

# Theoretical Problems of the Interpretation of Contracts in the Thai Civil and Commercial Code

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## Abstract

*The Thai Civil and Commercial Code contains two main provisions dealing with the interpretation of a contract, namely, Sections 171 and 368. While the majority view takes the approach that these two provisions can be applied simultaneously, opponents argue that Section 171 must be applied before Section 368, provided that the parties' common intention can be found. It is concluded that the second interpretative approach provides a more systematic method of interpretation than the first one on the basis that, inter alia, it distinguishes the application of Sections 171 and 368 from each other. Under the first approach, it is unclear how Section 368 interacts with Section 171. Moreover, it is not altogether clear how this approach deals with non-mandatory rules. However, the second approach functions effectively in most of the studied cases and does not cause inconsistent sequences of interpretation. Firstly, it seeks the parties' common true intention, which can be established either subjectively or objectively, according to Section 171. Secondly, if Section 171 cannot be applied; the applicable non-mandatory rule takes precedence. Finally, if the non-mandatory rules are not applicable, the contract is to be interpreted based on ordinary usage and good faith according to Section 368.*

Keywords: Interpretation of contract — True intention — Good faith

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## I. INTRODUCTION

The Thai Civil and Commercial Code contains two main provisions that concern the notion of interpreting contracts, namely, Sections 171 (“In the interpretation of a declaration of intention, the true intention is to be sought rather than the literal meaning of the words or expressions”) and 368 (“Contracts shall be interpreted according to the requirements of good faith, ordinary usage being taken into consideration”). There is no consensus among legal scholars in relation to the application of these two provisions. A number of scholars, who appear to be of the majority view, propose that Sections 171 and 368 can be applied together when interpreting a contract. The Thai courts also seem to support this approach, and one of the supporting reasons is that Sections 171 and 368 have their origins in Sections 133 and 157 of the German Civil Code (“BGB”), respectively. However, opponents insist that, when interpreting a contract, it is necessary to apply Section 171 first to seek the mutual intentions of the parties. This is based on the prevalence of the true intention of the contracting parties over other things, including ordinary usages or even good faith, which complies with the notion of freedom of contract.

The main aim of this article is to analyse whether (i) the approach of applying a combination of Sections 171 and 368 and (ii) the approach of applying Section 171 before Section 368 (if Section 171 can be applied, it is not necessary to apply Section 368) would make better sense doctrinally and provide cases with a fairer outcome. Some theoretical uncertainties in relation to the interpretation of contracts will also be analysed. In short, the studied issues can be summarised as follows:

- 1) When does a contract need to be interpreted, i.e., is it still permitted to interpret a contract if its contents are already clear?
- 2) What is the meaning of true intention in Thai law? Does it refer to an internal or external intention, or can it be both of them?
- 3) Is the approach that involves combining Sections 171 and 368 or the approach that entails applying Section 171 before Section 368 a more suitable legal analysis when interpreting a contract in Thai law?
- 4) To what extent can the true intention contradict good faith?

## II. THEORETICAL FRAMEWORK OF THE INTERPRETATION OF CONTRACTS IN THE THAI CIVIL AND COMMERCIAL CODE

The theoretical foundation of the interpretation of contracts in Thai law is provided in this section, and the controversial theoretical issues among Thai scholars are also pointed out, where available.

### A. Foreign Laws from Which the Thai Provisions Originate

It is believed that Section 171<sup>1</sup> and Section 368<sup>2</sup> were inspired by Section 133 and Section 157 of the BGB, respectively. The textual forms of these provisions in the BGB, which was in force at the time of drafting the Thai Civil and Commercial Code, were that, “In the interpretation of a declaration of intention, the true intention is to be sought without regard to the literal meaning of the expression,”<sup>3</sup> and “Contracts shall be interpreted according to the requirement of good faith, taking ordinary usage into consideration.”<sup>4</sup> It is clear that the Thai provisions for the interpretation of a contract are heavily influenced by the German provisions and, as such, a comparative analysis with the German law will certainly be useful.

### B. Reasons for Interpreting a Contract

There are at least three possible reasons for requiring a contract to be interpreted.<sup>5</sup> They are more theoretical than doctrinal because they are not recognised under the Thai Civil and Commercial Code, and courts or practitioners are not obliged to consider them in their interpretation. However, it may be useful to refer to these reasons in order to understand the issue under discussion, as well as illustrate them in relation to courts’ decisions.

#### 1. Unclear contractual terms.

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<sup>1</sup> ดาราดพร เตชะกำฟู, “ความสัมพันธ์ระหว่างมาตรา 132 และ มาตรา 368 ประมวลกฎหมายแพ่งและพาณิชย์” (2527) 1 วารสารกฎหมาย [Daraporn Techakumphu, “Relationship Between Sections 132 and 368 of Civil and Commercial Code” (1984) 1 Law Journal] (Thai) 62, 63.

<sup>2</sup> *ibid*; ภาควิชานิติศึกษาทางสังคม ปรัชญา และประวัติศาสตร์ คณะนิติศาสตร์ มหาวิทยาลัยธรรมศาสตร์, บันทึกคำสัมภาษณ์พระยามานวราชเสวี (ปลอด วิเชียร ณ สงขลา) (พิมพ์ครั้งที่ 2, วิทยุชน 2557) [Department of Legal Study in Society, Philosophy and History, Faculty of Law, Thammasat University, *Transcript of Interview with Phraya Manavarajasevi (Plod Vichian Na Songkhla)* (2nd edn, Winyuchon 2014)] (Thai) 160.

<sup>3</sup> Chung Hui Wang (tr), *The German Civil Code – Primary Source Edition* (reprinted edn, Nobu Public Domain Reprints 2014) 30.

<sup>4</sup> *ibid* 35.

<sup>5</sup> กรศุทธิ์ ขอฟางกลาง, นิติกรรม สัญญา และคำมั่น (โครงการตำราและเอกสารประกอบการสอน คณะนิติศาสตร์ มหาวิทยาลัยธรรมศาสตร์ 2565) [Korrasut Khopuangklang, *Juristic Acts, Contracts and Promises* (The Project for Promotion of Textbooks and Teaching Materials), Faculty of Law, Thammasat University 2022] (Thai) 148–50.

Since some words have several meanings, they inevitably need to be interpreted when they appear in a contract as a contractual term, particularly when the parties' understanding of them is different. For example, according to the contractual terms in Supreme Court Decision No. 1229/B.E. 2501 (1958), "The total fee is 9,000 baht, to be paid in 3 instalments. The first instalment of 3,000 baht is to be paid within 7 days after the contract is formed, the second instalment of 3,000 baht is to be paid during the trial, and the third instalment of 3,000 baht is to be paid when the case is completely finished and there is no further payment." Leaving aside the fact that the court viewed these terms to be clear for now, it can be understood that either the third instalment is to be paid when the case has been decided by the Supreme Court, or when it has been decided by a lower court, but can no longer be appealed. This ambiguity is due to the phrase ". . . the case is completely finished," which may be understood differently by people, especially lawyers and laymen.

## 2. Differences between contracting parties' internal and external intentions.

Another reason for interpreting a contract is that the parties' actual internal intention differs from what they apparently expressed, i.e., their external intention. In this case, an interpretation is required to determine the parties' mutual true intention and enforce it, where available. For example, Supreme Court Decision No. 4614/B.E. 2552 (2009) concerned a lease in which it was stated that, if there was a fire in the rented building, the lease would be immediately extinguished, regardless of the cause of the fire or the extent of the damage. Based on the contract drafter's testimony, the contractual term was intended to make the claimant responsible for taking reasonable care of the rented property in order to prevent a fire. This shows that the actual internal intention of the parties differed from the apparent one and the former was enforced by the court in this case.

