67} This point of view has been questioned in legal theory in accordance with what may be seen as the “benevolent” approach now taken by the courts in the meeting with EA-clauses.\textsuperscript{68} However, a claim that EA-clauses have more than a strong persuasive effect is hard to accept as a matter of principle. Like all other clauses, such provisions have to be interpreted. And after the \textit{Investors Compensation Scheme} case, it has been held that even clear wording may be contradicted on the ground that the relevant background indicates that the parties used the wrong wording.\textsuperscript{69} Thus, it is submitted that the mere existence of a certain type of clause is incapable of formally having more than a (very) strong persuasive effect. Evidence relevant for showing the intention behind the EA-clause cannot be precluded by the clause itself.

2.6 Waiving the entire agreement clause

In \textit{SAM Business Systems Limited v. Hedley and Company},\textsuperscript{70} it was held that the entire agreement clause had been waived by SAM, the party that could otherwise have relied on the clause.\textsuperscript{71} SAM had treated post-contractual conversations and letters that clearly indicated the claimant’s comprehension of the agreement “\textit{as incorporated into the contract}”. This was seen as a waiver of a subsequent allegation that the EA-clause precluded such an understanding.

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\textsuperscript{67} Para 2.15
\textsuperscript{68} McKendrick p 340. \textit{Watford Electronics Ltd v Sanderson CFL Ltd} [2002] FSR 19, \textit{White v Bristol Rugby Ltd} [2002], IRLR 204 (QBD (Merc. Ct.)), \textit{Cheverny Consulting Ltd v Whitehead Mann Ltd} [2005] EWHC 2431 (Ch)
\textsuperscript{69} This is an objective exercise, as opposed to rectification when declarations of subjective intent are taken into consideration.
\textsuperscript{70} \textit{SAM Business Systems Limited v. Hedley and Company} [2003], All ER (Comm) 465, Chitty 12-104.
\textsuperscript{71} See Chitty 12-104
3 A COMPARATIVE VIEW OF NORWEGIAN LAW

3.1 Introduction
Before discussing the EA-clause in relation to Norwegian law under section 4, some areas of distinctive differences between English and Norwegian law are considered in this section. These are (i) the distinction between substantive and evidentiary law (section 3.2), (ii) the principle of freedom of contract (section 3.3) and (iii) the legal effects of wrongful statements from the pre-contractual phase (section 3.4).

3.2 The distinction between substantive and evidentiary law
It was addressed in the previous section that EA-clauses are closely connected to the parol evidence rule and that this rule may be seen as a basis for exclusion of evidence. Legal theory has also discussed whether EA-clauses may found a basis for exclusion of certain kinds of evidence under Norwegian law.72 This latter discussion seems mainly to have arisen from an awareness of the debate at common law, and it is submitted that the difference in underlying principles makes the approach less important under Norwegian law.

In English law, the distinction between substantive and procedural law is drawn differently than under Norwegian law, with several issues addressed as procedural that Norwegian law addresses as substantive. The parol evidence rule is only one example. Another is prescription of rights (substantial under Norwegian law, procedural in the English regime).73 The result may be the same in both systems, but the way of getting there is different. Thus, the procedural effects of EA-clauses at common law cannot be automatically transferred to Norwegian law.

It is crucial to note that the clause itself does not have any express reference to procedural effects and that this seems to follow from the legal system in which the contract operates rather than from the particular clause. Norwegian law operates with stringent rules as to the exclusion of evidence, and the possibility for a judge to render evidence inadmissible because of irrelevance is extremely narrow.74 The only realistic legal foundation on which the exclusion of evidence could be based, therefore, seems to be the intention of the parties.75 But without express reference as to such effects and taking into consideration the fact that procedural effects of contract interpretation clauses are unfamiliar to Norwegian

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72 Gran p. 21 etc. For Danish law, see Bryde Andersen p. 344.
73 Chitty 28-116.
74 Cf. Civil Procedure Act 1915 s. 189(1)(1).
75 See Civil Procedure Act 1915 s. 190(2).
jurists, such effects are unlikely to have been intended. An example illustrating that procedural effects of interpretation clauses are foreign to Norwegian law is the practice concerning the Norwegian Standard Building Contract, NS 8405, section 3.2. This provision states that, if there is a conflict between the contract and, amongst other sources, pre-contractual statements, the contract shall supersede. Such regulation has obvious similarities to the regulation set forth in an EA-clause, but neither case law nor legal theory has even considered a procedural effect of such regulation.\(^{76}\)

EA-clauses do not have procedural effects under Norwegian law.

3.3 Freedom of contract and emphasizing predictability

Freedom of contract and certainty are imperative for commercial life. Since London has been a financial capital for centuries, it is not surprising that English law has served these purposes to a large extent. Traditionally, Norwegian law has placed greater emphasis on good faith principles and loyalty between contracting parties. While the English regime, with the existence of the parol evidence rule, would traditionally lead the judge to a predictable result based on the wording of the contract, Norwegian law would allow a certain room for a reasonable solution in the particular case based on good faith principles.

