The Interpretation of Standard Clauses in European Contract Law
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This comparative analysis of the interpretation of standard clauses is focussing on Belgian, Dutch, English, French and German law, with occasional references to other EU legal systems, mainly of Italy and Spain.

Standard clauses mainly have to be located in the context of consumer contracts and of the specific protection consumers are provided with under the 1993 EC Directive on Unfair Terms in Consumer Contracts. Before that Directive, most European legal systems already had introduced some legislative protection of this kind. The Directive aimed at giving a minimal standard of protection of the consumer all over the EU, allowing each country to offer a stronger protection to their consumers. This paper will try to reveal to what extent this Directive, together with the jurisprudence of the courts, has harmonised or is likely to harmonise the interpretation of standard clauses in European contract law, and to what extent differences among national legal cultures (will) continue to survive.

1. Current rules in European and domestic laws on the interpretation of (standard clauses) in (consumer) contracts

1.1. European Law

Following the 1993 European directive on Unfair Terms in Consumer Contracts, all EU legal systems have now a specific, and identical, legislative provision on the interpretation of standard clauses in consumer contracts. This Directive, indeed, limits its scope to standard clauses in consumer contracts. A consumer being defined as "any natural person who, in contracts covered by this directive is acting for purposes which are outside his trade, business or profession" (art.2(b)). The professional contracting party includes natural and legal persons, whether publicly owned or privately owned (art.2(c)).

The scope of the consumer protection is limited to standard clauses in a large sense, notably every clause "which has not been individually negotiated" (art.3). This is specified as follows: "A term shall always be regarded as not individually negotiated where it has been drafted in advance and the consumer has therefore not been able to influence the substance of the term, particularly in the context of a pre-formulated standard contract. The fact that certain aspects of a term or one specific term have been individually negotiated shall not exclude the application of this article to the rest of a contract if an overall assessment of the contract indicates that it is nevertheless a pre-formulated standard contract." (art.3:2.) This is somewhat broader than the usual meaning of a 'standard clause', but, for the sake of simplicity, we will, in this paper, use the concept of 'standard clause' in that broad sense. The protection of the consumer lies in the fact that such standard clauses "shall be regarded as unfair if, contrary to the requirement of good faith, it causes a significant imbalance in the parties' rights and obligations arising under the contract" (art.3:1.).

The Directive contains an indicative and non-exhaustive list of terms which may be regarded as unfair; Art 7 (2) requires member states furthermore to ensure that persons or organisations having a legitimate interest under national law in protecting consumers are enabled to challenge contractual terms drawn up for general use as unfair. This is a form of procedural protection hitherto unknown in the law of several member states.

1.2. CISG

For the sale of goods an important step towards a uniform contract law has been taken by the United Nations Convention on Contracts for the International Sale of Goods (CISG).

As to the rules of interpretation, article 7 limits its scope to the interpretation of a party’s statements and other conduct, which are to be interpreted according to the intent whenever the other party knew or could not have been unaware what that intent was (article 7 (1)). Interpretation of the statements or conduct of a party may be necessary to determine whether a contract has been concluded, the meaning of the contract, or the significance of a notice given or other act of a party in the performance of the contract or in respect of its termination. So, article 7 is equally applicable to the interpretation of "the contract" when the contract is embodied in a single document. Analytically,
this Convention treats such an integrated contract as the manifestation of an offer and an acceptance, following thereby the Common Law conception of 'contract'. Therefore, for the purpose of determining whether a contract has been concluded as well as for the purpose of interpreting the contract, the contract is considered to be the product of two unilateral acts.

Article 8 (1) cannot be applied if the party who made the statement or engaged in the conduct had no intention on the point in question or if the other party did not know and had no reason to know what that intent was. In such a case, article 8 (2) provides that the statements made by and conduct of a party are to be interpreted according to the understanding that a reasonable person would have had in the same circumstances.

In determining the intent of a party or the intent a reasonable person would have had in the same circumstances, it is necessary to look first at the words actually used or the conduct engaged in. However, the investigation is not to be limited to those words or conduct even if they appear to give a clear answer to the question. It is common experience that a person may dissimulate or make an error and the process of interpretation set forth in this article is to be used to determine the true content of the communication. If, for example, a party offers to sell a quantity of goods for Swiss francs 50,000 and it is obvious that the offeror intended Swiss francs 500,000 and the offeree knew or could not have been unaware of it, the price term in the offer is to be interpreted as Swiss francs 500,000. In order to go beyond the apparent meaning of the words or the conduct by the parties, article 8 (3) states that "due consideration is to be given to all relevant circumstances of the case." These circumstances include the negotiations, any practices which the parties have established between themselves, usages and any subsequent conduct of the parties.

The CISG doesn't contain any specific provision as to the interpretation of standard terms.

1.3. National Legal Systems

Within the domestic jurisdictions the interpretation of standard contract terms has to be located within the context of contract interpretation in general. The rather specific and atypical rule for interpreting standard contract terms in consumer contracts should conceptually be made to fit with the traditional doctrinal framework of contract interpretation. Inevitably, both this doctrinal reconstruction and the deeply rooted national legal cultures will influence the implementation of the Directive's rule on the interpretation of standard contract terms.

In this chapter we will limit ourselves to an overview of the national legal rules in France, Germany, England, Belgium and The Netherlands.

In France, most of (general) contract law is to be found in the Code civil (Cc), in which there is a chapter on 'Droit des obligations', with a subheading 'Les contrats'. Here, in the subdivision 'Les effets du contrat' a section V 'De l'interprétation des contrats' contains 9 articles (art.1156-1164 Cc) on the interpretation of contracts. The structure of the law, and the location of 'interpretation of contracts' in it, is similar, or even identical, in Spain2, Italy3 and Belgium (infra).

Article L.132-1 Code de la consommation (after the directive) remains very close to the wording of the 1993 Directive since the abusive character of a clause in a consumer contract will be judged taking into account all relevant circumstances surrounding the moment of formation of the contract as well as all the other clauses of the contract (contextualism).4 Before the EC Directive consumer protection was the goal of the so called « Loi Scrivener ».5 The relevant part of this Loi Scrivener is now implemented in the mentioned articles L.132-1 to 5 and article L 133-1 of the Code de la consommation, which was adapted in accordance with the 93/13/CEE Directive. Article L.133-2 Code de la consommation states that clauses in consumer contracts should be formulated in a clear and comprehensible way. In case of doubt, they should be construed in favour of the consumer or non-professional party.

In Germany, the Bürgerliches Gesetzbuch follows at first sight a similar structure as the French Code civil: contract law (Vertragsrecht) (with one article on interpretation, §157) as a subdivision of the law of obligations

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2 Art. 1281-1289 of the Código civil.
3 Art. 1362-1371 of the Codice civile.
4 "Les clauses des contrats proposés par les professionnels aux consommateurs ou aux non-professionnels doivent être présentées et rédigées de façon claire et compréhensible. Elles s'interprètent en cas de doute dans le sens le plus favorable au consommateur ou au non-professionnel."
5 Loi n° 78-23 du 10 janvier 1978 sur la protection et l'information des consommateurs de produits et de services : article 35 contains only the definition of an unfair contract term but no interpretation rule(s).
(Schuldrecht). However, there happens to be a more general chapter, in the
first book of the BGB, the 'Allgemeiner Teil', with a chapter on 'legal acts'
('Rechtsgeschäfte'), in which not only important principles are laid down
concerning general contract law, but in which there is also an important article
§133) for the interpretation of contracts, under the heading 'the declaration of
will' (Willenserklärung).

§12 (only concerned with the conflict of laws) and §24a AGBG 1996 have
incorporated the 1993 Directive into German legislation. These provisions too
remain very close to the wording of the 1993 Directive.

As from 2002 a new law of obligations has been incorporated into the BGB.6
One of the aims was to include the implementation of several European
Directives in the Code, replacing by this a number of separate Acts. In this
Code on Sales Law there are very few rules that apply exclusively to consumer
sales contracts7 and all the other provisions apply to all kinds of sales contracts
and not only to consumer contracts. Implicitly, however, these provisions have
to be interpreted in the light of the Consumer Sales Directive 1999/44/EC8, as
these provisions are mandatory for consumer contracts and open to contractual
deviation in other cases.9 Anyway, by incorporating the European Directive in
this way into the Civil Code, it gives that directive a larger scope, affecting
directly the whole of sales law and not only consumer contracts.

In England and in the other European common law jurisdictions, there are no
statutory rules on the interpretation of contracts in general. These principles
have been laid down by court decisions in the course of history and are to be
looked for in legal textbooks on 'The Law of Obligations', 'Contract Law' and,
exceptionally, 'The Interpretation of Contracts'.10 In English textbooks the
interpretation of contracts is traditionally not discussed in a separate chapter11.
Some textbooks even lack any heading referring to 'interpretation' or
'construction', but mostly it will appear as a smaller subheading in different
chapters, the main one being the chapter on 'implied terms'. In 1977 the Unfair
Contract Terms Act came into force in the UK. It has a
broader scope than the 1993 Directive in that it doesn't only apply to
consumers, not only to contract law13 and not only to standard clauses. It has a
more narrow scope in that it applies to exclusion clauses only. The UK enacted
the Unfair Terms in Consumer Contracts Regulation in 1994 (meanwhile
replaced by the Unfair Terms in Consumer Contracts Regulation 1999) in
order to implement the 1993 Directive, but kept alongside the 1977 Unfair
Contract Terms Act.

In Belgium the legal basis of the interpretation rules is the same as the French
one, namely the articles 1156-1164 of the Code civil (in Dutch: “Burgerlijk
Wetboek”, BW).14 Despite this common legal basis Belgian courts apply this
rules in a different way compared to their French colleagues (infra).
Furthermore the Civil code makes a distinction between interpretation and the
process of “filling the gaps” in the contract, or supplementation, for which
article 1135 BW serves as a legal basis referring to equity, custom and the law.
Recently, the interpretative and supplementing function of the principles of
good faith, reasonableness and equity have been playing a more important role
in Belgian law. Whereas traditionally interpretation used to be restricted to

6 Rules on standard clauses are to be found under §§ 305-310.
7 Gesetz zur Regelung des Rechts der Allgemeinen Geschäftsbedingungen
(standard contract terms) (9 December 1976, 29 June 2000 – implementation of
Directive 93/13 EC), Fernabsatzgesetz (distance selling) (27 June 2000 –
implementation of Directive 97/7/EC), Verbrauchercreditegesetz (consumer credit)
(17 Dec.1990, 29 June 2000), Gesetz über den Widerruf von Haustürgeschäften
implementation of Directive 85/577/EC), Gesetz über die Veräusserung von
Teilnutzungs-rechten an Wohngebäuden (time share) (20 December 1996, 29 June
2000 – implementation of Directive 94/47/EC)
8 P. ROTT, 'German Sales Law Two Years after the Implementation of Directive
9 P. ROTT, o.c., n° 13.
10 Only one book of this kind seems to have been published in England:
2004 (1st ed.: 1989). The author is not an academic but a practising lawyer (a
barrister at the time of the first edition and later on a judge in the High Court).
11 A notable exception is Ewan McKendrick’s textbook Contract Law. Text, Cases
13 For instance, it applies also to non-contractual notices, such as those excluding
liability for loss or damage in public buildings or parks (Michael H. WHINCUP,
o.c., nr.7.17 at p.197)
14 In Belgium, just as in France, this part of the civil code has remained unchanged
since the introduction of the Code Napoléon in 1804. Also the numbers of the
articles are identical: 1156-1164 Burgerlijk Wetboek/Code civil.
determining the “will” of a person, the more modern view sees interpretation rather as the determination of the legal effect of a clause or declaration. Indeed, in practice, it is certainly not possible to separate interpretation and supplementation completely.\textsuperscript{15} Interpretation always uses standards implying a certain duty of a party to clarify its intent, not to induce the other party in error, etc. (good faith). Besides the Civil Code, Belgium has a specific legislation on trade practices and consumer protection, the so called “Wet Handelspraktijken” (WHP).\textsuperscript{16} This regulation has a broad scope of application and covers every contract of sales or supply of services between a professional and a consumer. Article 24, §3 contains an interpretation rule in the way that measurable and verifiable factual data like identity, quantity, origin, price, possibilities of use and others (see article 24, § 1 WHP) mentioned in any form of publicity can be used to interpret the contract. One may say that this rule leads to taking into account the legitimate expectations of the consumer created by the publicity of the advertiser.\textsuperscript{17}

In the Netherlands the civil code does not contain any general provision on the interpretation of contracts. In contrast with the civil code of 1838, that contained a plain meaning or “clear words” rule in its article 1378, the founding fathers of the code of 1992 were of the opinion that such rules would be meaningless or superfluous.\textsuperscript{18} So, today one may say that interpretation is an exclusive task for judges and academics.\textsuperscript{19} One exception is to be made for the implementation of the contra proferentem rule of the EC Unfair Contract Terms Directive, in article 6:238, part 2, 2 of the Dutch Civil Code (NBW). Hence, in the Netherlands, the development of rules on contract interpretation is entirely left to the courts, and even to the lower courts, as it is considered to be a matter of ‘fact’, as long as the so-called Haviltex rule and/or CAO rule, worded by the supreme court, the Hoge Raad, is followed (infra).\textsuperscript{20}

2. Underlying Conceptions

2.1. Contract

2.1.1. Conceptions rooted in tradition

The conceptions of ‘contract’ are very similar in France and in Germany, where ‘contract’ is defined as "an agreement between two or more parties, that creates legal obligations\textsuperscript{21}" or, put more broadly, legal consequences (Rechtsfolgen). In order to identify the existence of a contract, in both

\textsuperscript{15} Ascertaining the meaning to be attributed to the actual words used by the parties is only one function of interpretation; economic reasons make that contracts are almost always incomplete: H. KÖTZ, A. FLESSNER, European Contract Law, Oxford, Clarendon Press, 1997, 106-107.


