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Methoden van contractsuitleg

Een model voor de uitleg van een overeenkomst

Proefschrift

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Summary

Methods of contract interpretation

A model for the interpretation of a contract

This research identifies a model for the interpretation of a contract under Dutch law. The model answers the question of which method should be applied to interpret a contract in the contest of a specific case, considering existing legislation, case law and legal doctrine. The model indicates which method of interpretation (e.g., the objective-oriented method of interpretation) is applicable, based on a case specific selection and assessment of sources of interpretation (such as 'the linguistic meaning of the wording', 'the pre-contractual phase' or 'trade usages') by using contextual factors (e.g., 'the nature of the contract', 'the nature and knowledge/experiences of the parties to the contract' and 'the manner of the formation of the contract'). A suitable method of interpretation can be identified and applied by selecting and balancing sources of interpretation in light of contextual factors. The model provides guidance on contract interpretation to parties engaged in a dispute about the meaning of the contract, and persons who need to solve such a dispute, such as judges and arbitrators. The law of evidence will also be considered.

The model, as identified under Dutch law (see Chapters 2 to 5) will be evaluated and both foreign legal systems (English and French law) and transnational principles (the PECL, the DCFR and the PICC; see Chapters 6 to 8) will be considered. How foreign case law and literature give substance to the model will be studied and the question of whether, in the foreign legal systems and transnational principles falling under the scope of this research, the applicable method of interpretation can be determined by using the model as identified under Dutch law will also be adressed. This comparative study provides valuable insights for legal practice, as it clarifies the differences and similarities between the legal systems and transnational principles in the field of contract interpretation. Moreover, it will also highlight how the model as identified under Dutch law can be refined on the basis of the comparative findings.

In the first three chapters of this research – Chapter 2, 3 and 4 – the model for the interpretation of a contract is identified by analysing existing legislation, case law and legal doctrine under Dutch law. The model indicates which method of interpretation is applicable in the case at hand, as a result of the influence of contextual factors

when selecting and balancing sources of interpretation. In the model a distinction is made between (i) methods of interpretation, (ii) sources of interpretation and (iii) contextual factors. These three elements form the key components of the model and are discussed in more detail. Chapter 5 sets out the role of the law of evidence when interpreting a contract under Dutch law.

Chapter 2 discusses the methods of interpretation, which are the techniques applied to interpret a contract. Contextual factors are used to select and assess sources of interpretation which, when taken together can constitute a method of interpretation. The identified methods of interpretation in Chapter 2 are therefore characterised by a specific selection and assessment of sources of interpretation. The contextual factors determine (i) the selection of sources of interpretation and (ii) the relative weight to be given to these sources when balancing them. In total, eight methods of interpretation can be distinguished under Dutch law. They range from the purely subjective method of interpretation to the purely objective method of interpretation:
– the purely subjective method of interpretation;
– the fundamental subjective method of interpretation;
– the subjective-oriented method of interpretation;
– the neutral method of interpretation;
– the objective-oriented method of interpretation;
– the fundamental objective method of interpretation;
– the purely objective method of interpretation; and
– the contra proferentem method of interpretation.

It is important to note that the method of interpretation is distinct from factual interpretation. In this study, the factual interpretation refers to the actual meaning that is ultimately given to the written or oral wording of the contract. The factual interpretation necessarily follows from the sources of interpretation that outweigh the others.

The Dutch Civil Code ('**DCC**') does not contain specific provisions for the interpretation of a contract. In Dutch law, the Haviltex standard and the collective agreement standard ('**cao standard**'), as established in case law, mostly – but not exclusively – form the basis of the identified methods of interpretation. For example, the purely objective method of interpretation, which in case law will generally be substantiated by the cao standard, is characterised by the exclusion of subjective sources of interpretation. Consequently, one or more sources of interpretation with a purely objective nature will become decisive when balancing the available sources. Under the objective-oriented method of interpretation, which in case law will mainly get substance by the Haviltex standard, the subjective sources of interpretation are not *prima facie* excluded. However, when balancing the selected sources of interpretation by using the present contextual factors, significant weight is often given to one or more objective sources of interpretation and these sources will prevail over the subjective sources of interpretation. The latter sources are simply less important. These subtle differences in the process of selecting and balancing sources of interpretation by using contextual factors, make it possible to distinguish between the different methods of interpretation. This also results in the methods forming a continuum, with a smooth transition from one method to another.
The contra proferentem method of interpretation has a different position within the identified model, as it is characterised by a unique technique. It will be shown, how-

ever, that in spite of this difference, this method also fits into the continuum of methods of interpretation. Within the contra proferentem method of interpretation, a distinction can be made between (i) a general contra proferentem method of interpretation and (ii) a specific contra proferentem method of interpretation for consumer contracts (Article 6:238(2) DCC). It is argued that the general contra proferentem method of interpretation, which applies to all contracts that do not qualify as consumer contracts, must be positioned as an individual method of interpretation instead of 'a reference point' when interpreting a contract, as is currently the position in Dutch case law. This approach is in line with the approach taken in the foreign legal systems and transnational principles as discussed in this research.
Under Dutch law, the general and specific contra proferentem methods of interpretation are almost identical. The technique characterising the contra proferentem method of interpretation consists of three distinct stages:

