

**JUS5240 - Comparative Private Law**  
**JUR1240 - Comparative Private Law (BA)**

**Comparative Private Law**

**Autumn 2012**

Compare the rules about the interpretation of contracts and good faith in the transnational restatements, principles, international conventions and the European Commission's proposal for a Common Sales Law Regulation. You find some relevant texts attached, and you may wish to make reference to one or more systems of national law to support your argument.

*In attachments, relevant excerpts from:*

***I. UNITED NATIONS CONVENTION ON CONTRACTS FOR THE INTERNATIONAL SALE OF GOODS, CISG***

***II. UNIDROIT PRINCIPLES***

***III. PRINCIPLES OF EUROPEAN CONTRACT LAW***

***IV. DRAFT COMMON FRAME OF REFERENCE (DCFR)***

***V. European Commission Proposal for a REGULATION ON A COMMON EUROPEAN SALES LAW***

***I. United Nations Convention on Contracts for the International Sale of Goods, CISG***

**CHAPTER II. GENERAL PROVISIONS**

**Article 7**

(1) In the interpretation of this Convention, regard is to be had to its international character and to the need to promote uniformity in its application and the observance of good faith in international trade.

(2) Questions concerning matters governed by this Convention which are not expressly settled in it are to be settled in conformity with the general principles on which it is based or, in the absence of such principles, in conformity with the law applicable by virtue of the rules of private international law.

**Article 8**

(1) For the purposes of this Convention statements made by and other conduct of a party are to be interpreted according to his intent where the other party knew or could not have been unaware what that intent was.

(2) If the preceding paragraph is not applicable, statements made by and other conduct of a party are to be interpreted according to the understanding that a reasonable person of the same kind as the other party would have had in the same circumstances.

(3) In determining the intent of a party or the understanding a reasonable person would have had, due consideration is to be given to all relevant circumstances of the case including the negotiations, any practices which the parties have established between themselves, usages and any subsequent conduct of the parties.

**Article 9**

(1) The parties are bound by any usage to which they have agreed and by any practices which they have established between themselves.

(2) The parties are considered, unless otherwise agreed, to have impliedly made applicable to their contract or its formation a usage of which the parties knew or ought to have known and which in international trade is widely known to, and regularly observed by, parties to contracts of the type involved in the particular trade concerned.

#### Article 10

For the purposes of this Convention:

(a) if a party has more than one place of business, the place of business is that which has the closest relationship to the contract and its performance, having regard to the circumstances known to or contemplated by the parties at any time before or at the conclusion of the contract;

(b) if a party does not have a place of business, reference is to be made to his habitual residence.

#### Article 11

A contract of sale need not be concluded in or evidenced by writing and is not subject to any other requirement as to form. It may be proved by any means, including witnesses.

#### Article 12

Any provision of article 11, article 29 or Part II of this Convention that allows a contract of sale or its modification or termination by agreement or any offer, acceptance or other indication of intention to be made in any form other than in writing does not apply where any party has his place of business in a Contracting State which has made a declaration under article 96 of this Convention. The parties may not derogate from or vary the effect of this article.

#### Article 13

For the purposes of this Convention “writing” includes telegram and telex.

## ***II. UNIDROIT Principles 2010***

### ARTICLE 1.6

(Interpretation and supplementation of the Principles)

(1) In the interpretation of these Principles, regard is to be had to their international character and to their purposes including the need to promote uniformity in their application.

(2) Issues within the scope of these Principles but not expressly settled by them are as far as possible to be settled in accordance with their underlying general principles.

### ARTICLE 1.7

(Good faith and fair dealing)

(1) Each party must act in accordance with good faith and fair dealing in international trade.

(2) The parties may not exclude or limit this duty.

### ARTICLE 1.8

(Inconsistent behaviour)

A party cannot act inconsistently with an understanding it has caused the other party to have and upon which that other party reasonably has acted in reliance to its detriment.

### ARTICLE 1.9

(Usages and practices)

(1) The parties are bound by any usage to which they have agreed and by any practices which they have established between themselves.

(2) The parties are bound by a usage that is widely known to and regularly observed in international trade by parties in the particular trade concerned except where the application of such a usage would be unreasonable.

