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RESEARCH ARTICLE

Interpretation and Characterisation of Contracts in the New Belgian Civil Code

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Abstract
This article examines the new provisions on contract interpretation and characterisation in Book 5 of the Belgian Civil Code, which entered into force on 1 January 2023. The reform preserves Belgium's traditional subjective approach to interpretation, prioritising the parties' common intention over literal textual meaning, contrasting with the objective or mixed approaches adopted by French law and international instruments. Regarding characterisation, Belgium introduces innovative provisions explicitly addressing contract classification and mixed contracts, filling gaps left by other legal systems. These aspects of the Belgian reform are put intto perspective with comparative observations drawn mostly from French, German, and Dutch law.

Keywords: contracts; interpretation; characterisation; classification; Belgian law; comparative law

Introduction

The reform of the Belgian law of contracts, contained in Book 5 of the new Civil Code, entered into force on 1 January 2023. More than is generally the case in Belgium, the reform of the law of contracts and obligations was deeply rooted in comparative law, and it particularly warrants discussion for this reason. Indeed, for the drafting of each provision, inspiration was systematically drawn from French law, as well as Dutch and German law, the Principles of European Contract Law (PECL), the Draft Common Frame of Reference (DCFR), the Unidroit Principles of International Commercial Contracts (PICC), and the Convention on Contracts for the International Sale of Goods (CISG).[1]

As it would be difficult to summarise the whole reform of the contract law in a few pages, this article focuses on the new Belgian provisions on the interpretation and characterisation of contracts. The choice to concentrate on these issues is not incidental. They occupy a classic and central place in contract law and, as such, provide an interesting vantage point from which to assess the broader ambitions of the Belgian reform. They make it possible, first, to test the legislator's oft-repeated claim that the reform is intended to bring about an evolution rather than a revolution of the law of contracts. Second, and more fundamentally, they bring to the fore the enduring tension between a subjective approach centred on the parties' actual intention and an objective approach grounded in their legitimate expectations or those of a reasonable observer. This tension, while conceptually structuring, is often resolved in practice through nuanced and hybrid judicial reasoning. It permeates a significant

[1]See the references to these sources in the explanatory memorandum of Book 5, [2020–2021] Doc Ch 55-1806/001.

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part of contract law and finds subtly different expressions across legal systems, making interpretation and characterisation especially revealing areas for both doctrinal and comparative analysis.

In respect of interpretation, this article argues that the Belgian reform deliberately reaffirms a traditional and subjective approach to contractual interpretation, even as a shift towards objective or mixed approaches can be seen elsewhere in Europe. The Belgian reform also introduces explicit rules on characterisation and mixed contracts, and those innovative rules set Belgium apart from neighbouring systems and international instruments. Taken together, these points suggest that the Belgian reform is best understood as evolution grounded in tradition.

The article proceeds as follows: it first provides contextual background on the Belgian reform of the law of contracts and an overview of the new rules (Section II), before turning to comparative observations on the interpretation (Section III) and characterisation of contracts (Section IV). On the question of interpretation of contracts, the primary point of comparison will be French law, as the French reform predates the Belgian reform by only a few years and clearly influenced the Belgian legislator in the drafting of most provisions. Any remaining differences are therefore all the more significant. With regard to the characterisation of contracts, however, French law contains no explicit provision directly addressing this issue. The comparative analysis will accordingly be extended to Dutch and German law, both of which also informed the Belgian reform.

The analysis will take as its primary point of reference the black letter rules as adopted by the Belgian legislator. Although these provisions have given rise to some criticism and remain the subject of debate among certain—though by no means all—Belgian legal scholars, and while reference will be made to these dissenting views where relevant, the legislator has nevertheless articulated a clear and deliberate normative position. It is this position that will serve as the premise for the comparative inquiry conducted in this article.

II. The context of the reform

Since the reform is still relatively unknown outside Belgium, some contextual background is warranted. The old Belgian Civil Code was promulgated under the authority of Napoléon in 1804, when the Belgian territories were still under French sovereignty. Despite several attempts, it was not repealed for more than two centuries, and the provisions pertaining to contract law were barely amended during this time, though their meaning was significantly altered under the constant influence of case law.[2]

Fast-forward to 2016, when then minister of justice Koen Geens, who also happened to be an academic, initiated a vast programme of legislative reforms.[3] These reforms were aimed at modernising the legal framework to ensure greater legal certainty and accessibility and to better reflect contemporary societal needs. To this end, he set up several commissions, one of which was tasked with the reform of the law of contracts and obligations discussed in the present article.[4] This commission prepared, from 2017 to 2021, four successive versions of a draft Book 5 of the new Civil Code, which, after being submitted to a public consultation and to the opinion of the Council of State, was finally enacted as a statute on 28 April 2022.[5]

The primary objective of the reform proposed by the commission was to enhance the accessibility of civil law by expressly codifying within the statutory text a multitude of rules that had been developed over the past two centuries by legal scholarship and case law on the basis of the outdated

[2]D Heirbaut and G Martyn (eds), *Un héritage Napoléonien: Bicentenaire du Code civil en Belgique* (Kluwer, 2005).

[3]K Geens, *Le saut vers le droit de demain: Recodification de la législation de base* (Ministry of Justice, 2016), https://bit.ly/droitdemain.

[4]Ministerial decree of 30 September 2017 [2017] MB 91,600. The commission was chaired by Professors Patrick Wéry and Sophie Stijns and its academic members were Professors Eric Dirix, Benoît Kohl, Ilse Samoy, and me.

[5][2022] MB 54,082. See for more details R Jafferali, 'La réforme du droits des contrats: Les principales nouveautés' (2023) *Journal des tribunaux* 21, para 2, p 21ff.

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wording of the old Civil Code. Complementarily, the reform also sought to strengthen legal certainty, notably by resolving certain long-standing controversies, and, where feasible, to introduce simplifications, for instance through the harmonisation of the rules governing restitution following the nullity or termination of contracts. Targeted modernisations were likewise introduced, generally inspired by comparative law, the most emblematic of which is undoubtedly the recognition of the change of circumstances. Finally, the reform aimed at improving the internal coherence between the various books of the new Civil Code and at enhancing the attractiveness of Belgian law on the so-called market for laws.[6]

When examining the text, Parliament stressed that the legislative proposal under consideration did not purport to bring about a revolution, nor did it alter the core foundations of the Civil Code. Rather, it constituted an exercise in recodification, integrating the case law of the Court of Cassation (Belgium's highest civil court) while preserving the underlying principles, within a thoroughly renewed Civil Code. While some observers had taken the view that the recodification did not go far enough, Mr Geens, for his part, considered that a fair and balanced compromise had been achieved.[7]

It is interesting to note that the reform of the Belgian Civil Code did not stop—nor did it even begin—with the adoption of Book 5. Indeed, the law of tort, contained in Book 6 of the new Civil Code, was prepared by a separate commission and entered into force on 1 January 2025. Other aspects of the civil law reform have also been completed to date. Book 1, containing general provisions which are closely connected to the law of contract (such as the concepts of juridical act, public policy, good faith, abuse of right, and willful misconduct), entered into force on 1 January 2023. Books 2.3 and 4, pertaining respectively to couples' patrimonial relationships, inheritance, gifts and wills, entered into force on 1 July 2022. Book 3, containing the law of goods, entered into force on 1 September 2021. Book 8, the first book of the new Civil Code to have been adopted, containing the law of evidence, entered into force on 1 November 2020. Most recently, Book 9.1, pertaining to personal suretyships, entered into force on 1 January 2026. Finally, some texts are currently in discussion in Parliament (such as Book 7 on the law of special contracts, including sale, lease, and service contracts) or are still being drafted (such as Book 10 on the law of time limitation, the second part of Book 9 on real suretyships, and the first two parts of Book 2 on family law).