However, with respect to commercial relations, there has been a recent development in Norwegian law that puts a heavy burden of proof on a professional party who seeks a solution that is in contradiction with contractual wording.\(^{77}\) It may thus be argued that Norwegian contract law also places great emphasis on freedom of contract and predictability for commercial relations between professional parties.

3.4 Legal effects of false statements under Norwegian and English law

The discussion above in section 2.3 has shown that far from all pre-contractual statements may be regarded as contractual terms under English law. Rather, such statements more commonly constitute misrepresentations and thus a foundation on which to contest the contract’s validity. As a consequence, the question of validity arises far more often under English law than under Norwegian law.

Under Norwegian law, it is often discussed whether a false pre-contractual statement constitutes a contractual breach but only rarely whether the same statement affects the validity of the contract. The reason is that the Norwegian regime has less stringent requirements for when a statement has become a term – as a starting point, all statements of a certain importance uttered under negotiations may be considered as a term to the contract. As a consequence, the same statement may be a contractual term under Norwegian law,

\(^{76}\) The former standard, NS 3430, had a similar regulation in section 4.2., which was considered in case law (see, e.g., LG-2004-43696, LG-2003-04187, LB-2003-10650, LB-2001-04037).

while it will only be a representation under English law. Thus, in the latter regime, the concept of misrepresentations will be of greater importance in practice.

A logical consequence from the fact that Norwegian law acknowledges more statements as contractual terms, is that the range of statements potentially excluded by an EA-clause is greater than under English law.

3.5 Broad concept of interpretation in Norwegian law

As discussed above, EA-clauses seem to have only minor, if any, impact on contract interpretation under English law. Since interpretation is understood as a broader concept under Norwegian law, it should be investigated whether this difference in judicial approach affects the legal effects of EA-clauses. As already mentioned in the previous subsection, the Norwegian regime does not distinguish determination of terms from interpretation with the same apparent clarity as English law. This difference in approach is important to keep in mind when considering whether arguments from English law should have any relevance for Norwegian law.

It is sometimes suggested that an EA-clause determines the terms of the contract but does not have any impact on interpretation. The UNIDROIT Principles, art. 2.1.17, and the equivalent in PECL 2:105 thus provide that, in the presence of an EA-clause, the terms of the contract are not to be supplemented or contradicted by pre-contractual statements. At the same time, it is provided that such statements “may be used to interpret the writing”. Because the same principles, as a result of interpretation, accept solutions that appear to be contradictory or supplementary to the wording, the effect of the regulation on EA-clauses appears to be somewhat unclear. The difficulty that remains is described by Farnsworth in relation to American law: ”[W]here does “interpretation” end and “contradiction” or “addition” begin?”

It is submitted that, if an EA-clause does not have any impact on contract interpretation under Norwegian law or under PECL and the UNIDROIT Principles, the effects of such regulation may be restricted.

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78 Farnsworth II, p 315.
4 EA-CLAUSES IN CONTRACTS GOVERNED BY NORWEGIAN LAW

4.1 Introduction
This section of the article will focus on the impact of Norwegian law on the legal effects of an EA-clause. Two particular issues may be distinguished: firstly, the relation between the EA-clause and the Norwegian rules of interpretation – both how the clause will be interpreted and how it will affect the interpretation of other terms of the contract (section 4.2). Secondly, the potential significance of mandatory law and the possibility for rectification of contracts must be considered (section 4.3).

4.2 Interpretation of EA-clauses

4.2.1 Introduction
Contract interpretation is governed by different guidelines in different legal systems. Thus, the same contract provision may have different legal effects and be understood differently in two legal systems. As an example: Under English law, an EA-clause may be understood as an indication of the parties’ intentions to govern the exercise of determining terms, as opposed to interpretation. As Norwegian law does not operate with such distinction, the parties should not automatically be ascribed such an intention.

This subsection considers the extent to which an EA-clause entails that the parties’ contractual obligations and their interpretation must be based on the contract document. As an introduction, the relation between EA-clauses and certain guidelines for contract interpretation will be discussed (section 4.2.2). Thereafter, the clause will be placed in the context of basic rules on contract interpretation (sections 4.2.3 and 4.2.4). In terms of interpretation, I deem it reasonable to distinguish between clarification of ambiguous wording (section 4.2.5), contradiction of clear wording (section 4.2.6) and supplementation (section 4.2.7). Further, it must be analysed whether the clause has an impact on the Norwegian doctrine of contractual assumptions (section 4.2.8) and, finally, the possibility of interpreting the EA-clause in contradiction to its wording (section 4.2.9).

4.2.2 Judicial guidelines for the interpretation of EA-clauses
Judicial guidelines for contract interpretation refer to certain underlying principles made relevant for contract interpretation by Norwegian doctrine. The principles applicable to EA-clauses do not differ from those generally applicable, but the impact of two of these guidelines should be discussed in particular in relation to EA-clauses.
The first is the principle of preferring an interpretation that makes all terms effective to one that would not. If it is not possible from the evidence to establish a mutual understanding between the parties, it has been emphasised in both legal theory and case law that a solution making all terms of the agreement effective is to be preferred to one that would not.\textsuperscript{79} Otherwise, some of the terms may be deemed redundant.