\textsuperscript{17} A. DE BOECK, Informatierechten en –plichten bij de toestandkoming en uitvoering van overeenkomsten. Grondslagen, draagwijdte en sancties, Antwerp, Intersentia, 2000, p. 514-516, n° 1197-1202.


\textsuperscript{19} A.S. HARTKAMP, Verbintenissenrecht. Deel II. Algemene leer der overeenkomsten, in Mr. C. Asser’s handleiding tot de beoefening van het Nederlands burgerlijk recht, Deventer, Tjeenk Willink, 2001, p. 274, n° 279; M.H. WISSINK, “Europese uitleg van onduidelijke algemene voorwaarden”, in Europees contractenrecht, M.E. FRANKE (ed.), Arnhem, 1995, 159.


\textsuperscript{21} France and Belgium: “Le contrat est une convention par laquelle une ou plusieurs personnes s’obligeront envers une ou plusieurs autres, à donner, à faire ou à ne pas faire quelque chose.” (art.1101 Code civil);

Spain: “El contrato existe desde que una o varias personas consienten en obligarse, respecto de otra u otras, a dar alguna cosa o prestar algún servicio.” (art.1254 Código civil)

Italy: “Il contratto è l’accordo di due o più parti per costituire, regolare o estinguere tra loro un rapporto giuridico patrimoniale.” (art.1321 Codice civile)

Germany: "A contract is formed when parties express their agreement in congruent declarations, a prior offer and a subsequent acceptance." and "A contract therefore emerges not out of two unilateral legal acts but out of the agreement produced by two binding declarations of intention." (ZWEIGERT, K. & KÖTZ, H., Introduction to Comparative Law , Oxford, Clarendon, 1992, respectively at p.381 and 382)
countries the consent between the parties suffices. This is also basically the conception of contract in the other Continental legal systems. If some slight difference between the French and the German definitions of ‘contract’ may be noticed, it is linked to the more abstract German approach, that focuses on ‘legal act’ (or ‘juridical act’) and ‘legal consequences’, whereas the French word it more concretely in terms of ‘contract’ and ‘legal obligations’.

The conception of ‘contract’ in England, on the other hand, is rather different. Firstly, rather than emphasising the agreement, the ‘meeting of the minds’ of the contracting parties, as continental lawyers do, English (and Irish) lawyers tend to focus on individual promises accepted by the other party. Rather than two persons ‘doing something together’, there is an, almost accidental, exchange of unilateral promises, accepted by the other party. Here, ‘contract’ is defined as ‘a promise or a set of promises, which the law will enforce’. Moreover, an agreement, or rather ‘acceptance of a promise’, does not suffice, there must be an (economic) advantage for each of the parties, called ‘consideration’. Equivalence of these advantages is not required, but there must be ‘something’. ‘Gratuitous contracts’ are possible in continental legal systems, but not in English law. Because of this economic view on ‘contract’, family agreements will not easily be accepted to be ‘contracts’, as ‘natural love’ is not a sufficient ‘consideration’. It seems very difficult to combine this traditional English conception of ‘contract’ with the idea of protecting the weaker party to the contract: “business is business”.

For English lawyers it is not the intention to create legal consequences that is essential to a contract, but the intention to create legal relations, as opposed to social and family relations. Again this tends to narrow the scope of contract law, as there is a presumption that no legal relations were intended when agreements, or promises, are made in such social or family contexts.

It is interesting to note that the Italian conception of ‘contract’ comes closer to the common law conception in this respect than to the other continental ones, in that it explicitly limits the scope of contracts to ‘patrimonial legal relationships’.

2.1.2. Common European developments as to the Conception of Contract

The interpretation of standard clauses in (consumer) contracts also has to be located in the context of some general and common developments in Europe which may be identified as to the conception of contract and which took place in the last few decades. This development is strongly linked to the elaboration of a new, and obviously European, concept of ‘consumer contract’.

22 Identical or very close to the wording of the French civil code are Belgium, Italy and Spain (see the previous footnote). The Dutch definition of contract comes closer to the German approach in that it refers to ‘legal act’ (rechtshandeling), the definition of which, in its turn, refers to the will to create a legal consequence (rechtsgevolg): “Een overeenkomst is een meerzijdige rechtshandeling, waarbij een of meer partijen jegens een of meer andere een verbintenis aangaan.” (art. 6.5. 1 BW) and “Een rechtshandeling vereist een op een rechtsgevolg gerichte wil die zich door een verklaring heeft geopenbaard.” (art.3.2. 2 BW); Finland: “Contractual obligations arise out of the meeting of two expressions of wills that are not essentially different.” (PÖYHÖNEN, J., An Introduction to Finnish Law, Helsinki 1993, 62)
23 House of Lords, Christopher Hill Ltd v Ashington Piggeries Ltd, Law Reports AC, 1972, 441-514, at p.502 (per Lord Diplock)
24 POLLOCK, Principles of Contract, 13th ed., 1950, 1; GUEST, A.G. (ed.), CHITTY on Contracts. General Principles, 26th ed., vol.1, 1989, §1. An identical approach is to be found in Ireland, where ‘contract’ is also defined as “a promise or set of promises which the law will enforce, an actionable promise or promises involving a minimum of two parties in an outward expression of common agreement.” (WINFIELD, 55 L.Q.R., 449)
25 “Consideration is usually said to be something which represents either some benefit to the person making a promise (the promisor) or some detriment to the person to whom the promise is made (the promisee), or both.” (ELLIOTT, C., & QUINN, F., Contract Law, 3rd ed., Harlow: Longman, 2001, 57).
26 Where a ‘gift’ is typically seen as a contract, that has to be accepted by the beneficiary in order to be ‘valid’ (art.894 Code civil: “La donation entre vifs est un acte par lequel le donateur se dépoile actuellement et irrévocablement de la chose donnée, en faveur du donataire qui l’accepte.”)
27 with the exception of a promise made under a formal covenant, for which no consideration is required (Law of Property (Miscellaneous Provisions) Act 1989)
29 “Il contratto è l’accordo di due o più parti per costituire, regolare o estinguere tra loro un rapporto giuridico patrimoniale.” (art. 1321 Codice civile)
A. From formal to substantive equality

Some countries had, in the course of the last few decades introduced legislation, which strongly protected the consumer in his relationship to the professional supplier of goods or services. Especially legislation in the Nordic countries and in Germany started from the assumption of the consumer as an uninformed, weak party that has to be protected against the professional who otherwise would take advantage of his stronger position. The United Kingdom, on the other hand, traditionally considered any legislative intervention in business transactions to negatively affect business efficacy and the free market. The Unfair Contract Terms Act of 1977 in the UK had a more limited scope than its continental counterparts. The creation of a European consumer law, through European Directives, however is creating a European conception of 'consumer contract', somewhere mid-way between the most protective and the most liberal approaches. Instead of protecting a priori any consumer against any professional, European law rather tends to create the conditions that put the consumer in a comparable position as the professional. Here, a vital element is the adequate information the professional has to supply the consumer with. It leads to the notion of the 'informed consumer', as Stephen Weatherill has called it:

"it is submitted that the Court possesses a notion of the European 'informed consumer' whose interest in market integration is typically found to outweigh an interest in national protection. Community law places faith in the capacity of consumers to process information and uses that notion of the informed consumer as a lever to achieve market integration by eliminating obstructive national rules that, judged against the standards of Community law, 'overprotect' the consumer and overregulate national markets."31

A more general notion, which is now developing in European law, as argued by Weatherill, is the one of the 'confident consumer'. Behind it lies a theory of the relation between legal regulation and economic freedom:

"Legislative activity seems to place an increasing emphasis on consumer confidence in the market and not simply on business confidence. Negative law sees the consumer as the passive beneficiary of integration whose interest is served by the elimination of national barriers to trade; positive law looks instead to the need to regulate that market so that the consumer will actively participate in it."32

According to the Preamble to the Directive on Unfair Terms, unfair terms have to be removed from consumer contracts, in order to facilitate cross-border shopping. This cross-border shopping, according to the November 1993 Green Paper on Consumer Guarantees, "can only flourish if the consumer knows he will enjoy the same guarantee and after-sales service conditions no matter where the supplier is located."33

The Green Paper, writes Weatherill, is more ambitious than the Unfair Terms Directive in the sense that it envisages the creation of a positive consumer right to protection of legitimate expectations, rather than simply a control over contract terms which are unfair.34

The notion of contract, which arises from this consumer orientated approach is one where the, formal, individual freedom and equality to enter into a contract is thus balanced by rules that aim at creating substantive equality among the contracting parties through information duties on behalf of the professional, and through the possibility of court intervention into the contract in order to correct the shake of reasonable trust the consumer could have with regard to the professional.

B. Other significant developments

Certain other recent developments should be mentioned, such as the evolution from an atomistic to a group approach (protection as a member of a group, eg tenant, consumer, acceptance of class actions, eg art.7:2 1993 Directive), the more dynamic approach (instead of a static view on contracts (changed

30 Misleading Advertising Directive 84/450; Doorstep Selling Directive 85/577; Consumer Credit Directives 87/102 and 90/88; Package Holidays Directive 90/314; Unfair Terms Directive 5 April 1993; Article 129a EC Treaty, entered into force on 1 November 1993
32 WEATHERILL, S., o.c., 314
33 COM (93) 509, p.5
34 WEATHERILL, S., o.c., 315
circumstances, party behaviour during the contract period, etc. have become more relevant), the emphasis on the duty to cooperate instead of the antagonism between the parties, and to conclude also the shift from an abstract to a more person-oriented approach. Here, however, we will not discuss these developments further.

2.2. Interpretation

In **France**, interpretation is basically focusing on *the will of the contracting parties*, on what they had in mind when concluding a contract. This vision is, very explicitly, supported by article 1156 of the *Code civil*: "On doit dans les conventions rechercher quelle a été la commune intention des parties contractantes, plutôt que de s'arrêter au sens littéral des termes." This, clearly is a 'subjective approach' to interpretation: precedence is given to the intention of the parties.

In **England**, interpretation primarily focuses on the meaning "as it appears from the text of the contract". What people exactly had in mind when drafting the contract is difficult to find out afterwards, if not impossible. The 'normal meaning' of the text, here, seems to offer, at least apparently, the most reliable basis for judicial interpretation of contracts. This may be called the 'objective approach', a view which gives precedence to the external appearance of the expression because social and commercial intercourse requires that reliance be protected.

German lawyers take an intermediate position between the French subjective approach and the English objective approach. They do not focus primarily on the contracting parties thought, nor on some 'objective meaning' of the wording of the contract, but on *the meaning a reasonable outsider would assume to be meant*. The same position has been taken by the **Dutch** Supreme Court, in 1981 (*Haviltex* case), by declaring that it is not the literal sense of the term which is decisive, but "the sense the contracting parties could mutually reasonably attach to the stipulations in the present circumstances and that which they could reasonably expect from each other to that matter." This is a somewhat 'objectivated' subjective approach: if one has wrongly expressed his thoughts in a way an outsider would have noticed that this could not reasonably be meant, the 'real', psychological, will has to take priority over the expressed will. It is also a 'subjectivated' objective approach in that it does not interpret the text in isolation of its authors and the context in which the contract was concluded.

Summarising, we have to conclude that at the level of underlying conceptions and theories there are, at least at first sight, important divergences among European legal systems about such fundamental concepts as 'contract' and 'interpretation', which may considerably affect the implementation of the European rule as to the interpretation of standard terms in consumer contracts.