## 3. Gaps in a contract.

If the contracting parties do not agree to every detail in the contract, it can still be formed by virtue of Section 367,<sup>6</sup> but it will contain a gap. When there is a dispute in relation to this gap, the contract always needs to be interpreted to resolve it. For example, in Supreme Court Decision No. 797/B.E. 2556 (2013), the agreement to sell or to buy did not specify the starting time and the timeframe for the construction of the commercial building. However, the court held that the defendant had a duty to start to construct the building without delay, as well as to specify the period for

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<sup>6</sup> Section 367 of the Thai Civil and Commercial Code provides that "If the parties to a contract, which they regarded as concluded, have in fact not agreed as to one point upon which an agreement was to be settled, those parts which were agreed upon are valid in so far as it may be inferred that the contract would have been concluded even without a settlement of this point."

finishing the construction. It is clear that this contract contained a gap because the parties did not agree on this point; hence, it needed to be interpreted.

### C. When Is It Permitted to Interpret a Contract?

Whether it is only permitted to interpret a contract if it contains unclear terms or whether contracts can always be interpreted is debatable.

#### 1. When the contract terms are unclear or ambiguous.

The majority view is that a contract is only permitted to be interpreted if it contains unclear or ambiguous contractual terms. The interpretation of clear contractual terms is prohibited.<sup>7</sup> For example, Prakob Hutasingh explains that interpretation is only required when the expressed intention is unclear or ambiguous, e.g., it has several meanings. It is not necessary and is prohibited to interpret a contract if the terms are already clear and cannot be understood differently.<sup>8</sup> The Thai courts also seem to have adopted this view. There have been cases in which they have held that interpretation is not required because the contractual terms are already clear. For example, in the aforementioned Supreme Court Decision No. 1229/B.E. 2501 (1958), the court reasoned that the phrase “. . . the third instalment of 3,000 baht is to be paid when the case is completely finished . . .” was already clear.<sup>9</sup>

#### 2. Contracts can still be interpreted despite clear terms.

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<sup>7</sup> E.g., ไชยยศ เหมือนระชะตะ, กฎหมายว่าด้วยนิติกรรม (สำนักพิมพ์แห่งจุฬาลงกรณ์มหาวิทยาลัย 2548) [Chaiyot Hemarachata, *Law of Juristic Acts* (Chulalongkorn University Press 2005)] (Thai) 301–2, 307; จิตติ ดิงศรัทธี, คำอธิบายประมวลกฎหมายแพ่งและพาณิชย์ เรียงมาตรา ว่าด้วยสัญญา บรรพ 2 มาตรา 354–394 (สนธิ์กรณ โสติกพันธ์ ผู้ปรับปรุง, กองทุนศาสตราจารย์จิตติ ดิงศรัทธี 2552) [Chitti Tingsabadh, *Commentary on Civil and Commercial Code, Section-by-Section, on Contracts, Book 2, Sections 354–394* (Sanunkorn Sotthibandhu (ed), Professor Chitti Tingsabadh Fund 2009)] (Thai) 46; หลวงประดิษฐ์มนูธรรม (ปรีดี พนมยงค์), “คำอธิบายประมวลกฎหมายแพ่งและพาณิชย์” (2471) 3 นิติสาน [Pridi Banomyong, “Commentary on the Civil and Commercial Code” (1930) 3 Nitisarn] (Thai) 64–78, 260–61, 286; พระยาเทพวิฑูร, คำอธิบายประมวลกฎหมายแพ่งและพาณิชย์ ตอนที่ 3 มาตรา 98–143 (พอพ 2477) [Phraya Thep Widun, *Commentary on Civil and Commercial Code Volume 3, Sections 98–143* (Phorthong 1934)] (Thai) 55–69, 483–87; ปันโน สุขทรศนีย์, ประมวลกฎหมายแพ่งและพาณิชย์ว่าด้วยนิติกรรมและสัญญา (โรงพิมพ์มหาวิทยาลัยธรรมศาสตร์ 2514) [Punno Sukthasane, *Civil and Commercial Code: Juristic Acts and Contracts* (Thammasat Printing House 1971)] (Thai) 140–42, 319–21; อักษราทร จุฬารัตน, คำอธิบายวิชากฎหมายแพ่งและพาณิชย์ว่าด้วยนิติกรรมและสัญญา (พิมพ์ครั้งที่ 5, โครงการตำราและเอกสารประกอบการสอน คณะนิติศาสตร์ มหาวิทยาลัยธรรมศาสตร์ 2531) [Akkarathorn Chularatana, *Commentary on Civil and Commercial Code: Juristic Acts and Contracts* (5th edn, The Project for Promotion of Textbooks and Teaching Materials, Faculty of Law, Thammasat University 1988)] (Thai) 73–74; ประสิทธิ์ ไชวีกุล, การตีความกฎหมาย สัญญา และกรรมธรรม์ประกันภัย (พิมพ์ครั้งที่ 2, วิทยุชน 2538) [Prasit Kovilaikool, *Interpretation of Law, Contracts and Insurance Policy* (2nd edn, Winyuchon 1995)] (Thai) 14–16, 35; บุญญิต์ สุชีวะ, “การตีความเอกสาร” (2506) 10 ดุลพาห [Banyat Suchiwa, “Interpretation of Documents” (1963) 10 Dulaphaha] (Thai) 1018, 1021–22.

<sup>8</sup> ประkob หุตะสิงห์, กฎหมายแพ่งและพาณิชย์ว่าด้วยนิติกรรมและสัญญา (นิติบรรณการ 2518) [Prakob Hutasingh, *Civil and Commercial Law: Juristic Acts and Contracts* (Nitibannakarn 1975)] (Thai) 74.

<sup>9</sup> See also Supreme Court Decisions No. 800/B.E. 2529 (1986), 321–22/B.E. 2538 (1995) and 6563/B.E. 2545 (2002).

Opponents of this view argue that interpretation is always required.<sup>10</sup> For instance, Kittisak Prokati criticises the former approach for not always being correct because the external intention of the declarer, which appears to be clear, may be different from his internal one in some cases.<sup>11</sup> Similarly, Sanunkorn Sotthibundu refers to the legal interpretation by citing Preedee Kasemsup, who asserts that the written law always needs to be interpreted, even though the text of the provisions is clear. This also applies to the interpretation of a contract.<sup>12</sup>

## D. Relevant Theories of the Interpretation of a Declaration of Intention

Subjective and objective theories are the two rival theories that deal with interpretation. The position of adopting these theories is clear in some jurisdictions, and it is not a matter of differences between the Civil Law and the Common Law.

Firstly, the subjective theory seeks to enforce the actual internal intention of the contracting parties. French law is well-known as the leading legal system that applies the subjective approach of contractual interpretation,<sup>13</sup> followed by a number of jurisdictions, including Luxembourg, Belgium, and Portugal.<sup>14</sup>

Secondly, the objective theory does not seek what is actually inside the declarer's mind, but instead, to determine the intention that has been expressed from the perspective of a reasonable man. This approach is adopted in most legal systems, both in Common Law systems, led by England,<sup>15</sup> and followed by other Common Law nations, and in Civil Law systems, including Austria, the Netherlands, the Czech Republic, Estonia, Poland, Greece, Slovakia, and Hungary.<sup>16</sup> It is also adopted by some

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<sup>10</sup> E.g., เฉลิมวุฒิ ศรีพรม, “หลักการตีความสัญญา” (2559) 2 บทบันทึก [Chalermwut Sriporm, “Principles of Interpretation of Contracts” (2016) 2 Botbandit] (Thai) 54, 61–66; ดาราพร ธีระวัฒน์, “การตีความกฎหมายเอกชน: สัญญาสำเร็จรูป” ใน กองทุนศาสตราจารย์จิตติ ดิงศักดิ์ (บรรณาธิการ) การใช้การตีความกฎหมาย (พิมพ์ครั้งที่ 4, วิทยุชน 2563) [Daraporn Thirawat, “Interpretation of Private Law: Standard Form Contracts” in Professor Chitti Tingsabadh Fund (ed), *Application and Interpretation of Law* (4th edn, Winyuchon 2023)] (Thai) 126–35, 161. It should be noted that Daraporn Thirawat explained this matter in the context of a standard contract term.

