EXHIBIT 8
Belgian Perspective on Rainy Sky S.A. and Others (Appellants) v. Kookmin Bank (Respondent)

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Abstract: In Belgian law, a subjective interpretation of contracts prevails: the common intention of the parties is the vital criterion that governs the construction of agreements. In England the system is more objective, which means the meaning which the document would convey to a reasonable person predominates in matters of contractual interpretation. However, an in-depth analysis of the case Rainy Sky S. A. and others v. Kookmin Bank shows that, in practice, the two systems are more alike than might seem at first sight.

1. Introduction and Factual Background

On 11 May 2007, six separate sales contracts (the Contracts) were concluded between six parties (the Buyers) and Jinse Shipbuilding Co. Ltd. (the Builder), in which the Builder committed himself to build and sell a ship to each of the Buyers for the price of USD 33.3 million each, payable in five equal instalments of USD 6.66 million, with the final instalment payable on delivery.

Precedent to payment of the first instalment, the Builder had to deliver a refund guarantee to each Buyer in a form acceptable to the Buyers’ moneylenders. On 22 August 2007, Kookmin Bank (the Bank) issued six Advance Payment Bonds (the Bonds), one to each of the Buyers.

In late January 2009, when each of the Buyers had paid the first instalment and one Buyer had also paid the second, the Builder became insolvent. The Buyers notified the Builder that the installed debt workout procedure triggered an obligation under Article XII.3 of the Contracts to refund the instalments received. The Builder refused and the dispute was submitted to arbitration. The Buyers then demanded from the Bank under the Bonds repayment of the instalments paid. The Bank refused to pay because of two reasons. First, the Bank said that it was not obliged to pay pending the dispute between the Buyers and the Builder. Second, the Bonds did not cover refunds in the event of insolvency under Article XII.3 of the Contracts.

The judge rejected both arguments and summary judgment was given for the Buyers. The Bank appealed on the second ground only, and succeeded, since the Court of Appeal gave summary judgment for the Bank. The Buyers subsequently appealed to the Supreme Court, asking whether a true construction of paragraph 3 of the Bonds implied that they were entitled to payment under the
Bonds of the refunds to which they were entitled under Article XII.3 of the Contracts.

2. The Bonds
The point of departure in this case is the Bonds, since the dispute concerns the true construction of the Bonds. The relevant part of each of the Bonds is the following:

[3] In consideration of your agreement to make the pre-delivery instalments under the Contract and for other good and valuable consideration (the receipt and adequacy of which is hereby acknowledged), we hereby, as primary obligor, irrevocably and unconditionally undertake to pay to you, your successors and assigns, on your first written demand, all such sums due to you under the Contract (or such sums which would have been due to you but for any irregularity, illegality, invalidity or unenforceability in whole or in part of the Contract) PROVIDED THAT the total amount recoverable by you under this Bond shall not exceed US $[26,640,000] . . . plus interest thereon at the rate of . . . (7%) per annum (or 10%) per annum in the case of a Total Loss of the Vessel) from the respective dates of payment by you of such instalments to the date of remittance by telegraphic transfer of such refund.

A Bond has a broad and flexible meaning in English common law, referring most of the time to a personal security used to cover certain risks of parties to long-term and complex contracts of transactions, such as the supply of ships. Such an undertaking does not create security by giving the creditor access to certain assets but by providing for a second debtor. It is a strict undertaking (guarantee) of a party (guarantor), normally a bank, to pay a certain sum of money to another party, the beneficiary (creditor), under certain conditions in order to cover a risk of that party. In international commerce, contracts of guarantee governed by English common law often include clauses stating that the guarantor has to pay on first demand and that the undertaking is unconditional. By using these words, the parties make sure a primary and independent obligation is constituted. It is thus typical for such bank guarantees that, on the one hand, they secure the obligation under another contract, while, on the other hand, they contain a primary obligation, abstract from any underlying contract. Such

guarantees cover different types of risks. In *Rainy Sky*, the parties who have made advance payments have exposed themselves to the risk that, in case of non-performance, the money will not be refunded. Protection was guaranteed by way of a *repayment guarantee* or an *advance payment bond* issued by the bank.

How would the Bonds in *Rainy Sky S.A. and Others v. Kookmin Bank* be characterized in Belgium?

The Bonds refer to a personal security used to cover certain risks of parties to long-term and complex contracts of transactions. However, which personal security under Belgian law fits best in this case? In Belgian law, personal security contracts are mainly to be distinguished in two different categories, namely *caution* (Art. 2011 Code Civil (CC)), a concept called *dependent personal security* in the Draft Common Frame of Reference (DCFR), and *garantie*, which the DCFR refers to as *independent personal security*. The main difference, as it is clearly pointed out by the nomenclature of the DCFR, is the independence of the relationship between the personal security contract and the underlying agreement between the instructing party and the beneficiary.

In order to qualify a personal security contract for a bond in a complex agreement, the DCFR distinguishes between *caution* (Art. 2011 Code Civil (CC)) and *garantie*. The latter is characterized as *independent personal security*, which means that the underlying agreement and the personal security contract are independent. This is in contrast to *caution*, where the personal security contract is essentially an extension of the underlying agreement. The independence of the bond contract from the underlying agreement is crucial for its characterization under Belgian law.

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security contract, the judge first has to interpret the agreement by searching for
the common intention of the parties (Art. 1156 et seq. CC). A characterization
of caution must be accepted when it is the will of the parties to connect the position
of the added debtor with that of the principal debtor. A contract is characterized
as a garantie when the obligations are formulated in an abstract way, without any
reference to the obligations of the principal debtor. Helpful to interpretation is
the presence of the words op eerste verzoek or à première demande, which means
on first demand, since they create a rebuttable presumption in favour of the
characterization as an independent personal security.

In order to characterize the Bonds in this case in a proper way, the words
of Article XII.3 of the Contracts are revealing. It states that the Bank undertakes
to pay ‘as primary obligor, irrevocably and unconditionally, on your first written
demand, all such sums due to you under the Contract’. A first clue is to be found
in the words primary obligor. The Bonds constitute primary obligations, and
therefore, they cannot be a caution. Besides, the payment is irrevocable and
unconditional, which confirms the presumption of autonomy and independence
from the underlying contracts between the instructing party and the beneficiary,
which brings about the characterization of garantie as well. Also significant is the
expression on first demand, triggering a rebuttable presumption in favour of the
characterization as a garantie, namely a garantie bancaire à première demande.
At first sight, the repeated references to the Contract itself in Article XII.3 might
seem to indicate dependence from the underlying contract between the Buyers
and the Builder. This, however, is not the case, since the inclusion of a reference
to the underlying relationship between the instructing party and the beneficiary is
a typical feature of every guarantee contract that does not aim at creating any
interdependent relationship.

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Garanties op Eerste Verzoek, Bruylant, Brussels 1998, p. 236 (hereinafter abbreviated A. PRÜM,
E. WYMEERSCH, 1986, p. 484; E. WYMEERSCH, R. STEENNOT & M. TISON, ‘Overzicht van
WYMEERSCH, R. STEENNOT & M. TISON, 2008).

6 C. BORMS, 2007, p. 87; E. DIRIX & R. DE CORTE, 2006, p. 301; C. MARTIN & M.
DELIERNEUX, 1990, p. 572.


J. ROMAIN, ‘Principes d’interprétation et de qualification des garanties indépendantes à
première demande’, TBBR 1989, pp. 430 and 433-437 (hereinafter abbreviated J. ROMAIN,
1989).