2.2.1. The status of statutory interpretation rules

Another question that should be answered is whether the interpretative rules, laid down in the code are compulsory rules or just guidelines for the judge. In **France**, and until a few decades ago also in Belgium, they are considered to be just 'guidelines', so that a judicial decision that is not

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35 See eg art.1.107 PECL: "Each party owes to the other a duty to co-operate in order to give full effect to the contract." and the references to national legal systems in O.Lando & H.Beale (eds.), *Principles of European Contract Law, Part I, Performance, Non-performance and Remedies*, Dordrecht: Martinus Nijhoff, 1995, pp.60-61

36 Chapter 2 of Kim Lewinson's book on *The Interpretation of Contracts*, on 'The Object of Interpretation' starts with the following sentence: "The construction of a written contract involves the ascertainment of the words used by the parties and the determination, subject to any rule of law, of the legal effect of those words" (o.c., p.17)


40 see e.g.: Hof van Cassatie / Cour de Cassation 24 October 1912, *Pasicrisie* 1912, I, 430: "...les règles d'interprétation ... sont moins des préceptes impératifs que des conseils dont l'application est laissée à la prudence du juge."
following them cannot be quashed by the Court of cassation. The French Cour de cassation indeed does not “control” the interpretation which is considered to be a part of the sovereign power of the courts, although some scholars argue for a certain control over the interpretation of standard terms.\(^\text{41}\) 

In Italy, however, and nowadays also in Belgium,\(^\text{42}\) interpretation rules are considered to be compulsory, and the Corte di cassazione is controlling their application.\(^\text{43}\) The same goes for Spain: as Diez-Picazo and Gullón note, the articles 1.281 till 1.289 of the Código civil are legal norms, not just a collection of guidelines.\(^\text{44}\) The fact that the rules are more than just guidelines for the judge and have a compulsory character, does not mean that they are also mandatory. In Belgium so called “interpretation clauses”, i.e. interpretation rules that parties make for their own and insert in the contract, are considered to be valid.\(^\text{45}\) 

In Germany, in the comment to the draft of the Bürgerliches Gesetzbuch of 1896 it is emphasised that such interpretation rules are rules of practical logic without positive legal content.\(^\text{46}\) In the practice of the Bundesgerichtshof, however, the application of statutory, or generally recognised, interpretation rules by the lower judges is checked in the revisionsgerichtliche Überprüfung (comparable to cassation: it does not encompass the evaluation of facts).\(^\text{47}\)

In England it has regularly been posited that

"The canons of construction are not rules of law; they are as much as anything guidelines to the interpretation of the English language."\(^\text{48}\)

It is interesting to note that all, but the Dutch, codes have provisions on the interpretation of contracts, but none on statutory interpretation. Generally it is argued that interpretation theory is a matter of scholarly work, and that it is not a task for the legislator to regulate statutory interpretation. As to the interpretation of contracts this reasoning has not been followed, although the situation is basically the same. This has recently led the Dutch lawyer to dropping the provisions on statutory interpretation, which before were included in the civil code of 1838, and inherited from the Code Napoléon. The code of 1992 does not contain such provisions any longer because they were thought to be in part superfluous, and in part incorrect because of their generality. Once exception is to be made for the implementation of the contra proferentem rule of the EC Unfair Contract Terms Directive, in article 6:238, part 2, 2 of the Dutch Civil Code (NBW). Hence, in the Netherlands, the development of rules
dass die Vorschriften für wirkliche Rechtssätze genommen werden und dass der Sinn des gesprochenen Wortes als die Hauptsache behalten wird, von der nur insoweit abgewichen werden dürfte, als das Gesetz dies besonders erlaubt habe, während doch die Aufzählung aller möglicherweise massgebenden Umstände im Gesetze geradezu ausgeschlossen ist."


\(^\text{42}\) Hof van Cassatie / Cour de cassation 27 April 1979, Rechtskundig Weekblad 1980-81, 1117


\(^\text{45}\) "Wie die gemeinrechtlichen Quellen, so enthalten auch fast alle neueren Gesetzgebungen eine Reihe von Auslegungsregeln, theils allgemein für Willenserklärungen, theils in Beschränkung auf Verträge. Die Mehrzahl dieser Regeln richtet sich gegen die strenge Wortauslegung. Es wird vor ihr gewarnt und darauf hingewiesen, dass auch andere Umstände bei der Willenserforschung in Betracht zu ziehen sind, - die Übung des Verkehres, das Sprachgebrauch zur Zeit oder am Ort der Abgabe der Willenserklärung bzw. am Wohnsitz des Erklärenden, der Gang der Vorverhandlungen, der Zusammenhang mit anderen Verabredungen, der offensichtliche Zweck des Rechtsgeschäftes. Vorschriften dieser Art sind im Wesentlichen Denkregeln ohne positiv rechtlichen Gehalt; der Richter erhält Belehrungen über praktische Logik. Dabei liegt die Gefahr nahe,\n

on contract interpretation is entirely left to the courts, and is considered to be a matter of 'fact', as long as the so-called Haviltex rule is followed (see above). However, none of those statutory rules will necessarily lead to some specific result. They mostly aim at avoiding a too narrow approach to contract interpretation: the judge should not focus on the wording of the contract in isolation of its context, nor on some sentence or article in isolation from the whole of the contract.

Statutory interpretation rules should, indeed, be considered to be compulsory rules for judges, be it in the negative sense that it is not allowed to disregard the indicated contextual information whenever there is a discussion on the exact scope of a contract. Once these contexts are taken into account there is no positive duty to reach any kind of result in the interpretation process. In this respect statutory interpretation rules are merely 'guidelines', but it is wrong to deny such rules any status of positive law. If a judge is sticking to the literal wording of a contract and refuses to take into account relevant contextual information, notwithstanding a statutory duty to do so, he is breaching, or at least not correctly applying, the law. In legal systems with a court of cassation this should necessarily lead to the quashing of such judicial decisions.

2.2.2. Objective vs Subjective Interpretation

At the surface, the interpretation of contracts seems to be a very difficult topic for comparing the laws of England, France and Germany. There is no common basis available for comparison and almost everything seems to be different: the legal and doctrinal structure in which the topic is located, the problems discussed in legal doctrine, and the underlying conceptions of the two most basic concepts for this field: 'interpretation' and 'contract'. However, when we look at a deeper level, most notably the history and development of underlying theories and conceptions, we get a rather different picture.

Let us take the opposition between 'subjective' and 'objective' interpretation, in relation to which France is considered to be close to the 'subjective' end of the line, England close to the opposite end, and Germany somewhere in the middle.

A. Subjective interpretation: the will theory

Undoubtedly, the 'will theory', that emphasises the will of the contracting parties to determine the content and scope of the contract, has dominated legal thinking in France during the 19th and the beginning of the 20th centuries. In fact, one could say that this "will-approach" was the basis of the only interpretation method in search of the common intention of the parties. Nevertheless this has changed dramatically since the beginning of the 20th century.

When we have a closer look at history, however, we may notice that it is not unfamiliar to German and English legal cultures either.

In Germany the subjective approach to contract interpretation has dominated in the second half of 19th century. Especially VON SAVIGNY defended this subjective approach. To him, the (psychological) will was the only relevant element for interpreting a contract, or any other legal act, whereas the text, or any other form of declaration of the will, was only a sign through which the will could be discovered. This resulted in a choice for the will theory in the first draft of the Bürgerliches Gesetzbuch, in 1887. Under the influence of VON JHERING, who argued in favour of a 'reasonable trust', of what one could reasonably assume to have been meant, rather than the real will of the other party, the second draft of the BGB, of 1895, came closer to this more objective theory, which was eventually laid down in the final version of the BGB of 1896. However, the code still shows the opposition between both theories. The Willenstheorie is clearly to be found in § 133:

"When interpreting a declaration of will one has to search for the real will and not to stop at the literal sense of the saying"," which repeats, almost literally, the wording of art.1156 of the French Code civil. The objective counterbalance (Erklärungstheorie) is to be found in § 157:

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50 VON SAVIGNY, F.C., System des heutigen römischen Rechts, vol.3, Berlin 1840, e.g. at p.257-260 and 307-308. It is interesting to note that most of this volume is discussing the 'declaration of will' (pp.98-307)

51 “Bei der Auslegung einer Willenserklärung ist der wirkliche Wille zu erforschen und nicht an dem buchstäblichen Sinne des Ausdrucks zu haften.”
"Contracts have to be interpreted in such a way as is required by good faith and reasonableness in the context of the social practices and normative expectations."\(^{52}\)

In **England** the subjective approach obtained a central position in 19th century, under the influence of the writings of **Pothier**. As noted by **David Ibbetson**, the will theory had a measure of intellectual coherence that the traditional Common Law wholly lacked.\(^{24}\) In practice, however, the rule that it was the intention of the parties that determined whether or not a term was a condition, was watered down to a rule that it was open to the parties to depart from the ordinary interpretation, provided that their intention to do so was clearly expressed.\(^{55}\) Nevertheless, at the surface level the will theory prevailed.

In **Belgium**, the interpretation rules implemented in the Code civil have a kind of hierarchy.

The basis rule is the one of article 1156 C.c.: judges should look for the real common intention of the parties rather than stick to the literal meaning of the words that were used by them. Nevertheless the Court of cassation ruled that there is no principle of law that says that the real intention prevails to the intention that parties expressed.\(^{56}\) Using article 1156 C.c. courts also often re-qualify the contract: indeed the court is not bound by the qualification parties gave to their contract, on the condition that it does not deny the probative value of the act (to be understood broadly as all the relevant documents the court

\(^{52}\) "Verträge sind so auszulegen, wie Treu und Glauben mit Rücksicht auf die Verkehrssitte es erfordern."

\(^{53}\) Already in the Middle Ages a kind of will theory was largely applied to ‘informal contracts’ (‘covenants’ and ‘contracts’): "Covenant meant 'agreement', a 'coming-together'; it was based on 'the assent of the parties'; 'Contract' too ... always connoted an agreement rather than a unilateral promise; it could be said to be derived from 'the will of each party as proved by their mutual words';" (IBBETSON, D.J., *A Historical Introduction to the Law of Obligations*, Oxford: Oxford University Press, 1999, 73) In ‘formal contracts’, on the other hand, Common Law courts were not concerned to look behind the document (op.cit., 83-87).


\(^{55}\) op.cit., 224


uses for its interpretation task.\(^{57}\)\(^{58}\) Besides the wordings used in the contract courts can rely on the extrinsic circumstances surrounding the contract and the parties to find out what was meant by the contracting parties\(^{59}\), for example the execution\(^{60}\) of the agreement. The interpretation of legal transactions in Belgium is much less strictly bound by the letter of the transactions than is the case under English law. Other “signs” of an approach in which the real common intention prevails, in particular in standard contracts, is the fact that judges give priority to the particular handwritten clauses instead of the standard terms. The solution to the so-called “battle of the forms”-problem, consisting in considering contradictory clauses as being unwritten, also tends to reflect the real common intention approach.

When the rule of article 1156 C.c. does not help the judge to find the real common intention of the parties, then the articles 1157, 1158, 1159, 1161 and 1164 (article 1163 is a pure application of article 1156 C.c.) can help him to find the presumed common intention of the parties. Article 1157 C.c. states that whenever two different interpretations are possible, one should interpret the stipulation in the way that makes sense and has a concrete effect, rather than not (actus interpretandus est potius ut valeat quam ut pereat). Article 1158 C.c. stipulates that when two interpretations are possible one should keep in mind the global content of the contract and interpret the clause in the light of this content.\(^{61}\) Article 1159 C.c. refers to the local custom of the place where the contract was drawn up and article 1161 C.c. says that one should interpret one clause by keeping in mind the other clause of the contract in that way that every clause is constructed against the background of the global contract.\(^{62}\)

In the last stage, when also these rules do not lead to find out the presumed common intention, still the rule of article 1162 C.c. and the jurisprudential rule that a clause that differs from the so called “common law” (by which one means the supplementary rules of the C.c. that apply whenever parties are


allowed to differ but do not do so), is to be construed in a restrictive way, remain in the last resort. Both rules seem to be applied often in the frame of standard contracts (infra, D).

B. Objective interpretation: the 'objective' meaning of the text

In England, as a rule, the intention of the contracting parties must be ascertained from the document itself. The task of the courts is to construe the contractual term without any preconception as to what the parties intended. Words are to be understood in their plain and literal meaning, unless it appears from the document itself that another meaning was intended. Although, in practice, exceptions to this rather strict approach may be found (e.g. when such meaning would involve an absurdity), it assumes that, in almost all cases, written contracts have a meaning on their own, independently of any context, be it the previous negotiations, the subsequent way of implementation of the agreement, or any other relevant external facts or situations. This approach is well worded by Master of the Rolls COZENS-HARDY, in 1911:

"If there is one principle more clearly established than another in English law it is surely this: It is for the court to construe a written document. It is irrelevant and improper to ask what the parties, prior to the execution of the instrument, intended or understood. What is the meaning of the language that they have used therein? That is the problem, and the only problem".