<sup>11</sup> กิตติศักดิ์ ปรกติ, “เอกสารประกอบการศึกษาวิชากฎหมายลักษณะนิติกรรมและสัญญา (น. 101)” (คณะนิติศาสตร์ มหาวิทยาลัยธรรมศาสตร์) [Kittisak Prokati, “Handout on Law of Juristic Acts and Contracts (LA 101)” (Faculty of Law, Thammasat University)] <<https://www.law.tu.ac.th/teacher/kittisak-prokati/>> (Thai) 30.

<sup>12</sup> ศนันทกรณ โสถถิพันธุ์, คำอธิบายนิติกรรมสัญญา (พิมพ์ครั้งที่ 26, วิทยุชน 2567) [Sanunkorn Sotthibandhu, *Commentary on Juristic Acts and Contracts* (26th edn, Winyuchon 2024)] (Thai) 423.

<sup>13</sup> Barry Nicholas, *The French Law of Contract* (2nd edn, Clarendon Press 1992) 47–49.

<sup>14</sup> Christian Von Bar et al. (eds), *Principles, Definitions and Model Rules of European Private Law: Draft Common Frame of Reference (DCFR)* (Oxford University Press 2010) 556 <<https://doi.org/10.1515/9783866537279>>.

<sup>15</sup> *Prenn v Simmonds* [1971] 1 W.L.R. 1381.

<sup>16</sup> Christian Von Bar et al. (n 14) 559–60.

mixed jurisdictions, e.g., Scotland.<sup>17</sup>

The position in the Thai law and German law is probably less clear than in the aforementioned legal systems. As will be fully discussed in the next section, Thai lawyers have different views of whether to apply the subjective or objective test to the meaning of true intention. As for the German law, whether the subjective or objective theory prevails can be seen from the fact that the drafters of the DCFR do not particularly point out the German legal position.<sup>18</sup>

## E. Meaning of True Intention Under Section 171

There is no consensus among Thai scholars in relation to the meaning of “true intention” in Section 171. The opinions on this point may be grouped into three categories.

### 1. Internal or subjective intention.

The majority of Thai lawyers treat the true intention under Section 171 as the declarer’s internal intention. This can be seen from the fact that they use the subjective test to seek the declarer’s true intention. These writers commonly use the terms “true intention” (Thai: เจตนาที่แท้จริง), “internal intention” (Thai: เจตนาภายใน), and “apparent intention” (Thai: เจตนาแสดงออก), when describing the interpretation of a declaration of intention, and the true intention means the internal intention. Examples of writers who support this account include Pridi Banomyong,<sup>19</sup> Khemchai Chutiwongse and Borwornsak Uwanno,<sup>20</sup> Kittisak Prokati,<sup>21</sup> Chaivot Hemarachata,<sup>22</sup> Puangpaka Bunsopak and Prasarn Bunsopak,<sup>23</sup> Sak Sanongchart,<sup>24</sup> Punno Sukthasanee,<sup>25</sup>

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<sup>17</sup> Baaij Jaap, David Cabrelli, and Laura Macgregor (eds), *Interpretation of Commercial Contracts in European Private Law* (Intersentia 2020) 120–23 <<https://doi.org/10.1017/9781839700859>>; Scottish Law Commission, “Report on Review of Contract Law: Formation, Interpretation, Remedies for Breach, and Penalty Clauses” (SCOT LAW COM No 252, 30 November 2017) 69–97.

<sup>18</sup> Christian Von Bar et al. (n 14) 556–60.

<sup>19</sup> Pridi Banomyong (n 7) 115, 120.

<sup>20</sup> เข็มชัย ชุตินวงศ์ และบวรศักดิ์ อวรรณโณ, คำบรรยายกฎหมายว่าด้วยนิติกรรมสัญญา (มปพ. 2526) [Khemchai Chutiwongse and Borwornsak Uwanno, *Lecture on Juristic Acts and Contracts* (np. 1983)] (Thai) 146.

<sup>21</sup> Kittisak Prokati (n 11) 9, 30–37, 39, 41.

<sup>22</sup> Chaivot Hemarachata (n 7) 301–2, 312, 318–20.

<sup>23</sup> พงพกา บุญโสภาคย์ และประสาน บุญโสภาคย์, กฎหมายแพ่งและพาณิชย์ว่าด้วยนิติกรรมและสัญญา (พิมพ์ครั้งที่ 12, สำนักพิมพ์มหาวิทยาลัยรามคำแหง 2548) [Puangpaka Boonsopak and Prasarn Boonsopak, *Civil and Commercial Law on Juristic Acts and Contracts* (12th edn, Ramkhamhaeng University Press 2005)] (Thai) 10–11, 24.

<sup>24</sup> ศักดิ์ สอนงชาติ, คำอธิบายประมวลกฎหมายแพ่งและพาณิชย์ว่าด้วยนิติกรรมและสัญญา (พิมพ์ครั้งที่ 11, นิติบรรณการ 2557) [Sak Sanongchart, *Commentary on Civil and Commercial Code: Juristic Acts and Contracts* (11th edn, Nitibannakarn 2014)] (Thai) 148–50, 392.

<sup>25</sup> Punno Sukthasanee (n 7) 140–41.

Anumat Chaisamutr,<sup>26</sup> and Munin Pongsapan.<sup>27</sup>

Likewise, it appears that the Thai courts treat the “true intention” in Section 171 as the declarer’s “subjective intention.” However, this does not mean that the Thai courts, as well as the writers who adopt this approach, primarily enforce one party’s unilateral subjective intention. In the context of a contract, they will employ the “objective test” from Section 368 in order to balance the power of the subjective test. For instance, in Supreme Court Decision No. 2345/B.E. 2552 (2009), the case concerned an agreement between a husband and wife, which contained the phrase, “S. (the defendant) wishes to live separately from W. (claimant) and W. consents so.” Their motive for entering into this agreement was also mentioned, *inter alia*. After making the agreement, the defendant never mentioned the request for a divorce from the claimant. However, she asked the claimant to come back to live with her and the children. It was held that the foregoing agreement represented the claimant’s unilateral intention, which was signed because the defendant was afraid she would not receive maintenance from the claimant.

## 2. External or objective intention.

Some writers are of the opinion that the true intention in Section 171 refers to the external, namely, the apparent intention, of the declarer, which means applying the objective test. For example, Phraya Thep Widun use the terms “true intention” and “express intention” when dealing with Section 171. He explains that the true intention is the true intention that has been expressed according to Section 171, but it only needs to be considered from the text.<sup>28</sup> Likewise, when dealing with this matter, Sanunkorn Sotthibandhu uses the terms “internal intention,” “true or real intention,” and “apparent intention” to explain that the true intention is the “true intention which has been expressed” because the intention that is inside someone’s head cannot be known by anyone and it may be different from the expressed intention.<sup>29</sup> Others who support this account include Yud Saeng-uthai,<sup>30</sup> Chitti Tingsabadh,<sup>31</sup> Sanit Sanansilp,<sup>32</sup> Daraporn Thirawat,<sup>33</sup> and Dauenden Nakseeharach.<sup>34</sup>

<sup>26</sup> อนุมัติ ใจสมุทร, คำอธิบายประมวลกฎหมายแพ่งและพาณิชย์ว่าด้วยนิติกรรม (สมาคมสังคมศาสตร์ 2510) [Anumat Chaisamutr, *Commentary on Civil and Commercial Law: Juristic Acts* (Social Science Association Publishing 1972)] (Thai) 107–9, 217–18.

