Chapter 6 Interpretation

Article 6/1

[II. – 8:101]: 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) If 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 reasonably be expected to have been aware, of this intention, the expression is to be interpreted in the way intended by the first party.

(3) Unless otherwise provided in the preceding paragraphs, the contract is to be interpreted according to the meaning which a reasonable person would give to it in the circumstances.

COMMENTS

A. Relation of the rules on contracts and unilateral statements – Interpretation of offers and acceptances

This Chapter deals with the interpretation of contracts (Articles II. – 8:101 to II. – 8:107) and of unilateral statements (Article II. – 8:201). The main difference between the two sets of rules is that contracts are either to be interpreted according to the real common or visible intention of the parties (paragraphs (1) and (2)) or by reference to objective criteria such as the reasonableness of a fictitious person (paragraph (3)), whereas unilateral statements are to be reasonably interpreted from the addressee’s view (Article II. – 8:201(1)). Normally, it should be easy to distinguish the two cases. However, as offers and acceptances can be both a unilateral statement (if regarded as such) and a part of a contract, both sets of rules may be applicable in parallel. This should not cause a problem, as in the specific case of offers and acceptances the resulting interpretation should be the same under both sets of rules since the addressee is the other party to the contract. It might even be helpful to apply both sets of rules in parallel in order to convincingly present the two lines of reasoning, e.g., in cases where the interpretation differs from the common meaning of the words used.

Illustration 1

A offers B in writing 10 tons of håkjerringkjøtt for a certain price. In the preceding negotiations both used the Norwegian word (which in fact means Greenland shark meat) and shared the wrong belief that it means whale meat. The offer, being a unilateral statement under Article II. – 8:201, is to be interpreted in the way in which it could reasonably be expected to be understood by the addressee. As B knows that A assumes (as well as he himself) that the word means whale meat, he can reasonably be expected to understand the word in the sense meant by A, thus meaning whale meat. If B later accepts the offer, a contract is concluded and Article II. – 8:101(1) becomes applicable. The contract is thus 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. Hence, the subject matter of the contract is whale meat.

On the interpretation of offers and acceptances with regard to the necessary intention for the creation of a legally binding agreement, see Chapter 4 on the Formation of Contracts.

As the example of offer and acceptance shows, the Chapter on Interpretation sometimes provides guidelines rather than rigid rules. If the rules point to different directions, a choice has to be made as to which rule prevails in the particular circumstances of the case.

B. Interpretation of Contracts - General
Contracts are interpreted in order to determine their contents. This is particularly the case when the contract contains a term (i.e. a contract clause) or an expression (i.e. a word or phrase) which is ambiguous, obscure or vague; that is, when one cannot immediately see the exact meaning. But interpretation will also be necessary if terms or expressions which seem clear enough in themselves contradict each other, or cease to be clear when the general setting of the contract is taken into account.

When a contract contains gaps which need to be filled, the process is sometimes referred to as completive interpretation (ergänzende Auslegung) or the addition of implied terms. This is covered in II.–9:101 (Terms of a contract).

Determining the exact meaning of the contract may be necessary before it can be determined whether the contract is valid or whether there has been non-performance. For example, it may be necessary to decide whether the debtor’s obligation was one to produce a particular result (obligation de résultat) or only one to use reasonable care and skill (obligation de moyens).

Any kind of contract may need interpretation, from a very formal contract drawn up by and concluded in the presence of a notary, to a very informal contract concluded orally. Similarly, the rules of interpretation apply to contracts made on standard forms. In fact some of the rules apply particularly to these types of contract. Interpretation may be needed for the whole or part of a contract and for any term or expression used in it. And it may be needed for nonverbal expressions of intention such as symbols, signs or gestures.

It is not only judges who are called upon to interpret contracts. Indeed one of the functions of rules of interpretation is to enable the parties and their advisers to apply the rules and arrive at an agreed interpretation in the light of them, thus possibly avoiding the need for litigation.