In the presence of an EA-clause, this principle should be an argument for choosing an interpretation that differs from what would otherwise follow from Norwegian law. When applying this principle, the boilerplate nature of the EA-clause should be taken into account. Such clauses are inserted into numerous agreements, often more from habit than serious consideration,\textsuperscript{80} and one should therefore be cautious in putting too much weight on the presence of an EA-clause.

When interpreting the EA-clause, the principle of making all terms effective must be regarded in relation to the contract as a whole, not only the EA-clause. And in some cases, the effectiveness of certain contract provisions may be facilitated by adding or contradicting other terms. Thus the principle of effectiveness may be an argument both for and against the solution indicated by the wording of an EA-clause.

It should also be considered that the EA-clause is a general provision applicable in all situations. Thus that the clause is ineffective in one situation, e.g. where the wording is clear, does not necessarily make it redundant in all situations, e.g. where the contract does not regulate the relevant situation. It is submitted that the principle of making all terms effective has limited implications on the interpretation of EA-clauses.

The second guideline that should be discussed in relation to EA-clauses is the principle of choosing an interpretation which promotes the purpose of a relevant term and the agreement as a whole. This principle may have an impact on two levels in relation to EA-clauses. Firstly, it is relevant in order to add weight to the purpose of an EA-clause and, secondly, it may have an impact on the applicability of purpose considerations deduced from other sources than the contract itself. The presence of an EA-clause may entail that it is impermissible to base an interpretation on purpose considerations deduced from pre-contractual statements. Conversely, purpose considerations deduced from the contract document should be permitted.

\textbf{4.2.3 How is the doctrine of interpretation sought to be affected by EA-clauses?}

By setting out “the contract” and not the whole agreement (including, \textit{inter alia} pre-contractual and other statements) as exhaustive, EA-clauses introduce a distinction that is otherwise unfamiliar in Norwegian contract law. “The contract” is a term more comprehensive than the wording itself and narrower than “the agreement as a whole”.

\textsuperscript{79} Huser, p. 509-511; Høyberg, p. 150-152; Hov, p. 150-151; Haaskjold, p. 139-141. For Danish law, see Gomard p. 252. See also UNIDROIT Principles art 4.5 and PECL art. 5:106.

\textsuperscript{80} For such view on EA-clauses under Swedish law, see Adlercreutz p. 22.
Under English law, the distinction is well-known and may, as shown in section 2 above, be
decisive for whether a statement is deemed to be a part of the contract or not.

Because even the most comprehensive contract needs to be interpreted, an EA-clause
cannot prevent such an exercise from taking place. But as the Norwegian doctrine of
interpretation may lead to results that appear to contradict or supplement the written terms,
it needs to be considered whether the presence of an EA-clause entails certain limitations
on the operation of the Norwegian doctrine of interpretation.

First of all, it is commonly referred to as the starting point of contract interpretation that
any mutual understanding between the parties will prevail notwithstanding the wording.
Under Norwegian law, all types of evidence are admissible to establish such understanding.
The consequence may be that the wording is contradicted and can be described by the Latin
maxim falsa demonstratio non nocet, which again has obvious similarities to the English
regime of rectification. Since the mutual understanding of the parties is commonly proved
by the same sources of argument that EA-clauses seek to exclude, it must be discussed
whether the presence of such clause changes the starting point of contract interpretation.

A strong argument against EA-clauses having any effect on determining the parties’ mutual
understanding is that the legal effects of an EA-clause are the result of an interpretation of
the clause – not even an EA-clause can logically regulate its own interpretation. And if the
parties have a mutual understanding, one party cannot have meant the EA-clause to prevent
it from being applied to the contract – if one of the parties had such view of the EA-clause
when entering into contract, it would not be a mutual understanding at the relevant point of
time. Thus, a mutual understanding contradicting the EA-clause will prevail. Under English
law, as well, it is accepted that a contract may be rectified notwithstanding an EA-clause.81

In practice, it is rare that a mutual understanding is established when the parties have
decided to enter into litigation. A more practical question, therefore, is the extent to which
an interpretation must be based on the wording when a mutual understanding cannot be
established. An example may be that the parties have set out a list of warranties in the
agreement, and one party subsequently alleges that the agreement included yet another
warranty that was not included in the written contract. In recent Norwegian legal theory, it
is said that the interpretation in such situations should seek to protect a party’s reasonable
expectations.82 However, where a party’s expectations relate to terms that contradict or
supplement the written ones, an EA-clause should entail that such expectations, to be
reasonable, must be deduced from other sources of argument than pre-contractual
statements (as long as a mutual understanding between the parties is proven). This differs
from general Norwegian rules of interpretation.