III. The interpretation of contracts

A. The new Belgian provisions

Although there is no official English translation of the new Belgian Civil Code,[8] the provisions pertaining to the interpretation of contracts can be translated as follows:

> Art. 5.64. Primacy of real intention
>
> In contracts, the common intention of the contracting parties must be sought, rather than focusing on the literal meaning of the terms.
>
> However, where the contract is evidenced in writing, no interpretation of the contract may be given which is manifestly incompatible with the meaning of the written contract, taking into account the elements intrinsic to it and the circumstances in which it was drawn up and performed.

[6] See for more details R Jafferali, 'Présentation et objectifs de la réforme du droit des obligations' in R Jafferali, *Le Livre 5 du Code civil et le nouveau droit des contrats* (Larcier, 2022), para 4ff, p 11ff.

[7] Report on the first reading of the Justice Commission, [2021–2022] Doc Ch 55-1806/004, p 5.

[8] The original text of Book 5 can be consulted in French (www.ejustice.just.fgov.be/eli/loi/2022/04/28/2022A32058/justel), Dutch (www.ejustice.just.fgov.be/eli/wet/2022/04/28/2022A32058/justel), and German (https://reflex.raadvst-consetat.be/reflex/pdf/Mbbs/2023/09/14/141519d.pdf).

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Art. 5.65. Search for the real intention

To ascertain the common intention of the parties, the following guidelines, in particular, shall be taken into account:

1° when a clause is susceptible to two meanings, it should be understood in the sense in which it can have some effect, rather than in the sense in which it could produce none;

2° terms susceptible to two meanings must be taken in the sense that is most appropriate to the subject matter of the contract;

3° what is ambiguous is interpreted by what is customary in the region and sector concerned and in accordance with the usual relations between the parties;

4° all the clauses of the contracts are interpreted in light of each other, giving each one the meaning that results from the entire act;

5° however general the terms in which a contract is drafted, it only includes the subjects on which the parties appear to have intended to contract;

6° when a case is mentioned in a contract for the explanation of the obligation, it is not deemed to have been intended thereby to restrict the extent that the obligation receives by law to the unmentioned cases;

7° the performance given to the contract before a dispute arises between the parties is taken into consideration to interpret the contract.

Art. 5.66. Interpretation in case of doubt

When there is doubt concerning the common intention of the parties, the following rules apply, without prejudice to the rules specific to special contracts:

1° the standard-form contract is interpreted against the party who drafted it;

2° the exemption from liability clause is interpreted against the debtor of the obligation;

3° in all other cases, the clause is interpreted against the beneficiary of this clause.

The contract with a consumer is interpreted in accordance with Article VI.37 of the Code of Economic Law.

B. Overview of the Belgian rules: the survival of the traditional subjective approach

Generally speaking, interpreting a contract aims to determine its meaning. Under Belgian law, the concept is broad and includes the process of filling contractual gaps with implied terms,[9] although the principle of good faith also plays an important role in the latter scenario.[10] Indeed, 'comparative lawyers have long known that the common law-style implication of terms and the civilian-style supplementary interpretation are functional equivalents' and that 'there is no clear dividing line between

[9] F George, P Colson, A Cataldo, and B Fosséprez, *Manuel de droit des obligations* (Larcier-Intersentia, 2024), para 220, p 261; S Stijns, *Verbintenissenrecht*, 4th ed (die Keure, 2025), para 73, p 78; P Wéry, *Livre 5 du Code civil: Les obligations: Les sources des obligations* (Larcier-Intersentia, 2024), para 394, p 448. For a more nuanced approach, see W Buelens, 'Interpretatie en kwalificatie van het contract' in T Vansweevelt and B Weyts (eds), *Handboek Verbintenissenrecht*, 2nd ed (Larcier-Intersentia, 2023), para 428, p 295; I Claeys and T Tanghe, *Nieuw algemeen contractenrecht*, 2nd ed (Larcier-Intersentia, 2023), para 533, p 441.

[10] Art 5.73(2)(1).

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interpretation and implication'.[11] This contribution will, however, focus on the rules pertaining to interpretation *sensu stricto*.

The first principle of interpretation contained in the old Belgian Civil Code of 1804 was that contracts must be interpreted in accordance with the common intention of the contracting parties even if this intention does not correspond to the literal meaning of the words used.[12] Admittedly, some legal scholars had tried to advocate a more objective approach centred—even when the parties' subjective intention can be ascertained—on the ordinary meaning of the words used by a party and their normal understanding by the other party.[13] Alternatively, some authors have argued that an objective approach should at least be employed on a subsidiary basis where the parties' subjective intention cannot be determined.[14] The Court of Cassation has, however, remained faithful to a theory of interpretation primarily based on the parties' subjective intention. For instance, even when the lower court upholds the literal meaning of the contract, the Court of Cassation insists that this does not imply by itself that the lower court has not sought what the parties' common intention was.[15] Conversely, a lower court does not violate the binding character of a contract when it sets aside its literal meaning and prefers to it the meaning resulting from the parties' common intention.[16] Finally, the Court of Cassation refuses to interpret itself a contract because this would require it to ascertain the parties' intention, which—being a factual question—would exceed its constitutional powers.[17] This being said, some judgments of the Court of Cassation nevertheless hint at the possibility of interpreting the contract on the basis of the principle of good faith.[18]

The new Belgian Civil Code has retained the principle already applicable to the interpretation of contracts under the old Code,[19] though this choice has been regretted by some legal scholars.[20] The approach thus remains a subjective one, as the court needs, in the event of a dispute, to attempt to reconstruct the parties' frame of mind at the time of the contract's conclusion.[21] As regards the principle of good faith, it is recognised as having a dual function: supplementing the contract through

[11] S Vogenauer, 'Introduction before Art 5:101' in N Jansen and R Zimmermann (eds), *Commentaries on European Contract Laws* (Oxford University Press, 2018), para 17, pp 749–50. See also H Beale, B Fauvarque-Cosson, J Rutgers, and S Vogenauer, *Cases, Materials and Text on Contract Law*, 3rd ed (Hart Publishing, 2019), p 721.

[12] Art 1156. See for a detailed analysis J Waelkens, *Interpretatie van overeenkomsten en eenzijdige rechtshandelingen* (Intersentia, 2016), para 109ff, p 111ff.

