Abstract to the thesis:

Undergraduate thesis on the concepts of conditions, warranties, representations and covenants

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1 Definition of topic

1.1 Background and purpose

The undergraduate thesis concerns the explicit use of the terms conditions, warranties, representations and covenants in contracts with Norwegian law as governing law. These terms may have specific legal meanings and functions in English contract law, which not necessarily are suitable or acceptable in Norwegian contract law, or for which there at least does not exist any counterpart in Norwegian contract law. The parties of the contract may or may not be aware of the meaning English contract law gives to the terms. The question therefore arises how a Norwegian court will interpret the contract, and in case the parties meant to imply the English meaning, to what extent the Norwegian court will accept this meaning or exercise censorship on the terms. The originally intended meaning of the terms, and why the parties wish to use the terms and their functions in English contract law, will be explained first. Then it will considered to what extent the terms and their original functions are needed when making contracts governed by Norwegian contract law, and to what extent the terms may and can be interpreted to have such a meaning, or other predicted or unpredicted, desirable or none-desirable meanings.

1.2 Why the four specific terms

The four terms are frequently used in anglo-american contract-models, and have in common that they are used to categorise different types of contractual obligations i the contract. The terms often function as the typical definitions and headings for three of the main types of contractual obligations in the contract.

1.3 General assumptions and focus in the thesis

The focus in the thesis is how the parties explicit use the terms in the wording of the contract. It is assumed that the contracts are made in writing, negotiated individually, as a general rule with the help of legal aid (typical lawyers), and that both parties to the contract are commercial parties with more or less equal commercial strength and standings. Consumer and

consumer-like contracts, employment contracts, in addition to premade contract standards fall without the scope of the thesis. Furthermore the terms in question may be found in any type of commercial contracts and are as such general contractual terms. In this thesis the focus will be limited to the more typical commercial contracts, such as the sale and purchase of goods, services and capital and also contracts concerning financing. The thesis focus on the general rules of contract law, and does not as a main rule make distinctions between different types of contracts or contract areas, unless there are obvious deviations from the normal understanding of the terms within certain types of contracts or contract areas. Furthermore it should be noted that the focus on common-law will be limited to English common-law. American common-law and the law of other common-law countries will not be taken into consideration.

2 The originally intended meaning of the terms in English contract law

2.1 Conditions, and warranties in this context as the theoretical counterpart

Different meanings of the words

Neither the word "condition" nor the word "warranty" have a uniform meaning in English contract law. Case law has even called "warranty" one of the most ill-used terms in the legal dictionary. Firstly, "warranty" and "condition" may just be other words for a term, an undertaking, an obligation and so on, without having any legal significance attached to them. Secondly, the term "warranties" or "representations and warranties" are often used, typically in business sale agreements, to describe statements of fact in relation to important aspects of the business or its assets. This will be explained later on. Thirdly, "condition" may refer to so-called contingent conditions, either condition precedent or condition subsequent. These conditions refer to the order of performance. Non-fulfilment does not impose liability, but the contract will not be concluded or will be suspended if the conditions are not fulfilled. These meanings of the term "condition" are not the theme of this thesis.

Conditions as exception from the main of "substantial failure" in connection with rescisson for breach of contract

The subject is another meaning of the words. Conditions and warranties can be means of deciding what remedies are available in case of a breach of contract, by categorising the obligations of the contract as either conditions or warranties.

The two main remedies for breach of contract are damages and rescission. Rescission in this context means that the contract is terminated as from the date of rescission and the parties are relieved from further performance of their obligations from that date.

As a main rule rescission requires a substantial failure in performance. The criteria may be difficult to ascertain for the parties in case of a breach. The parties may therefore regulate the consequences themselves in a manner deviating from the main rule of "substantial failure", namely by the use of conditions and warranties. The main purpose of such regulation will be to gain a greater degree of certainty in the contractual relationship.

By categorising the terms of the contract as conditions or warranties the parties define how important the terms are.

Conditions are obligations which are regarded as essential to the main purpose of the contract, while warranties refer to the less important terms or terms that are collateral to the main purpose of the contract. The main point is that if a term is regarded as a condition in this meaning, any breach of it entitles the innocent party to rescind the contract, in addition to claim damages. It is not relevant how serious the breach is, whether or not the innocent party suffers any loss because of the breach, or what the motives for the breach are. Breach of a warranty on the other hand never entitles the innocent party to rescind the contract, only to claim damages. But it should already here be noted that it is not very common for the parties to regulate terms as warranties in this meaning, and in the following the main focus will be on how the parties define terms as "conditions". It does not seem to exist any established phrases that the parties use to categorise terms as warranties. A probable cause is that the parties did not deem it necessary to define terms as warranties, because if a term was not stated or construed to be a condition, the courts would define it as a warranty. Today, when the courts interpret the contract, they usually take the approach of asking themselves whether the term is a condition or an intermediate term. The latter is a third type of term which essentially follows the main rule of "substantial failure", and as such does not exclude the right to rescind the contract but requires that the breach is "substantial" if a party is to be given the right to rescind. Nevertheless, even though the parties do not use the term "warranties" in the meaning of excluding the right to terminate, it is not uncommon that they have an exhaustive regulation of remedies for breach of contract within the contract, and have not listed

rescission as one of them. In that case one can say that they indirectly have regulated terms as warranties, and such a regulation will and must be respected by the courts.

2.1.1 Why are the regulations allowed and used

As previously mentioned breach of condition entitles the innocent party to rescind the contract without regard to the seriousness of the breach, as long as there is a breach. And if the performance is not precise and exact in the smallest manner, except for microscopic deviations, there will be a breach. As a consequence of the use of conditions, the innocent party may in other words rescind the contract in case of an immaterial breach, even though the only reason is a change in the marked which has made the contract less profitable or desirable. As one can imagine this may result in rather harsh and unfair results, at least from a Norwegian perspective. The reason that parties nonetheless may do so is because English contract law greatly emphasis certainty and predictability in contractual relationships, at least the commercial ones. One can say that certainty often prevails over fairness and justice in English contract law. The ab initio categorisation of terms as conditions promotes certainty because the parties don't have to evaluate whether or not the breach is substantial. When there is a breach the innocent party will know immediately whether or not it is entitled to rescind the contract, without being in danger of committing a breach by denying further performance.

2.1.2 How may the parties categorise terms as conditions

The next question then is how the parties categorise terms as condition. Also case law and statutory law have defined and may define certain terms as conditions or warranties, but this is not the focus of the thesis. The primary aspect is how the parties may, and in fact do, categorise the terms as conditions and warranties, since it is these regulations that will be subject to interpretation by a Norwegian court. In the following it will be given some examples as to how the parties try to categorise terms as conditions. These examples are not exhaustive but typical. But first some aspects of English rules of interpretation of contract must be pointed out.

