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# Judicial Interpretation of Commercial Contracts in English and French Law: A Comparative Perspective

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## Abstract

In this paper, I consider whether the recent overhaul of French contract law via *ordonnance* No 2016-131 of 10 February 2016 has changed the principles of judicial interpretation of commercial contracts, and how these compare with the principles in English law. One of the questions I ask is whether the traditional dichotomy between the French subjective approach and the English objective one has been altered now that the objective principle of interpretation has been incorporated in the *Civil code*. I explore how both jurisdictions deal with the main aspects of judicial interpretation, such as the nature of the interpretative question and the purpose and scope of contractual interpretation. Similarities emerge that show a *rapprochement* between these judicial approaches. Naturally, differences persist, which reflect distinct contract law values embedded in each legal order. Even if the *ordonnance* No 2016-131 has only introduced small changes to the provisions relating to interpretation, French courts now have the interpretative tools to follow in the footsteps of English courts when interpreting professionally drafted commercial contracts. An emerging coalescence around an objective textual interpretation in a sophisticated business setting is to be welcomed as it enhances commercial certainty across borders.

## Keywords

Contractual interpretation, commercial contracts, principles of interpretation, subjective interpretation, objective interpretation, contextualism, textualism, English contract law, French contract law

## 1. Introduction

Interpreting a contract in France and England consists of ascertaining a meaning (or effect) to a term that is ambiguous, doubtful or in contradiction with other terms or contractual

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documents.<sup>1</sup> It is a process of crucial importance to commercial transactions in both jurisdictions as business people expect their contract to produce a commercial result.<sup>2</sup>

However, when disputes arise, parties' disagreements over the *proper* meaning of a term or word leave the judge as the ultimate arbiter – the exegete. Whilst courts in both legal systems engage in the interpretative process, they must “*identify what the parties have agreed, not what (they) think that they should have agreed,*” thus drawing a limit to their power of interpretation.<sup>3</sup>

In this paper, I compare the French principles of judicial interpretation enshrined in the *Code civil* with the UK Supreme Court's approach encapsulated in a series of leading cases, such as *Investors Compensation Scheme v West Bromwich Building Society*, *Chartbrook v Persimmon Homes*, *Rainy Sky v Kookmin Bank*, *Arnold v Britton* and *Wood v Capita Insurance Services Ltd*. The purpose of this comparison is to consider if differences in judicial approaches persist between these two jurisdictions following the 2016 reform of French contract law and in light of recent English decisions.

This comparison explores three main aspects of contractual interpretation, which determine the structure of this paper:

- (1) the *nature* of the interpretative question – it is a matter of law or a question of fact?
- (2) the *purpose* of contractual interpretation – what is the approach followed in each jurisdiction to identify the parties' intention? ; and
- (3) the *scope* of contractual interpretation – what does it cover? This question relates to the meaning of the contract terms and the use of maxims of interpretation in both legal systems.

The relevance of French law to this comparison derives from the recent overhaul of French contract law via *ordonnance* No 2016-131 of 10 February 2016.<sup>4</sup> The aim of the reform was to modernise and simplify the general law of obligations whilst reinforcing the *sécurité juridique* deriving from the legal provisions and enhancing its attractiveness for commercial parties.<sup>5</sup> The principles of contract interpretation now have a separate chapter of their own in the *Civil*

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<sup>1</sup> Bertrand Fages, *Droit des obligations*, n° 256 (LGDJ, 2013). See also Cass. Civ. 10 Nov 1891, Sirey 1891, I, 529. See *Investors Compensation Scheme Ltd v West Bromwich Building Society* [1998] 1 WLR 896, 912-913.

<sup>2</sup> *In re Golden Key Ltd* [2009] EWCA Civ 636, [25]-[29].

<sup>3</sup> *Arnold v Britton* [2015] UKSC 36, [2015] AC 1619, [20] per Lord Neuberger of Abbotsbury P.S.C. See also Cass. Civ. 28 October 2015, n° 14-11.498.

<sup>4</sup> *Ordonnance no 2016-131 du 10 février 2016 portant réforme du droit des contrats, du régime général et de la preuve des obligations*, *Journal Officiel de la République Française*, JO of 11 February 2016, as amended by *loi* No 2018-287 of 20 April 2018, which ratified the *ordonnance no 2016-131*. Most provisions of *ordonnance no 2016-131* entered into force on 1<sup>st</sup> October 2016 except for a few amended by *loi* No 2018-287 that came into force on 1<sup>st</sup> October 2018. French courts are now expected to apply three laws of contract: the law before the reform, the law from the reform to the ratification and the law resulting from the ratification.

The translation of the articles of the Civil code is partly mine partly the one available at [www.textes.justice.gouv.fr/art\\_pix/THE-LAW-OF-CONTRACT-2-5-16.pdf](http://www.textes.justice.gouv.fr/art_pix/THE-LAW-OF-CONTRACT-2-5-16.pdf).

<sup>5</sup> See *Rapport au Président de la République relatif à l'ordonnance no 2016-131 du 10 février 2016 portant réforme du droit des contrats, du régime général et de la preuve des obligations*, JO of 11 February 2016.

code, instead of a mere section.<sup>6</sup> In a spirit of simplification and clarity, the restatement of contract law reduced the number of *articles* (statutory provisions) from nine to four (Articles 1188 to 1191 CC) and added one (Article 1192 CC – the prohibition of judicial distortion of clear and precise terms).<sup>7</sup> Although these provisions only introduce small changes, they now constitute *essential tools* for the courts when interpreting a contract.<sup>8</sup> They contribute to a more coherent landscape and open new judicial horizons. It remains to be seen how courts will decide since the new provisions only apply to contracts entered into from 1<sup>st</sup> October 2016.<sup>9</sup> However, as common law of contract, these provisions apply to all agreements, and in doing so shed light on the interpretation of commercial contracts.<sup>10</sup> The relevance of English law by contrast derives from a series of recent seminal cases, which lay out the principles of interpretation. A comparative study between the French and English legal regimes allows a critical analysis of their respective interpretative tools in a commercial setting.<sup>11</sup>

The importance of understanding the interpretative process in both jurisdictions also lies in private international law since the law applicable to a contract governs its interpretation.<sup>12</sup> When a French judge decides on an issue relating to a contract governed by English law, she must apply English law to its interpretation, and vice versa for an English judge deciding on a contract governed by French law. *Dallah Real Estate and Tourism Holding Co v Ministry of Religious Affairs, Government of Pakistan* illustrates the challenges of such application. In that case, the UK Supreme Court, applying French law,<sup>13</sup> refused enforcement of an ICC award on exactly opposite grounds to the Paris Court of Appeal.<sup>14</sup> Although it applied the French subjective approach to interpretation, it upheld a formal and literal reading of the agreement,

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<sup>6</sup> It is interesting to note the place of these principles in the *Civil code* rather than the *Code of Civil Procedure* given that it relates to the function of the judge in the contract. The *Code of civil procedure* includes the rules relating to characterisation or categorisation of contract, and contrary to interpretation as discussed in this paper, characterisation is a question of law.

<sup>7</sup> Former Articles 1158 to 1164 CC have been left aside as rarely or not used at all by courts. Interpretation was governed by the former Articles 1156 to 1164 CC.

<sup>8</sup> Francois Ancel & Bénédicte Fauvarque-Cosson, *Le nouveau droit des contrats, Guide bilingue à l'usage des praticiens*, No 241, p. 128 (LGDJ, 2019).

<sup>9</sup> Article 9 of *ordonnance no 2016-131* provides that its provisions will enter into force on 1<sup>st</sup> October 2016 and that “contracts entered into before this date remain subject to the former legislation.”

<sup>10</sup> The characterisation or categorisation of a contract comes after its interpretation.

<sup>11</sup> Some articles have compared contractual interpretation in French and English law but nearly all of them have been published before the reform, including Stefan Vogenauer, *Interpretation of Contracts: Concluding Comparative Observations*, in Andrew Burrows and Edwin Peel (eds), *Contract Terms*, 123-150 (Oxford University Press, 2007); Catherine Valcke, *On Comparing French and English Contract Law: Insights from Social Contract Theory*, 4 J Comp L 69 (2009); Catherine Valcke, *Contractual Interpretation at Common Law and Civil Law: An exercise in Comparative Legal Rhetoric*, in J Neyers, R Bronaugh and SGA Pitel (eds), *Exploring Contract Law 77* (Hart, Oxford, 2009), with the exception of a few, such as Bénédicte Fauvarque-Cosson, *Les nouvelles règles du Code civil relatives à l'interprétation des contrats: perspective comparatiste et internationales*, No 2, p. 363, *Revue des Contrats* (2017). Some excellent book chapters deal with interpretation in France and England in general, including Hugh Beale, Bénédicte Fauvarque-Cosson, Jacobien Rutgers, Stefan Vogenauer, *Ius Commune Casebook on European Contract law*, (3<sup>rd</sup> ed, Hart Oxford, 2019).

<sup>12</sup> Article 12 of the EU Regulations No 593/2008 of 17 June 2008 on the law applicable to contractual obligations (Rome I).

<sup>13</sup> [2010] UKSC 46, [2011] 1 A.C. 763, [15].

<sup>14</sup> *ibid.* See also *Dallah Estate and Tourism Holding v the Ministry of Religious Affairs, Government of Pakistan* [2009] EWCA Civ 755 (CA). By contrast, see CA Paris 17 February 2011, RG 09/28533,

reaching a decision conflicting with the one from the Paris Court of Appeal. In the words of Pierre Meyer, it displayed “*the irreconcilable difference in the legal cultures of the judges.*”<sup>15</sup>

Interpretation does not happen in a vacuum; it reflects the balance struck between the contract values of each legal system. It goes without saying that French and English law share a common theory of contract based upon freedom of contract and sanctity of contract. However, sitting next to these principles now enshrined in a Preliminary Chapter of the *Code civil*, stands the principle of good faith (Article 1103 CC) in French law. English law currently recognises no such general principle even though the traditional hostility towards a duty of good faith may now appear overstated.<sup>16</sup> Interestingly, fairness in English law still plays a role in contract. Whilst considering these principles (and underlying values) in the context of interpretation, it is also important to refer to the influential European and international legal instruments, such as the Principles of European Contract Law and the Unidroit Principles of International Commercial Contracts, which inspired the French *ordonnance* No 2016-131.<sup>17</sup>

This comparison shows growing similarities between the sets of interpretative principles as applied to commercial contracts. Naturally, differences persist, which reflect distinct contract law values embedded in each legal order. Even if the *ordonnance* No 2016-131 has only introduced small changes to the provisions relating to interpretation, French courts now have the interpretative tools to follow in the footsteps of English courts when interpreting professionally drafted commercial contracts. An emerging coalescence around an objective textual interpretation in a sophisticated business setting is to be welcomed as it enhances commercial certainty across borders.

## 2. The nature of the interpretative question – is it a matter of law or a question of fact?

In both legal systems, interpretation has two facets, which deal with the ambiguity or incompleteness of a contract – one that seeks to give *meaning* to the contract terms, referred to as an explanatory interpretation or interpretation *stricto sensu* (*interprétation explicative*), and the other that fills in any gaps by implying terms so that the contract produces lawful effects, known as creative interpretation (*interprétation créative*) in French law and implication in English law. Each facet has a distinctive and apparently opposite nature in French and

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*Gouvernement du Pakistan- Ministère des Affaires Religieuses v Dallah Real Estate and Tourism Holding Company.*

<sup>15</sup> Pierre Mayer, *Conflicting Decisions in International Commercial Arbitration*, 4 Journal of International Dispute Settlement, No 2, 407-419, 412 (2013). Also, see Hugh Collins, *The European Civil Code, the Way Forward*, 146-181 (Cambridge University Press, 2008).

<sup>16</sup> See Johan Steyn, *Contract law: fulfilling the reasonable expectations of honest men*, 113 LQR 433 (1997) (Jul), p. 439: “*After all, there is not a world of difference between the objective requirement of good faith and the reasonable expectations of parties.*” See also Leggatt J in *Yam Seng Pte Ltd v International Trade Corporation Ltd* [2013] 1 All ER (Comm) 1321.