<sup>27</sup> Munin Pongsapan, “The Roles of Good Faith and Good Commercial Practice in Interpreting a Contract in Thailand” (2018) 8 *Thammasat Business Law Journal* 272, 297, 299–301, 304–6.

<sup>28</sup> Phraya Thep Widun (n 7) 58–59, 64–65, 435–37, 440, 484–87.

<sup>29</sup> Sanunkorn Sotthibandhu (n 12) 180–81, 447–52.

<sup>30</sup> หยุต แสงอุทัย, กฎหมายแพ่งลักษณะมูลหนี้หนึ่ง (โรงพิมพ์มหาวิทยาลัยธรรมศาสตร์ 2517) [Yud Saeng-uthai, *Civil Law on Sources Of Obligations 1* (Thammasat University 1974)] (Thai) 63.

<sup>31</sup> Chitti Tingsabadh (n 7) 75.

<sup>32</sup> สนธิ สนั่นศิลป์, “การตีความสัญญา” (2532) 12 *วารสารอัยการ* [Sanit Sanansilp, “Interprection of Contracts” (1989) 12 *Public Attorney Journal*] (Thai) 31, 37, 39.

<sup>33</sup> Daraporn Thirawat (n 10) 128, 161.

<sup>34</sup> เตือนเด่น นาคสีหาราช, กฎหมายลักษณะนิติกรรมและสัญญา (พิมพ์ครั้งที่ 5, อภิชาติการพิมพ์ 2564) [Dauenden Nakseeharach, *Law of Juristic Acts and Contracts* (5th edn, Aphichat Printing 2021)] (Thai) 355.



### 3. Both internal or subjective and external or objective intentions.

A few scholars offer a compromise that the true intention may be either internal or external. One of these is Surasak Maneesorn, who suggests that the intention may be either internal or external, depending on the circumstances.<sup>35</sup> The author has observed elsewhere<sup>36</sup> that, based on this approach, the subjective test is used to interpret a unilateral declaration of intention that has no receiver/party. It is also used to interpret a unilateral declaration of intention that has a receiver/party and a bilateral one, but the receiver/party should not be protected. In contrast, the objective test is utilised when interpreting a declaration of intention (both unilateral and bilateral/multilateral) that has a receiver of the intention or party to a juristic act.

It is also worth noting that some writers do not obviously express their support for either the subjective or objective theory when dealing with interpretation. Examples of these writers include Prakob Hutasingh,<sup>37</sup> Serm Vinijchaikul,<sup>38</sup> and Akkharathorn Chularatana.<sup>39</sup>

## F. Conflict Between True Intention and Good Faith

Good faith plays an important role in the Thai contract law, as well as in the wider scope of the Thai private law. It is said that good faith is fundamental to the Thai legal system.<sup>40</sup> Hence, it may be assumed that the contents of a contract cannot contradict good faith, particularly in cases where the parties' mutual intention cannot be ascertained and has to be inferred based on good faith. However, what should prevail if the true intention can be sought and it contradicts good faith can be seen from the following illustration.

### Illustration I

The price of face masks rocketed during the COVID-19 pandemic. Despite the existence of a regulation to control the price, people were forced to pay this high price because of the huge demand and lack of availability in the market. For instance, X., the buyer,

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<sup>35</sup> สุรศักดิ์ มณีสร, อาจารย์พิเศษ คณะนิติศาสตร์ มหาวิทยาลัยธรรมศาสตร์, “การตีความการแสดงเจตนาและการตีความสัญญา” (สัมมนา, คณะนิติศาสตร์ มหาวิทยาลัยธรรมศาสตร์, 7 เมษายน 2565 [Surasak Maneesorn, Adjunct Lecturer, Faculty of Law, Thammasat University, “Interpretation of Declarations of Intention and Interpretation of Contracts” (Seminar, Faculty of Law, Thammasat University, 7 April 2022)] <<https://www.youtube.com/watch?v=tMzETFK3lzo>> (Thai).

<sup>36</sup> *ibid*; For a detailed account, see Korrasut Khopuangklang (n 5) 138–41.

<sup>37</sup> Prakob Hutasingh (n 8) 36–39, 44, 67–68.

<sup>38</sup> เสริม วินิจชัยกุล, คำอธิบายประมวลกฎหมายแพ่งและพาณิชย์ลักษณะนิติกรรมและหนี้ (กรมสรรพสามิต 2515) [Serm Vinijchaikul, *Commentary on Civil and Commercial Code: Juristic Acts and Obligations* (Excise Department Printing 1972)] (Thai) 61–62, 71–73.

<sup>39</sup> Akkharathorn Chularatana (n 7) 31–35, 44, 73–74.

<sup>40</sup> สมยศ เชื้อไทย, ความรู้กฎหมายทั่วไป คำอธิบายวิชากฎหมายแพ่ง: หลักทั่วไป ความรู้พื้นฐานเกี่ยวกับกฎหมายและระบบกฎหมายไทย (พิมพ์ครั้งที่ 31, วิทยุชน 2567) [Somyot Chueathai, *Introduction to Law, Commentary on Civil Law: General Principles, Basis of Thai Law and Thai Legal System* (31st edn, Winyuchon 2024)] (Thai) 259.

entered into a contract for the sale of facemasks with Y. for a price that was 10 times that of the price control.

On the one hand, it could be assumed that this contract is likely to be void on the grounds that its object is expressly prohibited by law under Section 150<sup>41</sup> since the price was higher than that controlled by the law.<sup>42</sup> On the other hand, it could be argued that the contract under discussion was not void on the grounds of express prohibition by law, because determining if the object is expressly prohibited by law does not necessarily mean that any act that contradicts or differs from the law will be deemed as being expressly prohibited by law.<sup>43</sup> This is the interpretative approach that the author supports. The term “expressly prohibited by law” should be interpreted as a case in which the law does not intend that act to have any legal effect at all. If the transaction is related to criminal law, a criterion that may be used for this determination, but not exclusively, is whether or not the law applies a criminal offence to all sides of the parties; if yes, it is expressly prohibited by law. However, in this case, the law only punishes the seller, but not the buyer, if facemasks are sold at a price that exceeds that of the price control. In addition, Section 150 itself is an exception of Section 151 that deals with the notion of private autonomy. Section 151 states “An act is not void on account of its differing from a provision of any law if such law does not relate to public order or good moral[s].” Thus, interpreting Section 150 on the part of “expressly prohibited by law” should be strict due to the fact that it is an exception, not the general rule.

However, it is highly likely that the contract under discussion could be void by virtue of Section 150 on the grounds that it is contrary to public order. Although Section 150 is an exception to the notion of private autonomy (Section 151), the phrase “contrary to public order” is rather broad in the sense that judges can use their discretion, i.e., it is a *jus aequum*, when interpreting whether a case falls under the scope of “contrary to public order.” Given that a sale in which the price exceeds that of

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<sup>41</sup> Thai Civil and Commercial Code, Section 150.

An act is void if its object is expressly prohibited by law or is impossible, or is contrary to public order or good morals.