81 Cf. section 2.4 above.
82 For the impact of “reasonable expectations” on contract interpretation, see Woxholth, pp. 35 and 404;
Høgberg, p. 107; Haaskjold, p. 98. For Swedish law, see Adlercreutz II p. 34.
To illustrate this point, reference may be made to the above-mentioned warranty example, in which one party alleges that there are more warranties than those expressly stated in the written contract. It is important to note that the additional warranty does not necessarily have to be proven by pre-contractual statements but may also be deduced from the contract document itself. The price or other terms of the contract may indicate that the contract, or the decision to enter into the contract, does not make sense unless an alleged term is included in the contract. In such situations, the solution appears as an interpretation of the contract document as a whole and cannot be said to contradict the contract (as opposed to the wording of the contract). The EA-clause may thus not prevent an interpretation that contradicts or supplements the wording as far as such interpretation is based on the contract document.

Sometimes, situations arise that are not expressly governed by the contract. Then, the interpreter will either supplement the contract (so-called gap-filling) or claim, by an antithesis, that if an allegation has no support in the contract, it must not be upheld. The more extensive the contract is, the more reason there is, generally, to take the antithesis approach.83 The EA-clause clearly provides an additional argument for applying an antithesis approach, but it should be noted that, since commercial agreements between professional parties are commonly quite comprehensive, this may be the result even without such contract provision.

4.2.4 Which sources of argument are sought to be excluded?

Introduction
While the first part of an EA-clause commonly seeks to express that the contract document contains an exhaustive regulation of the contractual relation by stating that the contract is the entire agreement, it appears from the second part of the clause that the contract shall supersede certain other sources of argument. The first part of the clause is formulated broadly enough to give the impression that all sources of argument but the contract are excluded, while the second part is more specific as to what is superseded. It is therefore necessary to discuss, from an interpretation of the EA-clause, which sources of argument it seeks to exclude.

Pre-contractual circumstances
As the second part of the clause states that the contract “supersedes all prior representations, agreements, negotiations or understandings whether oral or in writing”, the clause particularly focus on pre-contractual circumstances arising from the prior contact between parties. Such “circumstances” may be drafts to agreements, correspondence,

83 Hagstrom, p. 128; Woxholth, p. 173. It also appears from Rt 1995 s. 543 (“Selsbakkhøgda borettslag”) on p. 551 in which the simple form of the agreement is said to be an argument for supplementation, as opposed to the antithesis.
protocols from negotiations, etc. “Pre-contractual circumstances” will be used as a collective term for this source of argument.

**Circumstances arising subsequent to entering into a contract**

Circumstances arising after the agreement has been entered into (hereinafter referred to as “subsequent circumstances”) are relevant both for interpretation and as a separate basis on which to found a separate term. While the EA-clause has an express regulation concerning pre-contractual circumstances, this is normally not the case for subsequently arising circumstances. What is to be discussed here is whether such circumstances are comprised by the clause.

When it comes to subsequent circumstances as a separate basis on which to found a term, the EA-clause must be considered in relation to “written modification clauses”, which are commonly inserted into commercial agreements. If the contract contains such a provision, it will be unnecessary to assess subsequent acts or omissions in relation to an EA-clause. However, if the contract does not contain a written modification clause, the EA-clause needs to be assessed separately.

Because the second part of the EA-clause is more specific than the first, in that it only focuses on pre-contractual circumstances, it would follow from the *ejusdem generis* principle that also the first part of the clause is limited to such circumstances. It is not clear whether the *ejusdem generis* principle is applicable under Norwegian law, but the same result may often be reached by inference from the contract provision as a whole. Furthermore, if the meaning of the second part is not to limit the sources that are to be superseded, it would be redundant as an addition to the first part of the clause.

Another argument for the same solution is that the aim to achieve predictability does not apply with the same strength to subsequent circumstances. The reason is that the parties are presumably better able to control what happens subsequent to entering into agreement than to have an overview of all statements that have been uttered during the course of negotiations.

From this discussion, the right solution seems to be that circumstances arising subsequently to entering into contract are not affected by the clause.

**General rules of law**

“General rules of law” refers to statutes, case law, custom and general legal principles. General rules of law may be used both as an argument in interpretation and as a source for filling gaps in the agreement. As for subsequent circumstances, general rules of law are not mentioned in the second part of the clause but in the first and general part. Thus, an

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84 In Norwegian: "Bakgrunnsrett".
argument along the lines of the *ejusdem generis* principles is applicable. However, in contrast to the situation for subsequent circumstances, the parties do presumably have an overview of the general rules of law when they enter into contract. Accordingly, it would seem to contradict an “entire agreement” provision if it did not comprise any of the elements of the general rules of law. At least when it comes to the general rules of contract interpretation, it is obvious that an EA-clause seeks to prevent such general rules from applying to the given contract.

It is submitted that general rules of law cannot be considered as one group of rules in relation to EA-clauses. While some rules relate to what the parties have said, done or assumed (e.g., the Norwegian Sale of Goods Act section 19), others appear as balanced substantive solutions that apply where there is a lack of agreement. Examples of the latter are the general rules of remedies for breach of contract and the buyer’s obligation to cooperate in making it possible for the seller to perform. Whereas the impact of pre-contractual circumstances on the agreement is within the core of what an EA-clause seeks to preclude, the same cannot be said about general rules of law that do not relate to what the parties have said or done during the pre-contractual phase. Indeed, if an EA-clause was considered as a general rejection of substantive rules of law, it would entail that general rules and obligations such as the remedies for contractual breach and an obligation of cooperation did not apply unless set out in the contract. The particularly comprehensive effects resulting from such an interpretation of EA-clauses is in itself an argument for the clause not to be considered as a general avoidance of general rules of law. It is unlikely to have been the intention of the parties.