<sup>17</sup> The French contract law has been influenced by the projects on European contract law and international commercial instruments. See Principles of European Contract Law (PECL) available at [https://www.trans-lex.org/400200/\\_pecl/](https://www.trans-lex.org/400200/_pecl/); Unidroit Principles of International Commercial Contracts (Unidroit Principles) 2016 <<https://www.unidroit.org/instruments/commercial-contracts/unidroit-principles-2016>> ; and also UN Convention on Contracts for the International Sale of Goods (CISG), <<http://www.uncitral.org/pdf/english/texts/sales/cisg/V1056997-CISG-e-book.pdf>>.

English law, which conditions the binding force of the interpretative principles and the degree of review by the highest domestic court. The *ordonnance* No 2016-131, however, unsettles this historical distinction in French law.

In addition, this distinction raises the question whether these two facets form part of a unitary exercise of contractual interpretation in both jurisdictions.

### 2.1. Explanatory interpretation – A convergence towards the binding force of principles of contractual interpretation?

The distinction between matters of law and questions of fact explains the steady flow of cases to the UK Supreme Court which lays out interpretative principles guiding lower courts in the process of interpretation<sup>18</sup> and, by contrast, the near absence of a theory of interpretation in France. An historical perspective shows how the *ordonnance* No 2016-131 may give tools to the *Cour de cassation* to challenge this traditional classification.

Since the early nineteenth century, interpreting a contract in French law has been considered a question of fact that falls within the sovereign power of lower court judges.<sup>19</sup> It derives from the subjective nature of the judicial approach given that the *juges du fond* are in charge of ascertaining the intention of the parties from the facts presented to them.<sup>20</sup>

This power being sovereign, its exercise may not be contested before the *Cour de cassation*, with the exception that the higher court may check that the lower courts have not distorted clear and precise terms and that an ambiguity presupposing interpretation exists.<sup>21</sup> In a recent case, the higher court confirmed the sovereignty of interpretation of the Court of Appeal “*in the absence of distortion, made necessary by the ambiguity of (contract) terms, ...*”<sup>22</sup> In the same vein, in another case relating to the substitution of a new index in a price variation clause that referred to a non-existing index, the *Cour de cassation* held that the Court of Appeal had “*sovereignly sought the common intention of the parties who had stipulated a clause of price variation.*”<sup>23</sup>

Linked to this sovereign power of interpretation, is the traditional view that interpretative principles are purely advisory. This goes back to 1807 when the *Cour de cassation* held that the principles in former Articles 1156 to 1164 CC “*were advice given to the judges in matters of contractual interpretation rather than mandatory principles (...)*”<sup>24</sup> Jean Carbonnier even

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<sup>18</sup> For a recent case which summarises the approach of the courts to interpretation, see *Lamesa Investments Ltd. V Cynergy Bank Ltd* [2019] EWHC 1877 (Comm), [12].

<sup>19</sup> See *Lubert v. Wancareghem*, Cass. Ch. réunies, 2 February 1808, in Francois Terré, Yves Lequette, Francois Chénéde, *Grands arrêts de jurisprudence civile*, vol 2, n° 160 (13<sup>th</sup> ed, Dalloz, 2015).

<sup>20</sup> See *infra* for a discussion on the subjective approach to interpretation.

<sup>21</sup> For a control of judicial distortion, see Cass. Civ. 15 April 1872, *Veuve Foucauld et Coulombe v. Pringault*, DP 1872, 1, 176. See *infra* for a discussion on the control of judicial distortion.

<sup>22</sup> Cass. Com 4 December 2019, n° 17-31.734 18-11.410 18-11.918 – « *en premier lieu, qu'ayant, par une interprétation souveraine, exclusive de dénaturation, rendue nécessaire par l'ambiguïté de ses termes, ...* »

<sup>23</sup> Cass. Civ 3, 12 January 2005, n° 03-17260.

<sup>24</sup> Cass. Req. 18 March 1807, S. 1807, 1, p.361. See also Cass. Req. 13 February 1883, S. 1883, 1, p. 466 and Cass. Req. 16 February 1892, S. 1892, 1, p.409. More recently, Cass. Civ 1, 17 October 1961, Bull. Civ. I, n° 464; Cass. Civ 1, 19 December 1995: Bull. Civ I, No 466.

referred to these principles as “*le petit guide-âne*” (*the small donkey guide*), thus mocking their relevance.<sup>25</sup> It follows that any non-observance of these principles cannot be a ground for appeal.<sup>26</sup> However, in certain cases the *Cour de cassation* has appeared to review the application of certain interpretative provisions.<sup>27</sup>

In any case, this could change as the *ordonnance* n° 2016-131 may lead to the recognition of the mandatory nature of the interpretative principles – at least certain principles *vis-à-vis* the judge.<sup>28</sup> It has been argued that the reduction of the number of the principles of contractual interpretation by the legislator may give greater force to those remaining.<sup>29</sup> More convincingly, the principle of prohibition of judicial distortion of clear and precise terms, consistently upheld by the *Cour de cassation* and now formally enshrined in the *Civil code* (Article 1192 CC), appears of a mandatory nature. Similarly, the *contra proferentem* maxim (Article 1190 CC) could also have such a binding force.<sup>30</sup>

In addition, the principles of contractual interpretation must be read in light of the principles of contractual freedom, binding force of contract and good faith now codified in the Preliminary Chapter of the *Civil code*. The *Cour de cassation* was already reviewing whether the interpretation of lower courts did not distort clear and precise terms on the ground of the binding force of contract (former Article 1134 CC) before this principle was incorporated in Article 1192 CC. In the same spirit, now that the objective approach to interpretation is incorporated in the *Civil code* (Article 1188(2) CC), the *Cour de cassation* may be vested with more extensive power of review.<sup>31</sup> It nevertheless remains to be seen if the *Cour de cassation* will seize this opportunity to uphold the mandatory nature of these principles – at least some of them - and exercise such oversight. As such it would bring legal certainty to a current interpretative process, which in the eyes of the commercial parties can lack predictability. This would draw the nature of the interpretative question closer to English law.

Matters of contractual interpretation in England are always questions of law, which fall under the control of the UK Supreme Court.<sup>32</sup> This classification is linked to the *objective* approach to interpretation with the aim of bringing legal certainty to the interpretative process and has historical justifications.<sup>33</sup> It can nevertheless be deceiving since decisions on a specific clause in a particular context are “*seldom of much help on a question of construction.*”<sup>34</sup> The UK

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<sup>25</sup> Jean Carbonnier, *Droit civil. Les obligations*, t. IV, n° 68 (22<sup>nd</sup> ed, Presses Universitaires de France, 2000).

<sup>26</sup> Cass. Req. 24 February 1868, D. 1868,1, p. 308; Cass. Req. 16 February 1892, S. 1892, 1, p.409. More recently, Cass. Civ 1, 17 October. 1961, Bull. Civ. I, n° 464; Cass. Civ 1, 19 December 1995: Bull. Civ I, No 466; Cass. Civ 1, 19 December 1995, No 94-10478, Bull. civ. I, No 466.

<sup>27</sup> Cass. Civ 1, 20 January 1970, Bull. Civ. I, No 24; Cass. Com 8 December 1987, Bull. Civ. IV, No 262.

<sup>28</sup> See *infra* for a discussion of the force of these principles *vis-à-vis* the parties.

<sup>29</sup> Olivier Deshayes, *L'interprétation dans les contrats*, No 21, p. 39 JCP G (2015); Bénédicte Fauvarque-Cosson, *Les nouvelles règles du code civil relatives à l'interprétation des contrats; perspective comparatiste et internationale* p. 365 *Revue des Contrats* (2017).

<sup>30</sup> Francois Ancel & Bénédicte Fauvarque-Cosson, *Le nouveau droit des contrats, Guide bilingue à l'usage des praticiens*, No 117, p. 131 (LGDJ, 2019).

<sup>31</sup> *ibid* p. 132.

<sup>32</sup> *Macbeath v Haldimond* (1786) 1 Term Rep 172, 180; 99 ER 1036; *Bowes v Shand* (1877) 2 App Cas 445, 462; *Pioneer Shipping Ltd v BTP. Tioxide Ltd* [1982] AC 724, 736.

<sup>33</sup> See *Sattva Capital Corp v Creston Molly Corp*, [2014] 2 S.C.R. 633, [45]-[46].

<sup>34</sup> *Surrey Health BC v Lovell Construction Ltd* (1990) 48 Build LR 113, 118.

Supreme Court has nevertheless over the years defined principles of interpretation with different emphasis depending on the sitting Justices. As a result, the interpretation process set in these decisions may appear incompatible or even conflicting, defeating the quest for legal certainty. In *Investors Compensation Scheme v West Bromwich Building Society*,<sup>35</sup> Lord Hoffmann lays out the principles of a contextualist (purposive) approach whereas in *Arnold v Britton*,<sup>36</sup> Lord Neuberger asserts a textualist (literal) approach. More recently, in *Wood v Capita*,<sup>37</sup> Lord Hodge seems to settle on an *iterative process* which seeks to reconcile the conflicting paradigms of textualism and contextualism as “(a) process by which each suggested interpretation is checked against the provisions of the contract and its commercial consequences are investigated.”<sup>38</sup>

This process aims to strike a balance between the opposing arguments that either the courts place too much emphasis on the natural meaning of the words and too little on the factual matrix, or vice versa.<sup>39</sup> It seeks to settle the matter of contractual interpretation. In the more recent case, *The Financial Conduct Authority v Arch Insurance*, Lord Hamblen and Lord Leggatt confirm the principles of interpretation as stated in *Wood v Capita* and restate the core principle that contracts must be interpreted objectively

“by asking what a reasonable person, with all the background knowledge which would reasonably have been available to the parties when they entered into the contract, would have understood the language of the contract to mean.”<sup>40</sup>

In that case, the UK Supreme Court was asked to attach a meaning and effect to insurance policy wordings forcing a detailed factual analysis of the language used. Beyond the setting of a methodology, the interpretative question clearly appears imbued with factual references, which inevitably gives lower court judges some discretion.<sup>41</sup> Given that these judges are the ones considering all the factual evidence relating to the contract, should more attention be paid to their interpretation? This would confirm that lower courts are in the best position to interpret the contract terms in their factual context and would limit the number of appeals to the higher court.

Whatever the nature of the interpretative question, it is trite to say how much courts at all levels in both systems can diverge in their interpretation of contract terms with the caveat nevertheless that in English law the UK Supreme Court always has the last word on questions of contract interpretation.<sup>42</sup> It is worth noting that the Supreme Court of Canada has departed from the traditional approach and now treats the question of contractual interpretation as a

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<sup>35</sup> *Investors Compensation Scheme v West Bromwich Building Society (No 1)* [1988] 1 WLR 896, 912-913.

<sup>36</sup> *Arnold v Britton* [2015] UKSC 36, [2015] AC 1173.

<sup>37</sup> *Wood v Capita Insurance Services Ltd* [2017] UKSC 24, [2017] AC 1173.

<sup>38</sup> *ibid* [12].

<sup>39</sup> *ibid*.

<sup>40</sup> *The Financial Conduct Authority v Arch Insurance (UK) Ltd and others* [2021] UKSC 1, [47].

<sup>41</sup> Catherine Valcke, *On Comparing French and English Contract Law: Insights from Social Contract Theory*, 4 J Comp L 69, 80 (2009).

<sup>42</sup> *Re Sigma Finance* [2009] UKSC 2, [2010] 1 All ER 571.



matter of mixed fact and law.<sup>43</sup> Interestingly, this may be the qualification that French courts settle upon.

A layer of complexity is added when courts imply terms in the contract since the nature of the interpretative question then changes in both jurisdictions.

## 2.2. *Implication (Interprétation créative) – divergent approaches*

The *interprétation créative* is a matter of law in French law whereas implication is a question of fact in English law. However, this duality may not be as stark as it seems given that the implication of terms may be part of a unitary exercise of contractual interpretation in both systems.