English rules of interpretation

As a general rule the courts look exclusively at the regulations of the written contract when they interpret the parties' intentions, due to the parol evidence rule (explained below). Evidence of the parties' intentions other then the wording of the contract itself is as a main rule not allowed to be regarded as relevant when interpreting the contract. Furthermore the courts take a very literal apporach when interpreting, and cannot interpret the contract in a manner that is inconsistent with the literal wording of the contract. If the wording of the contract expresses in a clear way that the parties' intentions were that a term was to be a condition, then the courts will respect that regulation no matter the consequences. The main function of the parties' ability to categorise terms as conditions is to give the parties the possbility to make predictable regulations in the contract with regards to the right to rescind the contract when the contract is breached. If the courts were to censor such regulations when interpreting the contract, it would contradict the very idea and intention of the ability to categorise terms as conditions. So in other words, when the parties categorise terms as conditions, they do so knowing that the court will interpret the regulations of the contract literally and as a general rule exclusively without taking into regard other evidence of the parties intentions other then written contract itself. With that said, we now shall see some examples as to how the parties try to regulate terms as conditions.

"Condition"

The first word that is natural to examine is the word "condition" itself, since this word often is used in the contracts. The parties may be regarded as having categorised a term as "condition" solely by the use of the word "condition". But allthough the use of the word is a strong indication that the parties intended the term to be "condition" in its technical sense, it is not conclusive. Even though the courts interpret the wording very literally, they dont interpret the words of the contract isolated. They must interpret the wording in context with the rest of the contract. The courts must be convinced that the parties meant to use the word "condition" in its technical sense. And when considering this, the courts will regard the fairness of the result. The more unfair the result will be, the less likely it is that the parties intended the term to a condition in its technical sense, as long as there exists no other indications in the contract that this is the case. But if the term is a commercially important one, the result may be the opposite.

The sole use of the word "condition" is in other words not necessarily a reliable way for the parties to define a term as a condition.

"Of the essence"

A phrase that is often seen used in the contract, especially in connection with time obligations, is the phrase "of the essence". By stating that the term or the performance of it is "of the essence" the parties may categorise a term as a condition. As previously mentioned, conditions are obligations that are essential to the main purpose of the contract, and by defining a term as "of the essence", the parties are thereby in fact defining it in the same manner as the definition of conditions. As the courts tend to interpret contracts quite literally, they will therefore interpret the intention of the parties as to being that the term is meant to be a condition since it is, according to the parties, essential to the contract. It should however be noted that, as far as known, the use of the phrase only has succeeded in defining a term as a condition within the context of precise time obligations, e.g. delivery by 12.00 pm on 1 May. It is unlikely that the phrase will work in context with less precise time-clauses, such as "without delay". The fact that the parties were prepared to agree to an imprecise time obligation negates the idea of a condition, i.e. a term which content and fulfilment is of essential importance to the parties. With regards to other obligations then time obligations, it has not been found any examples on the parties use of the phrase in this type of regulations, or examples on that the court interpret the use of the phrase "of the essence" in connections with such obligation as to meaning that the parties intended for the term to be a "condition". But on the other hand one can not rule out the possibility. The parties may very well categorise any type of obligation as "of the essence", but it is not certain that it will be interpreted as a condition due to this fact, all though it is possible.

"any breach of [a given term] entitles the innocent party to rescind the contract"

Another phrase used regularily in contracts when regulating the right to rescind the contract, is the phrase "any breach of [a given term] entitles the innocent party to rescind the contract". One would have thought that this phrase would make the term a condition, since the main consequence and main purpose is the same, and since the wording is clear. This is however not the case. The phrase will, as it is interpreted literally, give the party a right to end the contract prematurely notwithstanding the seriousness or consequences of the breach in question, or the motive for the termination. But the term will not be regarded as a condition. If a party terminates the contract because of an immaterial breach by use of the right given to him according to the phrase, he terminates the contract by a "power" given to him by the contract. Such a right to terminate according to a "power" in the contract must be

distinguished from the right to rescind as a result of a repudiation. There is a repudiation when the breach amounts to a substantial failure in performance or when there is a breach of a condition. The main consequence of this distinction concerns the right to damages. Where a contracting party terminates further performance of the contract pursuant to a "power" in the contract, and the breach which has caused it to exercise that power is not a repudiatory breach, the party exercising the right to terminate may only be entitled to recover damages in respect of the loss which it has suffered at the date of termination and not for the loss of bargaining. Is the breach on the other hand (also) repudiatory, he will be entitled to "full" damages, in other words also damages for loss of bargain because the contract is ended prematurliy.There is no practical difference between an agreement containing a power to terminate, and an agreement containing a provision to the effect that time of fulfilment is of the essence, so that any breach will go to the root of the contract. The difference is purely one of drafting form.

Summary

As far as known, only the phrase "of the essence" in connection with precise time obligations may be regarded as a reliable way for the parties through the wording of the contract to make a term become a condition.

2.1.3 Exhaustive regulation of available remedies for breach of contract were rescission is excluded

As previously mentioned, the parties usually do not use the word warranty other then as another word for obligation, term or undertaking, and therefore usually do not intend for the term to have any effects when it comes to rescission. However it is not unusal to regulate exhaustively what remedies are available for breach of contract, and in this connection not include the right to rescind, but maybe for instance only right to damages or price reduction. This will be an indirect way of categorising terms as warranties, and a regulation that the courts, if it according to its wording is clear enough, must respect.

2.2 Representations and warranties

The words “representations and warranties”, or just “representations” or “warranties”, are frequently used in contracts as headings for terms concerning disclosed information that the parties consider prerequisites for wanting to and being able to enter into the contract. Whether the parties use one or both of the words does not seem to have any legal significance attached to it, other then maybe having a small influence when the courts interpret whether or not the information contained within the clauses is meant to be terms of the contract or just representations given prior to the contract without being contractual terms.

The sole use of the word “representation” may imply that the parties did not mean for the information to be part of the contractual terms, but there is not in any way a presumption for such an interpretation. The sole use of the word “warranty” may on the other hand imply that the information is meant to be contractual terms, but neither here there is in any way a presumption for such an interpretation. The use of both words may imply both that the information ammounts to terms of the contract, and an exhaustive list of pre-contractual information given with regards to the rules of misrepresentations (see below). But there is not even here a presumption for such an interpretation. The main focus of the thesis at this point is therefore not the use of the term “representation and warranties” itself, but rather why the parties disclose such an amount of information and factual conditions, often obvious ones, into the contract that is common under the heading “representations and warranties”.

2.2.1 Why are such regulations necessary

The information is disclosed and written into the contract first and foremost because of the following reasons:

No duty to disclose information

Firstly, there exists in English contract law no general duty to disclose relevant information or act in good faith when entering into or fulfilling the contract. The ruling principle is “caveat emptor”, that is, each party has to take care of their own interests. The parties can therefore not rely on factual conditions unless they are disclosed, no matter how basic or to the foundation of the contract those conditions are. The parties can in other words not base their expectations on the other ones silence. If information is not disclosed they must themselves carry the risk of it being correct.