C. Priority of the common intention

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 real intention of the parties, and the objective method which takes an external view by reference to objective criteria such as the understanding of a reasonable fictitious person. The three paragraphs of this article are presented in a sort of ‘pedagogical’ order. The rather rare cases of paragraphs (1) and (2), thus a common intention, in particular when the intended meaning differs from the normal meaning, and a party which should have understood the real intention of the other party, have been placed before the general rule on interpretation along objective criteria (paragraph 3). The person interpreting the contract (the “interpreter”) is thus encouraged to start by looking to see what was the parties’ common intention at the time the contract was made. This is important because the contract is primarily the creation of the parties and the interpreter should respect their real intentions, expressed or implicit, even if their will was expressed obscurely or ambiguously. One of the clearest cases for the application of the rule in paragraph (1) is where the parties have, perhaps for reasons of commercial secrecy, deliberately used code words in contracting. In seeking this common intention the interpreter should pay particular attention to the relevant circumstances as set out in the next Article.

The search for common intention is compatible with rules which forbid the proof of matters in addition or contrary to writing, for example, if the parties have negotiated a merger clause to the effect that the writing contains all the terms of the contract, as it refers to external elements only to clarify the meaning of a clause, not to contradict it.

The Article states another important point: the interpreter should give effect to the common intention of the parties over the normal meaning of the expressions used in the contract. This means that in a case of conflict between the words written and the common intention, it is the latter which must prevail. Thus if a document is described as a loan but its content indicates that it is really a lease, the interpreter should not attach importance to the description in the document.

Illustration 2
The owner of a large building employs a painting firm to repaint the “Exterior window frames”. The painters repaint the outside of the frames of the exterior windows and claim that they have finished the job; the owner claims that the inside surfaces of the frames to exterior windows should also have been painted. It is proved by the preliminary documents that the representatives of the owner and of the painting firm who negotiated the contract had clearly contemplated both surfaces being done. Although the normal interpretation might suggest that only the outside surfaces were within the contract, since exterior and interior decoration are usually done separately, the parties’ common intention should prevail.

All the same, the interpreter must not, under the guise of interpretation, modify the clear and precise meaning of the contract where there is nothing to indicate that this is required by the Article.

D. Party who should be aware of the real intention of the other party

If one party’s words do not accurately express that party’s intention, for instance, because the intention is expressed wrongly or the wrong words are used, the other party can normally rely on the reasonable meaning of the first party’s words. But this is not the case if the second party knew or could reasonably be expected to have known of the first party’s real intention.

If the second party concludes the contract without pointing out the problem, the first party’s intended interpretation should be binding.

Illustration 3

A, a fur trader, offers to sell B, another fur trader, hare skins at so much per kilo; this is a typing error for so much a piece. In the trade, skins are usually sold by the piece and, as there are about six skins to the kilo, the stated price is absurdly low. B knows or could reasonably be expected to know what A really meant but nonetheless purports to accept. There is a contract at the stated price per piece as A intended.

One may see in this rule also a consequence of the rule that the intention of the parties prevails over the normal meaning of the expressions used in the contract.

In cases where the party was actually not aware of the particular meaning, it is nevertheless bound by this particular meaning if it “could reasonably be expected to have been aware” of the particular intention of the other party. This rule expresses that parties involved in contract negotiations are required to be reasonably attentive with regard to particular meanings intended by the other party. Hence the rule introduces a normative standard of care for the contracting parties. The yardstick for the required level of attentiveness is again reasonableness, thus what a reasonable person being in the position of the party would have understood in the circumstances. The sanction imposed by the rule on the party which was not sufficiently attentive is to make this party contractually bound by the particular meaning intended by the other party. This rule therefore needs to be read in conjunction with the rules on validity of a contract in cases of mistake.