In French law, this type of interpretation, also known as '*forçage du contrat*', is a matter of law that falls under the control of the *Cour de cassation*. It occurs when the court supplements the express terms of the contract with new ones implied from equity, usage or statute. As per Article 1194 CC, "(c)ontracts create binding effects not merely in relation to what they expressly provide, but also to all the consequences, which are given to them by equity, usage or legislation."<sup>44</sup> This article largely reproduces former Article 1135 CC, which had allowed courts to create now well-established obligations, such as the obligation of safety in contracts of transportation and the obligation of information in professional services contracts, including recently IT contracts.<sup>45</sup> Article 1194 CC now stands in a sub-section relating to the binding force of contracts in the Chapter on the effects of contracts whereas former Article 1135 CC used to live in the shadow of good faith given its place right after former Article 1134(3) CC.<sup>46</sup> Even if Article 1194 CC has severed its link to good faith as a principle of interpretation, it has maintained a reference to equity.

Indeed, the binding effects of contracts are drawn from equity, usage or legislation, in other words in light of objective standards, which commonly reflect policy considerations which naturally should be left to the legislator. Precisely, *ordonnance* No 2016-131 has enshrined an obligation of information in Article 1112-1 CC.<sup>47</sup> It therefore appears quite clearly that albeit called *interprétation créative*, Article 1194 CC is not actually a matter of interpretation. Rather, it is a way of filling in the *substantive* gaps of the contract - a matter of determination of the content of the contract as per equity, usage or legislation.<sup>48</sup> By contrast with English law, there

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<sup>43</sup> See *Sattva Capital Corp v Creston Molly Corp* [2014] 2 SCR 53, [45]-[55].

<sup>44</sup> Article 1194 CC reproduces the former Article 1135 CC, except for its reference to contracts rather than conventions. It is worth noting that although equity is mentioned first, it is not a source of law. Equity is a subsidiary standard of interpretation. See Cass. Soc. 4 December 1996, No 94-40.693 & No 94-40.701, Bull. Civ. V, No 421.

<sup>45</sup> For an obligation of safety (*obligation de sécurité*) in a contract of transportation, see Cass. Civ 1, 21 November 1911, DP, 13.1.249, note Sarrut, Sirey 1912, 1, 73, note Lyon-Caen; for an obligation of information in a credit agreement, see Cass. Civ 1, 12 July 2005, n° 03-10.115; Bull. Civ. I, No 326, p.270; same obligation in a real estate sale, Cass. Com, 3 February 2009, n° 08-15.307 ; same obligation of information in an IT contract, see Cass. Civ 1, 2 July 2014, No 13-10.076.

<sup>46</sup> Former Article 1134(3) CC – "(Agreements) must be performed in good faith."

<sup>47</sup> Article 1112-1(1) CC - "The party who knows information which is of decisive importance for the consent of the other, must share this information with that party provided that legitimately the latter does not know the information or trusts the contracting party."

<sup>48</sup> Gael Chantepie & Mathias Latina, *La réforme du droit des obligations*, n° 521, p. 439 (Daloz, 2016). See also Article 6:102 PECL and Article 4.8 Unidroit Principles.

is not a test set to imply a term leaving the exercise of this power to judicial discretion under the control of the *Cour de cassation*.

In English law, terms may be implied from one of three sources, i.e., statute, custom and common law, which resemble the French sources of equity, usage or statute.<sup>49</sup> The nature of the interpretative question varies according to the terms implied. At common law, a term implied in law is “a necessary incident of a definable category of contractual relationship.”<sup>50</sup> By contrast, a term implied in fact is “a matter of fact to give effect to what the court perceives to be the unexpressed intention of the parties to the particular contract.”<sup>51</sup> Only the latter term contributes to the process of interpretation as it is concerned to ascertain what the contract means.

Implying a term in fact traditionally carries two distinctive tests – (1) that it is ‘necessary to give business efficacy to the contract’ and (2) that ‘it is so obvious, that it goes without saying’. These two tests gave rise to uncertainty in their application until *Marks and Spencer v BNP Paribas* settled the matter.<sup>52</sup> This case restates the two tests as alternatives although in practice they tend to cumulate.<sup>53</sup> It confirms that “a term will only be implied if it satisfies the test of business necessity”<sup>54</sup> and clarifies that this test is not one of “absolute necessity” but of “business efficacy,” meaning that “without the term, the contract would lack commercial or practical coherence.”<sup>55</sup> It is not sufficient to show that the contract would be improved by the addition, or that the implied term is reasonable or fair.<sup>56</sup> In addition, it cannot be inconsistent with an express term.<sup>57</sup> The other test, that ‘the implied term must go without saying’, illustrates what the parties intended using the notional officious bystander test.<sup>58</sup>

As a matter of fact, it is for lower courts to decide how to apply these tests to the contract, and as acknowledged by Lord Neuberger in *Marks and Spencer v BNP Paribas*, “necessity for business efficacy involves a value judgment.”<sup>59</sup> Naturally, courts may be tempted to supplement or even vary the parties’ expressed intentions “whilst preserving the appearance of conformity to the idea of respecting parties’ self-determination.”<sup>60</sup>

In addition, as in French law, it raises the question if the process of implying a term is part of a unitary interpretative exercise. In French law, the distinction between interpretation and

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<sup>49</sup> *Jacobs v Batavia & General Plantations Trust Ltd* [1924] Ch 287.

<sup>49</sup> Ewan McKendrick, *Contract Law* No 9.2, p. 187 (13<sup>th</sup> ed, Red Globe Press, 2019). See also *Société Générale, London Branch v Geys* [2012] UKSC 63.

<sup>50</sup> *Scally v Southern Health and Social Services Board* [1992] 1 AC 294, 306.

<sup>51</sup> *ibid*.

<sup>52</sup> *Marks and Spencer Plc v BNP Paribas Securities Services Trust Co (Jersey) Ltd* [2015] UKSC 72, [2016] AC 742. See also, before that case, Lord Hoffmann in *Attorney-General of Belize v Belize Telecom Ltd* [2009] 1 WLR 255 and *The Moorcock* (1889) 14 P.D. 64.

<sup>53</sup> *Marks and Spencer Plc v BNP Paribas Securities Services Trust Co (Jersey) Ltd* (n 53) [21].

<sup>54</sup> *ibid* [17].

<sup>55</sup> *ibid* [21].

<sup>56</sup> *ibid*. See also *Bou-Simon v BGC Brokers LP* [2018] EWCA Civ 1525, [12].

<sup>57</sup> *Nazir Ali v Petroleum Company of Trinidad and Tobago* [2017] UKPC 2; [2017] ICR 531, [5].

<sup>58</sup> *Marks and Spencer Plc v BNP Paribas Securities Services Trust Co (Jersey) Ltd* (n 53) [21]. See also *Nazir Ali v Petroleum Company of Trinidad and Tobago* [2017] UKPC2, [2017] ICR 531, [5].

<sup>59</sup> *Marks and Spencer Plc v BNP Paribas Securities Services Trust Co (Jersey) Ltd* (n 53) [21].

<sup>60</sup> Hugh Collins, *Implied Terms: The Foundations in Good Faith and Fair Dealing* 67 *Current Legal Problems* 1, 297 (2014).

implication is blurred and it may be difficult to discern between them given the sovereign power of interpretation of lower court judges and the wide evidentiary basis attached to interpretation.

The UK Supreme Court in *Marks and Spencer v BNP Paribas* refers to what is now known as a 'sequential' approach, according to which the court must first focus its attention on the express terms of the contract to ascertain their meaning before considering any question of implication.<sup>61</sup> This is not a unanimous position. Lord Hoffmann in *Attorney General of Belize v Belize Telecom* had asserted the implication of terms to be part of the process of interpretation.<sup>62</sup> More recently Lord Mance in *Trump International Golf Club Scotland v The Scottish Ministers* held that

*the processes of consideration of express terms and of the possibility that an implication exists are all part of an overall, and potentially iterative, process of objective interpretation of the contract as a whole.*<sup>63</sup>

In the same judgment, Lord Hodge nevertheless gave support to the sequential approach,<sup>64</sup> which seems to have gained momentum.<sup>65</sup> Even if the implication of terms arises from the process of interpretation, it is nevertheless subject to a different, more stringent, test, for obvious reasons, given its "intrusive" nature.<sup>66</sup> It remains distinct from the equivalent approach in French law where there is no such test.

Whether they are part of a unitary interpretative exercise or distinct processes, these two facets of interpretation give judges discretion to interpret or supplement the expressed intentions of the parties, albeit subject to different tests and with varying degrees of review by the higher courts.

### **3. The purpose of contractual interpretation – the search for the parties' intention**

The purpose of contractual interpretation in both countries is to give effect to the intention of the parties to the contract.<sup>67</sup> In English law, it consists of ascertaining "*what is to be taken as the intention which reasonable people would have had if placed in the situation of the parties.*"<sup>68</sup> When interpreting a contract, the task of English courts is to discover the parties' intention from "*the legal obligations each assumed by the contractual words in which they sought to express them.*"<sup>69</sup> By contrast, French courts must seek the *subjective* intention of the parties in the contract. This dichotomy of approach – *objective and subjective* – has been emblematic of English and French law respectively. The *ordonnance* No 2016-131 has nevertheless

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<sup>61</sup> *Marks and Spencer Plc v BNP Paribas Securities Services Trust Co (Jersey) Ltd* (n 53) [28].

<sup>62</sup> *Attorney -General of Belize and others v Belize Telecom Ltd and another* (n 52) [16].

<sup>63</sup> *Trump International Golf Club Scotland Ltd v The Scottish Ministers* [2016] 1 WLR 85, [42].

<sup>64</sup> *ibid* [35].

<sup>65</sup> *Europa Plus CA SIF v Anthracite Investments (Ireland) plc* [2016] EWHC 437 (Comm), [34].

<sup>66</sup> *Philips Electronique v British Sky Broadcasting* [1995] EMLR 472, 481, *per* Sir Thomas Bingham MR.

<sup>67</sup> See Sir Christopher Staughton, *How Do the Courts Interpret Commercial Contracts?* 58 CLJ 303, 304 (1999), and Article 1188 CC.

<sup>68</sup> *Readon Smith Line v Yngvar Hansen-Tangen* [1976] 1 WLR 989, 996.

<sup>69</sup> *Pioneer Shipping Ltd v BTP Tioxide Ltd (The Nema)* [1982] AC 724, 736, *per* Lord Diplock.

altered this opposition since it now formally enshrines an objective approach as a fall-back principle to the subjective approach, leading to a *hybrid*, or two-step, interpretative process. This hybrid approach is very much inspired from international legal instruments. How does it compare with the English approach?

For some scholars, the distinction between *subjective* and *objective* interpretation is “*largely irrelevant in practice since it is well established that the same criteria must be employed (...)*.”<sup>70</sup> In theory, and even in practice, this distinction as articulated in Article 1188 CC nevertheless remains significant since it sets a clear methodology for the courts and determines the evidentiary basis available to the parties.

### *3.1. The confirmation of the conventional French subjective approach to interpretation*

The *ordonnance* No 2016-131 confirms the conventional subjective approach to interpretation in the first article of the Chapter on Interpretation – Article 1188 CC. This article’s first paragraph provides that ‘*the contract is to be interpreted pursuant to common intention of the parties rather than according to the literal meaning of the terms.*’ Rooted in the values of liberal individualism of the 18<sup>th</sup> century, this subjective approach aims to give full effect to party autonomy as an expression of free will.<sup>71</sup> In other words, it aims to be *fair* to the parties’ will since “*justice requires that (the parties) be held to the bargain upon which they truly agreed.*”<sup>72</sup> The meaning of the terms is to be found in the *actual* intention of the parties to the contract rather than according to the literal meaning of the terms. As a result, it leaves no room to the traditional antinomy between literalism and contextualism.<sup>73</sup> Instead it raises the question of the normative value of the subjective approach to interpretation, which is relevant in the context of interpretation clauses.