<sup>42</sup> The Supreme Court also appears to support this approach. In Supreme Court Decision No. 5625/B.E. 2557 (2014), the defendant purchased lottery tickets from the plaintiff for 90 baht per ticket despite the price stated on the ticket as 80 baht. There were two laws prohibiting the sale of higher price of lottery tickets and punishing the sellers who did so, namely, the Gambling Act B.E. 2478 and the Government Lottery Act B.E. 2517. Therefore, the sale was expressly prohibited by these two laws and was void by virtue of Section 150. Even though the fact emerged that it was common for the sales of lottery tickets higher than the controlled price, due to the system of distribution of lottery tickets and the enforcement of the law, it could not be regarded as an exception that would make the case not regarded as expressly prohibited by law. Nonetheless, since the defendant bought a lot of lottery tickets from the plaintiff to use for commercial purpose, the defendant also benefited from the contract. According to the circumstances, it could be assumed that the parties intended the void part (namely, the part that the price was higher than the controlled price) to be separate from the valid part (namely, the part that the price of the sale was 80 baht per ticket).

<sup>43</sup> For a further explanation of this interpretive approach, see Korrasut Khopuangklang (n 5) 31–32.

the price control and is likely to affect society as a whole, it could be easily deemed as being contrary to public order.<sup>44</sup>

Nevertheless, assuming there is a hypothetical situation in which there is no law that expressly prohibits the content of a contract, neither is it regarded as being contrary to public order or good morals, the contract is valid. However, if the contents of the contract are contrary to good faith, the outcome of the case may be ambiguous when interpreting its content. Consider another illustration:

#### **Illustration II**

X is about to miss his flight as the taxi he pre-booked has not arrived. As his house is a long way from the airport and there is no public transport, X asks his neighbour, Y, who has a car, to drive him to the airport. As Y knows that X is in urgent need and has no other choice, he asks for a fare of 10,000 baht, which is 20 times higher than the normal taxi fare for the same distance. X reluctantly agrees to pay the fare requested.

Presumably, this contract is valid because it is not expressly prohibited by law. Also, it is difficult to regard it as being contrary to public order, as Y does not offer this service on a regular basis. Nevertheless, it could probably be regarded as being contrary to good faith because the fare requested by Y is 10 times higher than the normal fare. Hence, it may be debatable whether X should be bound to pay the agreed fare (which was the parties' true intention) or the price based on good faith (in this case the reasonable fare). This issue will be revisited in Section VI.

### **III. APPROACHES TO THE INTERPRETATION OF CONTRACTS IN THE THAI CIVIL AND COMMERCIAL CODE**

Two rival theories of the interpretation of a contract under the Thai law are explored in this section. While most writers apply a combination of Sections 171 and 368 to interpret a contract, opponents argue that Section 171 must be applied before Section 368.

#### **A. Approach of Applying Sections 171 and 368 Simultaneously**

##### **1. Doctrinal foundation of the approach.**

Section 171 is the main provision when interpreting a contract that has been formed. In addition, since a contract is a bilateral/multilateral juristic act, it must be interpreted based on the mutual intentions of the parties who agreed to form it.<sup>45</sup> Meanwhile, the interpretation must be based on good faith by taking ordinary usage

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<sup>44</sup> Then, the same analysis could apply regarding partial voidness as in Supreme Court Decision No. 5625/B.E. 2557 (2014).

<sup>45</sup> Serm Vinijchaikul (n 38) 61–62, 71–73.

into account, as specified in Section 368.<sup>46</sup>

## 2. Method of interpretation.

*a) Application of a combination of Sections 171 and 368.* This approach requires a combination of Sections 171 (true intention) and 368 (good faith and ordinary usage) to be used to interpret a contract. In addition, the scholars who prefer the approach of simultaneously applying Sections 171 and 368 include (i) those who treat the true intention under Section 171 as the subjective intention, which seems to be the majority, and (ii) those who view it as the objective intention. Apart from scholarly explanations, examples can also be found in a great many examples of Supreme Court Decisions.<sup>47</sup>

For example, it was explained in Supreme Court Decision No. 679/B.E. 2547 (2004) that the interpretation of a contract must comply with good faith and ordinary usage based on Section 368. The true intention must also be considered rather than the literal meaning of the words or expressions, based on Section 171. The claimant and the first defendant had only intended to enter into the sale of the original master recording. They had not intended to transfer the copyright of the disputed song. The copyright still belonged to the first defendant. Hence, the fact that four defendants had jointly produced master recordings of 14 songs for 3 albums, which were different versions from the master recording sold to the claimant, was not regarded as an adaptation of a musical work, which would have infringed the claimant's rights.<sup>48</sup>

*b) Application of Sections 10–14.* There are five provisions that deal with the interpretation of a document under the Thai Civil and Commercial Code, namely, Sections 10–14. A number of scholars explain that Sections 10–14 can be applied together with Section 171 and/or Section 368.<sup>49</sup> For example, Banyat Suchiwa asserts that respecting the declarer's true intention is the most important rule when interpreting a document. In other words, the true intention of the declarer is to be sought according to Section 171. If the declarer's desire or purpose in making the document can be found, it must be interpreted based on his true intention. However, the search for the true intention of the declarer is only permitted when the document contains unclear terms. If the terms in the document are clear, the interpretation must

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<sup>46</sup> E.g., *ibid* 71–75, 395–96; Prasit Kovilaikool (n 7) 14–16, 35; Prakob Hutasingh (n 8) 67–69, 170; สุปิน พูลพัฒน์, คำอธิบายประมวลกฎหมายแพ่งและพาณิชย์ว่าด้วยนิติกรรมและสัญญา (ศูนย์การพิมพ์ 2515) [Supan Phulphat, *Commentary of Civil and Commercial Law on Juristic Acts and Contracts* (Central Printing 1972)] (Thai) 98–104, 421–22, 426, 433–35.

<sup>47</sup> See also Supreme Court Decisions No. 2546/B.E. 2538 (1995); 1037/B.E. 2540 (1997); 1847/B.E. 2540 (1997); 13098/B.E. 2555 (2012); 530/B.E. 2558 (2015); 10657/B.E. 2559 (2016).

<sup>48</sup> It should be noted that, in some cases, the court only refers to Section 368 when dealing with the interpretation of contracts, e.g., Supreme Court Decisions Nos. 2233/B.E. 2533 (1990), 4888/B.E. 2532 (1989), and 4732/B.E. 2533 (1990).

<sup>49</sup> E.g., Prasit Kovilaikool (n 7) 14–16, 35; Puangpaka Boonsopak and Prasarn Boonsopak (n 23) 277, 282–83; Serm Vinijchaikul (n 38) 71–75, 395–96.

be enforced according to those terms. The declarer cannot maintain that his intention was different due to the convention that a speaker or writer will speak or write what he intends.<sup>50</sup>

As for the approach taken by the court, it appears that the courts do not apply Section 171 together with Section 11–14. The reason may be that, as already noted, it is clear that Sections 12,<sup>51</sup> 13<sup>52</sup> and 14<sup>53</sup> contained the phrase that they are only applicable where the true intention cannot be sought; thus, there would be no need to apply them together with Section 171. As for Sections 10 and 11 although, unlike Sections 12–14, there is no clear foregoing phrase, it can be implied that it is only applicable when the true intention of a declarer or parties cannot be established. This can be seen from the fact the phrases “a clause . . . can be interpreted in two senses” and “in case of doubt” are contained in Sections 10<sup>54</sup> and 11,<sup>55</sup> respectively.<sup>56</sup>

*c) Application of “presumption of intention by law” provisions.* Provisions that are regarded as the “presumption of intention by law” (also known as “non-mandatory rules”) are recognised in the Thai Civil and Commercial Code, in which the rights and duties of the contracting parties are specified. They can be found in any book, especially the book of obligations and the book of specific contracts. However, how this approach deals with the presumption of intention by law provisions in terms of whether or not they can be applied together with Sections 171 and 368 is unclear.