E. Objective method

The interpreter should not try to discover the intentions of the parties at any price and end up deciding what they were in an arbitrary way. Where neither paragraph (1) nor paragraph (2) resolve the case, thus a common intention cannot be established and paragraph (2) of the Article does not apply, paragraph (3) comes into operation. This refers not to fictitious intentions but to the meaning which a reasonable person would have given to the contract in the circumstances. A reasonable person would, of course, take into account the objective circumstances in which the contract was concluded and the nature of the parties between whom it was concluded. This provision will be of very wide application because in practice it is quite common for parties to have no special intention as to the meaning of expressions used in their contract. But equally this use of objective interpretation does not empower the judge to overturn the contract under the guise of interpretation and to go against the unequivocal will of the parties.
Paragraph (3) also applies in the case of a third party who has reasonably and in good faith relied on the apparent objective meaning of the contract. Third parties who rely, reasonably and in good faith, on the apparent meaning of contracts cannot be expected to be bound by particular meanings secretly attached to words or phrases by the parties.

Illustration 4

B buys from A 10 tons of håkjerringkjøtt for a certain price. A and B assume that the word means whale meat. It means in fact shark meat. According to paragraph (1) the subject matter of the contract is thus whale meat. If B presents the contract to his bank C without disclosing the particular meaning of the word, the contract is to be interpreted, for the purposes of the relation between B and C, according to the objective meaning of the word, thus meaning shark meat (paragraph 3). Under a credit contract between B and C which obliges B to create a security right in the subject matter of the sales contract presented, B is in breach of contract, if he creates a security in whale meat.

However, an assignee has no better right against the other party to the original contract than the assignor. An assignee has to take many risks, including the risk that a contract has been modified by agreement between the parties since it was concluded, and has appropriate rights against the assignor who conceals the existence of defences or exceptions available to the other party to the contract. To allow an assignee to take advantage of the apparent meaning of a term, when its real meaning as between the parties was something else, would be to allow one party to a contract to change the content of the contract by assigning its contractual rights to a third person.

Article 6/2

[II. – 8:102]: Relevant matters

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 expressions which are similar to those used in the contract and the practices they have established between themselves;
(d) the meaning commonly given to such expressions in the branch of activity concerned and the interpretation such expressions may already have received;
(e) the nature and purpose of the contract;
(f) usages; and
(g) good faith and fair dealing.

COMMENTS

A. Relevant matters

The Article gives the interpreter a non-exhaustive list of matters which may be relevant in determining either the common intention of the parties or the reasonable meaning of the contract.

Thus the interpreter may consider the preliminary negotiations between the parties (paragraph (a)): for example, one of the parties may have defined a word in a letter and the other not have contested this interpretation when an opportunity arose. The interpreter may do this even where the parties have agreed that the written document embodies the entirety of their contract (merger clause), unless in an individually negotiated clause the parties have agreed that anterior negotiations may not be used even for purpose of interpretation. This sort of clause may be very useful when long and complicated negotiations were necessary for the contract.
Public statements made before the conclusion of the contract are regulated in Article II. – 9:102. Under this provision, a public statement can become part of the contract. In this case it is self-evident that regard may be had to the public statement, since it is a part of the contract. However, if a public statement falling under Article II. – 9:102 that does not become part of the contract were taken into account under paragraph (a) of the present Article, this would undermine the results of the application of the more specific rules in Article II. – 9:102. Public statements in the sense of Article II. – 9:102 therefore fall not under paragraph (a), but exclusively under Article II. – 9:102 which is thus lex specialis.

The conduct of the parties, even after the making of the contract, may also provide indications as to the meaning of the contract (paragraph (b)).

Illustration 1
A German manufacturer of office supplies has engaged B to represent A in the north of France. The contract is for six years but the contractual relationship may be terminated without notice if B commits a serious non-performance of its obligations. One of these obligations is to visit each of the 20 universities in the area “every month”. Assuming that this obligation applies only to the months, in the country concerned, when the universities are open and not to the vacations, B only visits each one 11 times a year, and A knows this from the accounts which are submitted to it by B. After 4 years A purports to terminate the contractual relationship for serious non-performance by B’s obligations. Its behaviour during the four years since the conclusion of the contract leads to the interpretation that the phrase “every month” must be interpreted as applying only to the months when universities are active.