[13] See in particular M Herbosch, 'De dwaling van het consensualisme' (2022) *Tijdschrift voor privaatrecht* 21, para 73ff, p 93ff; ME Storme, 'Rechtszekerheid en vetrouwensbeginsel in het Belgisch verbintenissenrecht' (1997) *Tijdschrift voor privaatrecht* 1861, para 35ff, p 1892ff. See also, for a more nuanced approach stressing that the subjective and the objective approaches do not differ fundamentally in their methods and in their results, X Dieux, *Le respect dû aux anticipations légitimes d'autrui: Essai sur la genèse d'un principe général de droit* (Bruylant/LGDJ, 1995), para 52ff, p 123ff. On the protection of legitimate reliance in the law of obligations, see also S Stijns and I Samoy, 'La confiance légitime en droit des obligations' in S Stijns and P Wéry (eds), *Les sources d'obligations extracontractuelles* (la Charte, 2007), p 47ff.

[14] See Waelkens, note 12, para 145, p 163, and the references cited in note 511; J Tanghe, 'De controle van het Hof van Cassatie op de interpretatie van geschriften in een nieuwe verpakking' (2023–2024) *Rechtskundig Weekblad* 122, para 4ff, p 123ff.

[15] Cass., 6 September 2013, *Pas*., 2013, no 428; Cass., 20 November 2009, *Pas*., 2009, no 681.

[16] Cass., 7 September 2020, no C.19.0131.N; Cass., 4 January 2019, *Pas*., 2019, no 9; Cass., 25 November 2004, *Pas.*, 2004, no 567.

[17] See Cass., 7 November 2024, no C.17.0195.F; Cass., 1 December 2023, no C.23.0072.F; Cass., 27 November 2015, *Pas*., 2015, no 709; Cass., 19 September 2005, *Pas.*, 2005, no 440.

[18] See Cass., 5 June 2014, *Pas*., 2014, no 407; Cass., 23 March 2006, *Pas*., 2006, no 170.

[19] Art 5.64(1).

[20] See later in Section III.D.

[21] See, however, F Peeraer, 'Totstandkoming, geldigheid en interpretatie van contracten en eenzijdige rechtshandelingen: inhoudelijke vernieuwingen, herformuleringen en metonymieën' (2024) *Tijdschrift voor privaatrecht* 1135, para 140, p 1254, who considers that, notwithstanding the text of Art 5.64(1), the parties' common intention must objectively be interpreted, that is, on the basis of a person's behaviour such as it could reasonably be interpreted by the person to which this behaviour was addressed.

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implied terms and preventing the abuse of rights.[22] On the other hand, no interpretative role is expressly attributed to this principle by the new Civil Code.

The main change brought by the reform is the addition of a provision clarifying the courts' power to uphold an interpretation incompatible with the wording of a written contract (Art 5.64 Alinea 2). This resolves a long-standing difficulty in the case law. To exercise (limited) control over the interpretation upheld by lower courts without ruling itself on the facts of the case, which it is forbidden to do,[23] the Court of Cassation had developed the concept of 'violation of the faith due to a document' (*violation de la foi due à l'acte*), which relies on the idea that an interpretation of a written document which is radically incompatible with the wording used in that document violates its evidentiary value.[24] This theory is the functional equivalent of the French concept of *dénaturation*.[25] However, that theory sat uneasily with the text of the (old) Civil Code, which states that the interpretation of the contract must be based on the common intention of the parties irrespective of the wording used.[26] The new Civil Code resolves this tension by confirming the power of lower courts to adopt an interpretation that departs from the literal meaning, provided this interpretation is not 'manifestly incompatible' with the text of the contract, taking into account all its clauses as well as the circumstances in which it was drafted and performed.[27] The parties' behaviour both before and after the formation of the contract is thereby recognised as relevant to ascertaining their common intention.[28] This new legal provision thus confirms that a clause can never be considered as clear and unambiguous in isolation but must always be read in its context.[29]

In any case, ascertaining the parties' common intention therefore remains at the heart of contractual interpretation under the new Belgian law. To help the court in this difficult endeavour, two additional tools are available to it.

First, a series of traditional principles of interpretation are codified to help ascertain the common intention of the parties,[30] for example that each clause of the contract is presumed to have some added value rather than being meaningless (*effet utile*),[31] that the words used must be read in light of the subject matter of the contract,[32] or that regard must be had to usage.[33] Most of these principles were already mentioned in the old Civil Code.[34] They were slightly redrafted in the new Code, notably to specify that the relevant usage comprises not only the usage in use within the country but also the usage of the relevant region or trade sector as well as the habitual relations between the parties,[35] and that regard must be had to the manner in which the contract was performed before the dispute arose between the parties.[36] Moreover, the provision now clarifies that these principles of interpretation enjoy the status of 'guidelines': while their character of legal rules cannot be denied, they are only

[22] Art 5.73(2).

[23] Art 147 of the Belgian Constitution.

[24] See, for example, Cass., 12 December 2023, no P.23.0813.N.

[25] Art 1192 of the French Civil Code; G Chantepie and M Latina, *Le nouveau droit des obligations*, 3rd ed (Dalloz, 2024), art 1192, para 509, p 537; O Deshayes, T Genicon, and Y-M Laithier, *Réforme du droit des contrats, du régime général et de la preuve des obligations*, 2nd ed (LexisNexis, 2018), art 1192, p 428; J Flour, J-L Aubert, and E Savaux, *Droit civil: Les obligations: L'acte juridique*, 18th ed (Lefebvre Dalloz, 2024), para 724, p 941ff; S Rowan, *The New French Law of Contract* (Oxford University Press, 2022), p 125; F Terré, P Simler, Y Lequette, and F Chénédé, *Droit civil. Les obligations*, 13th ed (Dalloz, 2022), para 619, p 721.

[26] On this tension, see R Jafferali, 'La liberté de la preuve en matière commerciale, spécialement de la transaction' (2014) *Revue critique de jurisprudence belge* 662, para 18 ff, p 691 ff.

[27] Art 5.64(2). See on this provision J Tanghe, note 14 above, p 122 ff.

[28] Buelens, note 9 above, para 431, p 299; Wéry, note 9 above, para 396, p 451.

[29] See also, about French law, Beale et al, note 11 above, p 736.

[30] Art 5.65.

[31] Art 5.65(1).

[32] Art 5.65(2).

[33] Art 5.65(3).

[34] Arts 1157–1164.

[35] Art 5.65(3).

[36] Art 5.65(7).

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recommendations addressed to the court and therefore devoid of any binding effect, since they may very well lead to differing interpretations in a given case.[37]

Second, subsidiary rules apply if the court entertains doubt regarding the common intention of the parties.[38] Under the old Civil Code, the contract had to be interpreted, in case of doubt, against the creditor and in favour of the debtor.[39] This principle remains under the new Civil Code, but in a slightly redrafted form: in case of doubt, the contract is interpreted against the beneficiary of the clause,[40] which is generally the creditor, but may be the debtor in cases such as those involving clauses limiting the debtor's liability.[41] A special rule is also included for standard-form contracts, that is, contracts which have not been individually negotiated within the meaning of the EU Directive on unfair terms.[42] The application of the rules applicable to consumer contracts is also reserved.[43] Overall, the traditional subjective approach to contractual interpretation has thus been preserved by the Belgian reform.