Difference in concequences between wrongful disclosed information that amounts to terms of the contract and informatioon that only amounts to misrepresentations

Furthermore, if the information is disclosed but proves to be wrong the consequences are somewhat different depending on whether or not the information is made part of the contract terms. If the wrongful disclosed information is not made part of the contract, the innocent party will not be entitled to any remedies for breach of contract, but the disclosure may amount to a misrepresentation. Opposite to a breach of contractual obligations, which are considered absolute and automatically entitle the innocent party to damages, the consequences of a misrepresentation depend on the degree of fault and the discretion of the court. Damages may be awarded, but the estimation may be different then that of damages for breach of contract. While the purpose of remedies for breach of contract is to put the parties in the same position as if the contract was performed correctly and the intended bargain achieved, the purpose of remedies for misrepresentations is to put parties in the same situation as if the information never were given/disclosed. Furthermore rescission may be awarded, but rescission in this context means that the contract is set aside for all purposes and regarded as never having existed. As one can see, the consequences of disclosed wrongful information are both different and more uncertain if it only amounts to pre-contractual misrepresentations than if the information is incorporated as terms of the contract and therefore amounts to a breach of contract. To enhance certainty, the parties will therefore be best off with making the disclosed information part of the contracts terms.

When will the disclosed information amount to terms of the contract

If the disclosed information is written into the contract, as a general rule it will be regarded as terms of the contract, all though this must be decided through interpretation of the contract. On the other hand, if the information is not written into the contract, the information will often not be regarded as part of the contract. This is due to the “parol evidence rule”. The rule regulates what evidence that is relevant when interpreting a written contract, and only applies where the written contract exhaustively regulates the transaction, but this is often the case in larger commercial transactions. Even though a contract does not contain an “entire agreement” clause, the fact that the parties have formalized the contract into a written document, and often an extensive one, is an indication that the written contract is exhaustive. The “parol evidence rule” states that evidence other then the wording of the contract is irrelevant and shall not be considered. The consequence is that the parties will not be heard

with the claim that the contract contains other terms then the ones written into it. If the parties want to make certain that the information will be regarded as terms of the contract, the safest way to ensure this is to write it into the contract.

Summary

The parties may only rely on disclosed information, and if they want the disclosed information to be regulated by the remedies for breach of contract they should incorporate it into the contract as terms. Otherwise wrongful information may only amount to a misrepresentation. To enhance certainty in the contractual relationship, it is therefore necessary to get all information needed disclosed and written into the contract.

2.3 Covenants

We now move onto the third term in which the parties often categorise the obligations of the contract into, namely covenants. The term is often used in contracts as heading for obligations that concern restrictions or requirements when it comes to what the parties must or must not do during the life of the contract.

Originally the term was another word for deed, which is a type of contract that derives its validity from its form. Amongst others it has to be signed by witnesses. These types of contracts are sometimes required by law, and they do not require that the beneficial party of a contract accepts the offer he is given, or knows the content before the other party is bound by the offer. But most interesting in our case is the fact that such contracts are not subject to the rule of consideration. This rule states that a binding contract will not exist before the initial offer is met with a counter-offer, called consideration. In other words gifts can not be given as binding contracts without consideration, unless they are given as deeds. It may be that the parties in the commercial contracts this thesis focuses on wish to regulate certain obligations in the contract that do not seem to have any counter-offer as deeds so that the parties are certain that the regulations are binding. This is probably a somewhat theoretical view, since the rule of consideration cna be fulfilled even though the counter-offer only consists of 1 NKR or the like. In other words there is no requirement that the offer and counter-offer are balanced, and the rule of consideration is therefore a somewhat formal rule. Nevertheless the parties may wish to make certain obligations, as the ones in question, as deeds to avvoid

uncertainty as to whether or not consideration is fulfilled. But this will not be the case solely by defining the obligations as covenants. In case the reason the parties are using this word for the obligations is to avvoid the rule of consideration, it will not have any effect, unless they also use the formal requirements for deeds when entering into the contract.

When the term covenant is used in commercial contracts today, the formal requirements are usually not fulfilled. The term is only used as another word for undertaking, obligation and so on without having any legal meaning attached to it, other than perhaps trying to make the term look more important and solemn. One might ask why the parties wish to make the terms more solemn. A possible explanation may be that they wrongfully think they are avoiding the rule of consideration by doing so, or that contracting parties previously did, and the use of the term has been "hanging on" as a tradition when making the contract, even though the tradition is without effect or meaning. But aside from this the only effect the use of the term covenant has, is to function as a label for a certain type of obligations in the contract.

3 Evaluation under Norwegian law

In the following we shall now see how the terms will be interpreted under Norwegian contract law. The goal is to clarify to what extent they can and will have same effects as in English contract law as described above and if this effect is necessary, needed or has any purpose, and/or if they have other wanted or unwanted effects. The examples mentioned earlier will be interpreted according to Norwegian rules of interpretation. In this way we will get two answers. Firstly we will see what effects the concrete examples have under Norwegian contract law. This has value itself, since these examples are typical examples of how the anglo-american contract models make use of the terms, and therefore often will be used in contracts governed by Norwegian contract law when the parties adopt the models in their contracts. Secondly we will get a more general answer to what extent parties under Norwegian contract law can regulate the same contractual consequences as in English contract law, and to what extent they need to.

3.1 Conditions and warranties

3.1.1 Is the regulation of the right to rescind needed?

As a main rule Norwegian contract law also requires a form of “qualified breach”, that is a serious or substantial enough breach, if a party is to rescind the contract. The parties will often find it difficult to ascertain whether or not a breach is substantial enough to deny further performance and terminate the contract. The same problem as in English contract law therefore arises in connection with the need for certainty.

3.1.2 Sollutions in non-mandatory contract law that try to satisfy the parties need for certainty with regards to the right to rescind for breach of contract

Before we look upon the parties’ access to regulate the right to rescind the contract, we shall briefly see to what extent the non-mandatory legislation also has rules that do this. The reason why this is needed is because if these rules regulate the right to rescind in a same manner as the use of conditions, or in similiar ways makes the certainty around when the parties can rescind the contract as absolute as that of conditions, then the parties will not need to regulate this in the contract themselves, but can instead rely on the non-mandatory rules. Furthermore the non-mandatory rules are often regarded as setting up fair sollutions for the parties, and these sollutions often have influence on the courts when they interpret the contracts.

In the different non-mandatory Acts of contract law there are examples of regulations that try to lessen the uncertainty around the right to rescind somewhat. For example according to the sale of goods Act and sale of real estate Act the buyer may give the seller a “fair” respite when delayed. If the seller does not deliver within the new time-limit, the buyer will be entitled to rescind without having to consider the cause or consequences of the delay any further. But nevertheless the new time-limit must be fair and in accordance with the principle of loyalty and good faith. Its therefore not as absolute as conditions, or opens up for the same certainty as to whether it will be accepted by a court and upheld whatever the time-limit is and what the motives for it is. Furthermore there are rules in the maritime Act that says that if a rented ship is not put at disposal within the agreed time the contract may be rescinded without having to consider the seriousness of the delay. This rule does infact work in the same way as conditions, and opens up for an unconditional right to rescind no matter the consequences of the breach, the degree of fault or the reason for wanting to rescind. But this is also, so far as I

know, the only rule in Norwegian non-mandatory contract legislation that opens up for such an unconditional right to rescind the contract.

In other words there exists no general exception in Norwegian contract law from the right to rescind the contract that with the same effect as conditions.