2003, p. 276, note R. STEENNOT; R.F. BERTRAMS, Bank guarantees in international trade,
pp. 444-447; E. WYMEERSCH, 1986, p. 489; E. WYMEERSCH, R. STEENNOT & M. TISON,
More in detail, the Bonds can be characterized as a garantie de remboursement or a garantie de restitution d’acomptes, since in the case at hand, Article X.8 of the Contracts states that the Builder would deliver to the Buyers refund guarantees relating to the first and subsequent instalments and because of the fact that the Bonds are called Advance Payment Bonds. Kookmin Bank indeed assures repayment of the instalments.

The garantie bancaire à première demande, to be translated as bank guarantee on first demand or simple demand guarantee, is a guarantee contract, in which a guarantor, mostly a bank, commits himself to the payment of a sum of money to a beneficiary, on first demand, following the conditions included in the guarantee contract, while not being allowed to raise objections arising of obligations outside the letter of guarantee. The guarantee contract often has the form of a letter, the so-called letter of guarantee. A simple demand guarantee is supplied as a performance of an underlying agreement between the party who instructs the guarantee and the beneficiary.

3. The Contracts
In Rainy Sky S.A. and Others v. Kookmin Bank, Lord Clarke reflects upon the interpretation of the Advance Payment Bonds in the following words: It is common ground that the terms of the Contracts are relevant to the true construction of the Bonds. They are referred to in the Bonds and provide the immediate context in which the Bonds were entered into. They are thus plainly an important aid to the meaning of the Bonds.

Thus, according to English common law, the underlying contract between the instructing party and the beneficiary can be a useful tool in interpreting the Bonds. However, in Belgium, this is not the case at all.

In its most basic form, a bank guarantee on first demand implies the intervention of three persons: an instructing party, a beneficiary, and a guarantor. The guarantor, which is in most cases a bank, directly commits himself to pay an amount of money to the beneficiary. The cause of this commitment, the decisive motivation, is vehemently discussed. First, some scholars consider that the

guarantee commitment results from the relationship between the instructing party and the beneficiary.\textsuperscript{12} The guarantor only undertakes to pay the beneficiary because the beneficiary commits himself towards the instructing party. If no contract would have existed between the guarantor and the instructing party, there would be no need whatsoever to establish a guarantee commitment. Besides, some are of the opinion that the instructing party-beneficiary as well as the relationship instructing party-guarantor contains the roots of the guarantee commitment.\textsuperscript{13} Followers of this view take into account all the different reasons underlying the decision of the bank to engage in a guarantee commitment.\textsuperscript{14} They believe that in both different legal relationships a decisive motivation is to be found. A last view, with which I agree, grounds the guarantee commitment in the relationship guarantor-instructing party.\textsuperscript{15} The decisive motivations for the guarantor to undertake a commitment are the fact that he receives a commission and the knowledge that he has a right of recovery. The demand of the instructing party to establish a guarantee commitment is grounded in the relationship beneficiary-instructing party, but this is the reason why the instructing party


wants the guarantee commitment to come into being, not the reason why the guarantor wants this to happen.\textsuperscript{16}

In order for a guarantee commitment to fully fulfil its function as a security, it is necessary that it can be invoked at any time, independent from what happens to the other contracts that form part of the triangular relationship.\textsuperscript{17} However, since the cause of the commitment is to be found in the relationship instructing party-guarantor, the validity of the guarantee commitment might be influenced by that legal relationship. In order to avoid this unwanted effect, an abstract character is bestowed upon the bank guarantee on first demand. By doing so, the bank guarantee is detached from its cause and, therefore, from the underlying relationship between the instructing party and the guarantor.\textsuperscript{18} This does not mean that there is no cause, which would be contrary to Article 1131 CC, but merely that the validity cannot be affected by means of defence arising from the contract between the instructing party and the guarantor.\textsuperscript{19}

The Belgian Court of Cassation used to judge that a legal act can only be abstract, and thus separated from its cause, when the law prescribes it.\textsuperscript{20} However, different scholars and judges interpreted law in an extensive way, conceiving abstract commitments as allowed, as long as the law did not expressly forbid it, and characterized the bank guarantee on first demand repeatedly as abstract.\textsuperscript{21} Therefore, it was not surprising that in 2009, the Court of Cassation explicitly acknowledged this characterization.\textsuperscript{22}

\begin{thebibliography}{9}
\bibitem{17} E. NORDIN, 2010-2011, pp. 1283-1284; E. WYMEERSCH, 1986, p. 489.
The bank guarantee on first demand is not to be acknowledged as abstract from the relationship between the beneficiary and the guarantor, since the decisive cause of the commitment is not to be found in that contract. However, exceptions arising from that agreement cannot be raised either. In this regard, the bank guarantee is only to be characterized as independent or autonomous.

The foundation of the autonomous character is the same of that of the abstract character: the relativity of the agreement (Art. 1165 CC). When the bank pays an amount of money to the beneficiary, it fulfils its own obligation and settles its own debt.

A simple demand guarantee therefore has to be characterized as abstract, independent, and autonomous at the same time.

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the independency of the relationship bank-beneficiary from the contract between
the bank and the instructing party, whereas the two last epithets refer to the
independency in relation to both underlying contracts, namely the agreement
between the guarantor and the instructing party as well as the contract concluded
between the beneficiary and the instructing party. No exceptions arising from the
relationship guarantor-beneficiary nor from the relationship beneficiary-issuer of
the guarantee therefore can influence the guarantee commitment.29

The autonomous and abstract character of the bank guarantee gives rise to
literalism: the content, scope, extent, and limits of the guarantor’s obligations are
exclusively determined by the guarantee contract or letter of guarantee itself.30


note J. BUYLE & M. DELIERNEUX; Comm. C. Ghent 16 Nov. 1999, TBH 2001, p. 809; Gent 3


garanties dites "à première demande" ou abstraites’, JT 1980, pp. 345-357.


M. DELIERNEUX; Brussels 14 Feb. 2000, DAOR 2000, p. 269, note C. LEWALLE; Rev. not. b


STEENNOT; C. BORMS, 2007, p. 84; G. BOSMAN, loose-leaf, IV.115-4-IV.115-5; P. COLLE,


abbreviated M. DELIERNEUX, 2003); D. DE MAREZ, 2000, p. 308; D. DE MAREZ, 2000-2001,


toepassing van de leer inzake garanties op eerste verzoek” (note under Brussels 2 Mar. 2001),


Autonomes: les Exceptions au Devoir de Paiement’, in L’actualité de Garanties à Première

Demande – Actualia inzake Garanties op Eerste Verzoek, Bruylant, Brussels 1998, pp. 129-130

(hereinafter abbreviated Y. POULLET, 1998); G. SCHBANS, 1994, p. 1167; L. SIMONT, 1998,

Besides, he cannot rely on other exceptions than the ones that arise from the words of the guarantee letter, in which his intention is expressed and the limits of his commitment are included.\textsuperscript{31} This very formal approach is the guiding interpretation principle in the field of bank guarantees, which results in a very limited interpretation power of any interpreter, whether it is the guarantor himself, a judge, or an arbiter.\textsuperscript{32} The immediate effect of literalism is that every request made by the beneficiary to perform the guarantee needs to be formally examined for compatibility with the terms of the guarantee contract.\textsuperscript{33} If the beneficiary demands performance of the guarantee, the guarantor only needs to check whether or not the formal conditions and the provisions as regards content are fulfilled.\textsuperscript{34} The literalist character and its main consequence, namely the formal review of the beneficiary’s request, are indicated with the term \textit{guarantee formalism}.\textsuperscript{35}

The literal character is sometimes under discussion when a more flexible approach is pleaded for, since literalism can lead to unreasonable results in some cases.\textsuperscript{36} In a French case, the parties had agreed that an arbitral reward had to be submitted in order to be able to call upon the guarantee. However, the judge accepted a judgment rendered by a judge and not by an arbiter as a fulfilment of this condition.\textsuperscript{37} The Court of Cassation yet quashed the decision as a violation of Article 1134 CC.\textsuperscript{38} In the Netherlands, the Hoge Raad took a more flexible approach considering that reasonableness needed to play a role in the interpretation of a bank guarantee.\textsuperscript{39}

\textsuperscript{32} D. DE MAREZ, 2000, pp. 308-309.
\textsuperscript{36} M. DELIERNEUX, 2003, p. 348; E. NORDIN, 2010-2011, p. 1288.
The guarantee stated that the beneficiary could only rely on the guarantee after the submission of a mandatory opinion issued by M., an expertise centre, that made it clear that the issuer of the guarantee had failed to fulfil his obligations. However, because of a conflict of interest, the bureau did not want to be involved, unless the instructing party declared that it could operate. Yet, the instructing party refused to agree. The Hoge Raad decided that a literal interpretation of the guarantee would be unfair, regarding the circumstances and the behaviour of the issuer of the guarantee.