C. Contrast with the modern objective approach

This traditional, subjective approach to contractual interpretation, however, contrasts with the more objective approach adopted by other legal systems as well as international instruments. The French reform, adopted in 2016 and revised in 2018, slightly before the Belgian reform, serves as a useful point of comparison.[44] At first glance, the French provisions on contractual interpretation present strong similarities with their Belgian counterparts. Indeed, the interpretation is primarily based on the parties' common subjective intention,[45] subject to the limit of *dénaturation*.[46] Several guidelines are provided to the court to assist it in this task.[47] Subsidiary rules are also provided in case of doubt, in which case the contract is interpreted in favour of the debtor (or against the drafter in the case of a standard-form contract).[48] Yet a significant difference must be emphasised: where the parties' common intention cannot be ascertained, the contract is interpreted in the sense that a reasonable person placed in the same situation would give it.[49]

This move towards a more objective approach to interpretation, applicable where the parties' subjective common intention cannot be ascertained, is expressly inspired[50] by the PECL,[51] the DCFR,[52] and the PICC.[53] Reference can also be made to the CISG.[54] Along similar lines, and subject to certain nuances, German law also provides that—save where the contractual terms are used by both parties

[37] Explanatory memorandum, note 1 above, p 77.

[38] Art 5.66.

[39] Art 1162.

[40] Art 5.66(1)(3).

[41] Art 5.66(1)(2).

[42] Art 5.66(1)(1), Art 5.10, and the explanatory memorandum, note 1 above, p 21, referring to Council Directive (EC) No 93/13 [1995] OJ L 95/29, art 3.

[43] Art 5.66(2).

[44] See Chantepie and Latina, note 25 above, para 500ff, p 527ff; Deshayes et al, note 25 above, art 1188, p 413ff; Flour et al, note 25 above, para 713ff, p 929ff; Rowan, note 25 above, p 115ff; Terré et al, note 25 above, para 602ff, p 704ff.

[45] Art 1188(1).

[46] Art 1192.

[47] Arts 1189 and 1191.

[48] Art 1190.

[49] Art 1188(2).

[50] 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 [2016] JORF 25, p 13.

[51] Art 5:101(3).

[52] Art II.—8:101(3)(a).

[53] Art 4.1(2).

[54] Art 8(2).

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in a specific and atypical sense (*falsa demonstratio non nocet*)—a party's declaration is, in principle, to be interpreted according to the meaning that the addressee could reasonably attribute to it.[55] Likewise, under Dutch law, interpretation turns on the meaning that the parties could reasonably ascribe to the contract and on the expectations they could reasonably have of one another.[56] Finally, English law currently favours an objective and contextual approach as expressed by Lord Hoffmann in *Investors Compensation Scheme Ltd v West Bromwhich Building Society*: '[i]nterpretation is the ascertainment of 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' (principle 1), being understood that '[t]he law excludes from the admissible background the previous negotiations of the parties and their declarations of subjective intent' (principle 3).[57] Therefore, the approach adopted by English law is generally presented as being exclusively objective, since the parties' intention is deemed to be irrelevant for contractual interpretation.[58]

D. Comparative observations

Some authors have regretted that the Belgian reform retained the traditional subjective approach instead of recognising the courts' power to interpret the contract on the basis of a reasonable person's understanding, at least where the parties' common intention cannot be ascertained.[59] Reciprocally, the French reform has been approved based on the idea that 'reliance on objective considerations is not only inevitable but widespread. It should therefore not be disguised'.[60] That said, two observations can be made to contextualise the choice of the Belgian reform to uphold the traditional approach despite these objections.

1. Interpretation in case of doubt

The first observation is that, in the French reform, a hierarchy is established between subjective and objective interpretation: the former enjoys the primacy and the latter is applied only if the parties' common intention cannot be ascertained.[61] Admittedly, this hierarchy is rather theoretical since in practice the objective approach is more commonly followed.[62] But the often-overlooked consequence of the introduction of such a hierarchy is that it necessarily affects the pre-existing hierarchy among interpretation methods.

[55] See H Brox and W-D Walker, *Allgeminer Teil des BGB*, 45th ed (Franz Vahlen, 2021), para (6)6ff, p 63ff; D Medicus and J Petersen, *Allgeminer Teil des BGB*, 11th ed (CF Müller, 2016), para 323ff, p 139ff; J Neuner, *Allgemeiner Teil des Bürgerlichen Rechts*, 13th ed (CH Beck, 2023), para 35(26)ff, p 415ff.

[56] See Hoge Raad, 13 March 1981, ECLI:NL:HR:1981:AG4158, *NJ* 1981/635, note CJH Brunner; DJB Op Heij, 'Uitleg van overeenkomsten of interpretatie van contracten naar Nederlands en Belgisch recht: De interpretatieregeling in het Belgisch BW als inspiratie voor het Nederlandse privaatrecht?' in S De Rey (ed), *Het nieuwe Belgische verbintenissenrecht vanuit Nederlands perspectief* (Lea and Paris, 2024), p 168ff.

[57] [1998] 1 All ER 98, [1998] 1 WLR 896, [1997] UKHL 28; J Beatson, A Burrows, and J Cartwright, *Anson's Law of Contract*, 31st ed (Oxford University Press, 2020), p 175ff; E McKendrick, *Contract Law*, 14th ed (Hart Publishing, 2021), para 9.6, p 180ff.

[58] Rowan, note 25 above, p 122.

[59] See the opinion expressed by I Claeys and M Storme during the hearings organised in Parliament, [2021–2022] Doc Ch 55-1806/004, pp 119 and 134. See and contrast with Buelens, note 9 above, para 484, p 351, who considers that, under the new Civil Code, the interpretation of the contract on the basis of objective good faith is already recognised as a rule subsidiary to the determination of the parties' subjective common intention.

[60] Rowan, note 25 above, p 121. See also Deshayes et al, note 25 above, art 1188, p 417.

[61] Chantepie and Latina, note 25 above, para 503, p 530; Deshayes et al, note 25 above, art 1188, p 418; A Etienney de Sainte Marie, 'Les principes, les directives et les clauses relatives à l'interprétation'(2015) *Revue des contrats*, para 20, p 388; Flour et al, note 25 above, para 721, p 940; Rowan, note 25 above, p 123.

[62] Rowan, note 25 above, p 123. See also, in respect of the DCFR, P Hellwege, 'Objectivity and Subjectivity in Contract Interpretation' in A Burrows, D Johnston, and R Zimmermann (eds), *Judge and Jurist: Essays in Memory of Lord Rodger of Earlsferry* (Oxford University Press, 2013), p 470.