Or, as worded by Lord DEVLIN:

"For the Common law the sanctity of the contract means the sanctity of the written word in the form in which it is ultimately enshrined. Normally, evidence is not admissible of conversations or correspondence leading up to the contract; they cannot be used to amplify or modify the final document. That document must speak for itself. For the Common law has its eye fixed as closely on the third man as on the original parties; and the final document is the only thing that can speak to the third man."

In practice, notwithstanding appearances to the contrary, a similar approach may be found in French law.

An analysis of legal history shows an undisputed attachment to the will theory, at least from the 16th century onwards, including by the most authoritative scholars such as DOMAT and POTHIER. It is only by the end of 18th century that a more objective approach, limiting the predominance of intention over text, became more popular among French lawyers. However, the scholars and politicians involved in the drafting of the Code Napoléon, and the discussions on it, clearly followed the will theory, as also appears from the wording of the final texts on the interpretation of contracts in the 1804 Code.

After the enactment of the Code civil something strange happened. Courts, supported by most of the legal scholars, massively applied the objective approach to interpretation notwithstanding the opposite wording of article

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64 Recent decisions of the House of Lords, most notably INVESTORS COMPENSATION SCHEME v WEST BROMWICH BUILDING SOCIETY [1998] 1 All ER, 98 per Lord Hoffmann, are now often considered to be a radical shift to a contextual approach as opposed to the traditional literal approach. However, it seems rather probable that the pure objective approach to contract interpretation will survive to a large extent, notwithstanding an undeniable tendency of English case law towards an intermediate position between pure objective and pure subjective approaches to contract interpretation. Scotland too has traditionally followed the English jurisprudence as to the construction of contracts, but recently the Scottish Law Commission has argued in favour of a more contextual orientated approach (H.L. MacQueen & J. Thomson, CONTRACT LAW IN SCOTLAND, Edinburgh: Butterworths, 2000, p.114).
65 Cozens-Hardy MR in: Court of Appeal, Lovell & Christmas Ltd v Wall 104 LT, 1911, 85
67 but with one exception, CUJAS, who, in 16th century defended the maxim interpretatio cessat in claris, but was not followed by other scholars (DE CALLATAY, Edouard, Etudes sur l'interprétation des conventions, Brussels/Paris: Bruylant/LGDJ, 1947, 21-23)
68 DE CALLATAY, E., op.cit., 32
69 See the quotations and references in: DE CALLATAY, E., op.cit., 85-86 and 97-103
70 DE CALLATAY, E., op.cit., 68-78
1156, the long tradition of the will theory and the obvious choice of the drafters of the code to follow the subjective approach. The most plausible explanation for this unexpected change seems to be the fear for judicial arbitrariness⁷¹, which is closely linked to the period following the French revolution. One of the main aims of this revolution was to replace the aristocratic, law making judges of the Ancien Régime by servile bourgeois judges who would strictly follow the statutory law as laid down by the democratically legitimated parliament. Fear of a return to the previous gouvernement des juges created an atmosphere in which theories could flourish, which apparently seem to bind judges to the wording of the text, it be statutory or contractual. As a result the French Cour de cassation came to prohibit the interpretation of contracts when the wording is considered to be 'clear' (doctrine of clauses claires et précises).⁷² How this doctrine is really “thwarting” any tendency to “subjective” interpretation is illustrated by a well known decision of 1942. The plaintiff had agreed to buy a certain quantity of codfish, subject to reduction by the seller if the fishmongers’ association so decided. The association did so decide and in accordance with that decision the seller only delivered half of the quantity they agreed on. Since the seller had enough fish in stock the buyer sued him for damages stating that he could conform with the quantity agreed on. The lower courts twice gave judgment for the buyer, apparently because the parties had originally assumed that a reduction would only be authorised if there were a drop in the catch, not just because of a sudden rise in demand, as was now the case. The Cour de cassation quashed both decisions, and the buyer’s claim was dismissed. The cause in question being unambiguous, further investigation of the intention of the parties was excluded:

“Si la clause litigieuse est claire, il n’y a pas lieu de rechercher l’intention commune des parties pour en déterminer la portée”.

However, as early as 1808 the Court decided that the interpretation of contracts is a matter of fact finding, which has to be left to the lower courts and cannot be checked as such by the court of cassation.⁷³ Apparently it would have sufficed for lower judges to present a meaning as 'clear', even if it was based rather on the proven intention of the parties than on the average sense of the words. Hence, in order to be able to check the hidden interpretations by lower courts, that would not be in conformity with the 'normal' meaning of the wording of the contract, the Cour de cassation had to introduce an additional, be it rather artificial, theory on the 'denaturation of clear texts', which then would be seen as a matter of not (correctly) applying the code and not as a matter of factual judgement. It is interesting to note that the article which is considered to be violated in such cases is not art.1156 (on interpretation) but art.1134, which says that contracts are binding for the contracting parties as if they were a statute.⁷⁴

In other countries, such as Belgium, that were ruled, and even up to now still are, by the same dispositions, neither the theory on, and prohibition of, interpretation of ‘clear texts’, nor a theory on the 'denaturation' of such texts has been followed. The first theory has been criticised because it is scientifically untenable: there are simply no texts that could be ‘clear’ on their own, isolated from their context.⁷⁵ The ‘denaturation’ theory has, also rightly, been criticised as an open concept that allows the French Cour de cassation to control the

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⁷¹ "On n'a jamais rien à se reprocher en s'attachant au sens propre et naturel des mots; on court toujours le risque de se tromper lorsqu'on s'écarte sur des conjectures. Tout rentre alors dans un arbitraire effrayant." (TOULLIER, Droit civil français, book III, vol.III, p. 305 ff, quoted by DE CALLATAY, o.c, 70)

⁷² E.g.: "Attendu que si, aux termes de l'article 1156 du Code civil, on doit, dans les conventions, rechercher quelle a été la commune intention des parties contractantes plutôt que de s'arrêter au sens littéral des termes, cette règle n'est faite que pour le cas où le sens des clauses du contrat est douteux et exige une interprétation; mais permettre au juge de substituer la prétendue intention des parties à un texte qui ne présente ni obscurité, ni ambiguïté, ce serait manifestement l'investir du droit d'altérer ou même de dénaturer la convention." (Cass.civ., 10 November 1891, Sirey 1891, I, 529; Dalloz Périodique 1892, I, 406)


⁷⁴ See e.g.: Cass.civ. 7 March 1922, Sirey 1922, I, 366; Dalloz Périodique 1925, I, 143

factual judgement of a lower court whenever it does not like the result, without any statutory rule being violated by that court. The approach of the French Cour de cassation is also highly incoherent and paradoxical, as it is, in its own logic, based on a 'denaturation' of the obvious 'clear meaning' of art. 1156 of the Civil code.

The position of this court has remained unchanged up to the present, but part of the lower courts and of legal doctrine, nowadays, tend to take a more flexible position.

So, surprisingly enough, both the English and French (highest) courts have, during most of 19th and 20th centuries, applied an objective approach behind a facade of a subjective approach.

C. The intermediate theory: legitimate expectations

The obvious tension between the subjective and objective interpretation in France and England has as a consequence that none of these approaches has ever been applied in its pure form in any of these countries, at least not over the last two centuries.

In Germany, where the tension is to be found in the Bürgerliches Gesetzbuch itself, a more realistic theory has developed. A balance has been found between pure subjective elements that are difficult to find out and to prove, on the one hand, and objective elements, on the other. These 'objective' elements, however, are not some untenable theory of 'objective' meaning, but an 'objectivated' approach to the scope of the contract in the light of social standards of good faith and other social norms and practices. When interpreting a contract, German lawyers will not focus on the real intention of the parties, but rather approach it from an external point of view. They will do this both descriptively and normatively. When, descriptively, determining the meaning of the text of the contract, they will ask what an outsider, who would have been present when the contract was made, would reasonably have assumed to have been meant by the parties. Normatively, this meaning will be orientated towards, or corrected by, good faith (Treu und Glauben) and social practices and norms (Verkehrssitten). Interpretation, thus, is not just a matter of describing what is meant by the wording of the contract, but also a normative Auslegung, which is guided by what legitimately could be expected by the contracting parties.

The Civil Code of 1992 of the Netherlands has strongly been influenced by this German approach. Article 3:33 of the Dutch Civil Code requires an intention underlying a juridical act in order to produce legal effects, which intention has to be manifested by a declaration. However, the importance of such an intention is considerably reduced by article 3:35, which states: "The absence of intention in a declaration cannot be invoked against a person who has interpreted another's declaration or conduct, in conformity with the sense which he could reasonably attribute to it in the actual circumstances, as a declaration of a particular tenor made to him by that other person." The Dutch Civil Code, thus, has explicitly worded the legitimate expectations approach as to the interpretation of any declaration of will or any conduct.

76 "Ce mot dénaturation est un mot élastique à la faveur duquel deviennent possibles toutes les extensions du contrôle de la décision que le juge du fond a rendue en fait. On peut craindre que l'institution en perde son caractère et que la cour de cassation devienne un troisième degré de juridiction." (procureur-général at the Belgian court of cassation Paul LECLERCQ, in an opinion published in Pasicrisie 1933, I, 10); "si l'interprétation donnée par les juges du fond est jugée satisfaisante, la clause sera ambiguë, si elle ne l'est pas la clause est claire et précise." (CAPITANT, H., TERRE, F. & LEQUETTE, Y., Les grands arrêts de la jurisprudence civile, tome 2, Obligations, Contrats spéciaux, Sûretés, 11th ed., 2000, p.114, nr.5.

77 And even the Cour de cassation may be on its way to take a more flexible position, by limiting the use of the denaturation theory when it may reach the same result in another and more elegant way: "En fait, ce n'est que depuis peu que la Cour de cassation n'évoque plus la théorie de la dénaturation pour justifier les solutions qu'elle adopte." (GHESTIN, J., JAMIN, C. & BILLIAU, M., Traité de Droit Civil, vol. Les effets du contrat, 3rd ed., Paris: LGDJ, 2001, 63, with reference to BORE, J., La cassation en matière civile, Dalloz 1997, n° 1171, p.279)

78 "Verträge sind so auszulegen, wie Treu und Glauben mit Rücksicht auf die Verkehrssitte es erfordern." (§ 157 BGB). This is the only general provision on the interpretation of contracts in German law. On the other hand, when determining the scope of the duties to execute one's obligations, § 242 uses the same wording: "Der Schuldner ist verpflichtet, die Leistung so zu bewirken, wie Treu und Glauben mit Rücksicht auf die Verkehrssitte es erfordern."

79 art.3:35 BW
However, also 'reasonableness and fairness' (redelijkheid en billijkheid) have to be used by the Dutch courts as a touchstone, both for filling gaps in a contract and for correcting it. These statutory provisions are but a confirmation of a jurisprudential development in the Netherlands in the second half of twentieth century. Courts and legal doctrine had already introduced and applied these concepts long before 1992. As early as in 1967 the principle that contracts should be checked against 'reasonableness and fairness' had already been accepted by the Dutch Supreme Court.

Tendencies towards this kind of approach are present in the other countries too, most clearly in England. In fact, the idea that a contract has to be understood in the sense a reasonable man would expect the contract to mean, including some idea of good faith and balance between the parties, is today to a large extent applied everywhere (openly or more hidden). Meanwhile, economic analysis of law also points into the direction of a combination of the subjective and the objective approaches. The subjective aspect is important because only with a full consent of all the parties to the contract an optimal economic transfer will be realised. The subjective aspect, on the other hand, is important too, because it stimulates adequate information and communication.

Today, in England, it is asserted that the court must seek "the meaning which the document would convey to a reasonable person having all the background knowledge which would reasonably have been available to the parties in the situation in which they were at the time of the contract." This fits perfectly with the descriptive part of the German approach to interpretation. It is interesting to note how the importance of the context is now emphasised, and even more explicitly so by Lord Hoffmann in another decision:

"The meaning of words, as they would appear in a dictionary, and the effect of their syntactical arrangement, as it would appear in a grammar, is part of the material which we use to understand a speaker's utterance."

But it is only a part; another part is our knowledge of the background against which the utterance was made. The normative part of the German approach is now also present in English law, at least in consumer law, by the introduction of the good faith principle and the statutory duty for the judge to interpret consumer contracts in favour of the consumer. Undeniably this will, be it slowly, also affect the way English judges approach the interpretation of contracts in general. But this normative element is not just some foreign body that would have been imposed on the common law by a European directive. In his historical overview of the English law of obligations, David IBBETSON points to several developments, that took place in the period between 1970 and 2000, which lead to a more normative approach to interpretation. There is an increased use of standard form contracts, for which it is assumed that parties mostly do not have had any relevant intention at all. In such cases relevant elements have to be found to 'construe' an appropriate meaning. Here, good faith and contractual fairness can play a decisive role. This is supported, of course, by the introduction of the good faith principle in consumer law, but also by an increasing legislative regulation in general, by the judicial acceptance of unjust enrichment as a theory in common law, by a greater willingness of judges to lay down rules of law, and by the public law dimension of private law.