(i) First, there must be ambiguity within the contract. This is the case if the wording of the contract is open to more than one interpretation. In the model, the contextual factors select one or more sources of interpretation (with an objective and/or a subjective nature), leading to different factual interpretations (the first stage). In practice, most of the time only objective sources of interpretation will play a role, as subjective sources of interpretation are often absent due to the unilateral nature of the contract.
(ii) The application of the contra proferentem method of interpretation must be justified (the second stage). Contextual factors, such as 'the nature and knowledge/ experiences of the parties to the contract', 'the nature of the contract' and 'the manner of the formation of the contract' can be relevant. For example, if the parties did not negotiate the contract or the specific provision (i.e., it was drafted unilaterally), and/or if there is an unbalanced relationship between the parties (e.g., a consumer vs. a professional party), it may be justified to apply the specific contra proferentem method of interpretation for consumer contracts.
(iii) Finally, the sources of interpretation as selected during the first stage need to be balanced by the contextual factors. It should be understood, however, that the outcome is fixed in advance: significant weight must be attributed to the source(s) of interpretation, resulting in an interpretation against the drafter of the contract, and thus in favour of the other party (the third stage). This approach is based on the idea that the drafter of the contract or the specific clause is responsible for its clarity. Under Dutch law, the specific contra proferentem method of interpretation vis-à-vis consumers is mandatory (see Article 6:238(2) DCC, which is the result of Directive 93/13/ EEC on unfair terms in consumer contracts). In that case, the sources of interpretation resulting in an interpretation that is most favourable to the consumer must be given significant weight.

Although the general contra proferentem method of interpretation is not often applied in practice, it should not be discounted as one of the methods of interpretation to be used. As subjective sources of interpretation will mostly be lacking due to the unilateral nature of the disputed contracts, objective sources of interpretation will become more important. Therefore, the contra proferentem method of interpretation will generally be positioned on the more objective side of the continuum.

Chapter 3 reflects on the sources of interpretation. In the model, the contextual factors, taken together, select the sources of interpretation that can be relevant for the interpretation of the contract. In general, more than one source of interpretation will be relevant and selected, so the contextual factors must then balance these sources. Therefore, the contextual factors do not only select the sources of interpretation that are relevant, but also balance these by giving a relative weight to each of them. The final outcome of selecting and balancing sources of interpretation by using contextual factors will determine the applicable method of interpretation. When selecting the sources of interpretation, the contextual factors can exclude a specific type of sources, e.g., the subjective or the objective sources of interpretation. Consequently, when balancing the sources of interpretation, one type (i.e., the objective or the subjective ones) will (in principle) become decisive. In a scenario where all possible sources of interpretation are considered when selecting and balancing, the contextual factors will show to which source(s) significant weight must be attributed.
This research highlights some of the sources of interpretation that can be relevant when interpreting a contract. The following sources of interpretation are considered:
– the parties' intentions and expectations;
– the linguistic meaning of the wording (which includes the dictionary meaning and ordinary meaning);
– the legal meaning;
– the contractual definition;
– the pre-contractual phase;
– the post-contractual phase;
– trade usages;
– the generally prevailing opinion;
– the structure and design of the contract; and
– the law and related instruments.

This overview is not meant to be exhaustive, and it is acknowledged other sources of interpretation can play a role in practice. Using examples based upon case law, it is illustrated how the various sources of interpretation can affect, and can be decisive for, the factual interpretation of the wording used in a contract. In Dutch literature and case law it is not always specified which sources of interpretation are releand which relative weight is given to these sources. By specifying the sources of interpretation underlying the factual interpretation, a judge or an arbitral tribunal resolving a dispute involving contractual interpretation, will be able to render a well-reasoned judgment concerning the interpretation of a contract. By doing so, they improve the predictability of their decisions which ultimately results in enhanced legal certainty.
This research shows that sources of interpretation can be subjective or objective in nature. The actual nature of the sources of interpretation is determined by the factual substance given to the sources when applied in the case at hand. This is an important nuance to the dominant views in Dutch legal practice, which generally characterises a specific source of interpretation as subjective or objective in advance. This will be illustrated with an example. If a source of interpretation is closely linked to the parties to the contract and is given substance by the subjective perspective of these parties, the source of interpretation will be subjective in nature. The knowledge of that specific party is then vital for its substance. So, the factual interpretation rendered by using one or more subjective sources of interpretation will be determined in a subjec-