In Belgium, case law and legal doctrine in general vehemently stick to the principle of literalism.40 This holds equally for procedural requirements, for instance, the condition that a demand to perform the guarantee should be made by registered letter, as for requirements as to the content of the demand to perform, such as the need for specific statements of the presentation of specified documents. In both cases, any appeal that does not comply with the conditions is void and has to be rejected.41 After all, the inclusion of requirements is a deliberate choice, to which the beneficiary could have objected at the time of the conclusion of the letter of guarantee.

In a recent case, the Court of Appeal of Brussels repeated that a bank guarantee must be interpreted in a literal way.42 By way of a repayment guarantee, a bank had committed itself to refund an advance payment that amounted to a sum of EUR 186,000. The letter of guarantee stated that it would take effect once a deposit of EUR 186,000 would have been made on the account of the beneficiary of the guarantee. Due to tax legislation 5 per cent of the total sum was withheld, so that only EUR 176,700 was deposited. When the beneficiary

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demanded repayment of EUR 176,700, the bank refused, stating that the guarantee had never taken effect. The Court of Appeal followed this reasoning and judged that the guarantee had not entered into force, because no advance payment of EUR 186,000 had been deposited.

In an older case, the Court of Appeal of Brussels explicitly judged that the taking effect and the scope of a letter of guarantee are not dependent upon the intention of the parties.\(^4^3\)

The Court of Appeal of Brussels emphasized the abstract and literal character of the bank guarantee. In the case, a provision of a repayment guarantee stated:

This contract provides for an advance payment of 30\%, i.e. DEM 140.220,- against a bank guarantee of DEM 140.220,-. We, GENERALE DE BANQUE-GENERALE BANK, Regional Office of BRUSSELS, therefore guarantee [...] irrevocably and unconditionally the payment of an amount of DEM 140.220,- [...] maximum. We shall pay you this amount upon your first demand without regard to the merits of your demand. This guarantee will enter into force when the above mentioned advance payment is effectively credited to account n° [...] opened in the name of S.A. FUSION with our bank. [...] If no demand is made in accordance with the above mentioned conditions [...], this guarantee will automatically expire on June 30th, 1990.

However, only EUR 62,888.90 (123,000 DM) was deposited. When the beneficiary demanded repayment of EUR 62,888.90 (123,000 DM), the bank refused, stating that the guarantee had never taken effect. The Court of Appeal followed this reasoning and judged that the guarantee had not entered into force, because no advance payment of EUR 71,693.35 (DM 140,220) had been deposited.

One exception to the principle of literalism can be found in a judgment from the Court of Appeal of Liège, where it judged that the guarantee formalism does not free the guarantor from the obligation to perform his obligation in good faith.\(^4^4\) However, not everyone approves of the judgment.\(^4^5\)

The guarantor, a bank, had accepted three different extend or pay demands, even when they did not live up to the formal conditions prescribed by the guarantee contract. When the bank suddenly declined a fourth extend or pay demand on the ground that it did not comply with the requirements, the Court considered this a breach of good faith. The Court first acknowledged the literal

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\(^4^5\) J. BUYLE & M. DELIERNEUX, 2000, pp. 738-739 ; D. DE MARÉZ, 2000, pp. 304-344.
character of the guarantee, stating that the conditions that are mentioned need to be interpreted in a strict way. However, the Court adds that the guarantor cannot invoke formal deficiencies, when doing so would be inconsistent with la loyauté et confiance réciproques en corrélation avec les usages admis en affaires.

It implies that a Belgian judge who would have to render a judgment in similar circumstances as the facts underlying in the case Rainy Sky S.A. and Others v. Kookmin Bank, unlike an English judge, would not use the terms of the underlying contracts between the Builder and the Buyers in order to interpret the Bonds. In Belgium, the terms of the contracts are not relevant to the true construction of the Bonds. Even if they are referred to in the Bonds and even if they provide the immediate context in which the Bonds were entered into, they cannot be an important aid to the meaning of the Bonds, because of the abstract, autonomous, and literal character of the bank guarantee on first demand. However, since the text of the Bonds is ambiguous, a literal interpretation cannot be carried out. The general rules of interpretation therefore need to be called upon.46

4. The Correct Approach to Construction

As to describing the correct approach to construction in Rainy Sky S.A. and Others v. Kookmin Bank, Lord Clarke proceeds in two steps. First, he mentions the general English approach to construction, stating the principles of interpretation applicable in the case of any contract:

I agree with Lord Neuberger that those cases show that the ultimate aim of interpreting a provision in a contract, especially a commercial contract, is to determine what the parties meant by the language used, which involves ascertaining what a reasonable person would have understood the parties to have meant. As Lord Hoffmann made clear in the first of the principles he summarized in the Investors Compensation Scheme case at page 912H, the relevant reasonable person is one who has 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.

He then adds that more specific in the case at hand, the issue between the parties [...] is the role to be played by considerations of business common sense in determining what the parties meant. After quoting a significant body of authority, Lord Clarke concludes: Where a term of a contract is open to more than one interpretation, it is generally appropriate to adopt the interpretation which is most consistent with business common sense.

Looking at the case at hand from a Belgian perspective, two questions need to be asked: (1) what is the Belgian approach towards interpretation? And (2) does business common sense play a role in Belgian interpretation?

5. The Belgian Approach towards Interpretation

5.1. Introduction

Lord Clarke refers to the objective approach to contractual interpretation, which is typical for English common law. The judge does not aim at finding out what the parties meant when they entered into the agreement, but rather at an objective understanding of the meaning reasonable persons acting under the same circumstances would bestow upon the contract. After all, parties should be free to act upon the intention of the other party that is expressed, without having to take into account subjective intentions. In addition, third parties should be able to rely on the words of an agreement with a reasonable degree of certainty.

In this part, we investigate the Belgian approach towards contractual interpretation. In Belgium, a subjective approach governs. The main criterion that plays a role in interpretation is the common intention of the contracting parties. However, there is a growing body of opinion that stresses the need for a more objective viewpoint.

5.2. Subjective Approach

5.2.1. Hierarchy of the Interpretation Rules

The most fundamental rule of interpretation is contained in Article 1156 CC, stating: One must in agreements seek what the common intention of the contracting parties was, rather than pay attention to the literal meaning of the terms. Since 47


it is not always possible to discover the common intention, Article 1156 is followed by guidelines on how to ascertain the hypothetical intention, the ideal will, of the parties on the basis of objective elements.51 Those rules are subsidiary to the fundamental rule of Article 1156 CC.52

For instance, the Court of Cassation judged that Article 1157 CC does not mean that a provision always must be interpreted in a sense in which it may have effect. In this judgment, the Court emphasized the word rather in the text of Article 1157 CC, taking into account that on the basis of Article 1156 CC there can be reasons why the judge gives priority to an interpretation because of which the provision may not produce any effect.53

One rule, namely Article 1162 CC, lacks any kind of familiarity with an intention whatsoever. Article 1162 CC occupies the lowest place in the hierarchy, since the Court of Cassation has repeatedly stated that only in the case of persistent doubt as to the content of the agreement, which means when it is not possible to find out the common intention of the parties on the basis of intrinsic or extrinsic elements, Article 1162 CC comes into play.54
5.2.2. Main Rule: Common Intention of the Parties

5.2.2.1. Article 1156 CC

One must, in agreement, seek what the common intention of the contracting parties was, rather than pay attention to the literal meaning of the terms.