Another argument for the same limitation of legal effects is the lack of experience among Norwegian lawyers when it comes to drafting exhaustive agreements. Thus, certain questions, such as duty of disclosure, notice of contractual breach and duty of confidentiality have commonly been left out of the contract document without it being an indication that the parties meant that no such obligations should apply to the contract. It is submitted that, given the background of the parties, it is unlikely that they intended to exclude all such sources of law just by inserting a general EA-clause. For the interpretation of the EA-clause itself, the parties’ background must be taken into consideration for contract interpretation in general, and it cannot therefore be generally held that an EA-clause prevents general rules of law from applying to the contract.

Because the EA-clause seeks to limit the parties’ obligations to what is set out in the contract, the relation to defective performance is particularly interesting. The question is whether the written terms of the contract may be supplemented with general rules of law concerning, *inter alia*, the duty of disclosure, liability for wrongful information and the general duty of performing in compliance with reasonable standards of quality. On the one hand, this would “add to” the written contract; but, on the other, these rules are general principles of Norwegian contract law with close connections to the general obligation of

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loyalty. If these latter principles are precluded by an EA-clause, the effects of the clause are highly significant. And where a literal interpretation varies significantly from general rules of law, the courts have required clear and unambiguous wording in the clause to reach such effect. The wording of the EA-clause is so general that it may be unclear what the parties have meant in relation to the general rules of law. In this respect, the EA-clause is similar to “as is” clauses and exemption clauses, which have been interpreted restrictively in the Norwegian courts. Insofar as the EA-clause does not provide express reference to particular general rules of law, the rules concerning disclosure and liability for wrongful information should not be held inapplicable.

4.2.5 The EA-clause and the interpretation of ambiguous wording
Even the most comprehensive contract may have ambiguities that must be clarified through interpretation. As discussed in relation to English law, it is somewhat unclear whether an EA-clause has any impact on “interpretation”. This potential limitation of the clause is made possible by the distinction in English law between interpretation and determination of terms.86 It may be argued that the close connection between the EA-clause and the parol evidence rule makes it sensible that the clause only affects the determination of terms. Because Norwegian law does not have the same distinction, it is necessary to ask whether the same assumption regarding the intention of the parties can be made for Norwegian parties.

By stating that the contract “supersedes all prior... negotiations or understandings...”, the wording is broad enough to suggest that where there are two alternative interpretations of ambiguous wording, the one most closely related to the contract document will be preferred. There are, however, several counterarguments to such an interpretation of the clause. Firstly, such interpretation may lead to results that would have seemed quite remote to the parties when the contract was entered into. The reason is that, as long as the contract contains a relevant regulation and both alternatives of interpretation are compatible with the wording, it is probable that the parties have legitimate expectations that are not necessarily revealed by solely looking at the contract document. It is therefore not probable that the parties intended the EA-clause to entail that all arguments of interpretation must be based on the contract in every situation.

Secondly, there is a difference between amending or adding terms and clarifying the content of already existing provisions. In general, it may be assumed that the parties have an overview of the meaning of the express terms of the contract, with or without what appears as ambiguous to the courts. An illustrative example is Rugby v. Proforce Recruit, in which it was unclear what had been meant by “Preferred Supplier Status”. It can hardly be imagined that the parties, by including an EA-clause, really intended this expression to be interpreted entirely on the basis of other terms in the contract document.

86 Which is essential under the parol evidence rule.
That an EA-clause does not prevent recourse to extrinsic evidence to solve ambiguities in the wording is also consistent with the regulation of EA-clauses in UNIDROIT Principles art. 2.1.17 and PECL art. 2:105.

4.2.6 EA-clauses and corrective interpretation

Corrective interpretation comprises both the situation in which the contract is interpreted in such a way that it regulates a question that is not covered by the wording and in which the contract is interpreted restrictively so that it does not apply to a situation comprised by the wording. In relation to the latter, the courts have stated that general and wide-ranging clauses may be deemed ambiguous because the wording comprises more than what can reasonably have been within the intentions of the parties.

By its wording, the clause seems to prevent a corrective interpretation based on extrinsic evidence such as previous negotiations. However, previous negotiations are only one of many sources of arguments that may justify a corrective interpretation. A study of Norwegian case law shows that correction of the wording is very rarely based on the sources of arguments that the EA-clause seeks to preclude. Rather, the most common ground for corrective interpretation is that the courts conclude from the type of contract, placement of risk and logical inference from other terms that the parties cannot have meant what the wording of the contract indicates. Such deductions are based on the assumption that the parties are reasonable persons who would not have included a regulation that seems so inconsistent with the terms and risk allocation of the rest of the contract. It is submitted that such arguments are based on the contract and that the EA-clause, focusing on the “contract” rather than the “wording”, is not capable of preventing a corrective interpretation based on such sources of arguments.