tive manner. For example, sources of interpretation, like 'the parties' intentions and expectations', 'the pre-contractual phase', 'the post-contractual phase' and 'trade usages' can be subjective in nature. However, it has been shown that, contrary to popular belief, in practice, these sources are often not subjective but objective in nature. Therefore, in cases where the interpretation of a contract is disputed between parties, the subjective sources of interpretation are often less important than initially anticipated, because these sources are simply absent or not properly substantiated. In the latter case, the law of evidence comes into play.
In practice, objective sources of interpretation are by far the most significant ones. In many cases, sources of interpretation are given substance in an objective manner, which means that the sources of interpretation are established based on objectively verifiable data, independent of the parties to the contract and their subjective perspective. This does not mean that such data should be universally known and publicly accessible. Instead, it should be understood as data that can be known independently of the subjects concerned, i.e., independently of the parties to the contract. If this is the case, one can speak of objectively verifiable data. The factual interpretation will therefore also be determined in an objective manner. Some of the sources of interpretation discussed in this research will, by definition, be objective in nature, such as 'the linguistic meaning of the wording', 'the legal meaning', 'the generally prevailing opinion' and 'the law and related instruments'. Other sources of interpretation can be subjective in one case and objective in another, such as, for example, 'the pre-contractual phase' and 'the parties' intentions and expectations'. In practice, however, these sources of interpretation are also predominantly objective in nature.
By using 'the pre-contractual phase' as example, it will be illustrated that a source of interpretation is not necessarily solely subjective or objective in nature in the model. To use 'the pre-contractual phase' as source of interpretation, some evidence needs to be available. The source of interpretation 'the pre-contractual phase' can be given substance in a more subjective manner. This is the case, for example, if a specific paragraph in an e-mail is interpreted in line with a statement by one of the parties, contrary to the linguistic meaning of the wording. In these circumstances, the source of interpretation 'the pre-contractual phase' will be subjective in nature, as the subjective perspective and the specific knowledge of that party will determine the content of this source of interpretation. In addition, the parties can also examine witnesses, who were involved during the pre-contractual phase, in court or by submitting written witness statements. In that case, the source of interpretation 'the pre-contractual phase' will be given substance by the knowledge and the subjective perspective of the parties to the contract. Contrary to popular belief, 'the pre-contractual phase' as source of interpretation is in many cases not subjective, but rather objective in nature. If, for instance, meeting notes or e-mail correspondence are available, 'the pre-contractual phase' can be established based on objectively verifiable data. Based on these documents, it is possible to determine, independently of the knowledge of the parties to the contract, what took place between the parties at the time the contract was concluded. The source of interpretation 'the pre-contractual phase' is accordingly objective in nature, as it is given substance in an objective manner, independent of the parties to the contract, based on objectively verifiable data.

Chapter 4 discusses the contextual factors. Under Dutch law, all the circumstances of the case must be considered when interpreting a contract. The circumstances of the

case determine which contextual factors are present. The contextual factors, taken together, select sources of interpretation and determine the relative weight to be given to the selected sources. The contextual factors play a central role in the identified model. Through the contextual factors, the specific context of the case is taken into account, which makes it possible to provide an interpretation dedicated to the case at hand. In this research various contextual factors have been identified as relevant such as:

- the nature and knowledge/experiences of the parties to the contract (within which, inter alia, a distinction is made between professional and non-professional parties);
- the assistance of skilled professionals;
- the involvement of third parties;
- the nature of the contract;
- the purpose of the contract;
- the scope of the contract;
- the extent and level of detail of the contract;
- the nature of a specific clause;
- the plausibility of legal consequences;
- the manner of the formation of the contract;
- the nationality of the parties to the contract;
- the agreed (interpretation) clauses;
- the foreign origin of contractual clauses; and
- the language of the contract.

The above list is not aimed to be exhaustive, as ultimately the circumstances of the case determine the existence of the contextual factors. The process of contextual factors selecting, and balancing sources of interpretation will result in the application of one of the identified methods of interpretation. By way of illustrative example: in a case where a collective agreement needs to be interpreted, the following contextual factors will generally be present: e.g., 'the nature of the contract' (a collective agreement), 'the involvement of third parties' (in this case it concerns a large group of third parties who were not present when concluding the collective agreement, but who will be bound by it and should therefore be protected against an interpretation based on the intention of the drafters that is not known to them) and 'the scope of the contract' (regulating the legal position of the third parties involved in a uniform manner). In general, the presence of these contextual factors and the factual substance given to these factors in the case at hand will result in a selection of only purely objective sources of interpretation. The subjective sources of interpretation will be fully excluded. The selected purely objective sources of interpretation that are closely linked to the wording of the contract, such as, for example, 'the linguistic meaning of the wording' or 'the structure and design of the contract', will be given decisive weight. Such an outcome results in the application of the purely objective method of interpretation. Which contextual factors play a role depends heavily on the circumstances of the case at hand. It appears that some contextual factors will always be present and relevant due to the formalities that apply when concluding a contract under Dutch law, such as 'the nature and knowledge/experiences of the parties to the contract', 'the nature of the contract' and 'the manner of the formation of the contract'. In the context of Dutch law, it is therefore implausible that only one contextual factor is decisive for selecting and balancing sources of interpretation. Besides the presence or absence of

some contextual factors, the circumstances of the case will also give factual substance to the contextual factors. For instance, the circumstances of the case will reveal the nature of the parties to the contract: e.g., whether it is a contract between two consumers or a contract between a consumer and a professional commercial party. It is also evident that contextual factors can be related and/or have some overlap. For example, if a consumer is a party to the contract, this will also imply that it concerns the interpretation of a consumer contract ('the nature of the contract'). As the circumstances of the case are decisive for the presence and factual substance given to the contextual factors, these specific circumstances must be furnished and, eventually, proved. If a party fails to do so, these circumstances will be disregarded when interpreting the contract. Consequently, some contextual factors which are unable to be evidenced cannot play a role when selecting and balancing sources of interpretation.