Consistent with Article 1156 CC, one must seek in contracts what the common intention of the parties is, rather than pay attention to the literal meaning of the terms. The common intention of the parties is their initial will, namely the intention they shared at the time of the conclusion of the agreement. This basic interpretation rule is in line with the primacy of the intention in the Belgian Civil Code.

How to discover the common intention of the parties that existed at the time of the conclusion of the agreement? First, the judge can rely on the words used in the agreement, assuming they are an externalization of the common intention of the parties wanted. Not only the clause under investigation can be used but also the other terms and clauses of the same contract as well. Often however, the written terms do not suffice in order to discover the true intention. In that case, it is permitted to include extrinsic elements in the activity of interpretation. These are elements that are outside the instrumentum of the agreement and can be drawn from the whole context of the contract, such as the performance of the agreement, correspondence between the parties, precontractual documents, the performance of other contracts between the parties, the purpose of the contract, statements of the parties, the principal agreement (for the interpretation of additional contracts), presumptions, the personality of the parties, and so on.

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5.2.2.2. Limits to the Subjective Interpretation Principle

Traditionally, in Belgium, the doctrine of the acte claire prevailed, in line with the rule from the Digests *cum in verbis nulla ambiguitas est, non debet admitti voluntatis quaestio*, meaning that clear terms cannot be interpreted. However,
nowadays, this theory is untenable. After all, the determination whether or not a text is clear is subjective and always depends on an interpretation of the terms.

Another important limit to interpretation can be indicated. The Belgian Court of Cassation judged that, according to the rules of evidence (Arts 1319, 1320, and 1322 CC), the meaning bestowed upon a contract by way of interpretation has to be compatible with its terms. For non-commercial contracts above EUR 375, Belgian law requires written evidence (Art. 1341 CC). Such a written act is conclusive evidence of the agreement it contains, which means that the judge is obliged to accept it as sufficient evidence (Arts 1319 and 1322 CC). The power of the judge, who has the sovereign authority to interpret agreements, is limited in the sense that he is not allowed to deny the evidential value of the written act, which means he cannot assign a meaning to the act that is conflicting with its terms. The evidential value of the act therefore is the ultimate limit to
the power of the judge. Although interpreting contracts forms a sovereign authority of the lower judge, a limited review by the Court of Cassation is possible. On the one hand, the Court controls whether or not the judge is mindful of the duty to state the reasons on which his decision is based (Art. 149 of the Constitution) and whether the given motivation is legally correct. On the other hand, the Court checks whether or not the evidential value of the act is violated by verifying if the given meaning is a plausible interpretation of the agreement. The Court only has the power to undertake a limited judicial review: solely in cases where the explanation of the judge is manifestly incompatible with the terms of the agreement, it can quash the decision.

5.2.3. Additional Rules Specifying Article 1156 CC

a. Article 1163 CC: However general the terms in which an agreement is phrased may be, it shall include only the things upon which the parties appear to have intended to contract.

Article 1163 CC describes the principle of a restrictive interpretation. The generality of the terms used in a contract is only indicative and sometimes needs to be corrected in relation to the real intention of the parties. An expression or a description in a contract can be formulated in a very general way, even when the...
parties did not mean to include everything that comes under the general terms. If that is the case, the interpreter should, according to Article 1163 CC, reduce the generality to the specific thing the parties intended. This rule constitutes merely an application of Article 1156 CC.73

A contract for the sale of a computer system was concluded between a supplier and a client. When problems arose regarding the delivery of the system, the client was of the opinion that the obligation of the supplier assumed that results would be achieved. The Commercial Court of Brussels judged however that the commitment of the supplier to respect the performances as stipulated by the client in the specifications was an obligation of means. After all, the contract was drafted with a lot of care and precision as to the terms. If the parties would have wanted to include an obligation that results would be achieved, they would not have inserted the word respect but the word realize. The term respect is a general term and must be interpreted in line with the intention of the parties (Art. 1163 CC).74

A stipulation of a car insurance policy stated that in case of an accident, no compensation would be awarded to the passengers of the vehicle if the use of intoxicants by the driver was established. An accident occurred when the driver had been drinking alcohol, but the amount was so low that it could not have created any risk for an accident. The Court of Cassation judged that the lower judge could, according to Article 1156 CC, decide that the parties could not have reasonably meant to exclude the passengers from compensation when there clearly was no causal link between the use of alcoholics and the accident.75 In the case at hand, the decision was based on Article 1156 CC, but Article 1163 CC could have been used as a valuable legal ground as well.76

b. Article 1164 CC: Where in a contract one case was expressed for explaining the obligation, it shall not be deemed that it was thereby intended to reduce the scope of the agreement which extends as of right to cases not expressed.

In line with Article 1164 CC, enumerations in a contract are merely exemplary and should not be interpreted in a restrictive way, unless it is the common intention of the parties that they are illustrative.77 Article 1164 CC thus reflects

the principle of an extensive interpretation, broadening the scope of the agreement.\footnote{A. DE BOECK, 2010, p. 20; A. GUILMOT & Y. NINANE, loose-leaf, II.1.14; D. LEJEUNE, K. SWERTS & N. PEETERS, loose-leaf, II.4-134.} Again, this rule is an application of Article 1156 CC.\footnote{E. CAUSIN, 1978, p. 308.}

The Court of Appeal of Paris judged that it resulted clearly from the provisions of a tenancy agreement that the parties wanted to inflict all burdens relating to the use and maintenance of the building upon the tenant, including the costs to be paid for the communal facilities. It follows that the costs of collective security have to be paid by the tenant, even if they are not mentioned expressly in the clause in which the expenses to be paid by the tenant are enumerated.\footnote{CA Paris, 17 Nov. 2004, Juris Data No. 2004-267178.}

5.2.4. Additional Rules to Discover the Hypothetical Intention of the Parties

a. Article 1157 CC: Where a clause admits of two meanings, one shall rather understand it in the one with which it may have some effect, than in the meaning with which it could not produce any.

Consistent with Article 1157 CC, the right interpretation of an ambiguous provision is the one that ensures it has legal effects. Article 1157 CC makes sure that the contract can have an \textit{effet utile}.\footnote{E. CAUSIN, 1978, p. 307; B. DELCOURT, loose-leaf, II.1.3-114; A. GUILMOT & Y. NINANE, loose-leaf, II.1.5-14.} The article encloses two components.

On the one hand, interpretation should be carried out in a way in which the contract or a separate clause is valid rather than in the sense in which it would be null and void: \textit{actus interpretandus est potius ut valeat quam pereat}.\footnote{"An act should be interpreted in a way that it can have effect rather than in a way it would be null."} \footnote{E. CAUSIN, 1978, p. 306; L. CORNELIS, 2000, pp. 261 and 279; A. DE BOECK, 2010, p. 15; B. DE CONINCK, 2001, p. 42; B. DELCOURT, loose-leaf, II.1.3-114; R. KRUTHOF, H. BOCKEN, F. DE LY & B. DE TEMMERMAN, 1994, p. 450; D. LEJEUNE, K. SWERTS & N. PEETERS, loose-leaf, II.4-134.}

For instance, the Court of Appeal of Liège judged that a clause in a private contract for the sale of an immovable property, stating that the buyer would acquire the full ownership of the property as from the date of the authentic document and of the payment, did not contain a suspensive condition but a term for the transfer of ownership. Including a suspensive condition would after all amount to an arbitrary condition, which would bring about the nullity of the agreement (Art. 1174 CC).\footnote{C. Liège 11 Mar. 2004, \textit{FIP} 2004, p. 1034.}
A second aspect of Article 1157 CC is that where a clause admits of two meanings, one shall understand it in the one with which it may have some effect than in the meaning with which it could not produce any.85

When an insurance policy, connected to a travel or a holiday policy, only covers damage resulting from the theft of objects from an isolated trunk, then the terms need to be interpreted in the sense of each trunk. Otherwise, the clause would be meaningless.86

b. Article 1158 CC: Terms which admit of two meanings shall be taken in the meaning which best suits the subject matter of the contract.