From an English perspective, the subjective inquiry is perceived as introducing uncertainty and undermining the goal of predictability in commercial transactions. The practice of French courts however shows the limits, which apply to such inquiry:

(1) the intention sought must be common to the parties; it is not enough to ascertain the intention of one party only,<sup>74</sup> so subjective intentions must be communicated and assented to by the other party;<sup>75</sup>

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<sup>70</sup> See Hugh Beale, Bénédicte Fauvarque-Cosson, Jacobien Rutgers, Stefan Vogenauer, *Cases, Materials and Text on Contract Law, Ius Commune Casebooks for the Common Law of Europe*, p. 727 (Hart Publishing, 2019).

<sup>71</sup> RJ Pothier, *Traité des obligations* (1761) in AM Dupin (ed) *Œuvres de Pothier* n° 91 (vol I, 1824). See also Jean Carbonnier, *Droit civil*, vol. II, *Les Biens, Les obligations*, No 1058 (Presses Universitaires de France, 2004).

<sup>72</sup> James J. Spigelman, *Contractual Interpretation: A Comparative Perspective*, 85 *Australian Law Journal* 412, (2011).

<sup>73</sup> Catherine Valcke, *On Comparing French and English Contract Law: Insights from Social Contract Theory*, 4 *J Comp L* 69, 73 (2009).

<sup>74</sup> Cass. 1<sup>ere</sup> Civ, 20 January 1970: Bull. Civ. I n° 24.

<sup>75</sup> Cass. Com, 23 October 1978, n° 76-15.637.

(2) the intentions must be sought out at the time of conclusion of the contract so private uncommunicated intentions before or after the contract are not relevant;<sup>76</sup> and

(3) the common intention must be *ascertainable*. It must be based on some objective elements and circumstances. As *M. le Batonnier Vatie* explains in his oral evidence in the *Dallah* case, “the court must ascertain the ‘genuine,’ subjective, intention of each party, but through its objective conduct.”<sup>77</sup> The *objective* form, be it the contract itself and/or the conduct of the parties, naturally conditions and restricts the *subjective* intent. English courts when ascertaining the intention of the parties also use objective elements, but as expressed by Leggatt LJ, this interpretation is objective “*in its weakest sense*.”<sup>78</sup>

As French courts seek the common intention of the parties, they look for it “*from the terms of the contract and the circumstances surrounding it that is from its text and context*.”<sup>79</sup>

Linked to the subjective approach to interpretation is the admissibility of *subjective* evidence of the parties’ intentions, which Lord Neuberger explicitly excludes in *Arnold v Britton*.<sup>80</sup> The wide evidentiary basis of the subjective approach appears in contradiction with an objective approach, which relies solely on intrinsic evidence since any extrinsic evidence, which contributes to ascertaining the actual intention of the parties, is admissible. It includes pre-contractual negotiations in the form of exchange of emails or documents, and subsequent statements or conduct of the parties.<sup>81</sup> The caveat is nevertheless that only *relevant* evidence is admissible – as such it sets a limit to the evidentiary *floodgate*. Recently, the *Cour de cassation* held that the Court of Appeal had violated Article 1103 CC (binding force of contract) and Article 1188 CC on the ground that it inappropriately based its decision to ascertain the common intention of the parties in a 24-month equipment lease and licensing agreement on irrelevant extrinsic evidence. It rejected a letter from Oracle, a third party to the contract between the licensee (Cegedim) and Finovia (then Arrow Capital Solutions), to Cegedim.<sup>82</sup> The *Cour de cassation* confirmed that the terms of the agreement were ambiguous and justified a subjective interpretation in view of the contract and the parties’ conduct, which included for instance Cegedim’s silence following the letter confirming the tacit renewal of the contract, the license fee’s payment for nearly three years, and Cegedim’s non-restitution of the leased equipment. This approach is consistent with Article 4.3 of the Unidroit Principles and Article 5:102 of the PECL, which refer to a list of circumstances that courts can take into account when ascertaining the subjective intention of the parties. It is difficult to deny that by increasing the amount of information deemed relevant to the interpretative exercise, the risks for longer and costlier proceedings increase. This is, however, not unique to the French judicial process as Catherine Mitchell draws the same conclusion with respect to the English

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<sup>76</sup> Cass. Ass. Plen, 12 May 1989, n° 86-41.740.

<sup>77</sup> *Dallah Real Estate and Tourism Holding Co v Ministry of Religious Affairs, Government of Pakistan* [2011] 1 AC 763 at [122].

<sup>78</sup> George Leggatt, *Making Sense of Contracts: The Rational Choice Theory* 131 LQR 454 (2015).

<sup>79</sup> Marie-Hélène Maleville, *Pratique de l'interprétation des contrats, Etude jurisprudentielle*, 165 (Publications de l'Université de Rouen, 1991).

<sup>80</sup> *Arnold v Britton* (n 36) [15] per Lord Neuberger of Abbotbury P.S.C.

<sup>81</sup> Req 20 April 1857, S. 1857.1.694; Req. 9 May 1877, D.P. 1878.1.30; Civ. 18 February 1986, n° 84-12.347; Bull. Civ. I, No 31. Cass. 1er Civ. 13 December 1988, n° 86-19.068. See also Article 5:102 PECL and Article 4.3 Unidroit Principles.

<sup>82</sup> Cass. Com, 6 February 2019, n° 17-26494.

contextualist approach.<sup>83</sup> Given this wide evidentiary basis, professionals can choose to insert entire agreement clauses into their contracts, but surprisingly these are mostly found in international commercial contracts.<sup>84</sup>

It is worth noting that evidence is free to prove a commercial contract, such as its existence or effects, against a merchant.<sup>85</sup> Article L.110-3 of the Commercial Code provides that “*against merchants, commercial acts (actes de commerce) can be proved by all forms of evidence unless otherwise provided by the law.*” This contrasts with the requirement set in Article 1359 (1) CC for non-commercial matters since a legal act (*acte juridique*) relating to a sum of money or value in excess of 1500 euros (as fixed by the decree no 2004-836 of 20 August 2004 currently in force) must be proved by evidence in writing.

Finally, it must be observed that in cases where the search for a common intention of the parties is pointless as a fiction, for example in complex commercial contracts between professionals acting with the assistance of lawyers and in the case of standard form contracts, French courts can now rely on an objective approach enshrined in the *Code civil*. Courts are no longer constrained to ascertain the subjective intention of the parties *at all costs*. It is consistent with the Unidroit Principles, which provides this alternative approach as they highlight that the practical importance of the subjective approach should not be overestimated in commercial transactions where parties choose their words pursuant to their usual business meaning, and in case of a dispute, are unlikely to share a common intention over that particular meaning.<sup>86</sup>

### 3.2. *The consecration of the objective approach to interpretation in French law*

The originality of Article 1188 CC lies in its second paragraph, which enshrines an objective approach, as a subsidiary to the subjective approach. It provides that ‘(w)here the common intention cannot be found, the contract is to be interpreted in the sense that a reasonable person placed in the same situation would give to it.’ The main source of inspiration for this hybrid approach is rooted in the international legal instruments, which had originally articulated this alternative - e.g., Article 4.1 Unidroit Principles, Article 5:101(3) PECL and Article 8(2) CISG. It is also a striking echo of Lord Hoffmann in *Investors Compensation Scheme v West Bromwich Building Society*.<sup>87</sup>

Some scholars would say that it is not new - that “*where no such common intention can be found, the judge is supposed to ascertain the ‘hypothetical’ intention of the parties or to adopt the interpretation which in all the circumstances, objective and subjective, must be regarded as the one the parties would reasonably have intended.*”<sup>88</sup> I would however question this statement as courts do not appear to refer explicitly to such ‘hypothetical’ or ‘reasonable’

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<sup>83</sup> Catherine Mitchell, *Interpretation of Contracts*, 108- 114 (Routledge-Cavendish, 2007).

<sup>84</sup> See *infra* for a discussion on entire agreement clauses.

<sup>85</sup> Any kinds of evidence can be brought to show the intention of the parties – for instance a letter from a notary as held in Cass. Civ 1, 19 October 1964, Bull. Civ. I, No 451, or a letter from an expert as held in Cass. Civ 1, 11 April 1995, No 93-13.551. See also Cass. Civ 1, 26 January 2012, No 10-28.356, Bull. Civ. I, No 13, Defrenois 2012.285, obs. B. Beignier.

<sup>86</sup> Unidroit Principles 2016, Comment under Article 4.1.

<sup>87</sup> [1998] 1 WLR 896, 912-913. See *infra*.

<sup>88</sup> Konrad Zweigert and Hein Kötz, *An Introduction to Comparative Law*, p. 402 (3<sup>rd</sup> ed, Oxford University Press, 2011).

intention. To that effect, the *ordonnance* No 2016-131 has now officially incorporated the objective approach with reference to the standard of the *reasonable person in the same situation* into the interpretative *corpus juris*.

This standard already appeared in the 1804 *Code civil* albeit in only one provision (former Article 1112 CC) with respect to duress and undue influence (*violence*). It is now commonly referred to since in 2014, it replaced the old-fashioned figure of *bon père de famille* throughout the *Civil code* as part of the legislator's effort to promote equality between men and women.<sup>89</sup> Historically, scholars had associated the French *bon père de famille* with the reasonable man in Common law. The English translation of the now repealed *Code civil*, which was published on [legifrance.fr](http://legifrance.fr), specified in its glossary that the good father is 'the rough functional equivalent of the reasonable man.'<sup>90</sup> However, there was no such reference in the former articles relating to interpretation.

It goes without saying that courts already take into account objective standards when interpreting the contract, for instance when considering custom, equity or the general economy of the contract and more importantly, whether the terms are clear and precise (Article 1192 CC).<sup>91</sup>

Whatever the degree of novelty attached to this provision, it reflects a trend towards an objective approach, which is particularly relevant to complex commercial contracts, where there is no such thing as a common intention of the parties. It remains nevertheless to be seen how openly French courts will follow this objective approach, or whether they will continue to mask their decisions "*on the basis of objective considerations and call it the commune intention des parties contractantes*."<sup>92</sup> Interestingly, in a recent decision, the Court of Appeal of Douai used the standard of the reasonable person to decide upon the terms of an easement.<sup>93</sup>

In terms of evidence, however, the objective approach does not imply that only objective evidence is admissible. By comparison, Article 4.3 Unidroit Principles does not draw any such distinction when it lists the "*circumstances which have to be taken into consideration when applying both the "subjective" test and the "reasonableness" test in Articles 4.1 and 4.2.*" This list is not even exhaustive. In the case of an objective approach, the scope of evidence remains therefore subjective, in contrast with the English objective evidentiary basis, but how different is it when English courts follow a contextual approach?

### 3.3. *The English objective interpretation approach - text and context*

The approach of English law is objective in that the meaning of the contract is to be ascertained by asking in every case what reasonable parties would understand their common intention to

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<sup>89</sup> See Article 26 of the Act n° 2014-873 of 4 August 2014: JO 5 August 2014.

<sup>90</sup> Translation by Georges Rouhette and Anne Rouhette-Berton.

<sup>91</sup> See *infra* for a discussion of Article 1192 CC.

<sup>92</sup> Konrad Zweigert and Hein Kötz, *An Introduction to Comparative Law*, p. 402 (3<sup>rd</sup> ed, 2011: Oxford University Press).

<sup>93</sup> CA Douai, ch. 1 sect. 2, 27 April 2017, n° 16/02790. This decision is discussed further later when considering the *contra proferentem* interpretation.

be from what they have written.<sup>94</sup> As described by Lord Steyn in *Deutsche Genossenschaftsbank v Burnhope*,

*It is true the objective of the construction of a contract is to give effect to the intention of the parties. But our law of construction is based on an objective theory. The methodology is not to probe the real intentions of the parties, but to ascertain the contextual meaning of the relevant contractual language.*<sup>95</sup>

The court's task is to find out the *objective* meaning of the language used by the parties to express themselves in the agreement.<sup>96</sup> It goes without saying that this can be quite remote even from the objective intention of the parties. The dilemma that courts face is to either give effect to the words of the contract or to make sense of the contract, particularly if the contract is badly drafted. What is therefore the appropriate method of interpretation?