Chapter 5 concludes that the Dutch law of evidence can be incorporated into the model as identified in this research. The law of evidence plays an important role when interpreting a contract, as under Dutch law the circumstances of the case are crucial. Only those facts that a party has furnished, and if necessary proven, can be considered by the court when interpreting the contract. If a party fails to furnish a particular fact, that fact will be disregarded. As a result, a particular contextual factor can be excluded, or a particular source of interpretation can become irrelevant. In addition, parties are required not only to furnish the facts, and if required to prove them, but it is also recommended to substantiate how, in this specific case, the contextual factors, taken together, influence the process of selecting and balancing sources of interpretation. The party claiming a particular interpretation of the contract bears the burden of proof and, therefore, also the risk of non-persuasion. The opposing party will have to contest the invoked interpretation. The challenge can focus on the method of interpretation to be applied. However, the challenge can also refute (i) the underlying process of selecting and balancing sources of interpretation by using contextual factors or (ii) the factual content given to contextual factors and sources of interpretation that are relevant in the case at hand.
There has been some debate in the Dutch literature about the question which party, in the event of a challenge, bears the risk of non-persuasion, i.e., proving that the facts, brought forward in light of the challenge, did or did not occur. This is mainly a theoretical discussion and rarely seems to cause a problem in practice, as the assessment of the evidence by the court will clarify which facts play a role and to what extent they are relevant when selecting and balancing sources of interpretation by using contextual factors. Therefore, the burden of proof, and thus the risk of non-persuasion, of the facts put forward by the other party in the context of its challenge, will not rest specifically on one of the parties.
Under Dutch law, it is possible to attribute significant weight to the linguistic meaning of the wording, based on a limited selection and assessment of sources of interpretation by using contextual factors. As a preliminary step, the court will adopt a rebuttable presumption that the linguistic meaning of the words used in the contract reflects the parties' intentions. The underlying assumption is that the parties have attached great importance to the wording used in the contract when negotiating it. When doing so, the court will not consider all arguments and available evidence. Following this, an alternative weighing of the identified facts and circumstances occurs (as a sort of second stage) to ensure that all the facts and circumstances are taken

into account in the final judgment, which must be based on a full selection and assessment of sources of interpretation by using contextual factors. This distinction is only procedural, and whether to take one or the other route to issue a final judgment is at the discretion of the court.

If the rebuttable presumption is to the detriment of the party bearing the burden of proof under Article 150 Dutch Code of Civil Procedure, then, in the event of a sufficiently specific offer of proof to that effect, that party should get the opportunity to further substantiate its claimed interpretation. If the opposite is the case and the rebuttable presumption is in support of the party that bears the burden of proof, the other party must provide proof to the contrary, refuting the rebuttable presumption that the linguistic meaning of the wording reflects the parties' intentions.

Some Dutch academics have suggested introducing rules of evidence for contract interpretation. As such an approach is not in line with the case law of the Dutch Supreme Court and will only further complicate the interpretation process itself, it is not recommended to introduce such rules. Moreover, such rules of evidence prescribe a specific (factual) interpretation, which in a certain way also implies how sources of interpretation must be selected and balanced by contextual factors. The Dutch Supreme Court has repeatedly emphasised that the circumstances of the case are decisive for the interpretation of a contract. The introduction of rules of evidence for contract interpretation detract from this approach. The model, as identified in this research, aims to provide more guidance, as desired by practitioners, and to increase legal certainty. By using the model, it can become clear which method of interpretation must be applied in the case at hand and will shed light on the possible factual interpretations.

When interpreting a contract, written evidence – and in particular deeds – are very important, just as party and witness statements are. In the light of the identified model, these forms of evidence have been discussed. The means of evidence are crucial for establishing the facts. This is not only important for the presence of the contextual factors, but also for the factual substance given to these factors and sources of interpretation. How the evidence is ultimately valued impacts the selection and assessment of sources of interpretation by using contextual factors. For example, if the truthfulness of a witness statement is doubted, this can result in a source of interpretation being disregarded or being less important compared to other sources.

Parties have the freedom to contractually deviate from the law of evidence by means of an agreement as to burden of proof. In addition to specific evidentiary agreements (e.g., the exclusion of specific evidence), some contractual provisions, such as an '*entire agreement clause*' or an agreed method of interpretation, can also limit the scope of evidence to be considered. In cases where these clauses/agreements qualify as an agreement as to burden of proof, they can also affect the selection and assessment of sources of interpretation.

Additionally, the law of evidence in arbitration, as far as relevant for contractual interpretation, has been also considered and can be incorporated into the identified model. In this context, the Dutch Arbitration Act, the NAI Arbitration Rules, the UNCITRAL Arbitration Rules, the ICC Rules and the IBA Rules have also been considered and can be included in the identified model as well. It is therefore intended that the model, as set out in this research, can also be helpful in arbitral proceedings aimed at resolving disputes considering contractual interpretation.

Chapter 6 shows that under English law, the applicable method of interpretation can be determined based on the model as identified under Dutch law. The English principles of contract interpretation can be accommodated within the identified model. The method of interpretation that is dominant under English law aligns with the purely objective method of interpretation identified under Dutch law. This method is characterised by a selection and assessment of sources of interpretation by using contextual factors, resulting in one or more purely objective sources of interpretation having decisive weight. These sources of interpretation are very closely related to the wording of the contract. The subjective sources of interpretation are irrelevant and excluded. There is, however, a crucial distinguishing factor between the approaches taken within the two systems. The English method is focused on the perspective of a reasonable person having the same background information as the parties. Conversely, with the purely objective method of interpretation under Dutch law, does not refer to the perspective of a reasonable person. The factual interpretation reached by applying this method is therefore also purely objective in its nature. Additionally, English law does not have a general principle of good faith and, as such, this principle does not play a role when interpreting a contract.