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Indeed, under Belgian and French law, in case of doubt, the contract must in principle be interpreted in favour of the debtor.[63] This principle is not a mere guideline provided to the court; it is a rule that binds the courts under Belgian law,[64] though this is discussed by some authors under French law.[65] Traditionally, doubt existed when the parties' common intention could not be ascertained with certainty.[66] Yet, in French law, a new rung has been added to the ladder: interpreting the contract in favour of the debtor now requires determining not only that the parties' common intention cannot be ascertained but also that even a reasonable person would entertain a doubt as to the meaning of the contract.[67]

The nature of the doubt required has thus changed in character: while the content of the parties' common intention and the possibility of ascertaining it are purely factual questions, the objective meaning given to the contract by a reasonable person is much more abstract and implies a normative determination of what must be considered reasonable. Does this latter approach even leave room for doubt?[68] As a commentator rightly points out,

> *contra proferentem* interpretations risk remaining a dead letter if they apply only where the clause is incomprehensible to a reasonable person: not only will such occasions be few and far between, but it is hard to see how one could adopt a meaning favourable to the debtor or adhering party when no rational meaning can be gleaned from the clause.[69]

At the very least, one can assume that the cases of interpretation in favour of the debtor (or against the drafter of a standard-form contract) will be much less frequent under the French reform, since a reasonable interpretation can often be found.[70] This constitutes, in my view, an argument in favour of upholding the traditional approach, especially since the Belgian reform was intended to provide greater protection for the weaker party.[71] Indeed, it appears that the *contra proferentem* rules of interpretation will apply more frequently under Belgian than under French law.

2. The blurred distinction between the subjective and the objective approach

At any rate, the distinction between the subjective and the objective approaches to contractual interpretation should not be drawn too sharply. This has been recognised in Belgian contract law[72] and even more generally outside of contract law.[73]

On the one hand, the parties' common intention is a mental state which is not immediately perceptible and may not even exist.[74] It must necessarily be reconstructed by the court based on the available evidence, namely objective facts (such as the contract's wording, declarations made by the parties before the conclusion of the contract, or the way in which the contract was performed by them

[63] See earlier, Sections III. A and III. B.

[64] Wéry, note 9 above, para 397, p 453.

[65] See and contrast Chantepie and Latina, note 25 above, para 507, p 535; Flour et al, note 25 above, para 722, p 940.

[66] In Belgium, Wéry, note 9 above, para 397, p 453. In France, Deshayes et al, note 25 above, art 1190, p 424.

[67] Deshayes et al, note 25 above, art 1190, p 424; Flour et al, note 25 above, para 719, p 937; C Grimaldi, *Droit des contrats* (droitdescontrats.fr, 2025/3), para 293.

[68] Posing the question (but answering positively), Deshayes et al, note 25 above, art 1188, p 418. See also Waelkens, note 12 above, para 617, p 853, who takes the view that the *contra proferentem* rule should apply where the client can demonstrate that the standard contract admits of several reasonable interpretations.

[69] Free translation of Etienney de Sainte Marie, note 61 above, para 26, p 390.

[70] Flour et al, note 25 above, para 719, p 937.

[71] Explanatory memorandum, note 1 above, p 7.

[72] Dieux, note 13 above, para 55, p 128ff; PA Foriers, *Groupes de contrats et ensembles contractuels: Quelques observations en droit positif* (Bruylant/LGDJ, 2006), para 40, p 58; R Jafferali, *La rétroactivité dans le contrat: Etude d'une notion fonctionnelle à la lumière du principe constitutionnel d'égalité* (Bruylant, 2014), para 106, p 206.

[73] R Dworkin, *Law's Empire* (Harvard University Press, 1986), p 53ff.

[74] Terré et al, note 25 above, para 607, p 707.

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in tempore non suspecto).[75] The additional guidelines provided to interpret the contract, while being presented as tools to help the court ascertain the common intention of the parties, could alternatively be seen as factors 'which have nothing to do with the subjective state of mind of the parties' and are therefore in reality objective by nature.[76] Finally, to reconstruct the parties' common intention based on the available evidence and guidelines, the court uses its own common sense so that the so-called subjective interpretation is in fact primarily a judicial interpretation.[77]

On the other hand, the purportedly objective viewpoint of the reasonable person takes into account the specific circumstances in which this particular contract was concluded by these specific parties, and is thus to some extent subjectivised.[78] But, more fundamentally, the 'reasonable person' has no more concrete existence than the parties' common intention. It is also ultimately a construction by the judges who, even if they must go beyond their personal assessment,[79] will inevitably be tempted to consider themselves as the reasonable person *par excellence*.[80]

In the end, both approaches—subjective and objective—boil down to the discretionary assessment by the court of what the contract concluded by the parties ought to mean. Moreover, both approaches often lead in practice to the same outcome,[81] which may explain why the courts do not always distinguish between the subjective attempt to ascertain the parties' common intention and the application of the (more objective) guidelines provided to help determine such common intention.[82] Viewed in this perspective, the question of the choice of the interpretation model, whether subjective or objective, is mostly theoretical.

However, this does not mean that the distinction between these two approaches to interpretation is wholly irrelevant. It can indeed have secondary consequences. For instance, 'a consequence of the predominantly subjective approach in France is that issues of interpretation are regarded as questions of fact, whereas under the objective approach in England they are questions of law'.[83] The chosen approach is also illustrative of the legal system's core values.[84] Accordingly, the subjective approach exclusively recognised in Belgium is in line with other rules, such as the nullity of the contract whose subject-matter cannot be ascertained without a new agreement of the parties,[85] the prohibition for the court to replace a clause which is null and void with another clause which is not based on the consent of the parties,[86] or the possibility of rectifying a contract that contains an involuntary discrepancy between the parties' common intention and their stated intention.[87]

In conclusion, although the Belgian legislator's decision to uphold the traditional principle of interpretation based on the parties' subjective intention may appear out of step with the more objective approach adopted in neighbouring legal systems and international instruments, its practical impact remains limited, and it appears consistent with the core principles of the Belgian Civil Code.

[75] P Hellwege, note 62 above, p 456; S Voganauer, 'Art 5:101: General Rules of Interpretation' in N Jansen and R Zimmermann (eds), *Commentaries on European Contract Laws* (Oxford University Press, 2018), para 6, p 757.

[76] H Beale et al, note 11 above, p 724. See also Etienney de Sainte Marie, note 61 above, para 10, p 386.

[77] P Hellwege, note 62 above, p 456.

[78] P Hellwege, note 62 above, p 462; Vogenauer, note 75 above, para 6, p 758.

[79] Flour et al, note 25 above, para 721, p 939.

[80] C Grimaldi, note 67 above, para 292; Terré et al, note 25 above, para 609, p 710. See also Etienney de Sainte Marie, note 61 above, para 11, p 386.

[81] R Cabrillac, 'L'interprétation du contrat: le nouveau droit français à la lumière du droit comparé' in G Decocq, P-Y Gauthier, A Lepage, and J Passa (eds), *Etudes en l'honneur du Professeur Jérôme Huet* (LGDJ, 2017), p 49; H Beale et al, note 11 above, p 727; P Hellwege, note 62 above, pp 457–58.

[82] Buelens, note 9 above, para 434, p 306.

[83] Rowan, note 25 above, p 124.