Not all the laws of the Member States allow evidence to be given of pre-contractual negotiations, on the grounds that what one party said was meant is not useful evidence as the other might not have agreed with the interpretation. A better approach is not to exclude the evidence but to allow the court to assess it for what it is worth. This should be the same with regard to subsequent conduct.

The practices established between the parties (paragraph (c)) are often decisive.

Illustration 2
A has made a franchise contract with B. A clause provides that B is to pay for goods received from A within ten days. For a three month period B pays within 10 working days. Then A demands payment within ten days including holidays. The practice adopted by the parties indicates that this is not a correct interpretation.

The reference (paragraph (c)) to the interpretation which has already been given by the parties to expressions which are the same as, or similar to, those used in the contract is particularly relevant in relation to standard terms.

Paragraph (d) (concluding words) extends the same idea to expressions which have already been subject to judicial interpretation. This obviously may inform the interpreter’s decision. The meaning generally given to expressions in a particular sector may also be useful when one is dealing with expressions which have a technical meaning different to their ordinary meaning, for example the “dozen” which is understood in a particular trade to mean thirteen (the “baker’s dozen”).

The nature and the purpose of the contract may also be considered (letter (e)).

Illustration 3
The manager of a large real estate development makes a fixed price contract with a gardening company for the maintenance of the "green spaces". The manager later complains that A has not repaired the boundary wall. The contract cannot be interpreted as covering this as it is a contract for gardening.

Furthermore, it is normal to refer to usages by which the parties may be considered to have contracted or whether such usages form the basis of a reasonable interpretation used to
resolve an uncertainty in the meaning of the contract. The Article refers in principle to usages which are current at the place the contract is made, although there may be difficulty in establishing this place.

Illustration 4

A wine merchant from Hamburg buys 2,000 barrels of Beaujolais Villages from a co-operative cellar B. In Beaujolais a barrel contains 216 litres, whereas a Burgundian barrel contains more. A cannot claim that the barrels referred to in the contract are Burgundian barrels.

Illustration 5

A film producer A and a distributor B make a distribution contract in which there is a clause providing for payment of a certain sum if the number of exclusive screenings (i.e. screenings only in a single cinema or chain of cinemas) is less than 300,000. A meant exclusive for the whole of France, B only for the Paris region. According to usages of the French film industry, exclusivity means exclusivity only in the Paris region. It is this meaning which applies.

Finally, good faith and fair dealing will often determine the interpretation of the contract.

Article 6/3

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

Expressions used in a contract are to be interpreted in the light of the whole contract in which they appear.

COMMENTS

It is reasonable to assume that the parties meant to express themselves coherently. It is thus necessary to interpret the contract as a whole and not to isolate contractual terms from each other and read them out of context. It must be presumed that the terminology will be coherent; in principle, the same expression should not be understood to have different meanings in different parts of the same contract. The contract must be interpreted in a way that gives it basic coherence, so that the individual clauses do not contradict each other.

There is normally no particular hierarchy between the elements of a contract, save under special circumstances: for example, particular emphasis should be given to any definition of expressions used in the contract or to a preamble which could have been introduced into the contract.

This Article may also be applied to groups of contracts. For example one can treat a framework (master) contract and the various contracts made under it as a whole. By the “whole contract” must be understood the “whole group of contracts”.

Illustration

Miss A, an inexperienced singer, is taken on for six months by B, the manager of a cabaret on the Champs-Elysées. The contract contains a clause authorising the manager to end the contract in the first three days of the singer starting work. Another clause allows either party to terminate the contract on payment of a significant sum of money as a penalty. Miss A is fired after one day and claims payment of the sum. Her claim should fail because the penalty clause is to be read in the light of the clause allowing determination within three days, which is a trial period. The expression “to terminate” in the penalty clause must thus be interpreted as only covering a termination from the forth day onwards.

Article 6/4

[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.