Article 1158 CC indicates that interpreting should be carried out in line with the economy and the general meaning of the contract.87 The economy of the contract refers to all the elements that have played a role in concluding the contract, by balancing the different aims the parties want to achieve.88 If terms are ambiguous, the context of the whole of the document needs to be taken into account.89

A term of an employment contract was interpreted in favour of the employee, because such an interpretation is in accordance with the protecting aspect of labour law in general and with every employment contract in particular.90

Because of an explosion in a building causing a fire, a car parked outside the property was damaged. In the insurance policy of the liable person, the damage inflicted on neighbours was included. The judge stated that the term neighbour can have two different meanings, either based on proximity or based on proximity and constancy. According to Article 1158 CC, the first interpretation is the appropriate one in this case.91

88 D. LEJEUNE, K. SWERTS & N. PEETERS, loose-leaf, II.4-127.
90 Ind. C.A. Mons 8 May 1967, JF 1968, 140.
91 C. Liège 30 May 1961, RGAR 1961, nr. 6761, note O. MALTER.

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c. Article 1161 CC: All the clauses of an agreement are to be interpreted with reference to one another by giving to each one the meaning which results from the whole instrument.

Article 1161 CC stresses the importance of intrinsic elements. In order to interpret an agreement, all the terms and clauses of the contract should be used.\(^92\) A holistic approach towards contracts is needed, meaning that a clause must not be considered in isolation but in the meaning that results from the whole instrument.\(^93\) In fact, this rule is an enlargement of the general proposition that an individual word takes its meaning from the context in which it is found.\(^94\) Article 1161 CC and Article 1159 CC are very close to each other but differ in the sense that Article 1156 CC comes into play when there is doubt as to the interpretation of terms, whereas Article 1161 CC has a role in the interpretation of provisions.

An insurance policy concluded by a car dealer states that the cars in possession of the policyholder are insured insofar as they are located in the showroom and/or in the building and/or inside the fence of the policyholder and/or wherever in Belgium. In accordance with Article 1161 CC, that clause means, according to the Commercial Court of Brussels, that the cars should be located in a building or in a fenced-off area of the policyholder, which is situated in Belgium. The theft of a car in Belgium that was placed in a non-enclosed car park of the policyholder was not covered by the insurance policy.\(^95\)

d. Article 1159 CC: What is ambiguous shall be interpreted by what is in use in the region where the contract was made.

Usage can be useful to the act of interpretation. After all, it is logic that the common intention of the parties concluding a contract should be in line by what is in use in the region where the contract was made.\(^96\) Usages are local rules of which the applicability to a certain contractual relationship is generally acknowledged.\(^97\) Despite its possible usefulness, this article is not relied upon much by Belgian judges.\(^98\)
The Court of Appeal of Brussels called upon Article 1159 CC when it judged that the calculation of a mediator’s commission should be interpreted in line with the general usage that the wage is to be calculated on the basis of the real price of the conveyance.99

5.2.5. Subsidiary Rule: Interpretation against the Person Who Has Stipulated the Clause

Article 1162 CC, stating that in case of doubt, an agreement shall be interpreted against the one who has stipulated and in favour of the one who has contracted the obligation, lacks any kind of familiarity with an intention whatsoever. Article 1162 is an autonomous rule of law according to which disputes about interpretation are settled in a way different from the usual, subjective, one.100 When the judge fails to establish the meaning of the agreement consistent with the common intention of the parties, he can resort to Article 1162 CC.

Interpretation against the one who has stipulated means, according to the Court of Cassation, an interpretation against the party who is favoured by the clause under investigation, even when there is no clue that this corresponds with the common intention.101 Consequently, an exemption clause must be interpreted in favour of the creditor and a damages clause in favour of the debtor.102 When interpreting a reciprocal agreement, it is necessary not to investigate the contract in general but every provision separately.103

5.3. Towards an Objective Approach?

5.3.1. Introduction

The enumeration of Belgian interpretation rules sketches a subjective picture. The determination of what the parties meant by the language used does not, as it

102 D. LEJEUNE, K. SWERTS & N. PEETERS, loose-leaf, II.4-137.
is the case in English common law, involve ascertaining what a reasonable person, having all the background knowledge that would reasonably have been available to the parties in the situation in which they were at the time of the contract, would have understood the parties to have meant. However, the modern view on interpretation refines the subjective viewpoint, granting a more prominent role to reasonableness and fairness than the one-sided position described above. In this part, we investigate whether or not a Belgian judge would take into account reasonableness and fairness.

5.3.2. Reasonable Interpretation

5.3.2.1. Limits to Party Autonomy

Often a contract has binding force in more ways than the parties have agreed upon. In concluding an agreement, the contractual freedom is of primordial importance. However, the intention of the parties is not the only source of contractual obligations. First, parties often envisage only the essentials when they conclude a contract, leaving gaps in the agreement.\(^\text{104}\) Article 1135 CC states that Agreements are binding not only as to what is therein expressed, but also as to all the consequences which equity, usage or statute give to the obligation according to its nature. In every conflict of interpretation, the interpreter therefore needs to answer two questions.\(^\text{105}\) First, what are the rights and obligations the parties wanted to create? Second, what are the rights and obligations arising from fairness, usage, and the law?

Besides, not the internal intention of the parties is decisive for obligations to come into being but the intention as it is exchanged between the parties by means of words.\(^\text{106}\) The declaration of intent, as it is voiced by one party and trusted upon by the other party, is indicative for the concluded obligations.\(^\text{107}\) When there is a discrepancy between the real and the declared intention, the content of the agreement is determined by what the other party reasonably could have understood the given statement to mean (vertrouwensleer).\(^\text{108}\) This principle,


\(^{107}\) A. DE BOECK, loose-leaf, w.p.; W. VAN GERVEN & S. COVEMAEKER, 2010, p. 73.

which is included in Article II.-4:302 DCFR,109 does not devalue the lawmaking power of the will. After all, in most cases, there is a concordance between what the parties wanted and what they declared, especially regarding the main features of a contract.110

A third source of contractual obligations is embodied in Article 1134, paragraph 3 CC, according to which agreements must be performed in good faith. Good faith is in that sense an objective concept, which allows the judge to control whether or not the parties’ conduct is reasonable and fair.111 The concept is thus equated with fairness and reasonableness.112 The exact obligations binding the parties are, in case of dispute, established by a judge by means of interpretation and gap filling. Once the commitments of the parties are clarified, another task rests upon the judge: checking whether or not the parties abused the law by not performing the agreement in a moderate way. Traditionally, good faith plays a role in all three stages, having an interpretative, a complementary, and a moderating function.113

109 Article II.-4:302 DCFR: ‘How intention is determined. The intention of a party to be legally bound or to achieve the relevant legal effect is to be determined from the party’s statements or conduct as they were reasonably understood by the person to whom the act is addressed’.