The idea of some fair balance between the parties developed during that period, in two stages. From the 1970s, taking advantage of another party's weakness was not any longer acceptable. From the 1990s, principles of substantive fairness have been introduced in English contract law, including estoppels that have the same scope as continental principles such as the prohibition of abuse of rights. Duties of disclosure of information (misrepresentation) or prohibition of undue influence (duress) likewise aim at putting the contracting parties on equal footing.

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80 art. 3:12, 6:2 & 6:248 lid 2 BW
81 Hoge Raad 19 May 1967, Nederlandse Jurisprudentie 1967, 261 (case Saladin v HBU)
83 House of Lords, Investors Compensation Scheme Ltd v West Bromwich Building Society, 1 W.L.R.1998, 896
84 House of Lords, Mannai Investment Co Ltd v Eagle Star Life Assurance Co, A.C. 1997, 749
85 IBBETSON, D. op.cit., 246-247
86 op.cit., 249
87 op.cit., 251
88 IBBETSON, D. op.cit., 251
89 op.cit., 251 and 258
90 op.cit., 252-253
The pressure on English law to accept a general principle of good faith is strong. Not only has it already been introduced in the area of consumer contracts, which conceptually is a limited field but practically of very high importance, moreover there is a strong case for considering it to be a general principle of law in several other Commonwealth countries, such as Canada, Australia and New Zealand. \(^{91}\) The fact that such a principle is also generally accepted on the Continent puts the UK in a position of increasing, be it not very splendid, isolation. It is, hence, no surprise that Ewan McKendrick concludes:

"In practical terms it is likely that, sooner or later, English contract law will come to accept the existence of a doctrine of good faith and fair dealing. In a global economy England will not want to be seen to be standing alone. So it will have to climb on board." \(^{92}\)

Also in France, it is increasingly recognised that some normative input is needed in contract interpretation, in addition to the intention of the parties:

"Le contrat (...) se caractérise en tant que catégorie juridique par son élément subjectif essentiel: l'accord des volontés, et par ses finalités objectives: l'utilité et le juste. De la finalité d'utilité se déduisent les principes subordonnés de sécurité juridique et de coopération. De la finalité de justice se déduit la recherche de l'égalité des prestations par le respect d'une procédure contractuelle effectivement correcte et équitable." \(^{93}\)

It is recognised that the 'meaning' given to contractual terms is often an imposed meaning rather than the reconstruction of a real common intention held by both parties. Rather than assuming some (non-existent) will, it seems better to construct it on the basis of objective social standards, such as good faith, social practices, the purpose of the contract, general principles of law, \(^{94}\), or simply 'equity' \(^{95}\) or 'justice'. \(^{96}\) They constitute the 'objective' approach, which co-exists, in France too, with the, more traditional, subjective approach. Ghestin notes:

"Certes la Cour de cassation s'obstine souvent à se retrancher derrière la volonté des contractants, encore que l'on constate une évolution de la jurisprudence vers un abandon partiel de cette référence pour justifier certaines solutions." \(^{97}\)

This development has directly been influenced by German law, as it was Raymond Saleilles, who later on became very influential in France, who proposed, at the very beginning of 20th century, a more objective, socially oriented approach that was directly based on § 157 BGB. \(^{98}\)

It has been worked out in the jurisprudence of the French courts in the course of 20th century, in the form of theories that aimed at broadening the scope of contractual obligations, independently of the actual intentions of the parties: the distinction between 'obligations de moyen' and 'obligations de résultat', assuming stronger duties for some categories of contracting parties (e.g. a tour operator), that are liable if no result has been obtained, even without proven fault, \(^{99}\); security obligations with public transport, \(^{100}\) play grounds, medical services, schools, etc.: duties of information for the professional, such


as a banker\footnote{Cass.com. 18 May 1993, \textit{Bull.civ.} 1993, IV, n° 188, p.134.}, vis à vis the consumer; a \textit{prohibition of competition}, e.g., for an agent, with his principal\footnote{Cass.civ. 16 March 1993,\textit{Bull.civ.} 1993, IV, n° 109, p.75.}.

In England, one would call these (generalised) 'implied terms', which, paradoxically comes closer to the fiction of applying the will theory, than the French approach in this respect does.

Also in \textit{Spain}, where the Código civil and the civil law tradition clearly followed the subjective approach to contract interpretation, an increasing use of the good faith principle is leading to a more objective approach.\footnote{Díez-Picazo, Luis & Gullón, Antonio, \textit{Sistema de Derecho Civil}, vol.II, \textit{El contrato en general}, 9t ed., Madrid: ed.Tecnos, 2001, p.79 & 83}

For \textit{Italy} too, Musy and Monti note that, at least in scholarship and legislation, Italy is gradually abandoning the so-called 'will principle' and heading instead towards solutions similar to the German law and the American doctrines of \textit{reasonable expectations} and \textit{unconscionability}.\footnote{MUSY, Alberto M. & MONTI Alberto, ch.10 'Contract Law' in LENA, Jeffrey S. & MATTEI, Ugo, \textit{Introduction to Italian Law}, The Hague/London/New York: Kluwer Law International, 2002, 247-282, at p.264}

Hence, it is no surprise that article 2:102 of the \textit{Principles of European Contract Law} reads:

"The intention of a party to be legally bound by contract is to be determined from the party's statements or conduct as they were reasonably understood by the other party."

Obviously, also the scholars involved in the drafting of these principles, could agree on a 'legitimate expectation' view, discarding both the 'subjective' will theory and the 'objective' plain meaning theory, as explicitly stated in the Comment to this article:

"Following the majority of laws of EU Member States, the general rules on interpretation combine the subjective method, according to which pre-eminence is given to the common intention of the parties, and the objective method which takes an external view by reference to objective criteria such as reasonableness, good faith etc."

These principles thus also emphasise the role of the context, including social norms of good faith and fair dealing, for interpreting a contract\footnote{"In interpreting the contract, regard shall be had, in particular, to : (a) the circumstances in which it was concluded, including the preliminary negotiations; (b) the conduct of the parties, even subsequent to the conclusion of the contract; (c) the nature and purpose of the contract; (d) the interpretation which has already been given to similar clauses by the parties and the practices they have established between themselves; (e) the meaning commonly given to terms and expressions in the branch of activity concerned and the interpretation similar clauses may already have received; (f) usages; and (g) good faith and fair dealing." (art. 5:102 PECL).}.\footnote{H. KÖTZ, \textit{Europian Contract Law. Volume one}, Oxford, Clarendon Press, 1997, 112.}

\textbf{D. Application to standard clauses}

Summarising the analysis of underlying theories guiding the interpretation of contracts in the European countries, we notice that in fact, the \textit{same competing theories and conceptions} are largely to be found in each of those legal systems, but are gradually converging to some intermediate position. As worded by Hein KÖTZ:

"In days gone by, and more on the Continent than in England, the conflict in the interpretation of contracts between the “intention theory” and the “expression theory” may have had some significance, but it hardly matters at all today".\footnote{H. KÖTZ, \textit{Europian Contract Law. Volume one}, Oxford, Clarendon Press, 1997, 112.}

Standard terms are the classical topic where the principle of freedom of contract came under attack and where the individualist approach of 'contract as consensus' appeared to be highly fictitious. The modern mass production of standardised goods and services has brought about standard contracts. On the one hand standardised terms of contract make individual negotiation unnecessary and decrease the transaction costs. On the other hand they tend to be one-sided: one
party (hereinafter the stipulator), which is often the seller of goods or services and thus a professional party, will impose his terms upon the other party, (the adhering party), and let the adhering party bear as much as possible the risks involved in the transaction. For instance, such contracts frequently contain exemption clauses which in case of the stipulator’s non-performance exclude his liability or exclude or limit the adhering party’s right to terminate the contract, and clauses which in case of the adhering party’s non-performance impose severe penalties upon him. The adhering consumer is considered to be the typical weak party; he or she is often not able to understand the written standard terms. For this reason, or because he is careless, he does not read them, and if he reads them, he often does not even understand them and if he does, he would not make any objection. The contract often is “to take or to leave”: even if he might wish to have the terms changed in his favour, he cannot obtain such a change, as the stipulator will not accept any adjustment and will rather prefer not to enter into a contract than making a change. If the consumer would go to another supplier he will get similar terms.

Various kinds of rules and principles have been developed in order to cope with the specific problems connected with standard form contracting. In business-to-business relationships this problem sometimes occurs in a more special form, namely the “battle-of-the forms” problem. In any case the interpretation of standard form conditions cannot be as closely tied to the intention of the parties as the interpretation of individual contract terms.\(^{107}\)

The individualist view according to which all such contracts are valid and enforceable since its general conditions were freely accepted when the contract was signed and each party should take care of her own interests, has nowadays largely been abandoned in all European countries.

Invoking § 242 of the Civil Code the German courts, in the nineteen fifties, decided that unfair contract clauses are unenforceable. This happened both in consumer contracts and in business transactions. In 1976 standard terms were regulated in the General Conditions of Business Act which in many respects consolidated the earlier case law. § 9 of the Act provides that general conditions of business are unenforceable when contrary to the requirement of good faith they cause an unreasonable detriment to the adhering party. § 11 contains a catalogue of terms which are to be regarded as invalid per se (black list), and § 10 another catalogue of terms which the court may set aside if they cause an unreasonable detriment to the consumer (grey list). Unlike the general clause in § 9 the two lists are only directly applicable to consumer contracts. However, under § 9 the courts may also set aside terms, listed in the catalogues in §§ 10 and 11, in business contracts. German courts have done so to a considerable extent.

In England there is a tendency to consider general references to one party's standard terms not to imply that they would, by definition, be incorporated in the contract, but that the judge has to look for the "true intention of the parties". Elements which would point into the direction of those standard terms not being incorporated in the contract, would include: the inconsistency with the contract,\(^{109}\) the unusual or unreasonable nature of the clause,\(^{110}\) the lack of commercial common sense, the lack of reasonably sufficient notice\(^{111}\) (eg conditions printed on the back of a ticket).\(^{112}\)

In Belgium, it is especially article 1162 BW that has often been used by the courts to protect the weaker party. They did so together with the jurisprudential rule according to which a clause that differs from the so called “common law” (gemeen recht, droit commun) by which one means the supplementary, non-mandatory rules of the BW that apply to the extent that the parties did not stipulate otherwise), has to be construed in a restrictive way. In this respect a famous decision of the Court of cassation of 1979 should be mentioned. In this decision the public railway used an exemption clause stating, broadly worded, that it would not be responsible for the condition of the cover of the wagon. The principal (a private company) received goods badly damaged by rain during the transport. It

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110 Spurling Ltd v Bradshaw [1956] 2 All E.R. 121; Thornton v Shoe Lane Parking [1971] 1 All E.R. 686
111 Lacey's Footwear v Bowler International [1997] 2 Lloyd's Rep. 369; Interfoto Picture Library Ltd v Stilleto Visual Programmes Ltd [1988] 1 All E.R. 348. This principle of reasonably sufficient notice is also to be found in art. 1341 of the Italian Civil Code: "Le condizioni generali di contratto predisposto da uno dei contraenti sono efficaci nei confronti dell’altro, se al momento della conclusione del contratto questi le ha conosciute o avrebbe dovuto conoscerle usando l’ordinaria diligenza."
112 Parker v South Eastern Railway [1877] 2 C.P.D. 416
was ruled that using this kind of covers was a severe fault on behalf of the railway. Since the exemption clause did not explicitly exclude liability for this kind of breach or default, a restrictive interpretation led to the non-applicability of the clause. In the same case application was made of the contra proferentem rule of article 1162 BW, explaining hereby that the clause should be construed to the detriment of the party who inserted it to his advantage. This jurisprudence may lead to two fundamental remarks. In the first place as to the scope of these rules: both rules will not only apply in a professional-consumer relationship, but have a general scope. Of course they are of a special importance for standard form contracts. In the second place one should keep in mind that Belgian interpretation rules are to be applied following a specific hierarchy (supra). An interesting application of the above mentioned rule of article 1162 BW was made by the Antwerp court of appeal that had to deal with an exemption clause inserted in the general conditions of a renting contract concerning the hire of a gas boiler from the gas company. The question arose if the exemption clause would also apply to the intrinsic defects of the boiler (that had caused damage to the consumer-user). The Court ruled contra proferentem and damages were due by the gas company. This principle is also laid down in article 1602 BW concerning the sales contract: every unclear clause will have to be construed against the seller and thus in favour of the buyer. Since 1991 the same contra proferentem rule is inserted in favour of the consumer in article 31, § 4 of the above mentioned “Wet Handelspraktijken” (WHP). Especially the problem of exemption clauses produced a great deal of contractual litigation over the last decades. Both mentioned interpretation rules lead to the result that any ambiguity in an exemption clause will be resolved against the party seeking to rely on the clause. Since most of the time this will be the economic stronger party, the weaker party, be it a consumer or not, will be protected. In insurance contracts, it is often ruled that any ambiguity as to the possible exclusions of covering in the policy should be interpreted against the insurer and in favour of the, weaker and dependent, insured party. In a recent case the risk of theft of a car was excluded of covering. According to the court this had to be understood as any result of leaving the car unattended in a negligent way. The insured party who got out of the car in order to open the garage door two metres further was not considered to have left his car unattended in a negligent way. Henceforth, the covering for the risk was due. The insurance company, indeed, is the superior bearer of the risk of non-coverage due to interpretive uncertainty. However, a problem might follow from the conclusion that the probability of this risk cannot be quantified and that the insurance company cannot calculate the correct premium to be charged for bearing the risk. From an economic point of view an exception to the rule thus can be made whenever the non-drafting party is commercially sophisticated. In the same vein an employment contract was considered to be a standard contract to which the contra proferentem rule was applied in favour of the employee, as well as a contract between an estate agent and a consumer.