COMMENTS

International contracts are sometimes drafted in more than one language and there may be divergences between the different linguistic versions. The parties may provide a solution by stating that one version is to be authoritative, in which case that version will prevail. If nothing is provided and it is not possible to eliminate the divergences by other means (e.g. by correcting obvious errors of translation in one version), the present Article gives a reasonable solution by providing that the original version is to be treated as the authoritative one, since it is likely to express best the common intention of the parties.

Illustration

A French business and a German business make a contract in French and in German. The contract contains an arbitration clause. The French text provides that the arbitrator "s’inspire" from the rules of the ICC, i.e. may follow them. The German version provides "er folgt", i.e. the arbitrator must follow the ICC rules. The French version was the original and this is the one which should prevail.

If the contract provides that the different versions are to be equally authoritative, the will of the parties must be respected by observing this and resorting to the general rules of interpretation. It is not possible simply to give precedence to one version. It must be decided which version corresponds better to the common intention of the parties or, if this cannot be established, what reasonable persons would understand.

It is important to read this provision along with the contra proferentem rule in Article II. 8:103 if the original version was drafted by one of the parties.

Article 6/5

[II. – 8:104]: Preference for negotiated terms

Terms which have been individually negotiated prevail over those which have not.

COMMENTS

If in an otherwise non-negotiable contract (standard form or otherwise) there is, exceptionally, a term which has been negotiated, it is reasonable to suppose that this term will represent the common intention of the parties, other indications apart. This rule complements the rule in Article II. – 8:105.

The preference given to negotiated terms applies also to modifications made to a printed contract, whether by hand or in any other way (e.g. typed or stamped on). One may in effect assume that these modifications were negotiated. However, it is a rebuttable presumption.

Illustration

A printed form is used for the conclusion of an option to purchase land. One of the clauses provides that the eventual buyer will deposit a cheque for 10% of the price with an intermediary until the option is either taken up or is refused. The parties agree to replace the requirement for a cheque with a bank guarantee. The intermediary writes this change on the margin of the document but omits to cross out the printed clause. The contradiction between the two clauses is to be resolved in favour of the handwritten clause.

The rule applies even if the modification was oral.

Article 6/6

[II. – 8:106]: Preference for interpretation which gives terms effect
An interpretation which renders the terms of the contract effective is to be preferred to one which would not.

**COMMENTS**

The parties must be treated as sensible persons who intended that their contract should be fully effective (magis ut res valeat quam pereat). Thus if a term is ambiguous and could be interpreted in one way which would make it invalid or another which would make it valid, the latter interpretation should prevail (favor negotii). As to an exception for consumer contracts see Article II. – 8:103a.

Illustration 1

Architect A assigns his practice to architect B and undertakes not to exercise his profession for five years “in the region”. If region is interpreted to mean the administrative region which contains several departments, the clause would be invalid as too wide. If region is interpreted in a less technical and more reasonable sense (a reasonable area) the clause will be valid and fully effective.

For identical reasons, if one of two possible interpretations would lead to an absurd result the other must be taken.

Illustration 2

A grants B a licence to produce pipes by a patented method. B must pay a royalty of €500 per 100 metres if annual production is less than 500,000 metres and €300 if it is over 500,000 metres. To calculate the royalties on 600,000 metres, one can interpret the clause as fixing the price at €500 per metre for the first 500,000 metres and €300 per metre for the remainder, or the rate of €300 per metre could be applied to the whole quantity. The latter interpretation is not valid because it leads to an absurd result: the royalty for a production of 600,000 m. would be less than that for 400,000

**Article 6/7**

**[II. – 8:103]**: Interpretation against supplier of term

Where in a contract which does not fall under the following article there remains 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.

**COMMENTS**

This Article only applies to contracts which do not fall under the following Article, thus to contracts between businesses (“B2B”), between consumers (“C2C”) and to any other contract not being a consumer contract (e.g. a contract between a non-profit association having legal capacity and a business). The rule in the present Article, often called the contra proferentem rule, is widely recognised both in legislation and in case law in the different national and international laws. It rests on the idea that the party who has drafted a contractual term, or the whole contract, should normally bear the risk of any defect in the drafting unilaterally. The rule applies not only against the author but also against anyone who supplies pre-drafted clauses. This will be the case when the clauses have been prepared by, e.g., the professional association to which the party employing the clauses belongs.