[84] C Valcke, 'Contractual Interpretation at Common Law and Civil Law: An Exercise in Comparative Legal Rhetoric' in JW Neyers, R Bronaugh, and SGA Pitel (eds), *Exploring Contract Law* (Hart Publishing, 2009), 77, p 78.

[85] Art 5.49(1).

[86] Cass., 23 March 2006, *RCJB*, 2007, p 422, note C. Cauffman.

[87] Art 5.32.

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IV. The characterisation of contracts

A. Concept of characterisation and new Belgian provisions

The concept of *qualification du contrat* appears more difficult to translate into English than that of *interpretation*. Under Belgian and French law, the *qualification* immediately follows the *interpretation* and consists of classifying the contract within the legal category to which it belongs (such as sale, lease, service, etc.).[88] This allows determination of the rules applicable to all contracts of this category, which is usually rendered in English by the concept of 'implied terms in law'.[89] These implied terms are generally default rules from which the parties are permitted to derogate by common agreement (*règles supplétives*), but some of them cannot be derogated from, at least at the moment of concluding the contract. In this regard, Belgian law distinguishes between rules aimed at protecting the weaker party (*règles impératives*)[90] and rules aimed at safeguarding the general interest (*règles d'ordre public*).[91] This distinction roughly corresponds to the French distinction between *ordre public de protection* and *ordre public de direction*.[92]

To translate this concept of *qualification*, I have chosen the term 'characterisation', which is consistently used to describe the same intellectual operation, albeit in the context of conflicts of laws.[93] The term 'classification' could also have been chosen but appears to be generally used in a less technical sense.[94] As for the term 'qualification', it seems more ambiguous since it can also refer to '[a] modification or limitation of terms or language; esp., a restriction of terms that would otherwise be interpreted broadly'.[95]

The choice of the proper translation is rendered even more complex by the fact that the concept of *qualification* is generally ignored in international instruments such as the PICC and PECL, and is only partially addressed in the DCFR. The reason for such omissions may be explained by the fact that, as we will see, the process of *qualification* appears to be the functional equivalent of other legal institutions.

Subject to the preceding observations, I will examine first the review which the court may exercise over the characterisation chosen by the parties (Section IV.B). I will then discuss the rarely examined question of the characterisation of mixed contracts (Section IV.C).

B. Review of the characterisation of the contract by the court

The new Belgian Civil Code contains the following provision (my translation):

> Art. 5.68. Recharacterisation of the contract
>
> The characterisation given to the contract by the parties may only be disregarded where it is incompatible with the clauses of the contract or with mandatory rules or rules of public policy.

A distinction is thus made depending on whether the parties have characterised their contract at the time of conclusion. If they have failed to do so and if the category to which the contract belongs is

[88] In Belgian law, Buelens, note 9 above, para 463, p 334; F Pollefeyt, M Cuvelier, and B Tilleman, 'Tussen definitie en doel: her(r)ijking van de kwalificatie van bijzondere contracten' in *Preadviezen VVSRN* (Kluwer, 2025), p 3; J Van Meerbeeck, 'La (re)qualification du contrat: contrat d'hypothèque ou voyage en Chine ?' (2025) *Revue pratique de l'immobilier* 9; Wéry, note 9 above, para 398, p 454. In French law, G Chantepie, 'Contrats: effets' in *Répertoire de droit civil* (Dalloz, 2025), para 14; Terré et al, note 25 above, para 603, p 704. See also, in Dutch law, Hoge Raad, 31 January 2025, ECLI:NL:HR:2025:167, para 3.1.2; Hoge Raad, 20 December 2019, ECLI:NL:HR:2017:405, para 3.2.3.

[89] H Beale et al, note 11 above, p 766.

[90] Arts 1.3(5) and 5.58(2).

[91] Arts 1.3(4) and 5.58(1).

[92] Terré et al, note 25 above, para 495ff, p 584ff.

[93] BA Garner (ed), *Black's Law Dictionary*, 9th ed (West, 2009), sv characterisation.

[94] Ibid, sv classification.

[95] Ibid, sv qualification.

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relevant to determining the outcome of their dispute, the court is bound to determine the proper characterisation of the contract pursuant to an uncodified rule of procedural law (*jura novit curia*).[96] If, however, the contract has been characterised by the parties, Article 5.68 of the Belgian Civil Code provides a specific solution. Indeed, the characterisation given to the contract by the parties may only be disregarded where it is incompatible with the clauses of the contract or with mandatory rules or rules of public policy. For instance, if the parties have characterised their contract as a contract for services while it results from its stipulations that the service provider stands in a subordinate relationship to the client, the contract must in reality be characterised as an employment contract.[97] However, where the contract is open to several possible characterisations, the court is bound by the choice made by the parties. By contrast, in other legal systems such as Dutch law, characterisation is a purely objective question that is independent of the parties' common intention.[98]

The choice of the Belgian legislator to dedicate a provision of the new Civil Code to the characterisation of contracts is noteworthy. Indeed, no similar provision can be found in international instruments such as the PECL, the DCFR, or the PICC. A possible explanation for this absence is that, with the exception of the DCFR, these international instruments are confined to the general law of contracts. In the absence of distinct categories of specific contracts, the need to characterise a contract disappears, and the concept itself therefore does not require explicit treatment.

Another reason may be that the question of characterisation is often treated as being of a purely procedural nature. This is the case in French law, where slightly different rules apply. Indeed, the court is not bound by the name given by the parties to their contract. If the chosen category does not correspond to the content of their agreement (as interpreted pursuant to the rules set out earlier), the court can therefore restore the contract's proper characterisation.[99] However, this rule is based not on the Civil Code but on Article 12 of the Code of Civil Procedure, which requires the court to settle the dispute in accordance with the applicable rules of law and to give or restore the exact characterisation of the facts and juridical acts in dispute without regard to the name that the parties may have proposed.[100]

The reason why the problem of characterisation is often overlooked in international instruments may also be more profound. Indeed, it appears that the issue addressed by the characterisation of contracts under Belgian and French law is often treated in other legal systems from a different perspective. German law can be taken as an illustration of this trend.[101] Some authors consider that when the parties have improperly characterised a contract, for example by designating a sales contract as a lease, this error in designation must be rectified, even when intended by the parties, because the classification of a juridical act within one of the legal categories or 'types' is a purely legal question.[102] Reference is sometimes made in this respect to the maxim *falsa demonstratio non nocet*, that is, the principle of interpretation pursuant to which the parties' common intention prevails over the improper wording they have chosen.[103] One must, however, observe a shift in the use of the maxim, or perhaps an extended meaning attributed to it, since it is normally applied to interpret the contract's wording in a

[96]See C Botman, 'Principe dispositif et concours d'actions en matière de vente' in R Jafferali et al (ed), *Entre tradition et pragmatisme: Liber amicorum Paul Alain Foriers* (Larcier, 2021), p 173; J-F van Drooghenbroeck, 'Le juge et le contrat' (2007) *Revue générale de droit civil* 595.

[97]See Cass., 10 October 2011, no S.10.0185.F.