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<sup>50</sup> Banyat Suchiwa (n 7) 1018, 1021–22.

<sup>51</sup> E.g., Supreme Court Decisions No. 266/B.E. 2539 (1996); 1879/B.E. 2542 (1999); 333/B.E. 2551 (2008); 13730/B.E. 2557 (2014). Section 12 reads: “Whenever a sum or quantity is expressed in letters and in figures, and the two expressions do not agree, and the real intention cannot be ascertained, the expression in letters shall be held good.”

<sup>52</sup> E.g., Supreme Court Decisions Nos. 5021/B.E. 2540 (1997) and 13730/B.E. 2557 (2014). Section 13 reads: “Whenever a sum or quantity is expressed several times in letters or several times in figures, and the several expressions do not agree, and the real intention cannot be ascertained, the lowest expression shall be held good.”

<sup>53</sup> E.g., Supreme Court Decisions Nos. 1663–64/B.E. 2529 (1986); 918/B.E. 2544 (2001); and 1254/B.E. 2546 (2003). Section 14 reads: “Whenever a document is executed in two versions, one in the Thai language, the other in another language, and there are discrepancies between the two versions, and it cannot be ascertained which version was intended to govern, the document executed in the Thai language shall govern.”

<sup>54</sup> E.g., Supreme Court Decisions Nos. 1651/B.E. 2547 (2004) and 886/B.E. 2548 (2005). Section 10 reads: “When a clause in a document can be interpreted in two senses, that sense is to be preferred which gives some effect rather than that which would give no effect.”

<sup>55</sup> E.g., Supreme Court Decisions Nos. 6886/B.E. 2542 (1999); 1472/B.E. 2542 (1999); 5151/B.E. 2543 (2000); and 6444/B.E. 2551 (2008). Section 11 reads: “In case of doubt, the interpretation shall be in favour of the party who incurs the obligation.”

<sup>56</sup> It should be noted that there also appears to be cases in which the court applied Section 171 with Section 11, e.g., Supreme Court Decision No. 6886/B.E. 2542 (1999). However, it can be argued that, if the court could find the parties’ true intention, it would mean that the case was not in doubt; hence, Section 11 would be unnecessary. In other words, reliance on Section 11 to interpret the contract suggests that the parties’ mutual intention cannot be established and the disputed contractual term was doubtful.

It appears that, if the parties do not raise an issue in relation to the interpretation of the contract, the court will apply the “presumption of intention by law” provision directly to the case without the need to refer to Section 171 and/or Section 368.<sup>57</sup>

*d) Does good faith prevail over true intention?* The author has been unable to find any direct explanation in this respect among those who support the view that Sections 171 and 368 can be applied together. It appears to the author that this non-existence may stem from the fact that these scholars do not distinguish the application of true intention under Section 171, namely, subjective intention, and good faith under Section 368, namely, objective intention. Presumably, it is likely that the response to the foregoing question should be that true subjective intention that contradicts good faith will not be enforced. This response can be justified by the fact that, under this approach, subjectivity under Section 171 and objectively under Section 368, are usually, if not always, compromised. Therefore, good faith can generally be used to interpret the contents of a contract, which gives it greater power than the true intention of the parties.

## B. Approach of Applying Section 171 Before Section 368

### 1. Doctrinal foundation of the approach.

The reason why Section 171 is applied before Section 368 is because the parties’ true intention is the most important aspect when interpreting a contract; thus, it prevails over the law, ordinary usage, and even good faith, i.e., if the mutual intention of the parties can be found, it must be enforced first.<sup>58</sup> It appears that a number of academics, e.g., Parawee Kasitinon<sup>59</sup> and Chalermwut Sriporm,<sup>60</sup> support this approach.

### 2. Method of interpretation.

Unlike the former interpretive approach, this one is based on a methodical sequence of interpreting a contract, as explained below.

<sup>57</sup> E.g., Supreme Court Decisions Nos. 3050/B.E. 2540 (1997) and 1822/B.E. 2544 (2001),

<sup>58</sup> This explanation is based on Surasak Maneesorn’s account. Surasak Maneesorn, Adjunct Lecturer, Faculty of Law, Thammasat University (n 35); See also Korrasut Khopuangklang (n 5) 151; Chalermwut Sriporm, “Principles of Interpretation of Contracts” (n 10) 61–66; การวิรัช กษิตินนท์, “การใช้หลักสุจริตในการตีความสัญญา” (วิทยานิพนธ์นิติศาสตรมหาบัณฑิต มหาวิทยาลัยธรรมศาสตร์ 2550) [Parawee Kasitinon, “The Roles of Good Faith in Contract Interpretation” (LLM Thesis, Thammasat University 2007)] (Thai) 171–83.

<sup>59</sup> *ibid* Parawee Kasitinon 171–74.

<sup>60</sup> เฉลิมวุฒิ ศรีพรหม, “ฎีกาวิเคราะห์ คำพิพากษาฎีกาที่ 11107/2555 (การตีความสัญญา)” (2557) 2 วารสารนิติศาสตร์ [Chalermwut Sriporm, “Case Note: Supreme Court Decision No. 11107/B.E. 2555 (2012) (Interpretation of Contracts)” (2014) 4 Thammasat Law Journal] (Thai) 456, 460–61, 464.

*a) Application of Section 171.* Since the true intention is the most important aspect based on the doctrine of private autonomy, Section 171 must be applied first when the parties' mutual intention can be found.<sup>61</sup> It is important to note that, according to Surasak Maneesorn's account,<sup>62</sup> both the subjective and objective tests can be used to seek the true intention when utilising this approach, depending on the circumstances. The subjective test is used when the other party to the contract (i.e., the contracting party who is the recipient of the message) knows, or should have known, of the declarer's internal intention (i.e., the party whose actual internal intention is enforced). In contrast, the objective test is used when the former does not know or could not have known of the latter's actual internal intention.<sup>63</sup>

Nevertheless, it should be noted that, although Parawee Kasitinon and Chalermwut Sriporm support the approach of applying Section 171 before Section 368, they do not expressly take the view that the "true intention" under Section 171 covers both subjective and objective intentions as Surasak Maneesorn does, the leader of this approach. Hence, it is possible that, from their perspective, Section 171 will only be applied before Section 368 as long as the common subjective intention of the parties can be established. In other words, the objective test will not be used to establish the parties' common intention.

Moreover, it is likely that the parties' true intention cannot be found in cases where a contract contains a gap on the basis that they did not express their intention in that matter. Parawee Kasitinon proposes<sup>64</sup> that, in interpreting the gap in a contract, the non-mandatory rules should firstly be applied, and Section 368 should be applied secondly because, from her perspective, it can be inferred that it is impossible to seek the parties' true intention in this case.

Nonetheless, in certain circumstances, the former practice between the parties may be used to determine their true intention. For example, the parties entered into a sale of goods, which is a specific thing, without specifying the place of performance and cost of delivery; hence, the contract contains gaps. The fact emerges that there was a former practice between the parties whereby the seller delivered the goods to the buyer free of charge using a carrier. Although the parties did not express their intention about these two aspects in the current contract, their true intention can be determined based on their former practice when the seller committed to delivering the property sold to the buyer using a carrier and agreed to be responsible for the transport costs, despite this being different from the legal provisions for the presumption of intention.