It applies in particular to standard terms drawn up unilaterally by one party, but it may also apply to a contract of adhesion which has been drawn up for the particular occasion but which is non-negotiable.

Illustration

An insurance contract contains a clause excluding losses caused by “floods”. The insurance company which drafted the contract cannot maintain that this exclusion applies to damage caused by water escaping from a burst pipe, since it has not made this clear.
It should be noted that the Article states only that the interpretation against the party who supplied the term “is to be preferred”. An interpreter could, in appropriate circumstances, interpret a clause which has not been individually negotiated in favour of the party who proposed it.

The rule only applies where the meaning of a term remains doubtful. In many, if not in most cases the general rules on interpretation in the preceding Articles will enable a clear meaning to be arrived at. The scope for the application of the present Article is therefore limited.

Article 6/8

[II.-8:103a] Interpretation in favour of consumers

(1) Where in a contract between a business and a consumer there remains doubt about the meaning of a term, the interpretation most favourable to the consumer is to be preferred.

(2) Paragraph (1) does not apply to terms supplied by the consumer [or to terms which have been individually negotiated between the parties].

(3) The parties may not, to the detriment of the consumer, exclude the application of this Article or derogate from or vary its effects.

COMMENTS

This Article is only applicable to contracts between a business and a consumer as defined in Article I.-1:105. It contains a stricter version of the rule given in the preceding Article. The idea and parts of the wording, in particular in paragraph (1) with regard to the phrase “the interpretation most favourable to the consumer”, is lifted from Article 5 of Directive 93/13/EEC on Unfair Terms in Consumer Contracts.

By using the superlative “most favourable to the consumer” in paragraph (1) the rule gives less discretion to the interpreter, in particular in comparison with the preceding Article. In cases where the business supplied the term in question, the interpreter must interpret the term against the business, if a term is ambiguous. Where a term could be interpreted in one way which would make it valid or another which would make it invalid and if it is more favourable to the consumer that the term is invalid, the present Article should, other than under Articles II. – 8:103 and II. – 8:106, lead to the result that, the latter interpretation prevails.

However, also the present Article only applies where the meaning of a term “remains” doubtful. This means that the general rules on interpretation in the preceding Articles are not completely overridden. In particular Articles II. – 8:101 and II. – 8:102 will often enable a clear meaning to be arrived at. The scope for the application of the present Article is therefore limited, but slightly wider than the scope of the preceding Article. It imposes on the interpreter a general duty to seek for the interpretation most favourable to the consumer. The consequence is that a business which drafts contract terms to be used in consumer contracts bears a higher risk of defects in the drafting than for other contracts.

Paragraph (2) contains [two] exception[s]. If the term in question or the whole contract had been supplied by the consumer, there is no reason to impose the risk of defects in the drafting on the business. It should be noted that paragraph is formulated as an exception to paragraph (1). This has the effect that only cases where the consumer supplied the terms are exempted. If the terms had been drafted by a neutral third party, in particular a notary, paragraph (1) remains applicable. Moreover, under the usual rules on the burden of proof, the business will have to proof that it was the consumer who supplied the term.

Illustration

The lodger of a flat buys a form for rental contracts in a stationary shop (which is possible in some member states) and insists on using this form in the contract with the landlord. The form contains a clause that the lodger has to pay a deposit of 2 monthly rents without clarifying whether this means just the net rental fee or also includes the agreed monthly
payment for additional property expenses for electricity, heating etc. Even if the landlord is a business (which depends on the size of his activity, since small investors are regarded as consumers and not as business), the present Article is not applicable. However, the lodger (i.e. a consumer) is nevertheless protected, as also Article II. – 8:103 is not applicable to the contract. The contract must be interpreted under the general Articles. If, e.g., in the region such deposits are usually calculated on the basis of the net rent (which is the case, e.g., in Germany because of § 551 Civil Code) Article II. – 8:102 (d) should lead to the result that the term is to be interpreted in this sense.