3.1.3 The parties right to regulate the right to rescind the contract

Since the general rule of rescission gives rise to a need for the parties to regulate the right to rescind the contract similar to conditions, and since there exists no general exception similiar to conditions in the non-mandatory codified or non-codified rules of contract that the parties can rely on, the next question is to what extent the parties themselves may regulate the right to rescission similar to that of conditions in the contract itself to satisfy their need for certainty.

The main rule is that it is up to the parties to define through their agreement what that amounts to a breach and when this breach may entitle the party not in breach to rescind the contract. The right for the parties to define the content of “substantial failure” and to define when a breach is substantial is a basic principle in Norwegian contract law.

Nevertheless, both the Norwegian rules of interpretation and section 36 of the Norwegian formation of contract Act, which prohibits unfair contract terms, also in commercial contracts, limits the parties ability to make whatever regulations they will in the contract and prevents the parties from being able to rely fully on these regulations and their literal wording, and thereby limits the possibility for the parties to create 100 % certainty around their contractual relationship and the concequences of the contract.

3.1.4 Possible limitations to the parties ability to regulate the right to rescind the contract exclusively and literally through its wording due to rules of interpretation

If the parties do not have a mutual understanding of the contract, and neither of the parties should have been aware of the others understanding (the ”good-faith” standard), then the contract is to be interpreted objectively based on the natural and plain meaning of the words. And when it comes to commercial contracts, court practise shows that the wording is greatly

emphasized. Nevertheless, one is not limited to look at the wording of the contract when interpreting contracts according to Norwegian rules of interpretation, in contrast to English common-law and its parol evidence rule. Other aspects, such as communication between the parties prior to the closing of the contract, former drafts, the price, acting of the parties prior to and after the entering into of the contract and so on may contribute to the interpretation. Norwegian courts are have in other words a much larger scope of proof, and a much larger freedom of what they can look at and take into consideration and lay weight on, when they are to interpret the meaning and intention of contract as the parties have meant it. Due to this freedom of the courts when it comes to interpretation, the parties can not rely fully and exclusively on the literal wording of the contract, and that the result of interpretation wil be based conclusively on this wording. They can therefor not rely on that the regulations they put into their contract will be interpreted and upheld fully according to the literal wording.

Furthermore, Norwegian contract law focuses on whether the result of the interpretation will be fair and just or not. Norwegian legal theory has as such pointed out that Norwegian and English contract law generally speaking reflects the conflict between certainty and fairness. While an English judge will not make the contract for the parties as it should have been, a Norwegian judge may to a certain extent “form” the contract through interpretation according to what is regarded as fair. When the courts are to decide whether or not a contract or contract term is fair, the measure of fairness must be found in the standard in section 36 of the formation of contracts Act, and in the solutions of the non-mandatory general rules of contract law, e.g. the sale of goods Act and the maritime Act. The former Act is central in Norwegian legislation regarding contract law and has been a role model for many other Acts concerning contract law. As such its solutions may often reflect the general principles of Norwegian contract law.

If the court should find the regulations of the contract to be too unfair they have a long tradition for interpreting the regulations in a way that limits the parties rights and duties of the contract if these are to wide according to the natural meaning of the wording, or to interpret into the contract restrictions to what the parties must have intended with the regulations. And to the extent the wording of the contract and the surrounding evidence, as interpreted by the courts, opens up for alternative results and meanings. then the courts often will look upon the non-mandatory rules of contract contained in background law, and solve the contract according to these rules, in other words choose the alternative that is most in harmony with

the background law. This way they can avvoid the most unfair results of the regulations. The party who did not make the wording clear enough will in other words have to take responsibility for this, and can not always expect that obligations preceding the background law will be imposed on the other party unless the contract makes the whole extent of the obligation very clear. But even so, the courts may also choose the rules of the background law as the solution to the contracts regulations, even though it may go against the literal wording of the contract.

On the other hand one must not exaggerate the importance of a fair result. In commercial contracts, as stated in newer decissions in the Norwegian supreme court, the wording of the contract still weighs heavily when the contract is to be interpreted, and certainty is important. The right to regulate a right to rescind the contract no matter the consequences of the breach is in itself not illegal or unfair. Nevertheless, legal theory gives reason to believe that such regulations may be restricted in certain cases as a consequence of unfairness.

To conclude on might say that even though the right to rescind the contract no matter the consequences of the breach in many cases may be acceptable under Norwegian contract law, the Norwegian contract law does not offer an as absolute or certain way to regulate this through the wording of the contract as English contract law does. The degree of certainty that parties in commercial contracts wish for, is not satisfied in the same manner in Norwegian as in English contract law. The point is not that courts often will restrict the parties' regulations concerning the right to rescind the contract, but that they can and may do so in certain cases. The possibility that the courts may censor the contract indirectly through interpretation, and not respect the parties regulations as stated according to the literal meaning of the contract regulations, gives room for an uncertainty that prevents the parties from being able to rely fully on the literal wording of the contract, and thereby limits the certainty in the contractual relationship.

3.1.5 The significance of English language and contractual expressions being used in contracts governed by Norwegian contract law

Before we look upon how the specific examples mentioned previously will be interpreted under Norwegian contract law, a few words must be said about the significance of the fact

that the contract is written in English. The question is whether or not this will or can have any impact on the interpretation. The main rule is that the governing law and not the language is decisive when interpreting the contract. Norwegian court practise shows that even though the contract is written in English, with typical English terms, the regulations are not treated in any special way but handled in the same manner as terms and regulations written in Norwegian. And especially when it comes to the remedies for breach of contract, unless the contract clearly states otherwise, the remedies will be solved in accordance with the general rules of Norwegian contract law. If the contract is to have special consequences deviating from the background law, it must state so clearly. If the parties do not agree on a special meaning of the contract or its terms, and none of the parties must or should have understood a special meaning the other party had in mind (standard of good faith), then the contract must be interpreted objectively. And the fact that the contract is written in English can not itself give rise to a claim that the other party should have understood a special English meaning intended by the one party as long as the governing law is Norwegian. According to the objective understanding of the terms, we may therefore already here conclude that neither the word condition nor warranty will have any effect themselves under Norwegian contract law when it comes to the rght to rescind the contract. The use of the words will not in anyway imply anything about the parties' regulation of the right to rescind the contract. And likewise the use of the expression "any breach entitles the innocent party to rescind the contract" will solely regulate the right to rescind and not the right to claim damages under Norwegian contract law.

3.1.6 Evaluation of the specific regulations

We shall now see how the specific regulations mention previously may be expected to be interpreted under Norwegian contract law. There are no known cases concerning these regulations in Norwegian court practise. Legislation, preparatory works and legal theory offer some general guidelines. But apart from this the evaluation of how the regulations will be interpreted must primarily be based on the general rules of interpretation.

3.1.5.1 "Condition"

The word "condition" in itself does not imply anything about an extended or unconditional right to rescind the contract. Normally the word is understood in the meaning of condition precedent and subsequent, or just as another word for a term or an obligation, by continental

lawyers. And as mentioned earlier the word will have no special effect in contracts regulated by Norwegian contract law.

3.1.6.2 ”of the essence”

In contrast to the word condition, the phrase ”of the essence” itself indicates that the term it relates to is important to the parties. The phrase is not unknown in Norwegian contract law. In the following it wil be analysed whether or not the phrase will be interpreted to give an unconditional right to rescind the contract in Norwegian contract law. It will be made a distinction between obligations concerning time limits and other obligations.