In the Netherlands, as mentioned above, the Haviltext-rule takes a central place, after the Hoge Raad decision of 1981. Following this rule it is not the literal sense of the term which is decisive, but "the sense the contracting parties could mutually reasonably attach to the stipulations in the present circumstances and which they could reasonably expect from each other to that matter". Although the starting point remains the common intention of the parties, a normative element (reasonable expectations of reasonable parties) is introduced. As mentioned before, this rule is a somewhat 'objectivated' subjective approach’ in the sense that it does not interpret the text in isolation of its authors and the context in which the contract was concluded. It refers to this reasonable parties (and especially to their social status and their legal knowledge), and not to any abstract reasonable party. Some authors argue for a more objective approach, especially as to the interpretation of standard clauses, in this way that one should refer to reasonable parties as such, thereby not taking into account the reasonable expectations of the parties.”

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already applied this principle as a “point of view”, for instance in insurance contracts.\textsuperscript{125}

Besides the mentioned Haviltex- and CAO-rules and the contra proferentem-rule, the Hoge Raad also frequently uses other “points of view” in order to interpret unclear general conditions. Those rules are very similar to those used in countries such as Belgium and France, which is no surprise, as the original Dutch civil code was deeply rooted in the French Code Napoléon. These points of view are, more precisely, that individual terms (individually negotiated and/or explicitly written in the contract) take priority over the standard terms and that any contractual or statutory rule deviating from a more general rule or principle should be interpreted in a restrictive way (exceptio strictissimae interpretationis est).\textsuperscript{126}

The EC Directive on Unfair Terms in Consumer Contracts stipulates in art 3(1) that a contractual term which has not been individually negotiated shall be regarded as unfair to the consumer, if, contrary to the requirement of good faith, it causes a significant imbalance in the parties’ rights and obligations arising under the contract to the detriment of the consumer. In an annex the Directive has supplied an indicative and non-exclusive list of 17 terms which may be regarded as unfair. Unfair terms used in a contract with a consumer shall not be binding on the consumer but the contract shall continue to bind without those terms (article 6).

Art 4(1) stipulates that the unfairness of a contractual term shall be assessed, taking into account the nature of the goods or services for which the contract was concluded and by referring, at the time of conclusion of the contract, to all circumstances related to the conclusion of the contract and to all the other terms of the contract or of another contract on which it is dependent.

The protection is only granted to a consumer, defined in art 2(b) as "any natural person who in contracts covered by this Directive, is acting for purposes which are outside his trade, business or profession.". She or he is the one who buys goods and services for her own and her household’s needs. Contracts between private persons and contracts between business enterprises and charities and other non business organisations remain outside the scope of the Directive. Nor are contracts

\textsuperscript{122} Hoge Raad 20 February 2004, Rechtspraak van de week 2004, 34. (Pensioenfonds DSM/Fox)
\textsuperscript{123} Eg Hoge Raad 30 November 2001, **** (zie Tjittes)
\textsuperscript{125} Ibid., 33.
\textsuperscript{126} A.S. HARTKAMP, Verbinntenissenrecht. Deel II. Algemene leer der overeenkomsten, in Mr. C. Asser’s handleiding tot de beoefening van het Nederlands burgerlijk recht, Deventer, Tjeenk Willink, 2001, p. 284, no 287.
between big and powerful enterprises and the small and medium sized traders covered by the Directive, although their position vis-à-vis the enterprise is not very different from that of the consumer. Under art 3 (2) of the Directive a term shall always be regarded as not individually negotiated where it has been drafted in advance and the consumer has therefore not been able to influence the substance of the term, particularly in the context of a pre-formulated standard contract. As already mentioned, a standard term which in fact was negotiated between the parties, although the consumer lost the battle, remains outside the scope of the Directive, whereas a term which the seller or supplier drafted in advance for this particular consumer only, and which was not negotiated, falls within the scope of the Directive.

The Directive is a so-called "minimum-directive": member states are permitted to provide a better protection for the consumer than that given by the Directive.

3. Rules of Interpretation

The canons of interpretation may be divided into three categories. The first one tries to limit the scope of contractual interpretation in court. The second one offers a number of methods that descriptively may help to find out, as correct as possible, the common intention of the contracting parties. The third category contains a number of rules that normatively fill gaps in the contract or correct a presumed, or even proven, common intention of the contracting parties. Only the second category falls under the heading 'methods of interpretation'. The first one is rather imposing one specific, erroneous, theory of meaning. The third one tends to correct the (literal interpretation of the) contract on the basis of moral principles.

127 Some scholars, such as Richard Posner, may deny the moral character of these rules and present them as the presumed intention of the contracting parties in case they would have foreseen all future events and circumstances, including the negative effects of acting in bad faith. This is one possible way of presenting things, be it somewhat artificial (but it reminds many European court decisions that also try to link the interpretation, which they make of the contract, to some presumed common will of the contracting parties). Anyway, the negative effects of bad faith behaviour precisely occur because one is breaching moral rules that are widely accepted in society or in a relevant part of it. See Posner's decision in Market Street Associates v Frey (US Court of Appeal 7th circuit 1991, 941 F.2d 588).

128 This appears clearly from the way Stefan Vogener has structured his comment on the paragraphs on interpretation in the German Civil Code (in Mathias SCHMOECKEL, e.a. (eds.) Historisch-kritischer Kommentar zum BGB. Band I Allgemeiner Teil, Mohr Siebeck 2003, pp.562-653). He makes a distinction between 'Auslegungskriterien' (par.5, at pp.596-614) and 'Gewichtung der Auslegungskriterien im Konfliktfall' (par.6, at pp.614-651). His analysis shows how difficult it is to create and to keep a coherent theory, which transends a case to case approach determined by changing points of view.

129 And it has deep historical roots, going back, at least, to Roman law: "Cum in verbis nulla ambiguitas est, non debet admitti voluntatis quaestio" (PAULUS, Dig. Book 32, 25)

130 In the United States the plain meaning doctrine seems to have been abandoned: "Because of the elasticity of language, courts have largely abandoned the 'plain meaning' rule of contract interpretation, which bars the use of extrinsic evidence to determine a contract's meaning." (HILLMAN, R.A., The Richness of Contract Law. An Analysis and Critique of Contemporary Theories of Contract Law, Dordrecht/Boston/London: Kluwer Academic Publishers, 1997, 147)
In this context, the French *Cour de Cassation* repeatedly stated that the judges should not interpret clear terms.\(^{131}\) Obviously, for supreme courts it is a way of limiting the scope of contractual interpretation and, hence, to limit the possibilities of arbitrary interpretations of contractual terms by lower judges, as clearly transpires from a decision of the French Court of cassation:

"According to article 1156 of the *Code civil* one has to look for the common intention of the contracting parties rather than sticking to the literal wording of the terms. This rule is made only for cases where the meaning of contractual clauses is doubtful and needs interpretation. Allowing the judge to let prevail an alleged intention over a text, which is neither unclear nor ambiguous, would obviously mean to give him the right to change or even to pervert the contract ("dénaturer la convention").\(^{132}\)

At the same time courts give a normative value, and even an absolute one, to the prima facie meaning the judges associate with the terms of the contract, without any guarantee that this is also the meaning the contracting parties had given to the wording of the contract.

However, it is only in France that the concept of 'plain meaning' of a term is still explicitly used by the supreme court, and this is mainly, if not only, done for allowing the *Cour de cassation* to quash court decisions that make an interpretation of a contract that seems unacceptable to this supreme court. Indeed, as the interpretation of contracts has, since 1808, been considered to be a matter of fact and not of law, it would escape any control by the court of cassation. Only in case of "dénaturation of the deed" the *Cour de cassation* considers itself competent to quash a decision of a lower court.

### 3.2. Methods of Interpretation

As in many legal systems emphasis is laid on the aim of the contract, i.e. on the common intention of the contracting parties, rather than on the wording of the contract\(^{133}\), a *teleological method* is often used. This approach aims at putting the text of the contract in context, and, by definition, this context cannot be the text itself. This paradox or ambiguity is often to be found in English law:

"The object sought to be achieved in construing any contract is to ascertain what the mutual intentions of the parties were as to the legal obligations each assumed by the contractual words in which they sought to express them."\(^{134}\)

The behaviour of the contracting parties after the making of the contract may be used as a presumption as to their common intention at the time they made the contract, as there is a reasonable presumption of coherence between both. However, it may also be seen as an implicit change of the contract in the course of the following months or years. An example is offered by a French case. Mrs Mandelman worked during 23 years as a commercial assistant for the Manoukian company. In that capacity she regularly received collections of clothes that she never gave back. One day, the company billed her for these clothes, for an amount of over 700.000 French francs (approximately 100.000 €). Mrs Mandelman refused to pay and argued, in court, that no clause in her contract imposed her to give back the clothes and that, anyway, the subsequent behaviour of the parties proved their common intention to exclude such an implied term. Both the court of appeal of Grenoble and the *Cour de cassation* followed her in this reasoning.\(^{135}\)

An example of a teleological approach in the common law is the opportunity for the courts to imply terms which the parties have failed to incorporate into their contract in order to give 'business efficacy' to the transaction\(^{136}\), or to establish

\(^{131}\) "il n'appartient pas aux juges d'interpréter des clauses claires et précises" (Cass.civ; 7 March 1922, *Sirey* 1922, I, 366)

\(^{132}\) "Attendu que si, aux termes de l'article 1156 du Code civil, on doit, dans les conventions, rechercher quelle a été la commune intention des parties contractantes plutôt que de s'arrêter au sens littéral des termes, cette règle n'est faite que pour le cas où le sens des clauses du contrat est douteux et exige une interprétation; mais que permettre au juge de substituer la prétendue intention des parties à un texte qui ne présente ni obscurité, ni ambiguïté, ce serait manifestement l'investir du droit d'alterer ou même de dénaturer la convention." (Cass.civ. 10 November 1891, *Sirey* 1891, I, 529)

\(^{133}\) Art. 1156 Code civil (France and Belgium): "On doit dans les conventions rechercher quelle a été la commune intention des parties contractantes, plutôt que de s'arrêter au sens littéral des termes." In the same sense: § 133 German civil code, art.1362 of the Italian civil code, art.1425 of the Québec civil code, art.54 of the Congolese *Code des contrats*. This interpretation rule has almost literally been over taken by the Principles of European Contract Law (art. 5:101 (1))

\(^{134}\) Lord DIPLOCK in *Pioneer Shipping Ltd. v B.T.Pioxide Ltd.* A.C., 1982, 724


\(^{136}\) *Keegan v Roberts v Dublin Co. Council*, Irish High Court, 12 March 1981; *Butler v McAlpine*, 2 I.R., 455
what the contract is, when the parties did not have stated the terms. The classic case, in which an implied term had been accepted by the English Court of Appeal in order to give the contract 'business efficacy' is the Moorcock case of 1889. A contract had been made to unload a boat at a jetty. When the tide went out the boat grounded and was damaged. The contract was silent as to the safety of the boat or the requisite depth of water. The court held the jetty owners liable for breach of an implied term that the boat could be left there safely, as without such an underlying assumption the whole purpose of the contract would be meaningless.

On the Continent only Italian law seems to have something similar to the Common Law's implied terms, called 'presupposizione'. However, in all continental legal systems, there is a large number of non mandatory statutory rules, that act as 'implied terms' as far as no deviant contractual provisions were made. Moreover, the good faith principle may also be used to interpret the contract in such a way as to 'add' some 'implied term'. Several civil codes contain a provision which imposes the duty "not only to carry out what has been expressly agreed, but also all those consequences which according to their nature conform to good faith, usage and legislation" (art.1135 French and Belgian Code civil; art.1.258 Spanish Codigo civil). The maxim 'verba ita sunt intelligenda ut res magis valeat quam pereat' is an application of the teleological principle: one should interpret the contract in such a way that it is valid, rather than invalid. This is also why, for the French Court of cassation, clauses that are automatically causing the rescission of the contract should be interpreted narrowly.