The methods of interpretation applied to resolve a dispute considering contractual interpretation under English law are more limited than under Dutch law in this area. English law is therefore less complex than Dutch law. Nevertheless, it is expected that in practice the differences between the Dutch and English methods of interpretation will be insignificant. Often, in Dutch law, the subjective sources of interpretation fail to be substantiated or are absent, for example due to lack of evidence. In such cases, it would be expected that the contract would be interpreted by applying the objective-oriented method of interpretation, in which significant weight is given to one or more objective sources of interpretation. The factual interpretation established under Dutch law will then presumably be equal to the one that would have been reached under English law.

In addition, under English law it also possible to apply the general contra proferentem method of interpretation or the specific contra proferentem method of interpretation for consumer contracts (see Section 69(1) of the Consumer Rights Act 2015). Due to the exclusion of subjective sources of interpretation under English law, decisive weight will be given to one or more purely objective sources of interpretation. Contrary to Dutch law, the second stage of the technique characterising the general contra proferentem method of interpretation under English law, is focused on the identification of the drafter or contributor of the ambiguous clause. The general contra proferentem method of interpretation plays a very limited role in English law, as is the case under Dutch law. It should be noted that this is not the case where it concerns the interpretation of a consumer contract, in which case the specific contra proferentem method of interpretation must be applied.

When interpreting a contract under English law, the focus lies on the wording of the contract. For this reason, 'the natural and ordinary meaning' of the wording forms the most important source of interpretation. Various sources of interpretation, having an independent position under Dutch law, such as 'trade usages' and 'the contractual definition', fall under the scope of the source of interpretation 'the natural and ordinary meaning'. The concept under English law should therefore be understood as not only looking at the literal meaning of the wording, but also considering other sources of interpretation that are closely related to the wording of the contract. The source of

interpretation ‘the structure and design of the contract’ also plays an important role under English law. The main difference between English law and Dutch law is the exclusion of the sources of interpretation ‘the pre-contractual phase’ and ‘the post-contractual phase’. Under English law, these sources of interpretation are fully excluded. This is remarkable, as it has been shown that these sources of interpretation are of great importance under Dutch law to counterbalance the source of interpretation ‘the linguistic meaning of the wording’. The reason that these sources of interpretation are not considered under English law is due to the exclusion of the subjective perspective of the parties to the contract and the emphasis on the wording of the contract. It is believed that the use of these sources of interpretation would diminish legal certainty. However, under Dutch law, these sources of interpretation will generally be established in an objective manner. The subjective perspective of the parties to the contract is then irrelevant. In light of this finding, it is recommended that English law should include the sources of interpretation ‘the pre-contractual phase’ and ‘the post-contractual phase’ when interpreting a contract. As this is currently not the case yet, it is argued that Dutch law gives parties more opportunities regarding the sources of interpretation that can be considered than English law does. The sources of interpretation ‘the pre-contractual phase’ and ‘the post-contractual phase’ can identify other rights and obligations than initially apparent from the wording of the contract. These sources of interpretation can, for example, counterbalance the source of interpretation ‘the linguistic meaning of the wording’. In light of the above, English law can consider to include the sources of interpretation ‘the pre-contractual phase’ and/or ‘the post-contractual phase’ into account under English law, when established in an objective manner. However, it should be noted that under Dutch law, the ‘the pre-contractual phase’ and ‘the post-contractual phase’ as sources of interpretation are frequently hard to establish. Consequently, sources of interpretation that are closely related to the wording of the contract are dominating the interpretation (e.g., ‘the linguistic meaning of the wording’). If that is the case, the factual interpretation reached under Dutch law will probably not differ from the one reached under English law.

The contextual factors considered when interpreting a contract under English law have been shown to overlap with the ones under Dutch law. Under English law, the factual matrix determines the contextual factors. Contextual factors, like ‘the nature of the contract’, ‘the nature and knowledge/experiences of the parties to the contract’, ‘the assistance of skilled professionals’, ‘the manner of the formation of the contract’, ‘the involvement of third parties’ and ‘the nature of a specific clause’ also play an important role under English law. The contextual factor ‘the agreed (interpretation) clauses’ appears to be afforded greater importance under English law than is the case under Dutch law. Contracts governed by English law often include boilerplate clauses, such as a no oral modification clause and an entire agreement clause. If such clauses are included in the contract, they will influence the selection and assessment of sources of interpretation. In particular, the contextual factor ‘business common sense’ plays a significant role under English law. If two or more sources of interpretation have been selected and result in rival factual interpretations, the contextual factor ‘business common sense’ have a determining role in the interpretation process. By assessing the commercial consequences of the rivalling sources, this contextual factor can indicate which source of interpretation should be given decisive weight. The contextual factor ‘business common sense’ is similar to the Dutch contextual factor ‘the plausibility of legal consequences’. Under Dutch law, however, less em-

phasis is placed on the commercial outcome than is the given within 'business common sense' under English law. Finally, under English law, the outcome of selecting and balancing sources of interpretation by using contextual factors cannot be predicted in advance. The factual matrix plays a very important role and determines the contextual factors that are present in the case at hand. Consequently, English law offers less legal certainty, in the sense of predictability, than is generally assumed, it is the circumstances of the case, via the factual matrix, which fundamentally influence the interpretation of a contract. Therefore, it cannot be predetermined how a contract will be (factually) interpreted in a specific case.