*b) Application of Sections 10–14.* This approach entails a more systematic application of the provisions for the interpretation of documents. Unlike the first interpretive approach, these provisions will only be applied if the true mutual

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<sup>61</sup> Chalermwut Sriporm (n 10) 54–56, 62–66, 80; Parawee Kasitinon (n 58) 173–74, 178, 185.

<sup>62</sup> Surasak Maneesorn (n 35).

<sup>63</sup> For a detailed account, see Korrasut Khopuangklang (n 5) 138–41.

<sup>64</sup> Parawee Kasitinon (n 58) 179, 186.

intentions of the parties cannot be found.<sup>65</sup>

*c) Application of the “presumption of intention by law” provisions.* The third sequence involves the application of the provisions that are the presumption of intention by law.<sup>66</sup> This means that they will only be applied when the parties’ mutual intention cannot be found and Sections 10–14 are not applicable, either because the intention was not made in a documentary format or it falls outside the scope of Sections 10–14.

It may be observed that, in fact, some provisions that are presumption of intention by law also recognise the parties’ true intention. An obvious example can be found in Section 487 that reads: (para 1) “The price of the property sold may be fixed by the contract, or may be left to be fixed in the manner thereby agreed, or may be determined by the course of dealing between the parties. [para 2]) When the price is not determined as aforesaid, the buyer must pay a reasonable price.” As can be seen, the parties’ intention is recognised in para 1 of Section 487 by the phrases “. . . fixed by the contract, . . . left to be fixed in the manner thereby agreed, . . . [and] the course of dealing between the parties.” This approach causes a theoretical problem in terms of how to apply Sections 171 and 487, which will be revisited in Section VI.

*d) Application of Section 368.* As stated in Section 368, ordinary usage and good faith are the last aspects to be considered when interpreting a contract using this approach.<sup>67</sup> This means that Section 368 will only be used if the parties’ intention cannot be ascertained, and the provisions of the interpretation of documents and the provisions that are the presumption of intention by law are not applicable.

Although it appears that the Thai courts apply Sections 171 and 368 together, as noted earlier, they have only applied Section 368 in some cases, without including Section 171. Yet, there is no clear justification for only applying Section 368 in these cases. Three court decisions may be helpful to this discussion, as explained below.

Firstly, in Supreme Court Decision No. 1035/B.E. 2543 (2000), the case concerned entry into a lease. As the extent of the closeness of the personal relationship between the claimant and the defendant could not be found, it did not lead to the motive that the claimant would have gratuitously transferred the land to the defendant. Hence, it was held that the lease was neither a gift contract nor the promise of a gift, which would need to be made in writing and registered with the competent official. Instead, it was a contract between the claimant and the defendant, which created a personal right between them, which could be enforceable. The court reasoned that it was stipulated in Section 368 that a contract must be interpreted by taking good faith and ordinary usage into account.

Secondly, in Supreme Court Decision No. 439/B.E. 2543 (2000), it was reasoned that, in leasing a building, according to ordinary practice, the lease would

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<sup>65</sup> *ibid* 174–78, 185; Chalermwut Sriporm (n 10) 54–56, 69–73, 80.

<sup>66</sup> Chalermwut Sriporm (n 10) 54–56, 73–74, 80.

<sup>67</sup> Parawee Kasitinon (n 58) 177–78, 185; 54–56, 74–80.



cover the whole building, not only the internal area, unless the parties agreed otherwise. Hence, the lessor was not entitled to lease the roof of the building to other persons to install a billboard.

Thirdly, in Supreme Court Decision No. 478/B.E. 2544 (2001), when the defendant bought land from Th., there was a memo attached to the agreement to sell or to buy, in which it was stated that Th., as well as the claimant who bought the land from Th., was permitted to use the road. The words “to be permitted to use the road” in the memo attached to the foregoing agreement meant “to be permitted to use the road as it normally was.” If the defendant expanded the disputed road, the parties would be entitled to use the expanded part of the road too. The court relied on good faith and ordinary usage in Section 368 to interpret this phrase.

These three cases are interesting in that they do not involve an interpretation to fill a gap in a contract, in which case it would be reasonable to only apply Section 368 without the need to refer to Section 171. However, in these three cases, the court was required to either deal with the interpretation of contractual terms or the nature of the contract itself. What can be taken from these decisions is that the court sometimes directly applied Section 368 to solve the disputed issues when the common intention of the parties could not be established in relation to the contractual terms.

### 3. Does true intention prevail over good faith?

This approach provides a clear explanation of the contradiction between true intention and good faith. Surasak Maneesorn proposes that the true intention (namely, mutual subjective intention) of the parties must be enforced, even if it is contrary to laws (those are not related to public order or good morals), customs, or good faith.<sup>68</sup> He raised this issue in his exam question<sup>69</sup> in 2001 by asking if it is possible that the true intention<sup>70</sup> can contradict legal provisions, or good faith or ordinary usage (Section 368). If this is the case, which one prevails? In response to this, he explained<sup>71</sup> that the true intention prevails based on the justification that, unless the true intention contradicts Section 150, which contains four grounds of voidness, namely, expressly prohibited by law, impossible, contrary to public order, or contrary to good morals, it should be enforced. In addition, considering Section 151, juristic acts can be different from laws as long as those laws are not related to public order or good morals. As a result, when considering if Section 171 or Section 368 should prevail when interpreting

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<sup>68</sup> สุรศักดิ์ มณีนศร, “ข้อสอบภาค 2 ปีการศึกษา 2544 คณะนิติศาสตร์ มหาวิทยาลัยธรรมศาสตร์ วิชา น.101 กฎหมายลักษณะนิติกรรมและสัญญา กลุ่ม ผศ.ดร.สุรศักดิ์ มณีนศร” [Surasak Maneesorn, “Final Examination Questions, Semester 2, Academic Year 2001, Faculty of Law, Thammasat University, LA101 Juristic Acts and Contracts Section of Asst. Prof. Dr. Surasak Maneesorn”] (Thai).

<sup>69</sup> *ibid.*

<sup>70</sup> Author’s note: It is likely that he meant a true intention that can be enforceable.

<sup>71</sup> KK (ผู้เรียบเรียง), “EP.4: [คุยกับอาจารย์กฎหมาย] คุยกับผู้ช่วยศาสตราจารย์ ดร.สุรศักดิ์ มณีนศร ตอนที่ 2: ‘เลคเชอร์กฎหมายใส่เสื้ออาจารย์เงาะ’” (สิงหาคม 2562) [KK (ed), “EP.4: [Talk with Law Lecturers] Talk with Assistant Professor Dr Surasak Maneesorn EP. 2 ‘Law Lecture: Style Ajarn Ngo’” (August 2019)] <<https://www.law.tu.ac.th/talkwithlawlecturers-ep4/>> (Thai).

a contract, it should be determined that the true intention under Section 171 should prevail. He continued to explain that the law of juristic acts and the law of contract both respect the intention (which is the true intention of the declarer), and enforce it as such. However, a defective intention may result in voidness or voidableness (but due to a defective intention, not good faith itself). All in all, he concluded that, if the parties' true intention infringes the requirement of good faith, it can still be enforceable.

### C. Concluding Remarks

While the first involves applying Sections 171 and 368 together when interpreting a contract, the second advocates the application of the former before the latter. Nevertheless, the outcome of the interpretation using these two approaches is not as different as it appears to be at first glance because Section 368 is applied under the first approach in order to apply the objective test to balance the subjectivity under Section 171. Thus, the main difference between these two approaches is the method or sequence of the interpretation, rather than the outcome.