A parallel can be drawn here to the efforts made by English courts to reach results that are consistent with “common sense”, sometimes even though it seems corrective of the wording. As the principle of common sense interpretation is supposed to be in the interest of all reasonable parties, it should not be assumed that the parties have intended an EA-clause to prevent the courts from applying such considerations. A case in which such principles turned out to be decisive is the much discussed Investors Compensation Scheme case. As commented by the minority of the House of Lords (Lord Lloyd), the interpretation by the majority was in reality “to take words from within the brackets, where they are clearly intended to underline the width of ‘any claim’, and place them outside the brackets where they have the exact opposite effect.” The result was reached without taking pre-contractual negotiations (or other sources of arguments that are sought excluded by an EA-clause) into account, and it is highly unlikely that an EA-clause would have had any effect on this question.

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88 I.e. Lord Diplock in Cia Naviera SA v. Salen Rederierna AB (the Antaios) [1985] AC 191 on p 201: “…if detailed semantic and syntactical analysis of words in a commercial contract is going to lead to a conclusion that flouts business common sense, it must be made to yield to business common sense.”
Norwegian case law indicates that Norwegian courts may derogate from the wording provided that the literal meaning of the wording leads to a result that is sufficiently unreasonable.\textsuperscript{89} A general exemption clause was interpreted so that it did not comprise a defective construction,\textsuperscript{90} and a provision giving the lessee exhaustive rights to a piece of land did not give him a right to erect a building on it for commercial purposes.\textsuperscript{91} In these cases, the literal meaning of the contract entailed such radical discrepancies from what would follow from normal commercial behaviour that the wording was deemed not to be sufficiently clear to lead to such result. Pre-contractual statements were not decisive in either of these cases.

It is submitted that an EA-clause does not prevent corrective interpretation insofar as such result is based on sources other than those expressly excluded by the EA-clause. The presence of such clause will, however, make it even more difficult to reach an interpretation inconsistent with the wording when such interpretation is based on, e.g., precontractual negotiations. However, this sort of interpretation is very rare even without an EA-clause, and it may thus be said that the clause has little effect in Norwegian law when it comes to preventing corrective interpretation.

4.2.7 Gap filling and supplementing the contract

Sometimes questions arise that are not regulated in the contract. In such situations, there are a limited number of solutions: the contract can either be supplemented, or an antithesis may be deduced from the non-regulation (“the parties have not regulated such right, and thus there exists no such right”). To supplement the contract would seem contrary to the EA-clause, which states that “the contract contains the entire contract and understanding between the parties hereto”.

The EA-clause is an argument for deducing an antithesis. In \textit{White v. Bristol Rugby Ltd}, Mr. White claimed that, according to pre-contractual statements, he had a right to withdraw from the agreement. Such right was prevented by an EA-clause. However, additional terms are not necessarily based on pre-contractual circumstances, so that the significance of the EA-clause may be less obvious. Imagine a contract between a German car manufacturer and an alloy producer. The contract gives the former a right to terminate the contract if the sale of cars on the European market decreases by a certain percentage. After some time, the car manufacturer decides to focus mainly on the American market. Subsequently, the American market drops to a larger extent than what was required by the contract for the European market in order to give rise to a right of termination. The car manufacturer will claim that the parties did not have the amended strategy in mind when contracting and that the obvious similarity to the situation set out in the contract must lead to him having a right

\textsuperscript{89} See i.e. Rt. 1980.1037 and Rt. 1993.140
\textsuperscript{90} Rt. 1980 p. 1037
\textsuperscript{91} Rt. 1993 p. 1176
to terminate the contract. The alloy producer may claim that he would not have accepted a similar provision concerning the American market, because it is, in his opinion, less stable.

In situations like this, it is not obvious what the parties would have agreed to if they had the subsequent circumstances in mind when entering into contract, and it is not necessary to fill a gap in order to make the contract operative. It is submitted that the EA-clause should be considered as a placement of risk in such situations – the parties do not know what the future will bring, but ensure with the EA-clause that additional terms will not be implied into the agreement. Both parties thus bear the risk of the agreement turning into a bad bargain in the future. However, an exemption should be made for situations in which it is unthinkable that the parties would have intended to differentiate between a scenario that occurred subsequently and the one provided for in the contract. It is not likely that the parties intended to exclude such obvious logical inferences by inserting a general contract provision.92

In the above-mentioned situations, it was not strictly necessary to supplement the contract for it to function. However, sometimes, there is a gap in the agreement that has to be filled, and an antithesis is thus not possible. An example is Rt. 1992, p. 796 (Pepsico), in which it was clear that one party was liable for damages but unclear how they were to be measured in a particular situation. The contract had to be supplemented (damages were to be paid), something which could not be prevented by the EA-clause. The Supreme Court based its solution on what it deemed to be consistent with the agreement as a whole and the assumed intentions of the parties as they appeared in the contract. The court therefore did not rely on evidence excluded by the EA-clause.