“Time is of the essence” – time obligations

Even though the parties did not mean to use the English meaning of the phrase “of the essence” in connection with time obligations, the consequences may nevertheless be the same. Contract clauses that give a party a right to rescind the contract even though the delay is insignificant exist also in Norwegian contract law. Both legal theory and preparatory works to non-mandatory legislation within the field of contracts, both in Norwegian contract law and the contract law in rest of the Scandinavian lands too, express (and even refer to the phrase “of the essence” in this context without referring to English law) that precise time limits in combination with a statement that the time is important may very well be interpreted as to give the party a right to rescind even if there is only the smallest delay. Also non-mandatory legislation, such as the Maritime Act, has rules that give a right to rescind the contract not matter how small or insignificant the delay is, as long as the parties have agreed upon a precise time limit.

In other words, a precise time limit in combination with the phrase ”time is of the essence” may likely be interpreted as to giving the party not in breach a right to rescind the contract as long as there is a breach of the time-limit.

Nevertheless, this may not necessarily always be the case. Even though the wording of the contract has great significance when interpreting the contract, when it comes to the evaluation of what the party objectively has regarded as important, other evidence may indicate a different solution than what follows from the wording of the contract. And the court may find an unconditional right to rescission “unacceptable”. The interpretation is not restricted to the

wording of the contract, and the courts wish to reach a fair result and a result in harmony with the solutions in the non-mandatory legislations and to avoid disloyalty, may lead to an interpretation that limits the consequences of the use of the phrase. Furthermore the phrase itself does not state that the right to rescind shall be unconditional, it only states that the obligation or term in question is important, i.e. “of the essence”, and therefore opens up for other alternative interpretations then just as an unconditional right to rescind. The phrase may probably be interpreted as to lower the requirement for when a breach of the terms and obligations it relates to is regarded as substantial, but that does not mean that the prhase also always will be interpreted to give an unconditional right to rescind. This will amongst other depend on the other relevant proof of what the parties have intended, such as prior negotiations and more. So even thought the phrase may be interpreted as to open up for an unconditional right to rescind, this will not necessarily always be the case. Legal theory takes the view that an unconditional right to rescind the contract must be expected to be limited in some cases. It is probable that the phrase may be interpreted as to entitle the party not in breach to rescind the contract no matter the consequences of the breach in contractual relationships where time typically is of great importance, and/or where price speculation is one of the superior motives of the transaction, and/or where the purchased goods are to be resold. If on the other hand the contract or the obligation in question is of the type where time limits typically is not of importance, and/or the rescission will cause great loss and detriment to the party in breach, and/or if the contractual relationship is a long-term one with special aspects of cooperation and trust, then it is not as certain that the court will interpret the phrase as to give an unconditiona” right to rescind, based on views of fairness, loyalty and the purpose of the contract. The courts may find that the person who claims the understanding of a unconditional right to rescind, should have clarified this better for the other party, and as long as this was not done, the courts will not interpret the phrase any further then strictly necessary. The parties can not in other words take it for granted that the phrase always will be interpreted as to give an unconditional right to rescind the contract. The parties can not always rely fully on the wording of the contract, and the use of the phrase does not give rise to the same amount of certainty regarding when the parties will be entitled to rescind as it does in English contract law.

“of the essence” – other then time obligations

When it comes to the use of phrase ”of the essence” in connection with other obligations then time clauses, one can not exclude the possibility that the phrase may be interpreted as giving

the party not in breach a right to rescind the contract if there is a breach, no matter how small. But legal theory, preparatory works and so on first and foremost (with some exceptions) mention this understanding of the phrase in connection with time clauses. On the other hand some preparatory works and legal theory express that an unconditional right to rescission in many cases, other than those of precise time clauses, will be unfair and is not seen as a good solution. The main point is that concerning obligations other than those of precise time clauses, even though the treshold for when a breach is considered substantial probably may be lowere, it is not as probable as what is the case with precise time clauses, that the phrase "of the essence" will be interpreted as to giving the party not in breach a right to rescind the contract no matter the consequences of the breach. Unless it is normal and usual to regulate such a right to rescind the contract into the type of contract and term in question, the courts probably will not interpret it that way, and they will also look upon what optionable remedies are available to the parties before "allowing" such an unconditional remedy. The same moments as mentioned above in connection with time obligations will apply also here.

Summary

In many cases, at least concerning precise time clauses, the phrase "of the essence" may be interpreted as to mean an "unconditional" right to rescind the contract if there is a breach, not because the term is regarded as a condition, but because the parties have expressed that the obligation is important. But one can not with the same certainty as in English contract law say that this always will be the outcome of the interpretation. Even though the regulation as such is acceptable in Norwegian contract law and the need for the parties to have such regulations is present, the parties can not in all cases be certain that the phrase gives an "unconditional" right to rescind if there is a breach. To what extent the court will exercise indirect censorship on the regulation through interpretation is uncertain. But even though the result for all practical purposes often will be same, one has to bear in mind and expect that the when it comes to the more "extreme" cases or cases where such a right seems very unnatural or unusual in the contract, the Norwegian court may interpret the phrase in a more restrictive manner. It is not possible to expect such an absolute and certain consequence of the use of the phrase as in English contract law in contracts governed by Norwegian contract law.

3.1.6.3 ”any breach [of a given term] entitles the innocent party to terminate the contract”

As previously mentioned the use of the phrase “any breach entitles the innocent party to rescind the contract” does not make the term a condition. The phrase is nevertheless considered since it gives the party not in breach a right to terminate the contract as long as there is a breach.

According to its wording the phrase gives the parties an uconditional right to rescind the contract for any breach of the terms it includes, and gives a more clear, direct and undisputable expression for an unconditional right to rescind the contract, then what is the case with the phrase “of the essence”. The courts possibility for exercising indirect censorship will therefore be more restricted. In extensive commercial contracts with detailed regulations it probably requires special circumstances before the court interprets the contract in a way not consistent with the wording when the wording is in such a clear manner. Nevertheless one can not expect that the phrase will always be interpreted this way, due to the same considerations as mentioned above concerning the phrase “of the essence”. A possible sollution is that the courts interprets into the phrase a restriction by saying that the word “breach” can not have been meant by the parties to include minor, insignificant breaches, or breaches that cause no loss to the party not in breach. Furthermore, depending on the nature an d purpose of the contract, the courts may conclude that, based on the parties purpose of the contract and the principle of loyalty, the parties could not have meant for the phrase to have its full effect according to its wording if this opens up for disloyal behaviour contradicting the purpose of the contract. If the contract e.g. is based on cooperation over time, and there is no element of price speculation, the courts may find that disloyal use of the right to rescind can not have been the purpose of the parties when making the term.

Summary

As with the phrase “of the essence”, and probably even more so, the phrase “any breach entitles the innocent party to rescind the contract” will often be interpreted to give the parties an unconditional right to rescind the contract according to its wording. But also there the certainty and the parties’ ability to rely fully on the literal meaning of the term is limited. Nevertheless, the courts ability to resctrict the most unfair consequences of the term are here more limited due to the clear wording, and in some cases the only option will therefore be to openly censor the term by use of section 36 of the formation Act, as will be discussed below.