5.3.2.2. The Role of Good Faith

Initially, an interpretative content-determining function was allotted to the principle of good faith as set down in Article 1134, paragraph 3 CC: Based on the primacy of the will, the rule was supposed to aim merely at the search for the real intention of the parties, assuming that not the literal terms but the spirit of the agreement must be a decisive interpretative factor. Gradually, the principle of good faith obtained a larger and more creative role. The second complementary function of good faith enables the judge to impose additional obligations, for instance, the obligation to cooperate, to act loyal, to provide information, to limit damages, and so on. The moderating, limiting, restrictive, or correcting role of good faith, which is linked to the prohibition on abuse of the law, is accepted by the Court of Cassation in a judgment of 19 September 1983.
The concrete filling-in of the interpretative function was repeatedly criticized. Since it was too close to the disposition of Article 1156 CC, it was considered not to add anything to the general interpretation rules. Two solutions were put forward. On the one hand, some scholars denied that any interpretative value could be bestowed upon the good faith principle, which is only a rule of conduct. Article 1134, paragraph 3 CC concerns, in this viewpoint, merely the performance of the agreement, not the interpretation. After all, the rule is situated in the Civil Code in the section covering the general provisions concerning the consequences of contracts, whereas the interpretation rules are clustered in a separate division. On the other hand, another function is granted to the interpretative role: an interpretation according to reasonableness and fairness. The same role is assigned to good faith (Art. 1134, para. 3 CC) and reasonableness (Art. 1135 CC), namely to be a source to determine the content of obligations. This way of interpreting is called *reasonable interpretation*. It differs from normative interpretation (see *infra*) in the sense that the interpretative power of the judge is smaller, since the concept does not encompass gap filling nor abuse of the law. *Interpreting according to good faith, which is in line with reasonableness and fairness, means that the interpreter should, in his search for the common intention of the parties, be led by the sense one can reasonably attach to the mutually made declarations, paying attention to the surrounding circumstances.* In this view, it is supposed that what is agreed between the parties can be discovered by interpreting the agreement not according to the literal terms but following the demands of reasonableness and fairness.

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120 F. BAERT, 1956–1957, p. 495.


This means that an agreement should be interpreted in light of what would have been the will of a *bonus pater familias*, a contractual party, who is prudent and diligent.

The concept of reasonable interpretation arose from a problem that is often met in practice: detecting the common intention of the parties at a moment in which there is a dispute about it is difficult. The occurrence of use of form agreements, contracts of adhesion, and standard clauses makes this exercise even harder, since entering in such agreements, the parties did not necessary share the same intention at the time of concluding the contract. The common intention is limited to the essential elements of the contract, and the entrant depends on the conditions forced on him by the editor of the contract. If no common intention can be discovered, interpretation needs to be carried out by way of objective criteria, such as Articles 1157, 1158, 1159, and 1161 CC and Article 1134, paragraph 3 CC. The presupposition that contracting parties are reasonable persons has a legal ground in Articles 1157 and 1158 CC, two rules on how to ascertain the hypothetical intention based on reasonableness.

### 5.3.2.3. Is a Reasonable Interpretation Possible?

The question arises whether interpreting in a reasonable way is possible in a subjective system such as the Belgian one.

First of all, the role assigned to interpretation depends on the measure in which one separates the phase of performance from the interpretation of an agreement. Interpretation in principle aims at the determination of the obligations of the parties *in abstracto*, separate from how they are performed. However, the need for an exact description of the parties’ obligations by way of interpretation arises in practice during the phase of performance. When obligations are not performed, the judge has to interpret *in abstracto* and apply the contract *in concreto* at once. Consequently, Article 1134, paragraph 3 CC has a role to play regarding the interpretation as well as the performance of contracts.

Second, a reasonable interpretation does not conflict with Article 1156 CC: The aim of interpreting in a reasonable way is finding out the common intention

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125 L. CORNELIS, 1990, p. 583; B. DELCOURT, loose-leaf, II.1.3-113.
126 B. VEECKMANS, 2000, p. 348.
of the parties. Article 1134, paragraph 3 CC merely describes a way for reaching this purpose. It therefore deserves a place between the additional rules to discover the hypothetical intention of the parties. Those rules, used when the real intention of the parties cannot be discovered, are based on objective elements and inspired by reasonableness. Articles 1157, 1158, 1159, and 1161 CC should be seen as application of the more general interpretation principle of Article 1134, paragraph 3 CC.

It needs to be asked whether this viewpoint clashes with the case law of the Court of Cassation, where it judges that the power of the lower judge is limited in the sense that he is not allowed to deny the evidential value of the written act, which means he cannot assign a meaning to the act that is conflicting with its terms. Actually, it does not. Interpreting in a reasonable way means being led by the sense one can reasonably attach to the mutually made declarations, so the object of interpretation is, as the Court of Cassation wants it to be, the written act.\footnote{Ibid., p. 1014.}

According to legal doctrine, a reasonable view on interpretation therefore needs to be supported.\footnote{Ibid., p. 1014.}

Case law embraces this viewpoint as well. Sometimes a reasonable interpretation is grounded on Article 1156 CC.

In the above-mentioned judgment of 7 January 1966, the Court of Cassation judged that the lower judge could, in line with Article 1156 CC, decide that the parties could not have reasonably meant to exclude the passengers from compensation when there clearly was no causal link between the use of alcoholics and the accident. The driver only had sipped from a beer, without really drinking. The exclusion from coverage would, in view of the normal way of life in our society, boil down to the fact that the insurance, which of course was intended to be useful consistent with the common will of the parties, would remain idle words. The Court of Cassation emphasizes that the judge who searches for the reasonable intention of the parties applies Article 1156 CC.\footnote{Cass. 7 Jan. 1966, RW 1965–1966, p. 1846; Pau. 1966, I, p. 595; RGAR 1966, nr. 7709. See, for a similar case, Liège 27 Mar. 1997, RRD 1997, p. 451.}

A mother donated the family home to one of her daughters with a right of usufruct attached. The common intention of the parties was to put the house completely at the disposal of the daughter and her family, while the mother and her husband would still live at the family home. Because of a worsening of the relationship between the parties, co-habituation became impossible, which causes the parents to leave and to writ against their daughter for her expulsion. The judge stated that \textit{the only just solution that reconciles good faith and reality,}
consists of organizing the usufruct according to what the parents would receive in kind on the basis of the real will of the parties.\textsuperscript{135}

A reasonable interpretation can also be grounded on the principle that agreements need to be performed in line with good faith, as it is embodied in Article 1134, paragraph 3 CC.

The binding force of the agreement in which it was stated that a property must be enclosed by a hedge with three rows of barbed wire and in addition with iron wire URSUS to a height of 1 meter was not violated by a judge who said that planting a living hedge agrees with the purpose of the contract.\textsuperscript{136}

In line with the specifications added to a tenancy agreement, the tenant was responsible for the costs of reparations due to wear and tear and old age. However, the judge stated that such a provision needs to be interpreted according to good faith. When the premises are more than a hundred years old, and the landlord and his predecessors in title have never kept the house in good repair, there is no reason not to pay back the rent guarantee.\textsuperscript{137}

A stipulation of a car insurance policy stated that the insurance company had recourse against the insured person when the vehicle, at the moment of the accident, is driven by a person who does not comply with the conditions required by the Belgian law and regulations to drive a vehicle, for instance by a person whose right to drive has been annulled or a person who has not reached the minimum age. According to a Royal Decree, foreigners having their place of residence in Belgium had to replace their foreign drivers licence with a Belgian administrative piece. An Italian, who had not fulfilled this administrative duty, had an accident. Hence, the insurance company proceeded for recovery. The Court of Cassation judged that the non-observance of the administrative formality cannot justify the recourse of the plaintiff, since the principle of agreement-law needs to be interpreted and applied following the principle that contracts need to be performed consistent with good faith.\textsuperscript{138}