In cases like Pepsico, the gap in the contract can be filled by recourse to various types of evidence and arguments – assumptions as to the intentions of the parties, pre-contractual circumstances, circumstances arising after the contract has been entered into, general rules of law and considerations of reasonableness. According to its wording, an EA-clause should prevent recourse to, at least, pre-contractual negotiations. The Pepsico decision has occasionally been mentioned as a case in which the court, because of the EA-clause, based its solution on the intention of the parties as it appeared from the contract document. However, it is submitted that it is unclear whether it was the EA-clause that was decisive in this respect because, even without such provision, the intention of the parties as expressed in the contract document is of great significance for gap filling.

It may possibly be argued that an EA-clause forces the courts to focus more on the parties’ intention as it may be deduced from the contract document than they would have done otherwise. As long as such deductions are quite clear, as in Pepsico, they are of great significance even without an EA-clause. Often, however, these inferences may appear as vague assumptions about what the parties would have done, had they been aware of the relevant scenario when entering into contract. And if the basis for deducing these intentions

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92 As an example of such situation, see Rt. 1992.1105 (commented in Høgberg on p 264).
is vague, it is difficult to imagine that a Norwegian court would consider itself obligated to follow such vague assumptions if pre-contractual statements show that another solution would be more consistent with what seems to be the true intentions of the parties. This difficulty is further strengthened by the possibility for the courts to argue that the gap in the contract indicates that the parties did not have the relevant question in mind when agreeing to the EA-clause. And since the EA-clause cannot regulate its own interpretation, the clause must be interpreted in accordance with the intentions of the parties when entering into contract.

Even though an EA-clause cannot prevent recourse to extrinsic evidence when it is necessary to fill a gap in the contract, it may be argued with some force that the presence of such a provision should make the courts somewhat more reluctant to have recourse to pre-contractual negotiations when filling gaps in the agreements. It is particularly this sort of evidence that is sought precluded and, by inserting the clause, the parties have had an incentive to include important points from the negotiations in the contract document. However, this argument should not be taken too far.

As a conclusion, an EA-clause will have only minor effects when it is necessary to fill a gap in the contract, but it may prevent supplementation of the agreement when supplementation is not required for the contract to function.

### 4.2.8 Are the pre-contractual assumptions of the parties precluded from having legal effect?

Under Norwegian law, a disappointed pre-contractual assumption of one party may give rise to a right to repudiate or amend a contract if: (i) there is causation between the assumption and the decision to enter into contract (the assumption must be of some significance), (ii) the assumption was apparent to the other party when entering into contract and (iii) the disappointed assumption is relevant in the eyes of the law. The last consists of an objective assessment of which party should reasonably bear the risk for the disappointed assumption.

The line between interpretation and considerations regarding contractual assumptions can be hard to draw. However, as long as Norwegian law makes such a distinction, it must be investigated whether legal effects of contractual assumptions not expressed in the agreement are precluded by an EA-clause or if this falls outside its scope.

In some cases, the granting of legal effect to contractual assumptions is something different from interpretation. An example mentioned in theory is a person A, who gives a surety for the benefit of a friend, B, who subsequently assaults A’s daughter. This is deemed as a disappointed assumption for A, which would give him a right to repudiate the surety. Such assumptions are general for all contracting parties, and it should not be held that they have

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93 Because the EA-clause does not have procedural effects, e.g., proof of pre-contractual negotiations will be admitted before the courts.
intended to preclude them by inserting an EA-clause. It simply cannot be expected of the
directors that they regulate such situations in the contract, and thus it should not be assumed
that they intend to regulate the same type of question with an EA-clause. It must be kept in
mind that assumptions like this are endless and almost impossible to regulate fully by
express reference in a contract. Therefore, this type of assumption may be considered as an
implicit part of the agreement, so that the contract is not actually supplemented by giving
them legal effect. It is improbable that the parties have intended to include a regulation so
comprehensive that even circumstances like the ones mentioned in this paragraph are
excluded.

However, other examples show that the disappointment of an assumption may have legal
consequences even in situations in which it would not be unreasonable to expect the relying
party to regulate the question in the contract. In these cases, the distinction from
interpretation is significantly more difficult to draw. For example, in Rt. 1988, p. 982, a
party was obliged to pay certain sums pursuant to contract at the request of another party.
The only right given to the payee regarding terms of payment was a right of 14 days’
notice. Still, the Supreme Court found that it was a relevant disappointed assumption on
part of the payee when the creditor amended the dates of payment that had been indicated
during negotiations. It is submitted that this is so close to interpretation, which is within the
scope of an EA-clause, that the EA-clause must have some impact in order to avoid
inconsistency.

An important difference between the assault example and the latter example concerning
payment terms is that it could reasonably be expected in the latter case for the payee to
express his assumption regarding terms of payment in the contract. That his assumption
was closely related to the subject-matter of the contract strengthens this argument. Thus, if
an EA-clause was included in such a contract, it is not unreasonable to deem it to be within
the parties’ intentions with such clause to prevent results like that reached in the 1988 case.
It is submitted that an EA-clause may prevent the disappointment of pre-contractual
assumptions from having legal effect when it may be reasonably expected by the relying
party to regulate the question in the contract.