3.1.6 Indirect use of warranties – exhaustive regulation of available remedies for breach of contract where rescission is excluded

As mentioned the parties normally do not use the word warranty with the intention of defining the term as warranty in relation to the right to rescind the contract. Nevertheless it is not unusual to exhaustively regulate the available remedies in the contract, and not include the right to rescind amongst these remedies. Such a regulation will be respected fully by an English court. The question here is, given that the contract states in a clear way that rescission as remedy is excluded for breach of contract, to what degree such a regulation will be accepted and upheld by Norwegian courts.

The main rule and basic prinsciple is that it is up to the parties to regulate what remedies they want to have and shall have available, and to decide when the remedies shall be available. It is neither unusual to have such regulations, for examples in agreements concerning the purchase of companies. But also such regulations may be restricted through interpretation based on the principles of loyalty and fairness, or censored directly through section 36 of the formation of contracts Act. The exclusion of the right to rescind the contract may be viewed as a limitation of the parties' liability, and one should therefore take into consideration the rules concerning the right to disclaim liability when evaluating to what degree such regulations will be upheld by the court.

To what degree parties can disclaim liability in the contract compared to the liability that follows from the background law depends on a concrete discretionary consideration, based on the prinsciples of the criteria of unfairness stated in section 36 of the formation of contracts Act. Court practise shows, even before the Act was made, that the courts tend to interpret such regulations in a restrictiv way, also in commercial contracts. The exclusion of the right to rescind the contract may in other words very well be restricted if it is regarded as unfair. In the following it will be elaborated on some of the restrictions that are thinkable and likely.

First of all, the parties can not fully exclude liability for fraud or gross negligence. One might therefore expect that e.g. in long-term contracts that are based on cooperation and trust, a regulation excluding the right to rescission will not be accepted to also include fraudulent or

gross negligent breach of at least the more important and central obligations of the contract. This may be regarded as disloyal behaviour not in harmoy with the natur and purpose of the contract, and it may be regarded as unfair that the parties are forced to contine such a contractual relationship when there is proof of such a behaviour.

Furthermore, whether the regulation is unfair also depends on what kind of obligation it relates to. It is more likely that the the courts find the exclusion of the right to rescind unfair if it concerns central obligations compared to if it only concerns minor less important obligations, and if it concerns right to rescind for breach of any and all obligations in the contract compared to if it only concerns one specific obligation. It is also important why, if there is any good reason at all, that the parties regulated a restricion on the reight to rescind, amongst other to clarify if the regulation is natural and in harmony with the purpose and nature of the contract. Furthermore, one has to take into regard what available remedies the parties have, and if these can compensate adequatly. As an example, in international trade concerning commodities it is not unusual to exclude the right to rescind the contract in case of breach. The usual remedy here is price reduction. But, even here, if the breach makes the purchase useless, then the purchaser must be allowed to rescind nonetheless. If the regulated remedy proves itself useless, then one often will fall back to the rules of the background law. Finally, it seems that the courts will not accept a regulation that limits liability if a substantial and serious breach will not have any consequences if the regulation is to be upheld fully, such that the whole purpose of the contract may be forfeit. The removal of the right to rescind the contract is mentioned as an example in this context in legal theory.

Beyond this, it can not be given any general answer to when the exclusion of the right to rescind the contract will be regarded as unfair, since this has to be considered concrete for each case. The conclusion, and the most interesting in connection with the thesis, is that the parties can not with full certainty expect that such regulations always will be interpreted literally and upheld with its full effect. The regulation may, if it is regarded unfair, be indirectly censored through interpretation or directly through section 36 of the formation of contracts Act. Tha parties can not create full certainty in the contractual relationship by making such regulations, even though its wording is clear, as the parties can not trust fully that the regulation will be given full effect according to its wording.

3.1.7 Limitations because of the section 36 of the formation of contracts Act

If the courts can not censor the regulations in question indirectly through interpretation, the only option is to censor directly by means of section 36 of the formation of contracts Act. In the following it will be given a brief summary of section 36 and to what degree it can and may be used on the regulation we are analysing. This will finally be illustrated by an example.

Whether a contract is voidable after section 36 or not depends on a concrete individual discretionary evaluation of the contract as a whole. The aspects in the evaluation are much the same as already mentioned in connection with the interpretation above, and section 36 primarily comes into function where the court is not “capable” of limiting the unfairness of the contract through interpretation. As such the differences between indirect censorship through interpretation and direct censorship according to section 36 is somewhat obscure. Nevertheless it requires more in terms of how unfair the contract is before it is appropriate to use section 36, since this is a much more direct violation of the parties’ freedom to make their own contract. Furthermore, section 36 is only meant as a last resort, especially when it comes to commercial contracts, and should therefore be used with caution, and only in “exceptional”/”extreme” cases. The need for certainty, the fact that parties are responsible for the risk they take and the fact that commercial contracts often are made with professional assistance speak against the use of section 36. Nevertheless, it is not impossible that regulations concerning the right to rescind the contract may be considered unfair and voidable. An example can illustrate this.

A company lends a substantial amount of money from a bank. The loan is to be paid down over a period of ten years. The most important obligations of the contract is the payment of instalments and interest, and also to get the banks consent if larger investements are to be made or the company is to reorganise. A less important obligation is to send accounts every quarter of the year, seven days after they have been approved. The contract has a regulation that entitles the innocent party to rescind the contract for any breach of a list of obligations, in which the important and less important obligations, like the one concerning accounts, are listed. All obligations are fullfilled, except the one to send accounts, which is not sent on time the first quarter of the second year, but offered sent delayed. The breach has no consequences for the bank. The question is whether or not the bank will be entitled under Norwegian law to rescind the contract. The answer probably is that, based on an evalution of the significance of

the breach the courts may come to the conclusion that it will be unfair and out of proportions to allow such a remedy in this case according to section 36.

The conclusion is that even section 36 may be used on the regulations of the right to rescind the contract that has been described in above. It is not often this will happen, but if the cases are unfair enough, censorship is possible. And since section 36 therefore can and may even be used in commercial contracts, the parties can not always rely fully on their regulations and that they will be upheld fully according to their literal meaning. The focus on certainty and the literal meaning of the wording fo the contract that English contract law takes, and which again makes it possbile to regulate the right to rescission as described, can not be found to the same degree in Norwegian contract law.

3.2 Representations and warranties

We now move on to the second category the parties often categorise the obligations of the contract into, namely representations and warranties. As explained earlier, the focus here is not the use of words themselves, but the contents of this category. The questions that are to be answered here is to what extent it is necessary and has any purpose to disclose and write into the contract such an amount of factual information that often is the case.