Chapter 7 sets out that it is possible to determine the applicable method of interpretation under French law based on the model as identified in this research. The French statutory regime applying to the interpretation of contracts, as laid down in Articles 1188-1192 of the French Civil Code ('**FCC**') can be accommodated in the model. These statutory provisions are not mandatory rules of law and can be qualified as recommendations to the court. However, the court's discretion when interpreting a contract is not unlimited. It is not allowed to interpret a clause that is '*claire et précise*', as follows from Article 1192 FCC. If a court nevertheless acts in breach of this provision, this will be qualified as a '*dénaturation*', with the court deemed to have violated the binding force of the contract (Article 1103 FCC). Dutch law does not recognise such a rule, but in practice the Dutch courts' discretion when interpreting a contract is also limited. In cassation proceedings before the Dutch Supreme Court, it can be tested whether the lower court applied the proper method of interpretation and whether all the circumstances of the case were considered. This can result in the lower court's interpretation of a contract not being upheld. Although Dutch law is based on French law, the statutory interpretation provisions as laid down in the Dutch Civil Code were abandoned when reforming the Dutch Civil Code in 1992. Due to this historical relationship, there are many similarities between French and Dutch law in the field of contractual interpretation.
Regarding the methods of interpretation, it is unsurprising that Dutch and French law have many similarities, as the statutory provisions governing the interpretation of contracts under the Old Dutch Civil Code were derived from the French Civil Code. In both legal systems, both subjective (i.e., the purely subjective method and the subjective-oriented) methods of interpretation and objective (i.e., the objective-oriented and purely objective) methods of interpretation can be used. The applicable method of interpretation can be determined by selecting and balancing sources of interpretation by using contextual factors.
Under French law, a contract must in principle be interpreted in accordance with the common intention of the parties (Article 1188, first sentence, FCC). This makes it possible to interpret the contract in line with the actual intention of the parties. In that case, one or more purely subjective sources of interpretation will have decisive weight and the objective sources will be excluded. This is in line with the purely subjective method of interpretation as identified under Dutch law. In addition, the common intention of parties can also be ascertained by using the subjective-oriented or objective-oriented method of interpretation, in which case '*la bonne foi*' (Article 1104 FCC) can play a role, resulting in a more objective approach. Under both methods, both the subjective and objective sources of interpretation will be considered, and the contextual factors will determine which sources have significant weight.

Even though Article 1188, in the first sentence, FCC emphasises that a court, when interpreting a contract, must look beyond 'the linguistic meaning of the wording', in practice, the common intention of the parties will correspond with the linguistic meaning of the wording. If the above-mentioned methods of interpretation cannot resolve the dispute, a contract can be interpreted by focusing on the perspective of a reasonable person (Article 1188, second sentence, FCC). This method is in line with the purely objective method of interpretation as identified under Dutch law. Because of the focus on the perspective of a reasonable person, subjective sources of interpretation are excluded. Consequently, one or more purely objective sources of interpretation will be given decisive weight.

Finally, as a last resort, the general contra proferentem method of interpretation can be used (Article 1190 FCC). In contrast to Dutch law, this method has an identifiable legal basis under French law. French law distinguishes contracts that are negotiated by the parties ('*un contrat de gré à gré*') and those drawn up unilaterally ('*un contrat d'adhésion*'). This is different from Dutch law. As commercial contracts usually fall under the first category – the negotiated contracts – this type of contract can, under circumstances, be interpreted contra proferentem. Under Dutch law, the general contra proferentem method of interpretation is in principle only applied in cases where the parties did not negotiate the contract. However, as the circumstances of the case are determinative under Dutch law, including the contextual factor 'the manner of the formation of the contract', it is nevertheless possible to apply this method in a specific situation when the parties did negotiate the contract. Therefore, this research does not recommend the adoption of the the distinction made under French law in Dutch law. French law also has a specific contra proferentem method of interpretation for consumer contracts. This method is subject to mandatory legislation and aims to protect the weaker party in a contractual relation. Both the general and the specific contra proferentem method of interpretation for consumer contracts are characterised by the same three stages as under Dutch law. The contra proferentem doctrine underlies several other statutory provisions in the French Civil Code.

Under French law the methods of interpretation are classified in a proxy hierarchical order (Article 1188 FCC), but this hierarchy is not binding. In practice, a French court has the discretion to decide which method of interpretation is appropriate to apply in the case at hand. Although such hierarchy does not exist under Dutch law, it is argued that this will not result to a substantial difference in practice. The model identified in this research respects the court's discretion to decide on the applicable method of interpretation. Although French law has statutory interpretation provisions, French law does not seem to offer more legal certainty, in the sense of predictability, as the circumstances of the case remain decisive. By selecting and balancing sources of interpretation by using contextual factors, it will become clear which method of interpretation is applicable in the case at hand.