The German Bundesgerichtshof quashed a decision of a lower court that had declared void contractual standard clauses in which some elements had been left blank. The Oberlandesgericht had argued that in such a case the most disadvantageous possibilities had to be chosen, which, then were to be declared illegal. The German supreme court rejected this approach, and argued that the court had to interpret and to complete the blank clauses as much as possible in the light of the concrete intention of the parties, and not in an abstract way. Whenever possible, an interpretation that keeps the clauses valid has to be preferred.

In the line of the teleological approach it seems reasonable to assume that a contract is coherent. The systemic method starts from this presumption of coherence. If there is a common aim as to the core of the contract, the individual parts of the contract have to be interpreted in this context, or at least they should be interpreted in such a way that they are compatible with each other. This implies that words with more than one possible meaning have to be interpreted in the sense which fits best with the content of the contract. In this respect it should be mentioned that the French Court of cassation has construed an extension to its 'denaturation theory': If the judge does not take into account all clauses of the contract, he commits a 'denaturation by omission'. In a decision of the German Bundesgerichtshof it was emphasised that the interpretation by the lower court escaped the Revisions control by the supreme

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137 Siney v Dublin Corporation 1980, I.R., 400
138 [1889] 14 P.D. 64
139 Zie WHINCUP, o.c., p.145, nr.5.96
140 Art.5:106 PECL ("An interpretation which renders the terms of the contract lawful, or effective, is to be preferred to one which would not."); Art.40, 2 Pavia draft of a European Code of Contract Law. See also the decisions of English courts quoted by LEWISON, K., o.c., 198-200.
143 "Toutes les clauses des conventions s'interprètent les unes par les autres, en donnant à chacune le sens qui résulte de l'acte entier." (art.1161 French and Belgian Code civil; art.1363 Italian civil code; art.1.285 Spanish civil code; art.1427 Code civil du Québec). "A general point is that an interpretation in line with other expressions is to be favoured." (POYHÖNEN, J., An Introduction to Finnish Law, Helsinki 1993, 68).
144 "Les termes susceptibles de deux sens doivent être pris dans le sens qui convient le plus à la matière du contrat." (art.1158 French and Belgian civil code; art.1369 Italian civil code; art.1.286 Spanish civil code; art.1429 Code civil du Québec). "Terms are interpreted in the light of the whole contract in which they appear." (art.5:105 Principles of European Contract Law). In the same sense: art. 39, 1 Pavia draft of a European Code of Contract Law
145 House of Lords, Ford v Beech, 11 Q.B., 1848, 852, at 866 per Parke B.
court, as the lower court had followed a number of rules, which included the taking into account of the whole text of which a clause had to be interpreted.\textsuperscript{147} In standard form contracts the added special conditions will take priority over the pre-printed general conditions, as there is a strong presumption that the individually negotiated conditions give a better picture of the common intention of the contracting parties:

"If one party puts forward a printed form of words for signature by the other, and it is afterwards found that those words are inconsistent with the main object and intention of the transaction as disclosed by the terms specially agreed, the court will limit or reject the printed words so as to ensure that the main object of the transaction is achieved."\textsuperscript{148}

A similar wording is to be found in Art. 2.21 of the \textit{Unidroit Principles}: "In case of incompatibility between a standard clause and a clause which is not, the latter will take priority." However, it may turn out that the individualised clauses had been erroneously drafted, so that the standard clauses will nevertheless have to be preferred for determining the exact scope of the contract.\textsuperscript{149} A more normative 'coherence principle' is used, when general principles of law are used as interpretation rules, in other words, when the contract is interpreted in such a way as to make it as coherent as possible with those general principles. For instance, the French \textit{Cour de cassation} has decided that exclusivity clauses for running a business should be interpreted narrowly, because they derogate from the general principle of freedom of commerce and entrepreneurship.\textsuperscript{150}

The \textbf{contextual approach} emphasises that contracts are drafted within a specific context. The meaning of the terms used and of the stipulations they contain are determined by the linguistic community of reference, by the practices, usages and customs of the community of reference and by the peculiar facts which surround the contractual relationship\textsuperscript{151}, in other words by the social context, which has both a factual and a normative component. The social context is also the basis on which implied terms can be assumed to be implicitly included into the contract. Although 'implied terms' is a typical concept used in the common law, the same idea is also to be found in the \textit{Code Napoléon}, in art. 1160:

"One has to add in a contract the stipulations which are customary, even if they have not been included explicitly."\textsuperscript{152}

The Nordic countries seem to be more open to a contextual approach than most other European countries.\textsuperscript{153} However, a recent French case illustrates the growing attention to this contextual approach in other parts of Europe.\textsuperscript{154} In a recent consumer credit case the Belgian highest Court decided that the judge may take into account the bad financial situation of the consumer when he has to decide whether a penalty clause is exaggerated or unjustifiable.\textsuperscript{155}

Another aspect of the linguistic context of contract formation is the relative weight of each language in case the contract has been drafted in different languages. Article 5:107 of the Principles of European Contract Law gives priority to the language used for the original drafts:

"Where a contract is drawn up in two or more language versions none of which is stated to be authoritative, there is, in case of discrepancy between the versions, a preference for the interpretation according to the version in which the contract was originally drawn up."

\begin{itemize}
\item[151] "Ce qui est ambigu s'interprète par ce qui est d'usage dans le pays où le contrat est passé." (art.1159 French and Belgian C.c.; art.1368 Italian C.c.; art.1.287 Spanish C.c.). "On tient compte, dans l'interprétation du contrat, de sa nature, des circonstances dans lesquelles il a été conclu, de l'interprétation que les parties lui ont déjà donnée ou qu'il peut avoir reçue, ainsi que des usages." (art.1426 Québec C.c.)
\item[152] "On doit suppléer dans le contrat les clauses qui y sont d'usage, quoi qu'elles n'y soient pas exprimées." (art.1160 French and Belgian civil codes)
\item[153] PÖYHÖNEN, J., \textit{An Introduction to Finnish Law}, Helsinki 1993, 68
\end{itemize}
3.3. Interpretation principles

When courts are asked to resolve disputes on the meaning of certain words in contracts they will need general rules or principles to guide their interpretation. They will generally assume that the parties aimed at being reasonable and fair, that they wanted to act in good faith and aimed at an equilibrium between the diverging interests of the parties to the contract. And, even if his would not have been the case, judges will assume that the parties should have taken into account such values when entering into the contract.

1. Reasonableness principle

When two different interpretations are possible it seems reasonable to interpret the contractual stipulation in such a way that it makes sense and has a concrete effect, rather than not, and to avoid unjust or unreasonable alternatives towards either of the parties. In the same sense, if a clause is ambiguous one has to adopt the meaning “qui convient le plus à la matière du contrat” (art. 1158 French and Belgian Code civil, art. 1369 Italian C.c.), or the sense which would be attributed to it in the place where the contract was drawn up (art. 1159 Belgian and French C.c., art. 1368 Italian C.c.).

It is also reasonable to interpret an unclear stipulation in the way it is less onerous for the debtor, rather than more advantageous for the creditor, especially when it is a gratuitous contract.

When it can be determined which party drafted a stipulation it seems reasonable to interpret it in favour of the other party (contra proferentem rule), especially when (standard) contract terms have not been individually negotiated. These cases are also an application of the 'least cost avoider' principle, developed in the economic analysis of law. It is reasonable, and even preferable, to impose the burden of carefully drafting a clause on the person who actually imposes this clause on the other party, or the party to whom the clause is most advantageous. The obvious sanction for lack of care in this matter is a restrictive interpretation to the detriment of the careless drafter of the clause. This does not suggest that the economical principle of the 'least cost avoider' always will lead to the same result as the, more morally laden, reasonableness principle. What according to an

156 "Lorsqu'une clause est susceptible de deux sens, on doit plutôt l'entendre dans celui avec lequel elle peut avoir quelque effet, que dans le sens avec lequel elle n'en pourrait produire aucun." (art.1157 French and Belgian C.c.; art.1367 Italian C.c.; art. 1.284 Spanish C.c.; art. 1432 Québec C.c.; for Finland, see: PÖYHÖNEN, J., o.c., 69). In the same way a contract of sale should be construed against the seller and in favour of the buyer, article 1602 (2) Belgian and French C.c.

157 Qualora, nonostante l'applicazione delle norme contenute in questo capo, il contratto rimanga oscuro, esso deve essere inteso nel senso meno gravoso per l'obbligato, se è a titolo gratuito, ...” (art.1371 Italian C.c.; art.1.289 Spanish C.c.; art.41 Pavia draft European Code of Contract Law)

158 “Dans le doute, la convention s'interprète contre celui qui a stipulé, et en faveur de celui qui a contracté l'obligation." (art.1162 French and Belgian C.c.; art.1370 Italian C.c.; art.1432 Québec C.c.; for Finland, see: PÖYHÖNEN, J., o.c., 69). In the same way a contract of sale should be construed against the seller and in favour of the buyer, article 1602 (2) Belgian and French C.c.

159 “Qualora, nonostante l'applicazione delle norme contenute in questo capo, il contratto rimanga oscuro, esso deve essere inteso nel senso meno gravoso per l'obbligato, se è a titolo gratuito, ...” (art.1371 Italian C.c.; art.1.289 Spanish C.c.; art.41 Pavia draft European Code of Contract Law)


economic reasoning may be correct, will not necessarily always be considered 'reasonable' by the average citizen. As a result the contra proferentem rule preserves the legal status quo which would exist without the clause. If one party adds a clause, it usually worsens the other party's existing legal position by establishing duties or limiting rights. The rule aims at getting the other party's legal position only restricted to the extent that it is made perfectly clear in the wording of the contract.  

2. Good faith principle

Over the last decades the good faith principle has increasingly been recognised as a general principle of law, most notably in Continental Europe. Through its inclusion in the European Directive on consumer protection it is also finding its way into the UK and Ireland.

It is interesting to note that in most countries the general principle of good faith was induced from a statutory provision that imposes on the contracting parties the duty to execute their obligations "in good faith". Some European codes have explicitly broadened the scope of good faith to the interpretation, and not just execution, of contracts. Art.1366 of the Italian civil code and art. 5:102 (g) PECL say that the contract has to be interpreted according to the good faith principle. The Greek civil code goes even further by stating that every contractual obligation has to be adapted according to the demands of good faith (art.288).

In England the good faith principle is indirectly used as a rule of interpretation in the form of the principle that no party may take advantage of its own wrong. This principle has repeatedly been considered to be a rule of construction, rather than a rule of law. However, more recently, there are tendencies to give it a broader scope.  

Treu und Glauben is the German version of the concept of 'good faith' and plays an important role in the interpretation of contracts. Also the French courts use the good faith principle in contractual interpretation. A good example is the following case. A company had obtained an American Express credit card for one of its employees, with a contract according to which American Express could ask payment for the expenses made with the card both from its holder and from the company. Some months later the employee left the company, without returning his credit card. The company asks American Express to annihilate the card. American Express asks to send the card back and reminds that the company will remain liable for all expenses made with the card until then. However, later on, the company refuses to pay the bills related to that credit card. The judges in Versailles decide on the basis of the plain meaning of the contract, including American Express' general conditions. A standard clause in it says that the company that asked for the credit card remains liable for all expenses made with this card, with the exception of loss or theft. As the card was neither lost nor stolen the company was held liable. The Cour de cassation, however, decided differently. This court considered that the lower judges had to check whether American Express, after having been informed of the refusal of the company to take liability for any future payment with the credit card, did everything it could to avoid its use by the former employee. In other words, good faith implied this condition to the applicability of the clause, notwithstanding its plain meaning.

It seems that particularly the 'objective' approach to interpretation is, implicitly or explicitly using the concept of good faith, but in some legal systems it also serves as a basis for "supplementing interpretation" (ergänzende Vertragsauslegung): if a contract does not contain a specific provision for a question that arises, the gap in the contract can be filled by supplementing interpretation using the good faith-prescription as a basis for specific duties like the duty to inform and to cooperate.

164 Art.1134 French and Belgian C.c.; art.1375 Italian C.c.
165 Lord Diplock in Cheall v APEX, 2 A.C., 1983, 181; Lord Wrenbury in New Zealand Shipping Co. v Société des Ateliers et Chantiers de France, A.C., 1919, 1

167 "Ein redlicher, sich an Treu und Glauben haltender Verkäufer macht, wenn die Teile lediglich renoviert sind, eine entsprechende Einschränkung. Sonst ist die Angabe nicht verlässlich." (Bundesgerichtshof 14 October 1994, Neue Juristische Wochenschrift 1995, 45-47, at p.46, nr. 2.a).
3. **Fairness principle**

Close to the good faith principle is the fairness principle. Whereas 'good faith' basically refers to honest, correct behaviour of the contracting parties, 'fairness' or 'equity' refer to social standards of equitable repartition of rights and obligations among the contracting parties. Some codes explicitly stipulate that contracts also have the effects which equity dictates, according to the nature of the obligations.  