3.2.1 The need to disclose information

The need to disclose the information – Norwegian rules of duty to disclose information
The first question is whether or not is necessary to diclose all the information in question at all. The main rule in Norwegian contract law is that the parties themselves must bear the risk for their expectations. There is no general duty to disclose information. Nevertheless the parties are obligated to disclose information that it would be dishonest to to hold back. Failure to fullfill this duty may make the contract voidable, but more important in this thesis, it may also be viewed as a contractual breach. If the performance is not in accordance with the parties' expectations, and these expectations could have been avvoided by disclosure of information, then the expectation may play a role in ascertaining the requirements of the perfomance. Many contract laws regulate the duty to diclose information, but it is also a certain unwritten rule that failure to disclose information that should have been disclosed will

let the parties' demand that the performance of the contract is in accordance with what they with good reason could expect. These written and unwritten rules of duty to disclose information is a result of the general principle of loyalty in Norwegian contract law.

Whether or not there is a duty to disclose depends on both objective and subjective conditions, and the evaluation of dishonesty must be found within the principle of loyalty and section 33 of the formations of contract Act, or non-mandatory legislation.

The duty only includes circumstances that objectively are of substantial significance and that can be presumed to have had an effect on the contract. The duty has a less important role in commercial contracts. Furthermore the extent of the duty depends on the parties' positions, the circumstances the contract was made under, the nature of the contract and so on. For instance will the duty vary depending on whether the contract is based on long-term cooperation with need for mutual trust or more "pure" business relations, were it is seen as a basic principle that the parties take care of their own interests.

In addition to the objective conditions and moments, there also is a subjective condition requiring fault. It is not clear whether it is required that fraud is involved or whether negligence is enough. The unwritten rule of duty to disclose includes negligence while newer non-mandatory legislation requires fraud. The question is wether the rules in the legislation shall be used as analogy on case not included by legislation or if the unwritten rule here applies. The answer is not clear, and legal theory has different oppinions about it. The point here is not to conclude on the matter, but to point out the requirement of fault, and even so that if the contract in question is not covered by the non-mandatory legislation, then it is also uncertain for the parties what kind of fault that is required.

Even though, due to the mentioned requirements, it is not certain that the duty to disclose inforamtion will include all the information that typically is written into the contracts as representations and warranties, much if not most of it will probably be included. The information in question is typically of substantial significance and has made an effect on the purchase. Furthermore a lot of the information concerns relevant and substantial aspects of the object of the contract, and will seldom be accepted that is withheld. The same can be said about information concerning the parties ability to fullfill their obligations and so on. It is not

room here to elaborate over and analyse what types of information that typically will be included. The point is to that much of the information probably will be included.

The duty to disclose information therefore makes it less necessary then in English contract law to disclose all information the parties need to rely on that is accordance with their expectations. The parties will have remedies for breach of contract available in many cases if their expectations are not fullfilled even though the information they base it on is not disclosed. Nevertheless, this does not mean that it does not have any purpose to disclose information.

Purpose of getting information disclosed even though the parties often can rely on their expectations and the silence of the other party – promotes certainty since the information automatically is given relevance

The conditions, both objective and subjective ones, that are prerequisites for the duty to disclose information, make the effects of relying on ones expectations and the others silence somewhat uncertain. This is further enhanced in commercial contracts where the duty has an even smaller range, as the parties first and foremost are expected to take care of their own interests. It may therefore be difficult for the parties to ascertain whether or not a given type of information is covered by the duty, and this will create uncertainty if the parties are to base their expectations on the others silence. By getting all relevant information the parties need disclosed, they avvoid this problem. If the information is disclosed, it will automatically be relevant. In this way the parties create certainty around which of the parties shall bear the risk for the expectations they have.

3.2.2 The need to write into the contract disclosed information

We have seen that it is not necessary but can have its purposes with regards to certainty to get all relevant information the parties rely on disclosed. The next question then is whether it also is necessary or has any purpose to write all this information into the contract.

The need to write disclosed information into the contract – oral information may amount to terms of the contract and give grounds for remedies for breach of contract if the information proves wrong

Disclosed information can according to Norwegian contract law be regarded as part of the contract and its terms and give rise to remedies for breach of contract if the information proves wrong even though it is not written into the final contract. There exists no "parol evidence rule" or any presumption that the contract exhaustively regulates the contractual relationship in Norwegian contract law. If a party in connection with the making of the contract have disclosed information during negotiations, marketing, drafts and so on without writing them into the contract, this information clearly may have created expectations for the other party, and the information may under certain circumstances influence the substance of the contract and its obligations. And such information is given great regard in Norwegian contract law, even though it is not written into the contract, when the courts are to ascertain the content of the contract. The party which has disclosed the information will be liable for that the information is correct. Non-mandatory contract legislation has rules about liability for disclosed wrongful information, and it is also an unwritten general contractual rule that a party will be liable for wrongful information. There is no requirement of fault.

So it is not as necessary as in English contract law to write the information into the contract, since oral information and pre-contractual information may have influence when considering the content of the contract, and give rise to expectations for the other party that the disclosing party will be liable for as brach of contract if the information proves wrong. Nevertheless the writing of the information into the contract has its purposes as we now shall see.

Purpose of writing disclosed information into the contract I – avvoid the requirement that the information must have influenced the other party in connection with accepting the contract on its given terms

Unless disclosed wrongful information after an assesment can be said to have had influence on the agreement, it will not amount to a breach and neither give rise to remedies, as long as the information is not made part of the terms of the contract. Even though most of the information in question in this thesis often has had influence, this is not automatically the case. By writing the information into the contract the parties avoid the requirement of influence and the uncertainty this creates as the information as terms automatically wil be relevant, and thereby create certainty in the contractual relationship.

Purpose of writing disclosed information into the contract II – avvoid problems concerning proof as to whether the information is given or not.

If information given oral prior to the making of the contract is claimed to have been given, this must be proven according to the normal rules of evidence, and the party making the claim has the burden of proof. By writing all relevant and important information into the contract the parties avoid this problem, and will further promote certainty.

3.2.3 The possbility that the category “representations and warranties” is interpreted as an exhaustive regulation of information that the parties are liable for, both regarding disclosed and non-disclosed information

Due to the fact that the list of representations and warranties often are extensive and detailed, a question arises whether this can and shall have any influence on the interpretation of the contract by means of perceiving the parties as having regulated exhaustively what information they are responsible for with regards to the duty to disclose information and the liability for disclosed wrongful information. In other words, can the parties be interpreted as to haven taken the risk for information they rely on and expect to be true if the other party has not disclosed this information in the contract. The question is of interest, since even in large commercial contracts it is thinkable that important information is withheld, or disclosed but not written into the contract. Before answering the questions of interpretation itself, a few words must be said about the parties’ actual access to make such regulation in the contract.