Various sources of interpretation can be relevant under French law, as is also the case under Dutch law. The sources of interpretation that are identified under Dutch law can therefore also play a role under French law. Given the emphasis on the common intention of the parties, it is expected that, amongst others, the source of interpretation 'the parties' intentions and expectations' will play a role under French law. However, this does not mean that the wording of the contract is irrelevant. Even under French law, the wording of the contract remains the starting point for a court when interpreting a contract. As a result, under French law, the source of interpretation 'the

linguistic meaning of the wording' also often plays a very important role. Other important sources of interpretation are 'the pre-contractual phase', 'the post-contractual phase' and 'trade usages'. The source of interpretation 'the structure and design of the contract' holds a notable position under French law, because of its legal basis (Article 1189 FCC). The French legislator emphasises that, when interpreting a specific provision, the entire contract should be considered. This can include the preamble, annexes to the contract and the design and structure of the contract (such as the headings used in the contract). Under Dutch law, although it does not have a legal basis, this source of interpretation also plays an important role.
Moreover, in both legal systems the circumstances of the case play a crucial role and determine the contextual factors that are present. There are no limitations on the possible factors which can be considered. Contextual factors that are commonly considered include 'the nature and knowledge/experiences of the parties to the contract', 'the nature of the contract', 'the assistance of skilled professionals', 'the manner of the formation of the contract' and 'the agreed (interpretation) clauses'. Contextual factors such as 'the nationality of the parties to the contract', 'the language of the contract', and 'the foreign origin of contractual clauses' can also be relevant in specific situations. The contextual factor 'the plausibility of legal consequences' has a legal basis in the French Civil Code (Article 1191 FCC). As under Dutch law, this factor only plays a role when balancing sources of interpretation. In a scenario where various sources of interpretation are selected, the source giving the agreement some effect should ultimately outweigh the other sources.
Given the many similarities between Dutch and French law in the field of contract interpretation, it is postulated that when the model is applied, the factual interpretation reached by applying the model under French law will be almost identical to the one reached under Dutch law.

Chapter 8 shows that the interpretation provisions, as set out in the PECL, the DCFR and the PICC, can be accommodated in the model as identified in this research. Additionally under these transnational principles, the applicable method of interpretation can be determined by using the model. The principles referred to have considerable similarities. One difference concerns the scope of the principles: the PICC apply specifically to international commercial contracts, whereas the PECL and the DCFR can, in principle, apply to all types of contracts. Despite this difference, it is not necessary to adopt a different model a priori for, for example, the interpretation of international commercial contracts. To the extent that it is required to differentiate the approach because of the nature of the contract that needs to be interpreted, the model provides sufficient scope to do so, as the circumstances of the case are at the heart of the interpretation under these principles. It is therefore unsurprising that the model, as characterised under the transnational principles, bears great similarities to the model when characterised under Dutch law.
The methods of interpretation that can be used under the transnational principles, vary from the more subjective (the purely subjective and subjective-oriented methods of interpretation) to more objective methods (the objective-oriented and purely objective methods of interpretation). In line with English and French law, the transnational principles use the perspective of a reasonable person to interpret a contract if the common intention of the parties cannot be identified (see Article 5:101(3) PECL, Article II.-8:101(3)(a) DCFR and Article 4.1(2) PICC). In the model, this method of

interpretation is quite similar to the purely objective method of interpretation as identified under Dutch law. In both methods, only purely objective sources of interpretation will be considered, resulting in one or more of these sources having decisive weight. Although the perspective of a reasonable person is not adopted under Dutch law, the factual interpretation that would have been reached under this method is expected to correspond with the factual interpretation when applying the perspective of a reasonable person under the transnational principles. Considering the similarities and in line with Dutch law, it is therefore assumed that the purely objective method of interpretation under the transnational principles is the appropriate method to be used to interpret a contract affecting the legal position of a large group of third parties. By so implementing this method, it is possible to reach a uniform interpretation. The PICC and PECL do not contain a provision for this situation. The DCFR does and refers explicitly to the perspective of a reasonable person in case of third-party involvement (see Article II.-8:101(3)(b) DCFR).

A contract can also be interpreted by using the contra proferentem method of interpretation (see Article 5:103 PECL, Article II.-8:103(1) DCFR and Article 4.6 PICC) under the transnational principles. The DCFR instructs that it is best practice to interpret a term that has been established under the dominant influence of one party against that party (Article II.-8:103(2) DCFR). This is an alternative perspective, which does not seem to play a role in the other transnational principles and legal systems, including Dutch law. It ultimately falls, however, under the scope of the contextual factor 'the manner of the formation of the contract' and can therefore be considered when interpreting a contract. Under all these principles, the contra proferentem method of interpretation is characterised by the same three stages as under Dutch law. Even contracts between professional parties can be interpreted contra proferentem, as follows explicitly from the provision of the PICC. As the contra proferentem method of interpretation is a positioned as a last resort within the transnational principles – as is also the case in the other legal systems – this method plays a limited role in practice.

As the sources of interpretation are not limited under these transnational principles, many of the sources that are identified under Dutch law are also relevant under the principles, such as 'the parties' intentions and expectations', 'the linguistic meaning of the wording' and 'the structure and design of the contract'. Some sources of interpretation can be derived explicitly or implicitly from the interpretation provisions included within the principles. The actual nature of the sources of interpretation – i.e., whether these are objective or subjective – depends on the factual substance given to the sources when applied in the case at hand. The sources of interpretation 'the pre-contractual phase' (see Article 5:102(a) PECL, Article II.-8:102(1)(a) DCFR and Article 4.3(a) PICC) and 'the post-contractual phase' (see Article 5:102(b) PECL, Article II.-8:102(1)(b) DCFR and Article 4.3(c) PICC) are recognised along with the source of interpretation 'trade usages' (see, inter alia, Article 5:102(f) PECL and Article II.-8:102(1)(f) DCFR; Article 5:102(d) PECL and Article II.-8:102(1)(c) DCFR; Article 5:102(e) PECL and Article II.-8:102(1)(d) DCFR; Article 4.3(b) PICC, Article 1.9(1) PICC, Article 4.3(e) PICC and Article 4.3(f) PICC). Within the latter source of interpretation, various subcategories can be distinguished, e.g., the specific customs developed between the parties to the contract (which can result in a subjective nature for this source of interpretation) and the general usages that apply in a specific industry (which gives an objective nature to this source of interpretation). As the majority of contracts that are governed by the transnational principles involve international