4.2.9 Restrictive interpretation of the EA-clause
An EA-clause cannot logically regulate its own interpretation. Court decisions show that
the starting point for the interpretation of commercial contracts, and often the finishing
point as well, is that the solution is based on an objective understanding of the wording.
This also applies to EA-clauses. However, the wide-ranging and general character of the
clause makes it necessary to consider whether it can be interpreted restrictively in certain
situations.

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94 Cf. ND 2000, p. 240 (the "Troll" case) and Rt. 1988, p. 982.
95 A preamble may perhaps be a suitable place.
For the assessment of when a general provision may be limited by exceptions that contradict the wording, it has been emphasized in case law and legal theory how well prepared and comprehensive the contract is and whether the parties are professionals. These issues are all closely connected to whether it may reasonably be expected that the parties regulated the relevant question, considered in context of the comprehensiveness of the agreement. While the English contract tradition encourages “exhaustive” contracts made to cover “all” imaginable and perhaps even unimaginable scenarios, Norwegian legal practice does not traditionally rise to the same level of detail. Thus, it is reasonable to suggest that the expectations as to what could possibly be regulated in a contract are considered differently in the context of the background of the parties.

What could reasonably be expected by the parties in respect of detailed regulation is relevant because it is improbable that the parties intended to preclude rights and obligations that they did not expect to regulate in their contract. And since the parties will probably have little or no experience in writing exhaustive contracts, it may be questioned whether they have realised the comprehensive effects of an EA-clause if it was not interpreted with a limitation based on reasonable expectations. However, it should be assumed that the presence of an EA-clause gives the parties an incentive to have more detailed regulation than they otherwise would have. This will again affect the level of details that may be expected.

It is important to note that this article presumes that the parties have chosen Norwegian law as the governing law of the contract. This may have been done because of the possibilities under Norwegian law to limit the effects of wide-ranging contract provisions. Such intentions should be respected by the courts.

It is submitted that the EA-clause must be interpreted with a flexible exception for situations in which the parties could not reasonably be expected to regulate the relevant scenario in their contract.

4.3 Mandatory rules of law

According to Section 36 of the Norwegian Formation of Contracts Act 1918, an agreement or a term may be amended or held to be void if it is deemed contrary to reasonableness and good faith to enforce it. Section 36 is very rarely applied by the courts, and it has never been applied in commercial relations since its entry into force in 1983. This article is not the place to consider section 36 in detail, but a short discussion of its possible impact on EA-clauses will be set out below.

Contracts containing an EA-clause are often commercial contracts that have been concluded after extensive negotiations. Several departments of the contracting firms may have been involved, and several drafts can have been made and subsequently amended. After such a process, it may appear as a real risk for a party that he has some expectations and understandings of the agreement that are not shared by the other party. And there is a
risk that the other party’s understandings and expectations may be deemed reasonable and rightful by the courts even though they are in conflict with the wording. In this context the EA-clause is clearly distinguishable from mere exemption clauses, since the EA-clause is not necessarily an attempt to exclude liability for one’s own statements or pre-contractual behaviour but a result of an intention by both parties to ensure certainty in their contractual relationship. In this respect, the EA-clause may be deemed as a type of contractual risk placement.

As a corollary to what has just been said, it would be a significant limitation to private autonomy if it was deemed unreasonable and contrary to good faith according to section 36 that certain pre-contractual circumstances were precluded from having legal effect. In addition, the courts seem to operate with a nearly insuperable hurdle for section 36 to apply in commercial relations. However, the potential unreasonableness that may be occasioned by the clause may justify the application of this mandatory rule under particular circumstances.
5 CONCLUSION

This article has considered whether all rights and obligations of the contract must be based on the contract document when it contains an EA-clause. We have seen that the clause is given effect close to its literal meaning under English law – unless there is a gap that has to be filled or ground for rectification, the terms must be found “within the four corners of the document”. However, the clause has limited effect on the process of interpretation, which is distinguished from “determination of terms” under English law.

Under Norwegian law, the effects of the clause seem more limited. It does not impose derogation from all other sources of law than the contract, but rather that a party’s expectations must be based on other sources than pre-contractual circumstances in order to be deemed reasonable. Thus, the clause would most probably prevent corrective interpretation based on pre-contractual circumstances. However, pre-contractual circumstances are hardly ever given by the courts as the reason for corrective interpretation in commercial relations, so that its actual effects are limited. The effect of the clause is presumably slightly more significant in some other respects: the parties’ pre-contractual assumptions will be less relevant when it could reasonably be expected that the question was regulated in the contract, and an antithesis is more likely to be deduced from a contract’s silence on a matter.

In sum, EA-clauses do not mean that the contract document is to be considered an exhaustive regulation of the contractual relation under Norwegian law. However, it may be said that the clause has the consequence that circumstances arising from the parties’ pre-contractual behaviour are of less relevance for contract interpretation. Thus, the provision in the EA-clause stating that the contract is “the entire agreement” should not be understood literally.
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