Limits to the parties ability to regulate restrictions in the rules of duty to disclose information
It is clear that the parties can not fully renounce their duty to disclose information. Fraudulent or gross negligent behaviour, and situations which falls within section 33 of the formation of contracts Act, cannot be renounced liability for, even liability concerning remedies for breach of contract. Beyond this the answer is more uncertain, and depends on the principle of loyalty and good faith and the criteria of unfairness in section 36 in the formation of contracts Act. Whether or not liability can be renounced depends on which of the parties, according to the mendtioned rules and principles after a concrete assesment, should have responsibility for getting information disclosed. For instance if the seller has presented the whole list of information without giving the buyer any influence on the content, this speaks against letting the seller be relieved of liability for other withheld information. If on the other hand it is the buyer who has dictated the terms and list of information he wants disclosed, this speaks for letting the seller take a more passive role, and giving the buyer a more extensive duty to

investigate and ask for further information if he wants it. But again, it all depends on the concrete case, as there is no general presumption for such a result Furhtermore it is relevant whether or not the information is easy to access, such as public available information, or not. And if the buyer has been granted access to all information through seller, it may be that he should carry the risk for information he has not bothered to check or investigate further. But on the other hand, some types of information may very well be forgotten all together by both parties, or not discussed, or regarded as obvious that are correct. The fact that such information is not disclosed does not mean that the seller is not responsible for not having disclosed it in the contract. One more general point can probably be stated, which is that even though it is not possible to renounce all liability for the duty to disclose information, the fact that the parties have made such and extensive and detailed list of disclosed information in the contract as representations and warranties often is probably will affect the extent fot the duty to disclose other information then the one allready written into the contract. But beyond this the answer must be found by assessing each case concrete and individually.

Limits to the parties ability to regulate restrictions in their liability for wrongful disclosed information

As with withheld information, the parties can not renounce all liability for wrongful information that is disclosed. Fraudulent and gross neglingent behaviour and cases that fall within section 30 and more of the formation of contract Act are mandatory, also when it comes to liability for breach of contract and remedies for breach. Beyond this it has to be ascertained concrete, with regards to section 36 of the formation of contracts Act, whether or not it is allowed to renounce liability. There are situations where such a renouncement can be very reasonable and well founded. The parties may have agreed that information given prior to the formal contract, which is not written into it, shall not be taken into consideration, due to uncertainty around who has given them or what that was said. Further it may be that information given under negotiations that is not written into the contract shall not be taken into consideration, due to the fact that the party that gave them thereby signals that he can not vouch for them, or that he does not not have a full view over the information he has given. Likewise the party may wish to renounce liability for information given by others then himselves and the other persons involved in the negotiations or key persons on his business, since he does not know or have the full view over what that has been said. Without giving further examples it is probable, as with the duty to disclose, that the parties may to a certain degree renounce their liability for disclosed wrongful information, but not all of it, and that

the fact that they have regulated such an amount of information into the contract may influence in what other cases disclosed information outside the contract will be regarded as relevant and significant information that may be expected to have influenced the contract.

To what extent will the list of warranties and representations be interpreted as an exhaustive list of information the parties are liable for

Even though there is a certain access to regulate liability for withheld and wrongful disclosed information, the list of representations and warranties itself will probably not indicate that the parties have tried to restrict their liability in this connection. Even though the contract presumes to be exhaustive it does not mean that the background law is excluded. Unless the contract says otherwise, the list of representations and warranties will not replace but supplement the the general rules of the background law. Further it is not given that the list is especially thought true. It may as well be that the parties did not insert the list due to long and hard negotiations about its content, but rather more or less unconcious adopted the whole list from an anglo-american contract model. The parties know that these models try to regulate more or less anything and everything, and therefore use the list to make the contractual relationships as certain and predictable as possible for a low cost, without that indicating that they also wanted to exclude all other information that is not disclosed or disclosed but not written into the contract. Another motive may be that the parties wish to regulate pure objective liability for damages for the information enclosed in the contract, as will be described below. But as a main conclusion here, it must be said that the parties more explicitly must regulate in their contract that they wish to limit the responsiblity for withheld or disclosed information, then the fact itself that they have an extensive list of disclosed information in the contract. Such a list does not give grounds for a presumption when interpreting the contract that the parties have meant to exclude liability.

3.2.4 Special consequences in Norwegian contract law – objective liability for damages

A special effect that may arise in Norwegian contract law is that the parties are regarded as having guaranteed for the disclosed information in the contract, and therefore are objective and automatically liable for damages if the information is wrong. The liability may be based on different grounds.

Firstly, based on the use of the word “warranty” itself, already the wording of contract may indicate that there is a guarantee with objective liability. But the use of the word itself is not sufficient. There must exist more undisputable and secure grounds for such a liability if the rules of damages in the background law are to be replaced.The use of the word must be given reasonable consideration when considering whether this is the case or not. But in addition it is often required that the guarantee must relate to certain specific attributes of the object of the contract, such that it is important whether the attributes are precisely specified in the contract, or that the seller during negotiations has specifically pointed out certain attributes in a way that is suited to create a special expectation for the buyer that these attributes are correct and as described.

Disclosed wrongful information can also give rise to objective liability even though there is not given a explisit promise of guarantee. The information must then relate to substantial and significant attributes concerning the object of the contract, and must not in any way be presented as uncertain.

In addition, objective liability may be imposed if certian so called “core” attributes are missing. By this means attributes that are so substantial to the contract and its purpose and performance that they normally are taken for granted, and if they are missing it will amount to a fundamental breach.

Beyond this there can not be given a certain answer as to when the parties will be objectively liable for disclosed information, as it has to be assessed concrete with consideration given to the whole contract and circumstances around the making of it.

With regards to the information that typically is included in the list of representations and warranties, it is therefore not possbile to give a general answer as to when the parties will be objectively liable. But it is probably that this will be the case for alot of the information contained in the list. Due to the fact that the information is “warranted”, that it often concerns specified attributes and is detailed, that it often amounts to substantial information, and that it in some cases also concern “core” attributes, it is possbile that the party having disclosed it will be objectively liable for damages. And for instances concerning sale and purchase of business, legal theory expresses that the main function of representations and warranties are to impose objective liability on the one disclosing the information.

3.3 Covenants

As mentioned above, the use of the term covenants and the categorisation of obligations as covenants, given that the formal requirements for deeds are not fullfilled, has no legal implications. The parties may wrongly believe that they are avoiding the requirement of consideration, but other then this the term only serves as a label for a certain type of obligations in the contract. The questions that nevertheless are to be answered here, is whether or not it has any consequences to categorise these types of obligations in an own category, and if it is necessary with any more formal kind of categorisation.

3.3.1 The need to and consequences of using the category covenants

The significance of using the word covenant
The use of the of the word covenants itself will have no consequences in Norwegian contract law. The word will be interpreted as undertaking, term and so on.

The significance of having a category for the type of obligations that typically are gathered under the heading covenants
The categorisation of the type of obligations in question will not have any consequences in Norwegian contract law. It is according to Norwegian contract law without significance whether or not different obligations are placed this way or that in the contract, and whether they are placed under a category or not. Decisive is only the interpretation of the obligation itself.

The need to formalise certain type of obligations to avvoid the requirement of consideration – principle of promise as opposite to principle of contract
The question here is whether or not there exists a similar need in Norwegian contract law to formalise the contract concerning certain types of obligations to avvoid the requirement of consideration that exists in English contract law, to make sure the obligations are valid and not void. The answer is obvious. The main rule in Norwegian contract law is that an offer is binding when it arrives to the receiver, and there are no formal requirements. This is called

the principle of promise. The one who gives the offer, may not renounce the offer if the offer has arrived to the receiver and this one wants to accept it. Promises of gifts are therefore valid and binding when the receiver has received knowledge of them. This principle is the outright opposite to the principle of contract in English contract law that requires consideration. There is in other words no need or purpose to in any way formalise the contract for certain types of obligations according to Norwegian contract law.