Lord Hoffmann in *Investors Compensation Scheme v West Bromwich Building Society* advocates a purposive approach where contracts must be read in the context of their background facts surrounding the text. According to him, interpretation consists of ascertaining

*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.*<sup>97</sup>

This background knowledge, or '*matrix of fact*' as referred to by Lord Wilberforce, includes "*absolutely anything which would have affected the way in which the language of the document would have been understood by a reasonable man.*"<sup>98</sup>

This expansive approach has generated some disquiet and a fear of increased cost for litigants.<sup>99</sup> As a reaction, Lord Neuberger in *Arnold v Britton* insists on a literal approach.<sup>100</sup> More recently, Lord Hodge in *Wood v Capita* attempts to design a more nuanced position – an *iterative* approach – which aims at balancing textualism and contextualism in view of the circumstances as "*they are (both) tools to ascertain the objective meaning (...).*"<sup>101</sup>

The pendulum of interpretation appears to swing between sticking to the literal meaning of the words and identifying the commercial purpose of the transaction with the help of business common sense.<sup>102</sup> In this judicial exercise, courts consider the terms in their context at the time of the contract's conclusion whilst assessing the quality of the drafting with or without the

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<sup>94</sup> Richard Calnan, *Principles of Contractual Interpretation* (2<sup>nd</sup> ed, Oxford University Press, 2017).

<sup>95</sup> [1995] 1 WLR 1580, 1587.

<sup>96</sup> *ibid.* See also *Wood v Capita Insurance Services Ltd* (n 37) [10].

<sup>97</sup> *Investors Compensation Scheme v West Bromwich Building Society* (n 35) 912-913.

<sup>98</sup> *ibid.*

<sup>99</sup> Sir Christopher Staughton, *How Do the Courts Interpret Commercial Contracts?* 58 CLJ 303 (1999); James J. Spigelman, *Contractual Interpretation: A Comparative Perspective* 85 Australian Law Journal 412 (2011).

<sup>100</sup> *Arnold v Britton* (n 36).

<sup>101</sup> *Wood v Capita Insurance Services* (n 37) [13].

<sup>102</sup> For the importance of business common sense, see *Antaios Cia Naviera SA v Salem Rederierna AB (The Antaios) (No 2)* [1985] AC 191; *Rainy Sky v Kookmin Bank* [2011] UKSC 50, [2011] 1WLR 2900.



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assistance of skilled professionals.<sup>103</sup> Complex and sophisticated agreements where the quality of drafting is high may justify a textual analysis whereas informal, brief, without professional support, contracts may call for “a *greater emphasis on the factual matrix*.”<sup>104</sup> However, this distinction is not set in stone since even a professionally drafted agreement may be badly drafted and requires courts to consider “*the factual matrix and the purpose of similar provisions in contracts of the same type*.”<sup>105</sup> How far the background is to be taken into account to establish the commercial purpose is then a question of fact and degree.<sup>106</sup>

Nevertheless, some uncertainties remain as to the application of the objective standards. For instance, what is background knowledge *reasonably* available to the parties? How does the court identify what a *reasonable person* would have understood the terms to mean? What is even its relevance “*in those trades, like the shipping and 'commodities trades, where the participants do not need the assistance of the outside reasonable observer to instruct them in what they are doing'?*”<sup>107</sup> Leggatt LJ considers that this standard is insufficiently objective and too psychological, preferring a rational choice theory.<sup>108</sup> The uncertainty surrounding standards such as *background knowledge* and *commercial reasonableness* enables the court to give the disputed term a different, *more* appropriate, meaning than its natural and ordinary one.<sup>109</sup>

Linked to the *objective* approach to interpretation is the *objective* evidentiary basis, which relates to the *objective* meaning of the contract at the time of conclusion. Only *intrinsic* evidence is admissible, any extrinsic evidence that adds to, varies or contradicts the *instrumentum* being excluded.<sup>110</sup> As English courts adopt a contextualist approach, all the reasonably available and relevant background information for the purposes of construing the contract is nevertheless admissible.<sup>111</sup> This covers matters within the legal, factual and regulatory matrix. Depending on the court's approach, a variety of normative sources of meaning may be used that includes broader commercial considerations relating to the parties and their relationship.<sup>112</sup> The contextualisation of the contract appears quite aligned with the French understanding of the agreement in its social dimension, in other words the social underpinnings of the contract, which include ‘*norms that command general social acceptance*’ or ‘*specific to a particular trade or commercial activity*.’<sup>113</sup> The fear that this *liberal* approach leads to increased transaction and enforcement costs emerges, which is the same fear as

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<sup>103</sup> *Wood v Capita Insurance Services Ltd* (n 37) [13].

<sup>104</sup> *ibid.*

<sup>105</sup> *ibid.*

<sup>106</sup> James J. Spigelman (n 99).

<sup>107</sup> Michael Bridge, *The International Sales of Goods*, No. 2.13, p. 47 (4<sup>th</sup> ed, Oxford University Press, 2017).

<sup>108</sup> George Leggatt, *Making Sense of Contracts: The Rational Choice Theory* 131 LQR 454 (2015).

<sup>109</sup> For a discussion on how Lord Carnwath and Lord Neuberger took opposite positions in previous cases, see Zhong Xing Tan, *Beyond the Real and the Paper deal: The Quest for Contextual Coherence in Contractual Interpretation* 79(4) MLR 623–654 (2016).

<sup>110</sup> *Jacobs v Batavia & General Plantations Trust Ltd* [1924] Ch 287.

<sup>111</sup> *Chartbrook Ltd v Persimmon Homes Ltd* [2009] UKHL 38, [2009] 1 AC 1101.

<sup>112</sup> *Wood v Capita Insurance Services* (n 37); *Yam Seng v International Trade Corporation* [2013] EWHC 111 (QB) at 134.

<sup>113</sup> *Yam Seng v International Trade Corporation* (n 112).

the one stemming from the French basis of evidence already discussed.<sup>114</sup> However, like in French law, only evidence relevant to the dispute is admissible.<sup>115</sup>

In parallel, traditional exclusions relating to the delineation of the contract (what the contract is rather than the meaning of the words) continue to apply, such as the exclusions of prior negotiations and subsequent conduct of the parties. The parol evidence rule however contains so many exceptions, such as the equitable doctrine of rectification and corrective construction, that the existence of the rule itself is under question defeating its purpose in bringing certainty.<sup>116</sup> In practice, how can courts distinguish between inadmissible prior negotiations or subsequent conduct to define the contract and admissible surrounding circumstances to interpret the meaning of the contract? For instance, in *PST Energy 7 Shipping LLC and another v OW Bunker Malta Limited, The Res Cogitans*,<sup>117</sup> the UK Supreme Court, along with the lower courts, considered the actual consumption of bunkers to re-qualify the bunker supply contract as *sui generis*.<sup>118</sup> It has been suggested that “(t)he best way forward is for the matter to be one of weight rather than admissibility.”<sup>119</sup>

Another major exception to these exclusions is rectification – a remedy that French law does not know given its wide subjective approach.<sup>120</sup> As an equitable doctrine, it is applicable at the discretion of the court;<sup>121</sup> it enables the court to rectify the contract to give effect to the *actual* intention of the parties in light of pre-contractual negotiations.<sup>122</sup> Without resorting formally to the equitable remedy of rectification, courts may use a *corrective interpretation*, in the words of Arden LJ, that allows them to correct the *wrong* words to give effect to the parties’ *true* intention.<sup>123</sup> How different is it to the subjective approach?

### 3.4. *The contractual limits to interpretation*

In both legal systems, the parties may constrain the admissibility of evidence and the interpretation of the contract for the sake of commercial certainty. This practice is common in international commercial contracts and complex agreements that involve lengthy negotiations and extensive oral and written prior statements. Denis Mazeaud identifies seven families of

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<sup>114</sup> Catherine Mitchell, *Interpretation of Contracts*, 108- 114 (Routledge-Cavendish, 2007).

<sup>115</sup> *Investors Compensation Scheme v West Bromwich Building Society* [1998] 1 WLR 896 (HL) at 912-3.

<sup>116</sup> Ewan McKendrick, *Contract Law* No 9.2, p. 184 (13<sup>th</sup> ed, Red Globe Press, 2019); Robert Stevens, *Objectivity, Mistake and the Parol Evidence Rule*, in Andrew Burrows and Edwin Peel (Eds), *Contract Terms*, 123 (Oxford: Oxford University Press, 2007); Donald Nicholls, *My Kingdom for a horse: The Meaning of Words* 121 LQR 577 (2005); Paul Davies, *Negotiating the boundaries of admissibility* 70 CLJ 24 (2011).

<sup>117</sup> [2016] UKSC 23 on appeal from [2015] EWCA Civ. 1058.

<sup>118</sup> Stephen Cogley, *The Res Cogitans: A Sale is not always a Sale, Says the Supreme Court*, 13 ChaseCambria 4, No 21 (2016).

<sup>119</sup> Gerard McMeel, *Prior Negotiations and Subsequent Conduct – The next Step Forward for Contractual Interpretation?* 119 LQR 272, 296 (2003).

<sup>120</sup> Stefan Vogenauer, *Interpretation of Contracts: Concluding Comparative Observations*, in Andrew Burrows and Edwin Peel (Eds), *Contract Terms*, 123-150, No 7 (Oxford: Oxford University Press, 2007).

<sup>121</sup> *Daventry District council v Daventry & District Housing Ltd* [2011] EWCA 1153, 198.

<sup>122</sup> *Tartsinis v Navona Management Co* [2015] EWHC 57 (Comm), 13.

<sup>123</sup> *Cherry Tree Investments Ltd v Landmain Ltd* [2012] EWCA Civ 736, [2013] Ch 305, 62.

terms, which delineate the interpretative power of the judge.<sup>124</sup> Among them, the merger clause, also known as entire agreement clause (*clause d'intégralité*), provides that the written document (*instrumentum*) embodies the whole agreement – i.e. all the terms of the contract – between the parties. The typical effect of this clause is to exclude any claim based on extrinsic evidence, such as pre-contractual negotiations or agreements. Depending on the wording of the clause, it can also make an explicit reference to contract interpretation and restrict it to a certain method of interpretation; this is referred as interpretation or exclusion clause (*clauses d'exclusion*).<sup>125</sup> Other clauses, such as no-oral modification clauses, meaning that any modification to the contract or specific terms must be in writing, or priority clauses (*clauses de priorité*) which set a hierarchy between the contractual documents, are often associated with the merger clauses.<sup>126</sup> This commercial practice is acknowledged in Article 2.1.17 Unidroit Principles and Article 2:105 PECL.<sup>127</sup> By contrast, French and English law remain relatively silent, although courts in both countries tend to uphold them.

In French law, these clauses have not been dealt with in the *ordonnance* No 2016-131. They are rarely mentioned in textbooks on the law of obligations even if some scholars have recently discussed them.<sup>128</sup> Case law also remains rare. Despite this resounding silence, it is necessary to consider this commercial practice as it is a significant source of certainty for parties.

The validity of merger clauses is uncontested since parties are free to delineate the scope of their contract as part of their contractual freedom.<sup>129</sup> The *Cour de Cassation*, in rare instances, has upheld them.<sup>130</sup> Furthermore, if they are written clearly and precisely, lower courts must enforce them so as not to distort their meaning (Article 1192 CC). Difficulties arise nevertheless when they are read in conjunction with interpretation. Their wording must be analysed carefully to determine their effect on contractual interpretation:

(i) if the merger clause does not expressly exclude the use of extrinsic evidence for the purpose of interpretation, courts may still look at extrinsic elements to cast light on the parties' intention. In a unique case on this question, the Paris Court of Appeal followed a literal interpretation of the clause and refused the extension of the entire agreement

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<sup>124</sup> Denis Mazeaud, *L'encadrement des pouvoirs du juge: l'efficacité des clauses relatives à l'interprétation* No 6, p. 187 *Revue des Contrats* (2015).

<sup>125</sup> *ibid.*

<sup>126</sup> Uri Benliel, *The Interpretation of Commercial Contracts: An Empirical Study* 69 *Alabama Law Review* 469 (2017).