In an insurance policy covering water damage, it was stated that compensation was excluded when the building was not heated and the hydraulic installation was not emptied, if there was a causal relationship between the defect and the loss. When a claim arose, the insurance company did not want to compensate. However, the Court judged that agreements are to be interpreted in a reasonable way and need to be performed consistent with good faith.\textsuperscript{139}

\textsuperscript{139} Brussels 17 May 2000, \textit{RGAR} 2002, nr. 13.504.
The Court of Cassation judged that: *In line with Article 1134, 3 CC contracts have to be performed according to good faith. The judge has the power to interpret the agreement looked at from the perspective of the performance in good faith. However, he cannot impose obligations which are irreconcilable with the nature and the purpose of the agreement.* Therefore, the creditor on behalf of whom a mandator gives an irrevocable mandate to a third party to mortgage one or more of these properties in his name is allowed to determine when he wants to exercise his mandate, on the condition that the possibility for the judge to investigate afterwards whether the exercise fulfils the contractual provisions is not devalued.\(^{140}\)

A travel insurance covered, in case the insured person got injured in a foreign country, the organization of medical contacts and, in case the repatriation of the victim was necessary, also the transport back home. The Court of Appeal of Liège judged that the interpretation according to good faith of the agreement implied that this also covers the repatriation of the luggage.\(^{141}\)

In its judgment of 23 March 2006, the Belgian Court of Cassation not only explicitly acknowledged the interpretative function of good faith, whereas in the other judgment the acceptance was rather implicit, it also explicitly grounded it on Article 1134, paragraph 3 CC.\(^{142}\) It is therefore clear that a reasonable interpretation is possible Belgium and that it should be grounded on the principle of good faith as included in Article 1134, paragraph 3 CC.

### 5.3.2.4. Place in the Hierarchy

Cornelis is of the opinion that the general principle of good faith takes precedence over the principle of party autonomy.\(^{143}\) It aims at imposing social rules of conduct, possibly at the cost of rules determined by the parties, and intends to assign to the victim of a denial of the principle of good faith the advantages relied upon.\(^{144}\) Consequently, a reasonable interpretation takes precedence over the traditional subjective viewpoint, as included in Article 1156 CC. However, this opinion cannot be supported, because it minimizes the significance of the party autonomy, which is one of the pillars of the Belgian law of obligations.

Article 1134, paragraph 3 CC is one of the *additional rules to discover the hypothetical intention of the parties.* It therefore has the same place in the hierarchy of interpretation rules as the other rules to discover the hypothetical

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\(^{141}\) Liège 18 Nov. 2008, *DCCR* 2009, p. 97, note C. VERDURE.


intention. Like Articles 1157, 1158, 1159, and 1161 CC, the rule is subsidiary to Article 1156 CC and is only used when the real intention of the parties cannot be discovered. On the other hand, it is ranked above Article 1162 CC, which occupies the lowest place in the hierarchy.

5.3.3. Normative Interpretation

Following some Dutch scholars, M.E. Storme furthered the role of good faith in interpretation. Interpretation should, in his view, not cover the discovery of the common intention of the parties. Understanding interpretation as a determination of the content of a common intention is impossible when the actual intentions of the parties did not completely correspond, which is the case in almost every dispute – otherwise, no dispute would have arisen. Interpretation, which is the whole activity of the judge, should be a very broad concept, encompassing not only the traditional meaning of the concept but also gap filling and even abuse of the law. Storme grounds his viewpoint on Article 1135 CC, which obliges the judge to integrate the different factors that play a role in interpretation. A judge needs to interpret an agreement not according to the ordinary language, not according to the actual intention of the parties, but consistent with the requirements of good faith (which means: what they should mean). This approach is called normative interpretation, since the interpreter does not describe the content of the contract but actually creates a new rule. Interpretation then is the process whereby the whole legal relationship that exists between the parties is determined in line with good faith. Reasonableness,

147 D. Lejeune, K. Swerts & N. Peeters, loose-leaf, II.4-142a; M.E. Storme, 1990, pp. 99 and 117.
fairness, and good faith must be involved in interpretation, since parties should be considered not to have had unreasonable nor unfair intentions. An unreasonable interpretation could, under no circumstances, have been the common intention of the parties, at the most it might have been the intention of one contracting party.\textsuperscript{154} Moreover, good faith must not only be involved but also even has to precede interpretation. First, it needs to be established how the parties should reasonably have understood the contractual arrangement, and only when more than one reasonable interpretation can be put forward, the will of the parties comes up. This order emerges from the division of the Belgian Civil Code: Articles 1134 and 1135 CC are, under the heading \textit{general provisions}, mentioned first, whereas the special provisions on interpretation are deliberated upon later on.\textsuperscript{155}

Storme’s thesis provokes critique, since it exaggerates the function of good faith and minimizes the role of party autonomy.\textsuperscript{156} After all, it has as a consequence that what the parties should have meant according to good faith in the opinion of the interpreter might be put in place of the unmistakable will of the parties, because the will is appreciated as being unreasonable.\textsuperscript{157} Contrary to the reasonable interpretation, this approach favours a way of interpreting in which the interpreter changes provisions of the contract as he himself sees fit.\textsuperscript{158} Therefore, the concept hardly can be called \textit{interpretation}, since the contractual rights and obligations are not established by interpreting the contract but construed by the interpreter on the basis of objective good faith.\textsuperscript{159} Moreover, a normative viewpoint is at odds with Article 1156 \textit{et seq.} CC, which centres around the common intention of the parties and not around what the parties should have meant.\textsuperscript{160} In addition, attributing a broad sense to interpretation might be disadvantageous for legal certainty.\textsuperscript{161} Furthermore, it withdraws gap filling and moderation to a large extent from the reviewing power of the Court of Cassation, since interpretation belongs to the unassailable factual appraisal of the lower

\textsuperscript{154} M.E. STORME, 1990, pp. 119–120.
\textsuperscript{155} Ibid., pp. 120, 127.
\textsuperscript{158} W. VAN GERVE & S. COVEMAEKER, 2010, p. 97.
\textsuperscript{160} J. BAECK, loose-leaf, w.p.
\textsuperscript{161} Ibid., w.p.
judge.\textsuperscript{162} Besides, this expansive viewpoint on interpretation is irreconcilable with the evidential value of writings.\textsuperscript{163} Consistent with the rules of evidence (Arts 1319, 1320, and 1322 CC), the meaning bestowed upon a contract by way of interpretation has to be compatible with its terms. The interpreting judge has to make sure he does not allow any evidence that goes above or against the content of the written agreement. Gap-filling concerns situations the parties did not foresee and, therefore, are not included in the agreement. If the judge would add to the agreement under the pretext of interpreting, he would accept evidence above the content of the act. On the other hand, abuse of the law presupposes that a party acts performing a contractual right. If a judge, again pretending to interpret, denies or moderates contractual rights, he would tolerate evidence that goes against the content of the agreement. Such a broad view on interpretation is therefore difficult to reconcile with the case law of the Belgian Court of Cassation.\textsuperscript{164}

6. The Role of Business Common Sense

In \textit{Rainy Sky S.A. and Others v. Kookmin Bank}, Lord Clarke repeats the importance of business common sense, a notion that is mentioned by Lord Hoffmann in \textit{Investors Compensation Scheme Ltd. v. West Bromwich Building Society}, where he summarized the reigning view on contractual interpretation in five principles. The last one of the principles states:

The ‘rule’ that words should be given their ‘natural and ordinary meaning’ reflects the common sense proposition that we do not easily accept that people have made linguistic mistakes, particularly in formal documents. On the other hand, if one would nevertheless conclude from the background that something must have gone wrong with the language, the law does not require judges to attribute to the parties an intention which they plainly could not have had. Lord Diplock made this point more vigorously when he said in \textit{The Antaios Compania Neviera SA v. Salen Rederierna AB [1985]} \textit{1 AC} 191, 201: ‘… if detailed semantic and syntactical analysis of words in a commercial contract is going to lead to a conclusion that flouts business common sense, it must be made to yield to business common sense’.