The Principles of European Contract Law mention "good faith and fair dealing" among the "relevant circumstances" for interpreting contracts (art. 5:102 (g)). The Finnish Contract Act goes further and stipulates that "A contract term may be set aside or modified if it is found to be unfair having regard to the content of the contract, the circumstances at the making of the contract, later events and other circumstances." (§ 36) The same approach is to be found in Dutch law, where there are no statutory rules for contract interpretation, but where the judge has a general power to check any application of a rule, be it statutory or contractual against the principles of fairness and reasonableness. In Germany, the Bundesgerichtshof explicitly uses equity (Billigkeit) as a guiding principle for interpreting contracts. Often the fairness principle is applied behind the facade of a more strict interpretation. LEWISON notes as to English case law: "The court will sometimes manipulate the construction of the contract in order to achieve a fair result on the facts of the particular case. This approach is rarely overtly recognised, and has been disapproved in the case of exemption clauses."  

Recently the fairness principle has also explicitly been recognised as a rule of interpretation in English law. In the European Directive on Unfair Contract Terms, a balance between the parties is linked to the concept of 'fairness'. According to Article 3, a term covered by this Directive shall be regarded as unfair if "contrary to the requirement of good faith, it causes a significant imbalance in the parties' rights and obligations arising under the contract, to the detriment of the consumer." By this rule a contractual fairness principle has been established for the whole European Union, at least in the field of consumer law. Some, however, question the procedural limitation of the scope of the fairness principle to cover only contracts that have not been individually negotiated, referring to the Nordic Contracts Acts that give the courts the power to adjust both standardised and purely individual contract terms, a power that seems to be used both in consumer and business relations. Indeed, due to imbalances in bargaining power, even negotiated terms may be so unfair that they should not be upheld as such. From the same point of view of fairness one cannot justify the exclusion of the so-called core provisions of the contract (article 4, 2 Directive). It starts from the assumption that parties always negotiate the contractual terms to some extent or are at least aware of those parts of the contract that are market-determined. Actually, however, this does not always correspond to reality.

4. **Equilibrium principle**

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170 "Les conventions obligent non seulement à ce qui est exprimé, mais encore à toutes les suites que l'équité,l'usage ou la loi donnent à l'obligation d'après sa nature." (art.1135 French and Belgian C.c.; art.1374 Italian C.c.; art.1434 Québec C.c.)  
171 "A rule which applies between the parties as a result of a contract will not be applicable when this would be unacceptable in the actual circumstances in view of standards of reasonableness and fairness." (art. 6:248, 2nd section Dutch civil code)  
172 "Es entspricht deshalb der Billigkeit, dem Auftraggeber die Vorteile aus der Versicherung in Gestalt einer internen Freizeichnung zugute kommen zu lassen." (Bundesgerichtshof 17 December 1998, Neue Juristische Wochenschrift 1999, 942-944, at p.943, nr.II.1.b)
Interpreting a contract in such a way that an equilibrated balance between the contracting parties is reached, is expressly stipulated in the Italian and Spanish civil codes. 177

The German Bundesgerichtshof too follows the equilibrium principle, where it emphasises that the lower court has to take into account the interests of both parties when interpreting the contract. 178

The French Cour de cassation requires that the lower courts check some clauses against the principle of proportionality, such as clauses on prohibition of competition 179, or on minimum delivery 180, or the mobility clause in a contract of employment 181. This principle is a specific form of the equilibrium principle, as it envisages such equilibrium between chosen means and ends. Disproportionate clauses will thus automatically also disequilibrate the balance between the contracting parties. This is made very clear in a decision of the French Cour de cassation as to the interpretation of the scope of a mobility clause in a contract of employment. In this judgment the interest of the company is balanced with the interest of the employee, most notably his right under Art. 8 of the European Convention on Human Rights, to choose his residence freely. 182

5. The protection of the weaker party to the contract

Many legal systems have, in the course of the last century or so, introduced statutory rules aiming at protecting categories of contracting parties that, by definition, were considered to be in a weaker position and needed (statutory) protection against the stronger party: workers against the employers, tenants against their landlords, and, more recently, consumers against the professional supplier of goods or services. Here, we will limit ourselves to consumer protection, as there is not only a European Directive (93/13) that harmonises the national laws within the European Union, but, moreover, this Directive contains an interpretation rule for consumer contracts:

"In case of contracts where all or certain terms offered to the consumer are in writing, these terms must always be drafted in plain, intelligible language. Where there is doubt about the meaning of a term, the interpretation most favourable to the consumer shall prevail." 183

This, clearly, is an application of the 'least cost avoider' principle 184, or in this case the "cheaper contract drafter": the professional supplier of goods or services will, with very few exceptions, always be the drafter of the contract (himself or by delegation, using, e.g., a standard contract of his professional organisation), who can much more easily (and cheaper) avoid ambiguities and misunderstandings caused by an imperfect wording of the contract. From an economic point of view, similarly, if one of the parties is a repeat contractor or is assisted by legal counsel and the other is not (as in many consumer contracts), imposing liability on the

177 "Qualora ..., il contratto rimanga oscuro, esso deve essere inteso ... nel senso che realizzzi l'equo contemperamente degli interessi delle parti, se è a titolo oneroso." (art.1371 Italian C.c.; art. 1.289 Spanisch C.c.)


180 Cass.civ. 3 May 1997, Bull.civ. IV, n°131, p.113


182 Cass.soc. 12 January 1999, Revue de Jurisprudence Sociale 1999, n°151, p.103; Revue trimestrielle de droit civil 1999, 395-396 (summary): "en statuant par ces seuls motifs qui ne justifiaient ni le caractère indispensable pour l'entreprise d'un transfert de domicile, alors que le salarié proposait d'avoir une résidence à Montpellier, ni le caractère proportionné au but recherché de cette atteinte à la liberté de choix du domicile du salarié et alors qu'elle n'explique pas en quoi les attributions de M.S. exigeaient une présence permanente à Montpellier, la cour d'appel n'a pas donné de base légale à sa décision."


In France: "Les clauses des contrats proposés par les professionnels aux consommateurs ou aux non professionnels … s'interprètent en cas de doute dans le sens le plus favorable au consommateur et au non-professionnel." (art. L.133-2 Code de la consommation, loi du 19 mai 1998).

In the United Kingdom: "...if there is doubt about the meaning of a written term, the interpretation most favourable to the consumer shall prevail." (art.6 Unfair Terms in Consumer Contracts Regulations 1994)

In Germany: "Zweifel bei der Auslegung Allgemeiner Geschäftsbedingungen gehen zu Lasten des Verwenders" §305 c(2) BGB; 185

184 See above, and see in this sense: DE GEEST, G. & DE MOOR, B., 'Misverstanden tussen partijen over wat is afgesproken: aanzet tot een least cost avoider-doctrine', Tijdschrift voor Privaatrecht, 1999, 701-769, at 728 (English summary at pp.774-775)


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repeat and represented contractor in cases of contractual ambiguity or incompleteness will encourage that party to improve the terms of its contracts. The same *contra proferentem* rule can be found in article 4.6 of the Unidroit Principles:

“If contract terms supplied by one party are unclear, an interpretation against that party is preferred”.\(^{185}\)

In France, art. L.132-1 *Code de la consommation*, moreover, reconfirms the applicability of the usual interpretation rules, with the exception of article 1162, which is incompatible with the Directive, and emphasises the use of a contextual approach:

"Sans préjudice des règles d'interprétation prévues aux articles 1156 à 1161, 1163 et 1164 du Code civil, le caractère abusif d'une clause s'apprécie en se référant, au moment de la conclusion du contrat, à toutes les circonstances qui entourent sa conclusion, de même qu'à toutes les autres clauses du contrat. Il s'apprécie également au regard de celles contenues dans un autre contrat lorsque la conclusion ou l'exécution de ces deux contrats dépendent juridiquement l'une de l'autre."

One major problem may be to identify when precisely there may be doubt about the meaning of a term.\(^{186}\) The Dutch legislator pointed out that even when a term is clear as such, the consumer might still be brought in doubt by statements of the other party.\(^{187}\) Another question that arises is what is meant exactly by "terms offered to the consumer": a pro-consumer interpretation argues in favour of not restricting the rule to *standard* terms. Will the rule also apply when the consumer was assisted by an expert? Some find in the *Hoge Raad*-jurisprudence a negative answer.\(^{188}\) And what if a party uses the general conditions drawn up by a third person (eg. the insurance agent who uses the standard terms of the insurance company)? One indeed could argue that the (professional) user of standard terms always bears the risk of possible doubt about the meaning of a term.\(^{189}\) As in most countries the implementation of the rule is of a recent date, one will have to wait for new case law to get an answer to these questions.

### 4. Conclusion : convergences and divergences

Via the European Directive on Consumer Contracts the interpretation of standard contract terms has now been largely unified within the European Union, at least at the level of there being one single statutory rule for interpreting (standard terms in) consumer contracts. However, the environing legal rules, the approach to 'contract' and to 'interpretation', and the domestic legal cultures in general are still considerably diverging. Therefore, it is not obvious that the common rule on the interpretation of consumer contracts will be applied in the same way in all countries of the EU.

In most countries, no effort has been made to integrate the specific rules for consumer contracts into the larger whole of domestic contract law. Mostly, the European directive has been taken over literally into national legislation, as a separate entity, alongside the traditional rules of contract law that remained unchanged. Often, there is a tendency to limit the scope of the rules protecting one party against the standard terms imposed by the other party. For instance, the Italian *Corte di Cassazione* interpreted very narrowly the concept of 'contratti d’adesione' so as to exclude standard terms from the protection of the weaker party, as laid down in art.1341 of the Civil Code, whenever the form and the terms are not meant to regulate an indefinite number of contracts.\(^{190}\)

The conception of 'contract' remains rather different in the Common Law countries as compared to the Continental legal systems. The more business orientated conception of contract in the Common Law may well lead to a more narrow interpretation of the consumer protection as to the interpretation of standard contract terms. The dominant view that legislative rules on interpretation are just guidelines and not binding law together with the opinion that the interpretation of contracts is a matter of 'fact', not of law, limits the possibility to harmonise contract

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\(^{185}\) One can read in the comment tot the UNIDROIT Principles: “The less the contract term in question was the subject of further negotiations between the parties, the greater the justification for interpreting it against the party who included it in the contract”.


interpretation even at the domestic level, especially in countries where the
supreme court has only a competence of cassation. It is questionable whether the
present court structure of the EU will allow to keep coherent the interpretation of
consumer contracts all over Europe.

Generally, statutory rules do not, as such, suffice for changing legal practice,
including court decisions, dramatically. Often, previous views, conceptions,
ideological assumptions, and the like act as a framework for interpreting the new
rules narrowly and sometimes emptying their content completely. As very well
shown by Paolisa Nebbia this is clearly the case with Italian court practice related
to standard contract terms, where a liberal approach is still dominating the
interpretation and adjudication of the rules protecting the weaker party against
standard terms.\footnote{O.c. (fn.176).}

Nevertheless, there are at the same time developments of convergence, which
make it likely that the local differences will remain more limited than what one
would expect on the basis of the history of contract law in the different national
legal systems.

There is a notable development from formal to substantive equality among
contracting parties. Here, the European regulation took a position in between the
more consumer friendly Scandinavian countries and the less consumer friendly
English law.

The traditional opposition between the (rather French) 'subjective' approach to
interpretation and the (rather English) 'objective' approach has largely disappeared.
In practice, courts in all European countries mostly take an intermediate position.
On the one hand, the text of a contract is not isolated from its context, so that the
presumed common intention of the parties is indirectly taken into account within
the objective approach, whereas, on the other hand, it is not the 'real' will of the
parties that is searched for within the subjective approach, but rather the
reasonable interpretation an outsider would have in mind when reading the terms,
so that the subjective 'will' is 'objectivated'.

Notwithstanding differences among the legal systems in Europe as to conceptions,
rules, legal technique and the like, the interpretation of contracts seems to be
largely governed by a similar worldview, in which values such as reasonableness,
fairness, good faith and an equitable equilibrium between the parties' interests take
an overarching position, above the protection of the consumers as a weaker party
to the contract, especially when it comes to standard contract terms. For some of
these values, such as 'good faith', the Common Law may need a bit more time to

align with the Continental legal systems, but it is only a matter of time. The
present European and domestic legal framework offers all the necessary conditions
and sufficient guarantees for such a development.