The other exception is individually negotiated terms… [to be elaborated further after the decision on this issue has been taken. The part in square brackets is, for the moment, just a reminder that the group will have to return to this article after having dealt with the rules on unfair terms].

Paragraph (3) makes this rule mandatory in favour of consumers. This follows the model of Directive 93/13/ EEC on Unfair Terms in Consumer Contracts. This very specific provision should not invite to an argumentum e contrario for the other provisions of this chapter. Although not expressively mandatory, contract clauses, which try to amend the rules on interpretation of contracts may be invalid in particular under the rules of unfair terms. Moreover the interpreter may simply disregard such contractual clauses on interpretation, if they lead to an unreasonable result.

**Article 6/9**

**[II-8:201] Unilateral statements or conduct**

(1) Unilateral statements or conduct indicating intention are to be interpreted in the way in which they could reasonably be expected to be understood by the person to whom they are addressed.

(2) Articles 6/1 (2) [II. – 8:101 (2)] and 6/2 to 6/8 [II. – 8:102 to II. – 8:107] apply with appropriate adaptations.

**COMMENTS**

A. General

The rules on the interpretation of contracts cannot all be applied directly to the interpretation of unilateral statements or other conduct indicating intention. The primary rule in the interpretation of contracts refers to the common intention of the parties, which does not exist in the case of an unilateral statement. Examples of unilateral statements or other conduct indicating intention are all notices under a contract which intend to have a legal effect such as termination or avoidance. Also an offer to conclude a contract and its acceptance are unilateral statements. On their interpretation see the comments to Article II.-8:101 under A.

B. Reliance interest

Although some systems appear in principle to take a subjective approach, it seems inappropriate to interpret a unilateral statement according to the subjective intention of the maker. A person could not be allowed to say that he or she meant something entirely different to the ordinary meaning of the expressions used and expect this secret subjective meaning to have a legal effect on other people. So paragraph (1) lays down the general rule that a unilateral statement indicating intention is to be interpreted in the way in which it could reasonably be expected to be understood by the person to whom it is addressed. This does not allow the subjective meaning placed on the statement by the addressee to dictate the resulting interpretation. That would be just as unreasonable as giving preference to the subjective intention of the maker of the statement. However, it does allow the characteristics of the addressee to be taken into consideration. For example, a notice given by one trader to another trader in the same line of business would be interpreted as a trader in that line of business could be expected to interpret it, not as an ordinary citizen might be expected to interpret it. Paragraph (1) reflects the policy that a person receiving a communication which
is intended to have legal effect is entitled to rely on its having the meaning which any
recipient of the same type could reasonably be expected to place on it. The addressee is not
at the mercy of the secret intentions of the sender; the sender is not at the mercy of any
unreasonable interpretation placed on the statement by the addressee.

C. Addressee knows real intention of maker

If however the addressee knows the real intention of the maker of the statement, Paragraph
(1), which does not refer to a fictitious person, but to the reasonable understanding by the
concrete addressee of the statement, leads to the result that the real intention prevails. This is
similar to the equivalent provision for the interpretation of contracts in II.-8:101 (2) and
reflects the same policy. It can be regarded as a particular application of the requirement of
good faith and fair dealing. It would be contrary to good faith for a person who knows that
the maker of a statement attached a particular meaning to an expression, and who does
nothing to indicate that this is not acceptable, to argue later that this meaning was different to
the meaning which the addressee could reasonably be expected to give to the expression in
other circumstances. The same applies if the addressee could reasonably be expected to
know the particular meaning which the maker attached to the statement or to any expression
in it. In such circumstances the statement is to be interpreted in the way intended by the
maker.

D. Application by analogy of other rules on interpretation of contracts

Paragraph (1) of the present Article modifies only Article II.-8:101 for the interpretation of
unilateral statements and conduct indication intention. The other Articles of the Chapter on
Interpretation apply with appropriate adaptations. In particular most of the letters in Article
II.-8:102 can also help to interpret unilateral statements.