<sup>127</sup> Article 2:105 (Merger Clause) PECL provides that "If a written contract contains an individually negotiated clause stating that the writing embodies all the terms of the contract (a merger clause), any prior statements, undertakings or agreements which are not embodied in the writing do not form part of the contract."

<sup>128</sup> Denis Mazeaud (n 124) No 1, p. 187; Thibault de Ravel d'Esclapon, *Variations sur la clause d'intégralité à l'heure de la réforme du contrat*, No 14, p. 374 *AJ Contrat* (2017); Filip De Ly, *Interpretation Clauses in International Contracts*, n° 6, p. 719-812 *R.D.A.I./ I.B.L.J.* (2000); Bertrand Gelot, *Finalités et méthodes objectives d'interprétation des actes juridiques: aspects théoriques et pratiques*, n° 258 *LGDJ* (2003).

<sup>129</sup> See Article 1102 CC (freedom of contract).

<sup>130</sup> Relating to entire agreement clauses and priority clauses, see *Cass. Civ 1*, 15 May 2002, No 99-21090; *Cass. Civ 3*, 3 April 2002, No 01-01.647; *Cass. Civ 3*, 3 May 2001, No 99-14370, *Bull. Civ. III*, No 56; *Cass. Com* 22 June 1993, No 91-18181; *CA Paris*, 15 June 2005, *RTD civ.* 2006.111; *CA Versailles*, 7 June 2007, *RTD civ.* 2007.771.

clause to the issue of interpretation.<sup>131</sup> This is consistent with Article 2.1.17 Unidroit Principles and 2:105(3) PECL , which set the same rule;

(ii) if the merger clause expressly excludes the use of extrinsic evidence for the purpose of interpretation, questions arise, for instance, if there is a clash between the *actual* intention of the parties and the intention formally *expressed* in the contract. Can these clauses displace the cardinal principle of subjective interpretation- *la règle des règles* – as proclaimed by Demolombe?<sup>132</sup> Can a judge renounce seeking the actual will of the parties under such a clause, even if this results in finding an intention that is incomplete, inaccurate, or even false? Denis Mazeaud advocates that in these circumstances such a clause should produce no effect as it amounts to an “*insult to the spirit of the contract*” even if the clause is clear and precise.<sup>133</sup> His view reflects the conventional understanding of contractual justice achieved through the subjective approach.<sup>134</sup> In keeping with the objective interpretative approach, the opposite argument holds that these clauses reflect the parties’ contractual freedom to limit the judicial power of interpretation and help achieve the commercially important goal of legal certainty. In that vein, the *Cour de cassation* held that such a clause could prevent the court from resorting to former Article 1135 CC (new Article 1194 CC) with respect to obligations deriving from customs for the purpose of contractual interpretation.<sup>135</sup>

In the case where a clause expressly restrains the interpretative power of the judge to an objective approach, can it prevent courts from seeking the subjective intention of the parties? In other words, is it a way to force courts to resort to the objective approach (Article 1188(2) CC) directly, thus circumventing the subjective approach (Article 1188(1) CC)? Even if doing so challenges the binding nature of the subjective interpretative approach, it is consistent with the principle that, unless otherwise provided, the provisions in the *Civil code* are defaults (*règles supplétives*), as stated in the *Rapport au Président*.<sup>136</sup> How can this be reconciled with the earlier suggestion that the principles of interpretation are mandatory? It is a tenable view that the hybrid – or mixed - approach is binding (*impérative*) towards the courts and optional (*supplétive*) towards the parties, especially given that the parties have freely negotiated and agreed upon an interpretation clause in their contract.<sup>137</sup> This hybrid approach would contribute to the certainty that business parties seek in their commercial ventures, but still needs to be tested.

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<sup>131</sup> Only one case seems to discuss that possibility of extension, CA Paris, 4 March 1980, *Expertises* 17 April 1980, p. 8.

<sup>132</sup> Denis Mazeaud (n 124) No 13, p. 190.

<sup>133</sup> *ibid.* See *infra* for a discussion of clear and precise term.

<sup>134</sup> By analogy with respect to a clause of separability in a group of economically interdependent contracts, see Cass. Ch. Mixte, 17 May 2013, No 11-22.768 and 11-22.927, which held on the basis of former Article 1134 CC that “*concurrent or successive contracts which are part of financial lease are interdependent; that are deemed non written contract clauses incompatible with this interdependence.*”

<sup>135</sup> Cass. Civ 1, 15 May 2002, No 99-21090. See *supra* for a discussion of Article 1194 CC.

<sup>136</sup> See *supra* for a discussion of the mandatory force of interpretative questions.

<sup>137</sup> Bénédicte Fauvarque-Cosson, *Les nouvelles règles du code civil relatives à l'interprétation des contrats; perspective comparatiste et internationale* p. 365 *Revue des Contrats* (2017); Anne Etienney de Sainte Marie, *Les principes, les directives et les clauses relatives à l'interprétation*, No 21 & No 22 *Revue des Contrats* (2016).

C. Pédamon  
Contractual Interpretation

English courts usually uphold entire agreement clauses as an expression of contractual freedom and sanctity of contracts contributing to legal certainty.<sup>138</sup> They nevertheless tend to construe them strictly.<sup>139</sup> In *Inntrepreneur Pub Co v East Crown*, Lightman J held that

*The purpose of an entire agreement clause is to preclude a party to a written agreement from thrashing through the undergrowth and finding in the course of negotiations some (chance) remark or statement (often long forgotten or difficult to recall or explain) on which to found a claim such as the present to the existence of a collateral warranty.*<sup>140</sup>

However, recent case law sets limits to their effect as courts are willing to look behind such clauses, for example in the case where extrinsic evidence can still be used to ascertain the meaning of the contract (rather than to establish the agreement itself).<sup>141</sup> In that case, the Court of Appeal held that “a conventional ‘entire contract’ clause cannot in my view affect the question of whether a matter of fact is admissible as an aid to the process of construing a contractual document.”<sup>142</sup>

It also does not prevent terms from being implied into a contract where necessary for business efficacy and where such terms are intrinsic to the agreement,<sup>143</sup> as well as claims for rectification or misrepresentation.<sup>144</sup> Ultimately the effect of an entire agreement clause is a question drawing on the facts and circumstances of the case, which may defeat its purpose.

What about interpretation clauses? Can they be used as a way of “contracting out of contextualism” for the commercial parties, as argued by Catherine Mitchell?<sup>145</sup> Interpretation clauses are commonly found in commercial contracts, but usually only cover minor matters, such as those relating to the use of singular and plural or feminine and masculine. Richard Calnan encourages the use of a more extensive clause “to limit the ability of the tribunal interpreting it to (i) rely on too many background facts; and (ii) rewrite the contract” by overriding the express words of the contract.<sup>146</sup> His suggested interpretation clause prescribes the way the court is to interpret the contract, giving “the words and expressions used in this agreement (...) their ordinary meaning in the context of the Transaction Documents as a whole,” and “irrespective of any commercial or other considerations (...)”<sup>147</sup> It also rejects the implication of any terms relating to good faith and the use of *contra proferentem* and *eiusdem generis* rules in the interpretation of the agreement.<sup>148</sup> As discussed with respect to this clause in French law, the question is whether courts, particularly

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<sup>138</sup> *Springwell Navigation Corporation v J P Morgan Chase Bank* [2010] EWCA Civ 1221.

<sup>139</sup> Gerard McMeel, *The Construction of Contracts* No 26.14 (3<sup>rd</sup> ed, Oxford University Press, 2017).

<sup>140</sup> [2000] 2 Lloyd’s Rep 611, 614.

<sup>141</sup> *John v Pricewaterhouse Coopers* [2002] EWCA Civ 899.

<sup>142</sup> *ibid* [67].

<sup>143</sup> *Axa Sun Life Services Plc v Campbell Martin Ltd* [2011] EWCA Civ 133, [2012] Bus LR 203 [94].

<sup>144</sup> *Hawksford Trustees Jersey Ltd v Stella Global UK Ltd* [2012] EWCA Civ 55.

<sup>145</sup> Catherine Mitchell, *Entire Agreement Clauses: Contracting out of Contextualism* 22 *Journal of Contract Law* 222, 236-237 (2006). For American law, see Uri Benoliel, *The Interpretation of Commercial Contracts: An Empirical Study* 69 *Alabama Law Review* 469, 472 (2017).

<sup>146</sup> Richard Calnan, *Principles of Contractual Interpretation* p. 217 (2<sup>nd</sup> ed, Oxford University Press, 2017).

<sup>147</sup> Richard Calnan, *Controlling Contractual Interpretation*, in Paul Davies and Magda Raczynska (eds), *Contents of commercial terms: terms affecting freedoms*, p. 59 (New York: Hart, 2020).

<sup>148</sup> *Ibid*, p. 63.

the UK Supreme Court, may be constrained in their ability to interpret contracts, especially given that matters of interpretation are questions of law. Arguably such an interpretation clause should be upheld as an expression of the common intention of the parties. In any case, given that this clause is more likely to be found in a professionally drafted contract, it calls for a textual analysis pursuant to *Wood v Capita*, which is consistent with the literal approach set in the clause itself.

In France and England, the validity of entire agreement clauses and perhaps interpretation clauses is not disputed as an expression of contractual freedom. Paradoxically their effect raises a question of interpretation, which is subject to varying degrees of review by the respective higher courts. However, to the extent that they express the common intention of the parties and contribute to greater commercial certainty, they should be upheld. Ultimately it remains a matter of court discretion.

#### 4. The scope of contractual interpretation

It is well-established that English and French courts look first at the words of the contract for the meaning of the terms – this is the shared principle of the primacy of the contractual language.<sup>149</sup> If the ordinary meaning makes sense, that language must be given effect. *In claris interpretario cessat*. When the meaning remains unclear or ambiguous, courts resort to a series of interpretative maxims, which interestingly are quite similar in France and England.

##### 4.1. *The 'clear and precise terms' or the natural and ordinary meaning of the terms*

The interpretative process starts with the language of the commercial contract and aims at elucidating the meaning of the words used by the parties – their objective meaning. The text conveys a *prima facie* meaning that carries a normative value. This principle as the '*clear and precise terms*' principle (*doctrine des clauses claires et précises*) in French law or as the '*natural and ordinary meaning of the terms*' in English law, is common to both systems as it asserts the primacy of the language used by the parties but with different emphasis.

In French law, this principle is a tool in the hands of the *Cour de cassation* to review lower court's contract interpretation. Article 1192 CC provides that "*(c)lear and precise terms are not subject to interpretation as doing so would risk distortion.*" Although it is the last of the five articles in the chapter on interpretation, it governs all the other interpretative principles. Given its importance, it should have been placed at the beginning of the chapter as it delineates the scope of interpretation.<sup>150</sup> It enshrines consistent case law that goes back to 1872 where the *Cour de cassation* stood against judicial interpretation of clear and precise terms so as not to distort their objective meaning.<sup>151</sup> "*(...) (A)llowing the judge to substitute the alleged intention of the parties for a text that is neither unclear nor ambiguous, would manifestly vest in (the*

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<sup>149</sup> *Arnold v Britton* (n 37) [17]: "save perhaps in a very unusual case, the meaning is most obviously to be gleaned from the language of the provision."

<sup>150</sup> Francois Chénéde, *Le nouveau droit des obligations et des contrats: Consolidations, innovations, perspectives*, No 24.21 Dalloz (2016).

<sup>151</sup> Cass. Civ, 15 April 1872, *Veuve Foucauld et Coulombe v. Pringault*, DP 1872, 1, 176. See also Cass. Civ 1, 10 November 1891, Sirey 1891, I, 529. More recently, see Cass. Com, 24 May 2011, n° 10-24.869, Bull. 2011, IV, n° 80, and Cass. Com, 3 March 2015 *Eurochan*, No 13-27525.