Lord Hoffmann does not attach business common sense to the intention of the parties, as might seem on first sight. \textit{The law does not require judges to attribute to the parties an intention which they plainly could not have had should not be}

\textsuperscript{162} S. STIJNS, 2005, p. 60.
connected to the real intention of Article 1156 CC but to the hypothetical intention of Article 1157 et seq. CC. The underlying principle is after all the presupposition that contracting parties are reasonable persons, which has a legal ground in Articles 1157 and 1158 CC, two rules on how to ascertain the hypothetical intention based on reasonableness. Especially, the second aspect of Article 1157 CC is revealing. It is an application of common sense to state that when a provision in a contract is capable of two meanings, the meaning that makes sense should be preferred. Besides, business common sense also fits in the concept of reasonable interpretation. Good faith refers to the demands of social intercourse: acting in line with good faith is acting like a normal reasonable person in the same circumstances would have done.165 It is logical that a normal reasonable (business)man acts according to (business) common sense.

Business common sense thus plays a role in Belgian interpretation, in the subjective approach as well as in the objective one.

6.1. Application to the Facts
Following Lord Clarke in *Rainy Sky S.A. and Others v. Kookmin Bank*, it has to be accepted that two different constructions of the Bonds are arguable. The Bank’s interpretation is that the Bonds did not cover refunds in the event of insolvency under Article XII.3 of the Contracts. The Buyers’ interpretation is that the Bank’s promise in paragraph [3] was that in the sentence *in consideration of your [i.e., the Buyers’] agreement to make the pre-delivery instalments... we hereby, as primary obligor, promise to pay to you, your successors and assigns, on your first written demand, all such sums due to you under the Contract...*, the terms *all such sums* are a reference to the pre-delivery instalments at the beginning of paragraph [3].

Lord Clarke indicates the following: *Since the language of paragraph [3] is capable of two meanings it is appropriate for the court to have regard to considerations of commercial common sense in resolving the question what a reasonable person would have understood the parties to have meant. If the Bank’s construction of the Bonds would be followed, the surprising and uncommercial consequence would result from it that the Buyers would not be able to call on the Bonds on the happening of the event, namely insolvency of the Builder, for which the security of an advance payment bond was most likely to be needed. Such an interpretation therefore makes no commercial sense. Would the same result be attained in Belgium?*

As stated before, the Bonds in *Rainy Sky S.A. and Others v. Kookmin Bank* would, in Belgium, be characterized as a *garantie bancaire à première demande* and, more in detail, as a *garantie de remboursement* or a *garantie de restitution*

d’acomptes. Such a bank guarantee has an autonomous and abstract character that gives rise to literalism, meaning that the content of the guarantor’s obligations are exclusively determined by the guarantee contract or letter of guarantee itself.\textsuperscript{166} This very formal approach is the guiding interpretation principle in the field of bank guarantees, which results in a very limited interpretation power of any interpreter.\textsuperscript{167}

However, in the case at hand, a purely literalist interpretation cannot be maintained, since it leads to two different plausible interpretations. But how to overcome this deadlock? In a judgment of the Commercial Court of Turnout, some guidelines can be found.\textsuperscript{168}

A bank guarantee, drafted in Antwerpen on 26 September 1991, stated that it would be released on 7 October 1991. By way of registered post, the beneficiary of the guarantee appealed to the bank guarantee on 7 July 1993. The bank refused to comply with the demand, because the bank guarantee has expired since 7 October 1991. The judge said:

As the provision is clear, and it constitutes the law between the parties, there is no need for gap-filling nor interpretation. The argumentation of the claimant, to the extent that she expects the Court to interpret the clear provisions according to reasonableness and fairness, cannot be followed […] Ultimately, it needs to be taken in consideration that, when the claimant thinks that there is a discrepancy […], the alleged discrepancy needs to be interpreted in favour of the party who has committed herself, which is in this case the defendant.

Three directions can be derived from this judgment. First, if there is no need for gap filling or interpretation, because the provisions are clear, this, \textit{a contrario},

\begin{footnotesize}
\begin{enumerate}
\item \textsuperscript{167} D. DE MAREZ, 2000, pp. 308-309.
\end{enumerate}
\end{footnotesize}
means that gap filling or interpretation is appropriate in case the contract is ambiguous. Second, the argumentation of the claimant, to the extent that she expects the Court to interpret the clear provisions according to reasonableness and fairness, cannot be followed, because the provisions are clear. Another a contrario reasoning derives from those words that an interpretation consistent with reasonableness and fairness can come into play in case of ambiguity. Third, the judgment clearly states that an alleged discrepancy needs to be interpreted in favour of the party who has committed herself, which is in this case the defendant, which is a paraphrase of Article 1162 CC.

The fact that an interpretation according to good faith is possible in the case of bank guarantees, undermining the principle of literalism, is acknowledged by the above-mentioned judgment from the Court of Appeal of Liège, in which the Court judged that the guarantee formalism does not free the guarantor from the obligation to perform his commitments in good faith. The Court stated that the guarantor cannot invoke formal deficiencies, when doing so would be inconsistent with la loyauté et confiance réciproques en correlation avec les usages admis en affaires.

Another guideline is to be gathered from judgments from the Commercial Court of Brussels.

By way of a repayment guarantee, a bank had committed itself to refund an advance payment that amounted to a sum of DEM 140,220. The contract provided that the guarantee would enter into force when a sum of DEM 140,220 would have been deposited. Due to fiscal legislation, 14 per cent of the total sum was restrained, so that only DEM 123,000 was deposited. When the beneficiary demanded repayment, the bank refused, stating that the guarantee had never taken effect. The Court judged that the scope of the conditions were clear from the letter of guarantee, because the amount of DEM 140,220 is accurately mentioned. Contrary to the argumentation of the plaintiff, the Bank does not have to investigate which was the intention of the parties.

In a case where a counter guarantee did not contain any indication regarding the currency in which it had to be paid, nor regarding the place of payment, the Commercial Court of Brussels judged that in view of intrinsic as well as extrinsic elements it should be investigated, which was the common intention of the parties.

Again, an a contrario reasoning imposes itself. If no search for the common intention is needed when the provisions are clear, an interpretation according to the real will of the parties is appropriate when the contract is ambiguous.

The analysis of case law and legal doctrine creates the following picture. A bank guarantee has an autonomous, abstract, and literalist character, which means that the provisions of the guarantee contract or letter of guarantee should be interpreted literally in order to define the content of the guarantor’s obligations. However, when a literalist approach cannot solve the interpretation problem, the common interpretation rules, consisting of subjective as well as objective rules, come into play.

Applied to the facts of Rainy Sky S.A. and Others v. Kookmin Bank, this means that the interpretation rules of Article 1156 et seq. CC will come into play.

First, verifying the real intention of the parties, according to Article 1156 CC, seems not possible in this case. Second, the judge will check whether the rules to discover the parties’ hypothetical intention are useful. Among these rules, Articles 1158 and 1161 CC might be invoked, which would result in a judgment that favours the interpretation of the Buyers. After all, if the Buyers would not be able to call on the Bonds in case of insolvency of the Builder, this would not coincide with the economy and the general content of the contract. Besides, a reasonable interpretation might be invoked. In that case, the judge would be led by the sense that one can reasonably attach to the mutually made declarations, paying attention to the surrounding circumstances, which would lead to the same outcome as defended by Lord Clarke: a judgment in favour of the Buyers on the basis of business common sense.