[98]See Hoge Raad, 31 January 2025, ECLI:NL:HR:2025:167, para 3.1.2; Hoge Raad, 20 December 2019, ECLI:NL:HR:2017:405, para 3.2.2.

[99]Terré et al, note 25 above, para 603, p 705.

[100]Chantepie, note 88 above, para 14; A Danet, 'Principes directeurs du procès' in *Répertoire de procédure civile* (Dalloz, 2020), para 169.

[101]Jafferali, note 72 above, para 321ff, p 738ff.

[102]W Flume, *Allgemeiner Teil des Bürgerlichen Rechts*, II, *Das Rechtsgeschäft*, 4th ed (Springer, 1992), para 20(2), p 406; Neuner, note 55 above, para 40(26), p 473.

[103]C Armbrüster, '§ 117 Scheingeschäft' in FJ Säcker et al (ed), *Münchener Kommentar zum Bürgerlichen Gesetzbuch*, 10th ed (Beck, 2025), para 18.

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special sense used by the parties which derogates from its usual significance in the common speech.[104] In other words, the maxim is normally applied to the meaning of words used in the contract, not to the category chosen to designate the contract itself. Other authors seem to consider, in a more direct way, that the correction of the characterisation erroneously attributed by the parties to the contract belongs to the sphere of interpretation.[105] Finally, when the improper characterisation results in the nullity of the contract, the problem is addressed through the doctrine of conversion (*Konversion*). While the majority of authors acknowledge the specificity of this doctrine, some of them still see it as a mere application of the interpretation of contracts or of the partial nullity.[106]

Two significant examples of *Konversion* can be given to illustrate its potential overlap with the characterisation of contracts. In one case, a contract purporting to transfer the right *in rem* of usufruct in violation of § 1059(1) of the BGB was converted into the contract foreseen in § 1059(2), that is, a contract limited to the personal obligation to grant the exercise of the usufruct.[107] In a similar way, the French Court of Cassation decided at the same period that, when a right *in rem* could not validly be granted (because a right of easement cannot impose a positive obligation), the clause was not to be annulled but only granted a personal right.[108] Interestingly, the solution was based not on the doctrine of *Konversion*, which is not generally recognised under French law, but on the power of the lower court to interpret contracts subject to the prohibition of *dénaturation*.

In the second case, a commercial company (*offene Handelsgesellschaft*) which did not have any commercial objective was converted into a civil company (*bürgerlichrechtliche Gesellschaft*).[109] A parallel can be drawn with a similar Belgian judgment which, through the doctrine of characterisation, transformed a public limited company (*société anonyme*) which did not have any commercial objective into a non-profit organisation (*association sans but lucratif*).[110]

The Belgian legislator was well aware that *Konversion* and characterisation can, to a certain extent, be considered functional equivalents. Indeed, the explanatory memorandum notes that 'it has not seemed necessary to devote a provision to the conversion of invalid acts, as this can already be achieved through Article 5.68 relating to the recharacterisation of the contract'.[111] The Belgian legislator thereby took a position in an ongoing scholarly debate. In a well-known paper published in the 1960s, Professor Jan Ronse had advocated the recognition of the doctrine of *Konversion* under Belgian law, drawing inspiration from its counterparts in Dutch and German law.[112] A parallel can also be drawn between *Konversion* and partial nullity,[113] which is well recognised under the new Civil Code.[114] Other authors, however, were sceptical that the doctrine of *Konversion* could be recognised as such under Belgian law.[115] The reason lies in the fact that the doctrine of *Konversion* is based on what the parties would reasonably have agreed had they been aware of the nullity of their

[104]See Neuner, note 55 above, para 35(28), p 415.

[105]F Dorn, '§§139–141. Nichtighkeit II' in M Schmoeckel (ed), *Historisch-kritischer Kommentar zum BGB*, I (Mohr Siebeck, 2003), para 23, p 776.

[106]Ibid, para 30ff, p 781ff.

[107]RG JW 1910, 801; Flume, note 102 above, para 32(9), p 589.

[108]Cass., 15 November 1910, *D*, 1911, I, p 326.

[109]BGHZ 19, 269; Flume, note 102 above, para 32(9), p 596.

[110]Civ Dendermonde, 12 May 1966, *RW*, 1969–1970, col 1975, note P Crab, *RPS*, 1970, p 254, obs P Coppens.

[111]Explanatory memorandum, note 1 above, p 75 (see also p 80).

[112]J Ronse, 'Gerechtelijke conversie van nietige rechtshandelingen' (1965) *Tijdschrift voor privaatrecht* 199.

[113]F Peeraer, *Nietigheid en aanverwante rechtsfiguren in the vermogensrecht* (Intersentia, 2019), para 615ff, p 551ff; Pollefeyt et al, note 88 above, para 21, p 17.

[114]Art 5.63.

[115]L Cornelis, *Algemene theorie van de verbintenis* (Intersentia, 2000), para 573, p 725ff; Jafferali, note 72 above, para 324, p 721ff.

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contract.[116] Such a hypothetical intention is difficult to reconcile with the premises of Belgian contract law, which, as we have seen, remains deeply rooted in a subjective conception of contractual intention.[117]

An illustration of this can be found in a judgment of the Court of Cassation of 23 March 2006.[118] Under Belgian law, indexation clauses are subject to strict restrictions under the Act of 30 March 1976, on pain of absolute nullity. In a case where these provisions had not been complied with, the court of appeal sought to avoid annulling the contract by observing that, at a later stage of the works, the parties had agreed on a new indexation clause that complied with the 1976 Act, and that this new indexation clause should also replace the unlawful clause for the earlier phase of the works. This decision was, however, quashed by the Court of Cassation on the ground that a clause which is null and void cannot be replaced by another clause that is not supported by the parties' consent.

Generalising from this solution, the Belgian legislator appears justified in having refused to recognise the institution of *Konversion* as such. It appears more consistent with the Belgian tradition to rely instead on the institution of characterisation, which, unlike *Konversion*, is based on the parties' common and actual intention rather than on the hypothetical intention of a reasonable person placed in the same circumstances.

In conclusion, the question of the proper characterisation of the contract is probably not ripe for a common international solution as, depending on the foundations and particularities of each legal order, it can also be addressed from very different angles such as procedural law, interpretation, partial nullity, and *Konversion*.

C. Characterisation of mixed contracts

A 'mixed contract' can be defined under Belgian law as a contract which includes several transactions, each falling into a different legal category. The typical example is the sale of a machine coupled with a maintenance contract for the same machine. This approach differs from Article 6:215 of the Dutch Civil Code, where a 'mixed contract' is understood as a contract which, *as a whole*, falls simultaneously into different legal categories without being susceptible to being split into different transactions.[119]

The new Belgian Civil Code provides in respect of mixed contracts (my translation):

> Art. 5.67. Characterisation of mixed contracts
>
> Where a contract contains clauses that fall under different categories of contracts, each clause is subject to the rules that apply to the category to which it belongs.
>
> However, where a contract contains, as an accessory, clauses falling under a category other than that to which the contract principally belongs, the entire contract is subject, with the required adaptations, to the rules applicable to it in principal order, unless by their nature the accessory clauses concerned require their own regulations.