*judge) the right to alter or even distort the contract.*<sup>152</sup> As already mentioned, it used to be based on former Article 1134 CC (binding force of contracts) giving it a normative force, which it has retained.<sup>153</sup>

As a matter of law, the *Cour de cassation* reviews lower courts' interpretation and require that they explain the ambiguity in the contract and ground their decisions.<sup>154</sup> It is a way for this court "to curb arbitrary decisions of certain lower courts. Thanks to it, the lower judges know that they cannot indulge in the most far-fetched interpretations."<sup>155</sup> As a consequence, any unexplained interpretation is set aside.<sup>156</sup> This power of review is not commonly used, but recently the *Cour de cassation* has been more engaged in the interpretative process imposing its own understanding of terms. It quashed a decision by the Court of Appeal on the basis that it had ignored the clear and precise terms of the contract when it had rejected the claim for payment made by an editor against its distributor for the unsold (and now destroyed) copies of a magazine (No 46).<sup>157</sup> It based its decision on the 'obligation of the judge not to distort the contract' implicitly referring to Article 1192 CC even though it was not applicable to the contract.<sup>158</sup> It held that Article 6 of the contract clearly provided that the distributor was allowed to destroy the unsold copies of the magazine within one month from their payment rather than market withdrawal, thus giving ground for re-imbusement. In another commercial case, the *Cour de Cassation* quashed the Court of Appeal's decision on the ground that the lower court had failed to ascertain the intention of the party to uphold the termination clause and check that the period of 10 days from the notification (*mise en demeure*) had been complied with, confirming the literal application of the termination clause.<sup>159</sup> Naturally the *Cour de cassation* interpret literally whether the terms are *clear and precise*.

In English law, the golden rule of interpretation is to give effect to the natural and ordinary meaning of the terms.<sup>160</sup> Words should be given the meaning which a reasonable person would have understood the parties to have meant.<sup>161</sup> In *Arnold v Britton*, the UK Supreme Court reasserts the importance of the language as a backlash against a loose approach to interpretation.<sup>162</sup> "A court should be very slow to reject the natural meaning of a provision,"<sup>163</sup> even if it results to an unsatisfactory outcome for the lessees.<sup>164</sup> "Only in exceptional cases,"

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<sup>152</sup> Cass. Civ, 10 November 1891, Sirey 1891, I, 529.

<sup>153</sup> See *supra* for a discussion on the nature of the interpretative question.

<sup>154</sup> Cass. Com, 24 May 2011, n° 10-24.869; Cass. Civ 1, 24 May 2017, n° 16-13.087.

<sup>155</sup> Francois Terré, Pierre Simler and Yves Lequette, *Droit civil: les obligations*, no 459 (10<sup>th</sup> ed, Dalloz, 2009).

<sup>156</sup> Cass. Civ, 13 July 1936, S. S. 1936, 1, p. 306.

<sup>157</sup> Cass. Com, 5 June 2019, n° 18-11.753; and also Cass. Com, 6 February 2019, n° 17-26.494.

<sup>158</sup> This contract pre-dated the application of the *ordonnance* No 2016-131.

<sup>159</sup> Cass. Com, 30 May 2018, n° 17-11452.

<sup>160</sup> *Co-operative Wholesale Society Ltd v National Westminster Bank Plc* [1995] 1 EGLR 97 (CA); *Procter and Gamble Co v Svenska Cellulosa Aktiebolaget SCA* [2012] EWCA Civ 1413; *Arnold v Britton* (n 36). See Gerard McMeel, *The Construction of Contracts* No 1.72 (3<sup>rd</sup> ed, Oxford University Press, 2017).

<sup>161</sup> *The Starsin, Homburg Houtinport v Agrosin* [2004] 1 AC 715, [45] as per Lord Bingham.

<sup>162</sup> *Arnold v Britton* (n 36).

<sup>163</sup> *ibid* [20].

<sup>164</sup> *Arnold v Britton* (n 36). See an analysis of that case, Gerard McMeel, *Foucault's Pendulum : Text, Context and Good Faith in Contract Law* CLP 1 (2017).

can commercial common sense “drive the courts to depart from the natural meaning.”<sup>165</sup> Importantly, the common sense or ordinary meaning of the language is read in its context.<sup>166</sup>

Depending on the quality of the drafting, with or without the assistance of skilled professionals, and the complexity of the agreement, courts are more or less inclined to give weight to the ordinary and natural meaning of the words used by the parties.<sup>167</sup> The more badly drafted the contract is, the more ready are they to depart from this meaning.<sup>168</sup>

As held in *Wood v Capita*, “this is not a literalist exercise focused solely on a parsing of the wording of the particular clause (...).”<sup>169</sup> However, this approach still attracts criticism since, as Catherine Valcke notes, that “the natural and ordinary meaning of the terms is used ‘as a factual front from behind which to engage in active interpretation: Lord Hoffmann himself (...) presented it as resulting from a process by which the legally naturally meaning is made to conform to the linguistically natural, not the other way round.”<sup>170</sup>

In both systems, the doctrines of *clear and precise* terms and *natural and ordinary* meaning of the terms aim to give full effect to the text used. Paradoxically they only apply through the filter of judicial interpretation. There is also a varying degree of force attaching to these doctrines. In France, courts “are willing to deviate from it if other circumstances strongly militate in favour of a different result. (...) It is a rebuttable presumption in favour of the contractual language.”<sup>171</sup> The outcome does matter. By contrast, in England, the strength of the presumption that contracting parties have used words with the intention that they be given their conventional meaning varies depending on the approach which the judge is more inclined to follow.<sup>172</sup> In the words of Ewan McKendricks, “for Lord Sumption, that presumption would appear to be extremely strong, bordering in the irrebuttable, whereas for Lord Hoffmann, it is weaker and its strength would appear to depend on the context.”<sup>173</sup> Lord Hodge in *Wood v Capita* acknowledges that the strength of the presumption fluctuates whether the contract has been drafted with the assistance of professional advice and depending on its complexity. This distinction sits well with French law, especially as French courts are sensitive to the sophistication of the parties and their bargaining power. In these cases, the balance tilts towards a more literal reading of the contract in its context in both jurisdictions.

#### 4.2. Common judicial hermeneutics

A few maxims of interpretation are common to French and English law. The way they are applied however depends on the values promoted in each legal order.

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<sup>165</sup> *Carillion Construction Ltd v Emtor Engineering Services Ltd* [2017] EWCA Civ 65, [2017] BLR 203 at 46, per Jackson LJ.

<sup>166</sup> *Investors Compensation Scheme v West Bromwich Building Society* (n 35), 912-13.

<sup>167</sup> *ibid.*

<sup>168</sup> *Arnold v Britton* (n 36) [18].

<sup>169</sup> *Wood v Capita Insurance Services Ltd* (n 37)[10].

<sup>170</sup> Catherine Valcke, *On Comparing French and English Contract Law: Insights from Social Contract Theory* 4 J Comp L 69, 82-83 (2009).

<sup>171</sup> Stefan Vogenauer, *Interpretation of Contracts: Concluding Comparative Observations*, in Andrew Burrows and Edwin Peel (eds), *Contract Terms*, 123, 133-34 (Oxford University Press, 2007).

<sup>172</sup> Ewan McKendrick, *Interpretation*, in William Day and Sarah Worthington (eds), *Challenging Private Law: Lord Sumption on the Supreme Court* p. 14 (Hart Publishing, 2020).

<sup>173</sup> *ibid.*



#### 4.2.1. *Interpreting contracts as a whole (interprétation cohérente)*

This principle is common to French and English law and appears in the international legal instruments given their wide acceptance.<sup>174</sup> Article 1189(1) CC provides that “(a) *all the terms of a contract must be interpreted relative to each other, giving to each the meaning that respects the coherence (cohérence) of the transaction as a whole.*” This article reproduces the spirit of former Article 1161 CC, but the reference to the new standard of *coherence* highlights the primacy of the consistency of the whole contract over individual terms.<sup>175</sup> It explicitly refers to an objective construction of the contract as *instrumentum*. In that vein, the Court of Appeal of Dijon highlighted the necessity to ascertain the intention of the parties and the meaning of the contract in light of the by-laws of the partnership and the relevant legal statutes on the basis of Articles 1188 and 1189 CC.<sup>176</sup>

Article 1189(2) CC confirms the coherence of the whole when it now formally provides that “(w) *here, according to the common intention of the parties, several contracts contribute to one and the same operation, they are to be interpreted by reference to this operation.*” It asserts a theory of the contractual whole (*théorie générale des ensembles contractuels*), which underpins economic transactions according to the intention of the parties.<sup>177</sup> The contract is considered here as part of the operation as *negotium*. Courts must therefore consider the contract as a whole to extract a meaning which is consistent with the other terms or the other contracts of the same operation. This could be an important provision for the interpretation of standard form contracts, such as the ISDA documentation, where the meaning of words or terms should be consistent across documents.<sup>178</sup>

Similarly, Lord Hoffmann held in *Attorney-General of Belize v Belize Telecom Ltd* that “(t) *here is only one question: is that what the instrument, read as a whole against the relevant background, would reasonably be understood to mean?*”<sup>179</sup>

In *Wood v Capita*, Lord Hodge confirms that “*the court must consider the contract as a whole and (...) give more or less weight to elements of the wider context*” in asserting its view of that objective meaning.<sup>180</sup> The contextual elements include considerations of the nature of the contract itself, its complexity or sophistication, the quality of its drafting by professionals, or a *contrario* the absence of skilled professional assistance, and its informality and brevity.<sup>181</sup>

Overall, it is not disputed that a contract must be interpreted as whole, and not as a collection of terms, in both jurisdictions.

#### 4.2.2. *Interpreting contracts in line with business common sense (interprétation utile)*

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<sup>174</sup> See Article 4.4 (Reference to contract or statement as a whole) Unidroit Principles and Articles 5 :105 PECL.

<sup>175</sup> Gael Chantepie & Mathias Latina, *La réforme du droit des obligations*, n° 505, p.424 (Daloz, 2016).

<sup>176</sup> CA Dijon, 30 May 2017, No 15/00610.

<sup>177</sup> See Scarlett-May Ferrié, *L'ensemble contractuel, nouvelle clé de l'interprétation du contrat*, p. 187 Recueil Dalloz (2016).

<sup>178</sup> See the 2002 ISDA Master Agreement (French law).

<sup>179</sup> *Attorney-General of Belize v Belize Telecom Ltd* (n 52) [21].

<sup>180</sup> *Wood v Capita Insurance Services Ltd* (n 37) [10].

<sup>181</sup> *ibid.*

## C. Pédamon Contractual Interpretation

This other principle is expressed in the international legal instruments to guide an interpretation of unclear contract terms so as to give them effect.<sup>182</sup> It is also common to French and English law with some *nuances*. Article 1191 CC provides that “*where a contract term is susceptible of two meanings, the one which gives it effect is to be preferred over the one which makes it produce none.*” Courts must seek to attach some effect to the contract terms rather than to hold them useless or even invalid given that parties do not use words to no purpose.<sup>183</sup> Article 1191 CC reproduces the principle formulated under former Article 1157 CC, which was rarely used, but in a more neutral and succinct manner. As a result, it calls for a more rigid – “*mechanical*” – application, which could give it a binding force.<sup>184</sup>

In English law, the meaning that derives from commercial considerations may trump a conflicting rival argument. In *Rainy Sky v Kookmin Bank*, the UK Supreme Court held that “*(if there are two possible constructions, the court is entitled to prefer the construction which is consistent with business common sense and to reject the other.*”<sup>185</sup> In that case, the construction of the buyers (claimants) was to be preferred because it was “*consistent with the commercial purpose of the bonds*” issued by the bank (defendant).<sup>186</sup>

As per Arden LJ, greater regard must be given to

*the commerciality of the rival constructions, if that commerciality can be identified. The commerciality of a particular construction may be a crystallising factor in its favour where it is implausible that parties would have intended any other result.*<sup>187</sup>

In cases where the contract terms are badly drafted or contain ambiguity, courts are able to take broader considerations into account, such as the surrounding circumstance and commercial common sense – the factual and commercial matrix.

The objective quest for a legally operative meaning is common to English and French courts. The standards used are however quite different. Whereas French courts consider the effect that a contract term can produce, English courts apply commercial considerations, including business common sense, to decide upon a meaning. It may be overstated to regard business common sense as being more restrictive given its versatility.<sup>188</sup> Ultimately it remains a matter of court discretion in both jurisdictions.