### **III. PRINCIPLES OF EUROPEAN CONTRACT LAW**

(Parts I and II revised 1998, Part III 2002)

#### **CHAPTER 5 - INTERPRETATION**

##### *Article 5:101 (Ex art. 7.101/ 101A) - General Rules of Interpretation*

(1) A contract is to be interpreted according to the common intention of the parties even if this differs from the literal meaning of the words.

(2) If it is established that one party intended the contract to have a particular meaning, and at the time of the conclusion of the contract the other party could not have been unaware of the first party's intention, the contract is to be interpreted in the way intended by the first party.

(3) If an intention cannot be established according to (1) or (2), the contract is to be interpreted according to the meaning that reasonable persons of the same kind as the parties would give to it in the same circumstances.

##### *Article 5:102 (ex art. 7.102) - Relevant Circumstances*

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

##### *Article 5:103 (ex art. 7.103) - Contra Proferentem Rule*

Where there is doubt about the meaning of a contract term not individually negotiated, an interpretation of the term against the party who supplied it is to be preferred.

##### *Article 5:104 (ex art. 7.104) - Preference to Negotiated Terms*

Terms which have been individually negotiated take preference over those which are not.

##### *Article 5:105 (ex art. 7.105) - Reference to Contract as a Whole*

Terms are interpreted in the light of the whole contract in which they appear.

##### *Article 5:106 (ex art. 7.106) - Terms to Be Given (Full) Effect*

An interpretation which renders the terms of the contract lawful, or effective, is to be preferred to one which would not.

##### *Article 5:107 (ex art. 7.107) - Linguistic Discrepancies*

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.

*Article 6:101 (ex art. 8:101) - Statements giving rise to contractual obligation*

(1) A statement made by one party before or when the contract is concluded is to be treated as giving rise to a contractual obligation if that is how the other party reasonably understood it in the circumstances, taking into account:

- (a) the apparent importance of the statement to the other party;
- (b) whether the party was making the statement in the course of business; and
- (c) the relative expertise of the parties.

(2) If one of the parties is a professional supplier who gives information about the quality or use of services or goods or other property when marketing or advertising them or otherwise before the contract for them is concluded, the statement is to be treated as giving rise to a contractual obligation unless it is shown that the other party knew or could not have been unaware that the statement was incorrect.

(3) Such information and other undertakings given by a person advertising or marketing services, goods or other property for the professional supplier, or by a person in earlier links of the business chain, are to be treated as giving rise to a contractual obligation on the part of the professional supplier unless it did not know and had no reason to know of the information or undertaking.

*Article 6:102 (replaces 5:108) - Implied obligations*

In addition to the express terms, a contract may contain implied terms which stem from

- (a) the intention of the parties,
- (b) the nature and purpose of the contract, and
- (c) good faith and fair dealing.

*Article 6:103 - Simulation*

When the parties have concluded an apparent contract which was not intended to reflect their true agreement, as between the parties the true agreement prevails

*Article 6:104 (ex art. 2:101) - Determination of Price*

Where the contract does not fix the price or the method of determining it, the parties are to be treated as having agreed on a reasonable price.

*Article 6:105 (ex art. 2:102) - Unilateral Determination by a Party*

Where the price or any other contractual term is to be determined by one party whose determination is grossly unreasonable, then notwithstanding any provision to the contrary, a reasonable price or other term shall be substituted.

*Article 6:106 (ex art. 2:103) - Determination by a Third Person*

(1) Where the price or any other contractual term is to be determined by a third person, and it cannot or will not do so, the parties are presumed to have empowered the court to appoint another person to determine it.

(2) If a price or other term fixed by a third person is grossly unreasonable, a reasonable price or term shall be substituted.

*Article 6:107 (ex art. 2:104) - Reference to a Non Existent Factor*

Where the price or any other contractual term is to be determined by reference to a factor which does not exist or has ceased to exist or to be accessible, the nearest equivalent factor shall be substituted.

*Article 6:108 (ex art. 2:105) - Quality of Performance*

If the contract does not specify the quality, a party must tender performance of at least average quality.

*Article 6:109 (ex art. 2.109) - Contract for an Indefinite Period*

A contract for an indefinite period may be ended by either party by giving notice of reasonable length.