parties, it is assumed that the source of interpretation 'trade usages' can play a significant role in specific situations to which the principles apply.
The transnational principles also stress that all the circumstances of the case must be considered when interpreting a contract. Consequently, various contextual factors can play a role, as they are determined by the circumstances of the case. This is in line with Dutch, English and French law. The transnational principles include an indicative, not exhaustive, list of the circumstances that can be relevant (Article 5:102 PECL, Article II.-8:102 DCFR and Article 4.3 PICC). Upon analysis of the list, it is apparent that this list contains both sources of interpretation and contextual factors. Considering the model identified in this research and the terminology used, it must be noted that this list of 'circumstances' is therefore inaccurate and somewhat misleading. The importance of some contextual factors can be derived, explicitly or implicitly, from the interpretation provisions in the principles. In all the transnational principles, the contextual factor 'the plausibility of legal consequences' occupies a unique position. Under the PECL and the DCFR, this contextual factor follows from a specific provision (see Article 5:106 PECL and Article II.-8:106 DCFR). Under the PICC this contextual factor can be found in the general provision of Article 4.3 PICC, which lists some circumstances that can be relevant for the interpretation of a contract. Under the transnational principles, this contextual factor only plays a role when balancing the sources of interpretation and ensures that the factual interpretation has been realised. This is the same approach as under Dutch, English and French law. However, English law does opt for a slightly different application of the contextual factor 'the plausibility of legal consequences' because of its emphasis on 'business common sense'. It is notable that only the DCFR explicitly refers to the contextual factor 'the involvement of third parties'. It has been argued that this contextual factor can also play a role under the PECL and PICC. Moreover, the transnational principles address explicitly the situation when there is a discrepancy between the different language versions of the contract as circulated by the parties (Article 5:107 PECL, Article II.-8:107 DCFR and Article 4.7 PICC). Despite some variations in the wording used in the provisions and the explanatory notes to the principles, the rules between principles are substantially aligned. Dutch, English and French law, do not have similar provisions. Therefore, these legal systems, can in such a situation – i.e., where different language versions are circulated, and a discrepancy arises – learn from the transnational principles. By acknowledging the existence of the contextual factor 'the language of the contract', such a situation can be accounted for when selecting and balancing sources of interpretation by using contextual factors. In the list of relevant circumstances under the PECL and DCFR reference is made to 'good faith and fair dealing' (Article 5:102(g) PECL and Article II.-8:102(1)(g) DCFR; see also Article 1:201(1) PECL and Article I.-1:103(1) DCFR). In the PICC 'good faith and fair dealing' can be found under the general provisions, see Article 1.7 PICC, and can also be relevant when interpreting a contract, as confirmed by PICC's explanatory notes. In light of the model identified in this research, 'good faith and fair dealing' does not qualify as a circumstance, in the sense of a contextual factor, but it can be part of the method of interpretation itself, resulting in a more objective approach. This can be true under the subjective-oriented and obmethod of interpretation.
Despite some differences in the interpretation provisions under these principles, it is anticipated that the factual interpretation will generally be the same under all three sets of principles. It is anticipated that the factual interpretation will also be identical

to that reached under Dutch law, given the many similarities between Dutch law and the transnational principles.

The conclusion, as set out in Chapter 9, is that the model identified in this research, can clarify which method must be applied to interpret a contract considering existing legislation, case law and legal doctrine. In particular, it identifies which method of interpretation is applicable based on a specific selection and assessment of sources of interpretation by using contextual factors. The model intends to contribute to legal certainty in the sense of predictability. The existing principles for the interpretation of a contract under English law, the French statutory regime applying to the interpretation of contracts and the interpretation provisions laid down in the transnational principles can be accommodated within the model as identified under Dutch law. Conceived of in this way, the model can be used to determine the applicable method of interpretation.
The comparative law study demonstrates that the similarities between the different legal systems and transnational principles outweigh the differences. Despite each legal system and the transnational principles having their own characteristics and particularities, ultimately these not materially affect the way the model works. Due to the primary role of the circumstances of the case when interpreting a contract, it is not possible to predict in advance how the selection and assessment of sources of interpretation by using contextual factors will play out in the case at hand in any of the legal systems and transnational principles falling under the scope of this research. It is intended that in any case where parties are engaged in a dispute considering contractual interpretation, the identified model can provide guidance. The parties are recommended to not only prove that specific contextual factors and sources of interpretation are present, but also to show how the contextual factors, taken together, influence the selection of sources of interpretation and the relative weight given to these sources. By doing so, it will become clear which method of interpretation must be applied to interpret the contract in the case at hand. When the model is adopted consistently, it can be expected that the clarity, the legibility and the transparency of a judgment or arbitral award concerning the interpretation of a contract will be increased. This will enhance the quality and legitimacy of the contractual interpretation as laid down in a final judgment or arbitral award.