### **4.2.3. Interpreting contracts *contra proferentem* (*interprétation équitable*)**

This canon of interpretation – *in dubio contra proferentem* – is found in many legal systems with however domestic particularities. It has a long history originating in Roman law grounded “*on the basis that the risk of ambiguity (in unclear terms) should be borne by the party who*

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<sup>182</sup> Article 4.5 (All terms to be given effect) Unidroit Principles.

<sup>183</sup> Cass. Civ 3, 19 December 1968, JurisData No 1968-000573, Bull. civ. III, No 573.

<sup>184</sup> Gael Chantepie & Mathias Latina, *La réforme du droit des obligations*, n° 506, p.425 (Daloz, 2016).

<sup>185</sup> *Rainy Sky v Kookmin Bank* (n 102) [21].

<sup>186</sup> *ibid* [45].

<sup>187</sup> *In re Golden Key Ltd* [2009] EWCA Civ 636, [28].

<sup>188</sup> Neil Andrews, *Interpretation of Contracts and “Commercial Common Sense”: Do Not Overplay this Useful Criterion*, 36 *The Cambridge Law Journal* 76(1), 36-62 (2017). See also Leggatt J in *Tartsinis v Navona Management Co.* [2015] EWHC 57 (Comm).

*could more cheaply avoid it,*” i.e., the drafter of the clause.<sup>189</sup> *Contra proferentem* provisions can now be found in the Unidroit Principles and the PECL.<sup>190</sup>

In French law, Article 1190 CC provides that “*in case of ambiguity, a bespoke contract (contrat de gré à gré) is interpreted against the creditor and in favour of the debtor; and a standard form contract (contrat d’adhésion) against the party who put it forward.*” This article replaces the more limited former Article 1162 CC albeit with a twist. Article 1190 CC now includes a formal reference to standard form contracts. This was one of the specific requests expressed in the *loi d’habilitation* that the provisions relating to the interpretation of standard form contracts be clarified.<sup>191</sup> This canon of interpretation used to be perceived negatively as a maxim of last resort, but it seems to have gained momentum now that it applies to the interpretation of standard form contracts.

This technique of interpretation requires courts to identify the *proferens*, which is not an easy task, particularly in freely negotiated commercial transactions. Who are the creditor (*créancier*) and the debtor (*débiteur*) in these contracts? In a recent decision, the Court of Appeal of Douai held that an easement freely negotiated between the parties was interpreted according to the meaning that a *reasonable* person in the same situation would give, and as a result, in favour of the promisee of the obligation, i.e. the landowner, so that the easement would be limited over a period of time.<sup>192</sup> A parallel can be drawn with Article 1602 CC, which provides that “*any obscure or ambiguous clause is interpreted against the seller*” in a contract of sale.<sup>193</sup> In standard form contracts, Article 1190 CC clarifies who the *proferens* is, i.e. the person who puts the contract forward.<sup>194</sup>

Despite this broad qualification of the *proferens* in standard form contracts, the scope of application of Article 1190 CC is fairly limited given the restrictive definition of these contracts. Article 1110 CC defines them as contracts “*which include(s) a collection of non-negotiable terms which are determined in advance by one of the parties.*” As the definition only targets *non-negotiable pre-determined* terms, it excludes any *negotiable* terms. How feasible is it to discern between these terms and subject them to different rules of interpretation? Is it not in contradiction with the principle that contract terms must be read as a whole and not in isolation?

Even if Article 1190 CC is drafted briefly, it remains subsidiary to Article 1188 CC. It only applies where there is an ambiguity (*dans le doute*) and where the intention of the parties cannot be discerned. Some scholars suggest that this provision should have a mandatory force in standard form contracts, in line with the normative effects of Article L. 211-1 of the

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<sup>189</sup> See Hugh Beale, Bénédicte Fauvarque-Cosson, Jacobien Rutgers, Stefan Vogenauer, *Cases, Materials and text on Contract Law, Ius Commune Casebooks for the Common Law of Europe*, p. 759 (Hart Publishing, 2019).

<sup>190</sup> Article 4.6 (*Contra proferentem* rule) Unidroit Principles ; Article 5:103 PECL.

<sup>191</sup> See *loi d’habilitation* No 2015-177 of 16 February 2015 – Article 8. 5 – “*Clarifying the provisions relating to contractual interpretation and specifying those specific to standard form contracts (contrats d’adhésion).*”

<sup>192</sup> CA Douai, ch. 1 sect. 2, 27 April 2017, n° 16/02790.

<sup>193</sup> See Civ 1, 13 October 1993, No 91-16.344, Bull. Civ. I, No 287 p.198, D. 1994, p. 211; Cass. Civ, 21 February 2001, n° 99-17.666; Bull. Civ. III, No 22, p.18.

<sup>194</sup> See Cass. Civ 1, 22 October 1974, No 73-12.482, Bull. Civ. I, No 271, where the *Cour de cassation* upheld the lower court’s interpretation against the insurance company which had drafted the ambiguous term in the standard form insurance contract pursuant to former Article 1162 CC.

Consumer Code.<sup>195</sup> It would be a way to achieve fairness given that standard form contracts “can be regarded as a form of private regulation that must meet certain criteria of justification in order to be legally enforceable.”<sup>196</sup> This is however doubtful as it is not the current position of French courts and does not appear to make commercial sense.

In English law, the *contra proferentem* maxim is also seen as rule of last resort for the interpretation of commercial contracts. As held by Lord Neuberger in *K/S Victoria Street v House of Fraser*, this rule has lost relevance in the interpretation of commercial contracts as “rarely decisive as to the meaning of any provisions of a commercial contract.”<sup>197</sup> As in French law, it rather raises issues in terms of identifying the *proferens*.<sup>198</sup> In *Persimmon Homes Ltd v Ove Arup Partners Ltd*, Jackson LJ held that “(i)n relation to commercial contracts negotiated between parties of equal bargaining power, that rule now has a very limited role.”<sup>199</sup> It therefore appears as superfluous. Given that it is regarded with suspicion, it mostly applies in relation to certain clauses, such as exclusion, limitation and penalty clauses.<sup>200</sup>

English courts constrain the use of the *contra proferentem* maxim in the interpretation of commercial contracts.<sup>201</sup> The French courts may be able to access the rule more easily, especially with regard to standard form contracts. However, in business agreements, this might not be achievable nor commercially desirable.

In sum, the similarity in the interpretative process in both legal systems is perhaps not surprising since courts construing a document are bound to rely on the language of the contract with some understanding of the context and commercial purpose of the agreement. However, distinct underlying values highlight persistent differences.

## 6. Conclusion

Whilst analysing the three main aspects of judicial interpretation of commercial contracts, I have highlighted the similarities and differences between the English and French legal systems.

First, the *nature* of the interpretative question. Matters of interpretation *stricto sensu* have traditionally been considered as questions of fact, and the principles of interpretation as

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<sup>195</sup> Cass. Civ 1, 23 January 2003, No 00-13.342, Bull. Civ. I, n° 19, p. 14. It is in contrast with the former Art. 1162 CC which does not have any normative force. See also Cass. Civ 1, 22 October 1974, n°73-13.482. See also Bénédicte Fauvarque-Cosson, *Les nouvelles règles du Code civil relatives à l'interprétation des contrats : perspective comparatiste et internationale*, n° 02, p. 363 *Revue des Contrats* (2017) ; Anne Etienney de Sainte Marie, *L'interprétation du contrat d'adhésion*, No 2, p. 146 *Revue des Contrats* (2019).

<sup>196</sup> Dan Wielsch, *Contract Interpretation Regimes*, p. 971, 81(6) *MLR* 958-988 (2018).

<sup>197</sup> *K/S Victoria Street v House of Fraser (Stores Management)* [2011] *EWCA Civ* 904; [2012] *Ch.* 497, [68].

<sup>198</sup> *ibid.*

<sup>199</sup> *Persimmon Homes Ltd and others v Ove Arup Partners Ltd and others* [2017] *EWCA Civ* 373, [52]; see also *Multiplex Construction (Europe) V Dunne* [2017] *EWHC* 3073 (TCC), [27].

<sup>200</sup> Stephanie Barrett, *The contra proferentem rule in financial litigation* 11 *JIBFL* 707 (2017).

<sup>201</sup> Edwin Peel, *Whither Contra Proferentem?* in Andrew Burrows and Edwin Peel, *Contract Terms*, 123-150 (Oxford: Oxford University Press, 2007). Joanna McCunn, *The Contra Proferentem Rule: Contract Law's Great Survivor* 39 (3) *Oxford J Legal Studies* 483 (2019).

defaults, in French law. This might change in light of the *ordonnance* No 2016-131 as the *Cour de cassation* may now review the way lower courts apply the interpretative principles, at least those relating to the prohibition against judicial distortion of clear and precise terms and the objective approach to interpretation. This would be closer to the established English law position of considering interpretative questions as matters of law and the principles of interpretation as binding. Where the courts imply terms in both jurisdictions, each system treats this in the opposite manner, meaning that terms implied as a matter of fact are decided by English lower courts without review by the UK Supreme Court whereas terms implied under French law are subject to the control of the *Cour de cassation*. The implication of terms in both jurisdictions is subject to different tests. Whether they are part of a unitary interpretative exercise or distinct processes, these two facets of interpretation give judges room for discretion to interpret or supplement the expressed intentions of the parties with nevertheless different degrees of review by the higher courts. It remains to be seen if French courts follow the Canadian courts and pick their way through the interpretative dichotomy by adopting mixed fact and law qualification.

Second, the *purpose* of contractual interpretation. It is to identify the intention of the parties – whether subjectively or objectively. The formal introduction of an objective approach in the *Code civil* aligns French law with English judicial approach. However, the evidentiary basis for the French approach remains wide and subjective. By contrast, even if the English evidentiary basis is limited to intrinsic evidence it is undisputed in English law that words must be read in the context of their background facts. It is therefore not surprising that commercial parties both sides of the Channel in professionally drafted contracts seek to mitigate the risk of uncertainty by limiting the evidence available for interpretation through the use of entire agreement clauses and even aim to constrain the interpretative power of the judge with the inclusion of interpretation clauses. In France and England, the validity of these clauses is an undisputed part of contractual freedom, but paradoxically and ultimately, they are also subject to interpretation and as such, under judicial scrutiny.

Third, the *scope* of contractual interpretation. English and French courts first look at the words of the contract for the meaning of the terms confirming the shared principle of the primacy of the contractual language. If the ordinary meaning makes *sense*, that language must be given effect. When the meaning remains unclear or ambiguous, courts resort to similar maxims of interpretation, such as considering the contract as a whole and common business sense. However, there is divergence on one maxim of interpretation, which is *contra proferentem*. Whereas this rule is viewed with suspicion by English courts, it has gained momentum in French law, especially with regard to standard form contracts. However, in business agreements, this might not be commercially desirable.

Similarities in the interpretative principles can be explained by a shared respect for contractual freedom and sanctity of contract with an understanding that commercial parties need legal certainty. Naturally, differences persist, which reflect distinct contract law values embedded in each legal order. In the function of the judge (*office du juge*), French judges are expected to consider the contract as a whole in the wider context placing greater value on contractual fairness. This contrasts with a judicial trend in English law which puts greater emphasis on textual analysis for the sake of legal certainty. Even if the *ordonnance* No 2016-131 has only introduced small changes to the provisions relating to interpretation, French courts now have the interpretative tools to follow in the footsteps of English courts when interpreting

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professionally drafted commercial contracts. An emerging coalescence around an objective textual interpretation in a commercial setting is to be welcomed as it enhances commercial certainty across borders.

Finally, a link between the interpretative method and the view of contract can be observed. A subjective approach dives into the commercial realities of the contract placing emphasis on the social underpinnings of the agreement. The contract in its subjective dimension is understood as a *venture* pursued for a common purpose by the parties. By contrast, the objective approach extracts itself from this reality and gives an abstract understanding of the contract. As the *Code Civil* enshrines an objective approach, does the French conventional understanding of contract shift towards a different model of contract more in line with the utilitarian view of English contract law?