[116] § 140 BGB; Ronse, note 112 above, p 213ff. See also, under the new Civil Code, Peeraer, note 21 above, para 127, p 1243.
[117] See earlier, Section III.
[118] Cass., 23 March 2006, *RCJB*, 2007, p. 422, note C. Cauffman.
[119] ALM Keirse, note under Hoge Raad, 10 March 2017, ECLi:NL:HR:2017:405, *NJ* 2017/336, para 4; H Schelhaas and J de Vogel, 'De kwalificatie van bijzondere contracten naar Nederlands recht' in *Preadviezen VVSRN* (Kluwer, 2025), para 13, p 57; WL Valk and JJ Valk, 'Commentaar op art. 6:215 BW' in *T&C BW* (Kluwer, 2025), para 1; S van Gulijk, 'De kwalificatie van (bijzondere) overeenkomst naar Nederlands en Belgisch recht' in S De Rey (ed), *Het nieuwe Belgische verbintenissenrecht vanuit Nederlands perspectief* (Lea and Paris, 2024), p 150; S Verbeek-Meinhardt, 'Artikel 215: Gemengde overeenkomst' in *GS Verbintenissenrecht* (Kluwer, 2009), para 11.

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> This article applies unless the parties decide otherwise and subject to any relevant mandatory or public policy rules.

More than the precise content of this provision, which leaves wide discretion to the courts, its importance lies in the fact that the characterisation of mixed contracts is expressly addressed. Indeed, as the DCFR notes, '[t]here are few legislative provisions on this topic'.[120] In particular, there is no equivalent provision in the French or German civil codes, nor in the PECL or the PICC. The Belgian text is therefore directly inspired by Article II.—1:107 of the DCFR and, to a lesser extent, by Article 6:215 of the Dutch Civil Code.[121] Article 3(2) of the CISG, which takes into account 'the preponderant part of the obligations of the party who furnishes the goods', is also based on a similar rationale to the one underpinning Article 5.67(2) of the Belgian Code.

The regime of mixed contracts under the new Belgian Code can be summarised as follows. The general rule, expressed in Article 5.67(1), is that each transaction included in the contract is governed by its own rules (distributive approach).[122]

> Thus, for example, if a unilateral promise to sell is included in a lease agreement, each transaction remains in principle subject to its own rules. This solution is favoured for reasons of legal certainty because it allows the judge, when the parties have not clearly expressed their intentions, to revert to the legal regime applicable to the various operations that make up the mixed contract.[123]

Another justification is that '[i]t will often be a mere matter of chance whether there is one contract or two. This suggests that the practical results should preferably not differ depending on whether the parties conclude one contract or two'.[124]

An exception is immediately made in Article 5.67(2), which significantly reduces the practical implication of the general rule: if one part of the contract can be considered predominant, the other, ancillary parts are 'absorbed' by the predominant part and governed by the rules applicable to the latter. 'Thus, for example, if a contract for the sale of a standard kitchen includes a service for its installation and this installation is completely incidental in the intention of the parties (particularly with regard to the respective value of the kitchen furniture and the service), then the contract is considered as a sale in its entirety.'[125] This absorption by the dominant part of the contract calls for two nuances.

First, the ancillary parts of the contract are governed by the rules applicable to the dominant part 'with the required adaptations'. 'Thus, if, in the aforementioned example, the installation has a hidden defect, the rules on the guarantee against hidden defects in the sale, normally applicable only to defects affecting the good, will have to be applied by analogy to the hidden defects of the installation.'[126]

Second, the rules applicable to the dominant part of the contract also apply to its ancillary parts 'unless by their nature the accessory clauses concerned require their own regulations'.

> Thus, for example, the clause on applicable law, the clause on choice of forum or the arbitration clause, although of an ancillary nature, cannot be absorbed by the legal category to which the

[120] C von Bar and E Clive (eds), *Principles, Definitions and Model Rules of European Private Law: Draft Common Frame of Reference (DCFR) Full Edition*, I (Sellier, 2009), art II.—1:107, notes, 1, p 157.

[121] Explanatory memorandum, note 1 above, p 78.

[122] Criticising this legislative choice, see Pollefeyt et al, note 88, para 25, p 20.

[123] Explanatory memorandum, note 1 above, p 78.

[124] von Bar and Clive, note 120 above, p 155.

[125] Explanatory memorandum, note 1 above, p 79.

[126] Ibid.

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> main contract belongs (sale, lease, etc.) because they produce their own effects which could not be subject to the rules applicable to the main contract without distorting these rules.[127]

Finally, pursuant to Article 5.67(3), '[t]his article applies unless the parties decide otherwise and subject to any relevant mandatory or public policy rules'.

> Thus, if it appears that the parties clearly intended to conclude a *sui generis* transaction that is not directly related to any contract regulated by law, they remain free to do so, even if the transaction concluded borrows certain features from regulated contracts. However, this freedom is limited by mandatory or public policy rules, which cannot be circumvented in this way.[128]

This being said, the relevant mandatory or public policy rules will need to be interpreted carefully to determine whether they apply to the mixed contract or whether, because of its specificity, it falls outside of their scope.

V. Conclusion

The interpretation and characterisation of contracts in the Belgian reform of contract law manifest clear adherence to traditional principles, notably the subjective approach to interpretation. By reaffirming that the primary objective of contractual interpretation is ascertaining the contracting parties' common intention, the new Belgian Civil Code distinguishes itself from recent international trends exemplified by French law as well as international legal instruments which increasingly adopt an objective or mixed approach.

The decision to preserve the subjective approach illustrates the Belgian legislature's intention to maintain robust protection of contractual autonomy, privileging the parties' genuine intent over the understanding of a theoretically constructed 'reasonable person'. The addition of interpretative guidelines and subsidiary rules, designed to facilitate judicial determinations in ambiguous cases, further refines this traditional framework. Nevertheless, as comparative analysis reveals, subjective and objective approaches to interpretation are not rigidly distinct in practical judicial reasoning. Courts inevitably blend subjective reconstruction with objective normative standards, demonstrating judicial discretion that transcends these doctrinal concepts. Consequently, the distinction remains significant primarily for its secondary legal implications—such as the status of interpretation as a matter of fact or law—and for reflecting underlying legal system values concerning contractual freedom and judicial intervention.

In characterising contracts, Belgium's explicit regulation through Article 5.68 and the innovative handling of mixed contracts in Article 5.67 represent notable clarifications compared to other civil codes and international instruments, which typically overlook characterisation or treat it only implicitly through procedural or interpretative techniques. The Belgian legislator's explicit codification seeks to clarify the courts' role and to respect the parties' characterisation, subject to compliance with mandatory provisions and public policy.

Taken together, these provisions reflect a reform that is both rooted in tradition and open to evolution. Whether or not one agrees with the choices made by the Belgian legislator, the Belgian reform of contract law constitutes a new topic worthy of academic investigation by comparative lawyers.

Competing interests. The author declares none.

[127] Ibid.
[128] Ibid, pp 79–80.

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