*Article 6:110 (ex art. 2.115) - Stipulation in Favour of a Third Party*

(1) A third party may require performance of a contractual obligation when its right to do so has been expressly agreed upon between the promisor and the promisee, or when such agreement is to be inferred from the purpose of the contract or the circumstances of the case. The third party need not be identified at the time the agreement is concluded.

(2) If the third party renounces the right to performance the right is treated as never having accrued to it.

(3) The promisee may by notice to the promisor deprive the third party of the right to performance unless:

(a) the third party has received notice from the promisee that the right has been made irrevocable, or

(b) the promisor or the promisee has received notice from the third party that the latter accepts the right.

*Article 6:111 (ex art. 2.117) - Change of Circumstances*

(1) A party is bound to fulfil its obligations even if performance has become more onerous, whether because the cost of performance has increased or because the value of the performance it receives has diminished.

(2) If, however, performance of the contract becomes excessively onerous because of a change of circumstances, the parties are bound to enter into negotiations with a view to adapting the contract or terminating it, provided that:

(a) the change of circumstances occurred after the time of conclusion of the contract,

(b) the possibility of a change of circumstances was not one which could reasonably have been taken into account at the time of conclusion of the contract, and

(c) the risk of the change of circumstances is not one which, according to the contract, the party affected should be required to bear.

(3) If the parties fail to reach agreement within a reasonable period, the court may:

(a) terminate the contract at a date and on terms to be determined by the court; or

(b) adapt the contract in order to distribute between the parties in a just and equitable manner the losses and gains resulting from the change of circumstances.

In either case, the court may award damages for the loss suffered through a party refusing to negotiate or breaking off negotiations contrary to good faith and fair dealing.

*Article 7:101 (ex art. 2.106) - Place of Performance*

(1) If the place of performance of a contractual obligation is not fixed by or determinable from the contract it shall be:

(a) in the case of an obligation to pay money, the creditor's place of business at the time of the conclusion of the contract;

(b) in the case of an obligation other than to pay money, the obligor's place of business at the time of conclusion of the contract.

(2) If a party has more than one place of business, the place of business for the purpose of the preceding paragraph is that which has the closest relationship to the contract, having regard to the circumstances known to or contemplated by the parties at the time of conclusion of the contract.

(3) If a party does not have a place of business its habitual residence is to be treated as its place of business.

*Article 7:102 (ex art. 2:107) - Time of Performance*

A party has to effect its performance:

(1) if a time is fixed by or determinable from the contract, at that time;

(2) if a period of time is fixed by or determinable from the contract, at any time within that period unless the circumstances of the case indicate that the other party is to choose the time;

(3) in any other case, within a reasonable time after the conclusion of the contract.

*Article 7:103 (ex art. 2:108) - Early Performance*

(1) A party may decline a tender of performance made before it is due except where acceptance of the tender would not unreasonably prejudice its interests.

(2) A party's acceptance of early performance does not affect the time fixed for the performance of its own obligation.

*Article 7:104 - Order of performance*

To the extent that the performances of the parties can be rendered simultaneously, the parties are bound to render them simultaneously unless the circumstances indicate otherwise.

*Article 7:105 - Alternative performance*

(1) Where an obligation may be discharged by one of alternative performances, the choice belongs to the party who is to perform, unless the circumstances indicate otherwise.

(2) If the party who is to make the choice fails to do so by the time required by the contract, then:

(a) if the delay in choosing is fundamental, the right to choose passes to the other party;

(b) if the delay is not fundamental, the other party may give a notice fixing an additional period of reasonable length in which the party to choose must do so. If the latter fails to do so, the right to choose passes to the other party.

*Article 7:106 (ex art. 2:116) - Performance by a Third Person*

(1) Except where the contract requires personal performance the obligee cannot refuse performance by a third person if:

(a) the third person acts with the assent of the obligor; or

(b) the third person has a legitimate interest in performance and the obligor has failed to perform or it is clear that it will not perform at the time performance is due.

(2) Performance by the third person in accordance with paragraph (1) discharges the obligor.

**IV. Draft Common Frame of Reference (DCFR)**

Chapter 8: Interpretation

Section 1: Interpretation of contracts

## II. – 8:101: General rules

(1) A contract is to be interpreted according to the common intention of the parties even if this differs from the literal meaning of the words.

