[B] The Pendulum Method: Four Phases of the Interpretation

[1] First Objective Phase

The first objective phase includes the rules that only relate to the specific wording of the contract. Individual legal systems agree that the wording of a statement or contract is the starting point of interpretation, regardless of whether the subjective or objective approach prevails. The wording prevails over any other tool of interpretation. This is also true for legal systems and uniform law texts where the basic principle of interpretation is the supremacy of the common intent of the parties over the wording. A judge who is in a position to interpret a contract first sees the text of the contract. The meaning understood at first sight is also an outcome of a judge's interpretation of the text. The meaning given to the wording of the statements or contract is an objective meaning, because it is independent from the intent of the parties, even if they have a common intent. For this reason, the process of interpretation also begins with an objective phase in jurisdictions that adopt the priority of the common intent of the parties as the most basic principle of interpretation.

[2] First Subjective Phase

The task of a judge in the first objective phase of interpretation is to adhere a meaning to the wording of a contract, but the next task is to examine the true intent of the parties that underlies that wording. This is the first subjective phase. The meaning of a term or a contract does not need to be ambiguous for a judge to perform this task. Even if the wording clearly has an apparent meaning, the true intention of the parties may differ from that meaning.

In the first subjective phase, or the second phase of interpretation, the most basic rule is the superiority of the common intent of the parties over the wording of a contract, which is recognized as the most basic principle in most continental jurisdictions and uniform law texts. This principle was first identified by Papinianus in Dig. 50, 16, 219 and Ulpianus in Dig. 2, 1, 15. The first subjective phase begins with the application of the rules of subjective interpretation that...
emanate from this most basic principle. One of these rules is the prohibition on purely literal interpretations, which is recognized by most continental jurisdictions, including the French, Italian, German, and Swiss.\footnote{1372}

[...]

\section*{[3] Second Objective Phase}

Interpretation according to the principle of good faith and fair dealing, first stated by Donellus\footnote{1376} is the primary purpose of this phase. The second objective phase of interpretation is reflected in Romano-Germanic legal systems as the principle of trust, which is based on the principle of good faith and fair dealing.\footnote{1377} In Italian law, this phase is expressed with the emphasis placed on the "common" intent of the parties.\footnote{1378} This phase is represented in common law jurisdictions by the general objective approach to interpretation based on the understanding of a reasonable third person.\footnote{1379} In uniform law texts, the second objective phase of interpretation is expressed more clearly, as the ascertainment of the meaning that a reasonable person would give to a contract or to its terms, when the determination of the intent of the parties is not possible.\footnote{1380}

[...]

\section*{[4] Second Subjective Phase}

In Romano-Germanic legal systems, the principle of trust, which is based on the principle of good faith and fair dealing, requires courts to consider the circumstances in which the parties found themselves when making the term or contract.\footnote{1387} In accordance with this requirement, the principle of systematic interpretation is also conceived broadly so as to include not only the consideration of the other terms in a contract but also of all the circumstances of the parties, which existed at the time of the conclusion of a contract.

[...]
Throughout legal history, at times the subjective approach has prevailed and at times the objective approach has prevailed, but there has always been a search for balance between the two. This search for balance also characterizes the approach of today’s individual legal systems and uniform law.

1362 See, sections §3.02[B][6][a] Article 1362 of the CC. It. (Italian Law); §3.03[A][2] Types or Methods of Interpretation in German Law (German Law); §3.03[B][4][a] Subjective Interpretation (Swiss Law), §3.03[C][2][c] Principles of Literal Interpretation (Turkish Law); §3.04[A][3] The Parol Evidence Rule and Merger Clauses (English Law), supra.

1369 See, sections §3.02[A] [4] [a] Article 1188 (Former Article 1156) of the CC. Fr. (French Law); §3.02[B][6][a] Article 1362 of the CC. It. (Italian Law); §3.03[B][4] Article 18/1 of the OR (Swiss Law); §3.03(C) [2] [a] Article 19(1) of the TBK (Turkish Law), supra.


1371 See, section §2.01 [B][2][a], The Emergence of Principles of Subjective Interpretation in the Classical Period, supra.

1372 See, sections §3.02[A][4][a] Article 1188 (Former Article 1156) of the CC. Fr.; §3.02[B][6][a] Article 1362 of the CC. It.; §3.03[A][3][b] § 133 of the BGB; §3.03[B][5] Principles of Interpretation Developed Through Case Law, supra.

1376 See, section §2.02 Humanist and Naturalist Schools of Law and the Divergence of Approaches among Continental Legal Systems, supra.

1377 See, sections §3.03[A][3][c] § 157 of the BGB (German Law); §3.03[B][1] Generally SwissLaw; §3.03[C][2][b] The Will Theory, the Theory of Declaration, and the Trust Theory (Turkish Law), supra.

1378 See, section §3.02[B][4] Views Pertaining to the Objectivity of the Subjective Interpretation, supra.

1379 See section §3.04[A][2] Objective Approach, supra.

1380 Article 4.1 of the UPICC; §4.03[B][2] Article 4.2 of the UPICC; §4.04[A][2][a] Article 5.101 of the PECL; §4.04[C] [2] [a] Article 58 of the CESL, supra.

1387 See, sections §3.03[A][3][c] § 157 of the BGB (German Law); §3.03[B][1] Generally (Swiss Law); §3.03[C][2][b] The Will Theory, the Theory of Declaration, and the Trust Theory (Turkish Law), supra.

**Referring Principles:**

1. IV.5.1 - Intentions of the parties
2. IV.5.3 - Interpretation in favor of effectiveness of contract