(2) If one party intended the contract, or a term or expression used in it, to have a particular meaning, and at the time of the conclusion of the contract the other party was aware, or could reasonably be expected to have been aware, of the first party's intention, the contract is to be interpreted in the way intended by the first party.

(3) The contract is, however, to be interpreted according to the meaning which a reasonable person would give to it:

(a) if an intention cannot be established under the preceding paragraphs; or

(b) if the question arises with a person, not being a party to the contract or a person who by law has no better rights than such a party, who has reasonably and in good faith relied on the contract's apparent meaning.

## II. – 8:102: Relevant matters

(1) In interpreting the contract, regard may 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 interpretation which has already been given by the parties to terms or expressions which are the same as, or similar to, those used in the contract and the practices they have established between themselves;

(d) the meaning commonly given to such terms or expressions in the branch of activity concerned and the interpretation such terms or expressions may already have received;

(e) the nature and purpose of the contract;

(f) usages; and

(g) good faith and fair dealing.

(2) In a question with a person, not being a party to the contract or a person such as an assignee who by law has no better rights than such a party, who has reasonably and in good faith relied on the contract's apparent meaning, regard may be had to the circumstances mentioned in sub-paragraphs (a) to (c) above only to the extent that those circumstances were known to, or could reasonably be expected to have been known to, that person.

## II. – 8:103: Interpretation against supplier of term or dominant party

(1) Where there is doubt about the meaning of a term not individually negotiated, an interpretation of the term against the party who supplied it is to be preferred.

(2) Where there is doubt about the meaning of any other term, and that term has been established under the dominant influence of one party, an interpretation of the term against that party is to be preferred.

## II. – 8:104: Preference for negotiated terms

Terms which have been individually negotiated take preference over those which have not.

## II. – 8:105: Reference to contract as a whole

Terms and expressions are to be interpreted in the light of the whole contract in which they appear.

## II. – 8:106: Preference for interpretation which gives terms effect

An interpretation which renders the terms of the contract lawful, or effective, is to be preferred to one which would not.

II. – 8:107: Linguistic discrepancies

Where a contract document is 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.

## ***V. European Commission Proposal for a Regulation on a Common European Sales Law***

### *Chapter 6 Interpretation*

#### *Article 58. General rules on interpretation of contracts*

1. A contract is to be interpreted according to the common intention of the parties even if this differs from the normal meaning of the expressions used in it.
2. Where one party intended an expression used in the contract to have a particular meaning, and at the time of the conclusion of the contract the other party was aware, or could be expected to have been aware, of that intention, the expression is to be interpreted in the way intended by the first party.
3. Unless otherwise provided in paragraphs 1 and 2, the contract is to be interpreted according to the meaning which a reasonable person would give to it.

#### *Article 59. Relevant matters*

In interpreting a contract, regard may 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 interpretation which has already been given by the parties to expressions which are identical to or similar to those used in the contract;
- (d) usages which would be considered generally applicable by parties in the same situation;
- (e) practices which the parties have established between themselves;
- (f) the meaning commonly given to expressions in the branch of activity concerned;
- (g) the nature and purpose of the contract; and
- (h) good faith and fair dealing.

#### *Article 60. Reference to contract as a whole*

Expressions used in a contract are to be interpreted in the light of the contract as a whole.

#### *Article 61. Language discrepancies*

Where a contract document is in two or more language versions none of which is stated to be authoritative and where there is a discrepancy between the versions, the version in which the contract was originally drawn up is to be treated as the authoritative one.

#### *Article 62. Preference for individually negotiated contract terms*

To the extent that there is an inconsistency, contract terms which have been individually negotiated prevail over those which have not been individually negotiated within the meaning of Article 7.

#### *Article 63. Preference for interpretation which gives contract terms effect*



An interpretation which renders the contract terms effective prevails over one which does not.

*Article 64. Interpretation in favour of consumers*

1. Where there is doubt about the meaning of a contract term in a contract between a trader and a consumer, the interpretation most favourable to the consumer shall prevail unless the term was supplied by the consumer.
2. The parties may not, to the detriment of the consumer, exclude the application of this Article or derogate from or vary its effects.

*Article 65. Interpretation against supplier of a contract term*

Where, in a contract which does not fall under Article 64, there is doubt about the meaning of a contract term which has not been individually negotiated within the meaning of Article 7, an interpretation of the term against the party who supplied it shall prevail.