## IV. THEORETICAL FRAMEWORK OF THE INTERPRETATION OF CONTRACTS IN THE GERMAN CIVIL CODE

The purpose of this section is to explore the rules regarding the interpretation of a contract in the German law in order to address two important questions raised in this article.

### A. Relevant Provisions Under the BGB

There are two main provisions that deal with the interpretation of a contract in the BGB. One is Section 133, which reads: "When a declaration of intent is interpreted, it is necessary to ascertain the true intention rather than adhering to the literal meaning of the declaration"<sup>72</sup> and the other is Section 157, in which it is stated: "Contracts are to be interpreted as required by good faith, taking customary practice into consideration."<sup>73</sup> Both provisions are contained in "Division 3 Legal transactions" of "Book 1 General part." However, Section 133 belongs to "Title 2: Declaration of intent," while Section 157 belongs to "Title 3: Contract."

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<sup>72</sup> Federal Office of Justice, Federal Ministry of Justice (tr), *German Civil Code (BGB)*, <[https://www.gesetze-im-internet.de/englisch\\_bgb](https://www.gesetze-im-internet.de/englisch_bgb)>.

<sup>73</sup> *ibid.*

## B. Reasons for Interpreting a Contract

It could be concluded from looking at the problems with interpretation covered by the textbooks<sup>74</sup> that the reasons of interpretation are similar to those of the Thai law, as noted in Section II, and those of the DCFR, which will be mentioned in the next section. The first reason is the appearance of unclear or ambiguous text in the contract.<sup>75</sup> The second is the discord between the true intention of the parties and the apparent text. As will be fully discussed, Germany prefers the true intention over its literal meaning.<sup>76</sup> The final reason is that an interpretation is required to fill a gap in the contract.<sup>77</sup>

## C. When It Is Permitted to Interpret a Contract

It is hard to find a commentary on the German contract law that provides a direct answer to this question, but it may be inferred that a contract can still be interpreted under the German law despite having clear terms. This is based on the ground that the German law recognises the notion of “*falsa demonstratio non nocet*,” in which the parties’ mutual subjective intention is enforced, despite it being different from the expressed text. This means that it is possible to interpret the parties’ true intention, even if the contractual terms are clear.

## D. Meaning of “True Intention” in Section 133<sup>78</sup>

In terms of the historical development of the preference of the theory of interpretation (namely, subjective or objective) in German law, there was a battle between these two theories before the 20<sup>th</sup> century.<sup>79</sup> While some argued that the interpretation should be linked to the subjective true intention, opponents preferred the objective one by claiming that it should be preferred from a conceptual perspective.<sup>80</sup> The drafters of the German Civil Code did not offer an answer to this debate, given that Sections 133 and 157 were both used for matters related to interpretation, resulting in both theories

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<sup>74</sup> E.g., Jaap Baaij, David Cabrelli, and Laura Macgregor (n 17) 98–103; Gerhard Dannemann and Reiner Schulze, *German Civil Code Volume I: Books 1–3, Article-by-Article Commentary* (C. H. Beck 2020) 171–74, 207–9 <<https://doi.org/10.17104/9783406765773-1>>; Joachim Zekoll and Gerhard Wagner, *Introduction to German Law* (3rd edn, Wolters Kluwer 2019) 212–14.

<sup>75</sup> E.g., Jaap Baaij, David Cabrelli, and Laura Macgregor (n 17) 99.

<sup>76</sup> E.g., Gerhard Dannemann and Reiner Schulze (n 74) 172; Joachim Zekoll and Gerhard Wagner (n 74) 212–13.

<sup>77</sup> E.g., Gerhard Dannemann and Reiner Schulze (n 74) 208; Joachim Zekoll and Gerhard Wagner (n 74) 213.

<sup>78</sup> It should be noted that the meaning of “true intention” in Section 133 can be distinguished in two different contexts, namely (i) a declaration of intention that has no receiver and (ii) one that has. However, the former is beyond the scope of this article.

<sup>79</sup> Joachim Zekoll and Gerhard Wagner (n 74) 212.

<sup>80</sup> *ibid.*

continuing to exist in the German contract law.<sup>81</sup> As a consequence, an objective approach plays an important role in establishing the “true intention” of a declarer where the declaration of intention has a receiver. “Good faith and customary practice” are required to be considered because the purpose is to protect the receiver of the intention,<sup>82</sup> i.e., such a declaration of intention is interpreted based on the understanding of a reasonable man.<sup>83</sup> Thus, the outcome of the interpretation does not solely depend on the actual understanding of the receiver, but instead, how he should have reasonably understood it.

The justification for the application of the “objective theory of interpretation” in this context does not directly appear either in Section 133 or Section 157 (despite the terms “good faith” and “customary practice” appearing in Section 157). Rather, the effect of this application, which is generally accepted by German lawyers and courts, is required because it is in accordance with the notion of the “protection of legitimate expectations.”<sup>84</sup> In short, it may be concluded that the application of the “objective theory of interpretation” in Section 133 stems from a general principle of legitimate expectations, rather than the rule in a particular provision. However, this is despite the fact that German lawyers still refer to Section 157 when applying the objective test, as explained below.

Furthermore, the term “true intention” does not refer to the “actual internal intention” of the declarer, as opposed to the “apparent external intention.”<sup>85</sup> This is because, if there is discord between the internal and external intentions, the declarer is specifically entitled to avoid the juristic act by virtue of the principle of mistake.<sup>86</sup> This suggests that, in the contractual context, the “true intention” in Section 133 is primarily used to determine whether a contract was formed or not (when the “objective test” will be used); however, even if a contract was formed, a party who entered into it by mistake may still be entitled to avoid it on the grounds of a mistake under Section 119. Nevertheless, the party avoiding the mistaken declaration of intention is subject to liability to pay damages to the other party by virtue of Section 122.

An example can be found from a well-known case of *LG Hanau*,<sup>87</sup> when a vice-principal of a school made an offer to buy toilet rolls, which were stated as “25 Gros Rollen Toilettenpapier” on the order. The problem concerns the term “Gros,” which made the order literally mean “25 rolls of toilet papers for 12 dozen (i.e., the total amount was 3600 rolls). However, the offeror actually understood it as “große Rollen Toilettenpapier” (25 big toilet rolls). The court held that, in interpreting bilateral declarations of intention, the value of the objective expression (“objektiver

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<sup>81</sup> *ibid.*

<sup>82</sup> Gerhard Dannemann and Reiner Schulze (n 74) 173.

<sup>83</sup> Vsevolod Mazurenko, *Interpretation of Contracts: An Analysis of English Law, German Law and the Vienna Convention on Contracts for the International Sale of Goods* (LAP LAMBERT Academic Publishing 2013) 45.

<sup>84</sup> *ibid.*

<sup>85</sup> Ernest Joseph Schuster, *The Principles of German Civil Law* (Clarendon Press 1907) 105.

<sup>86</sup> *ibid.*

<sup>87</sup> *LG Hanau* NJW 1979, 721.

Erklärungswert”) must be followed and enforced based on the knowledge and reasonable understanding of the receiver. In addition, based on the surrounding circumstances, the terms communicated between the parties were pronounced similarly, which could lead to miscommunication. This was particularly due to the fact that the word “Gros,” as claimed by the seller, was an old word that was not commonly used. Hence, the contract of sale of 3600 rolls, as the offeree would have objectively understood, had been formed. However, the offeror, who had entered into this contract mistaken as to its contents, was entitled to avoid the contract, but she was bound to pay damages to the seller.

Nevertheless, it is also important to note that not every case in which the apparent intention differs from the internal intention of the declarer would be classed as a mistake.

### Illustration III

An illustration given by Earnest Schuster<sup>88</sup> is when a contractor starts work on the 31<sup>st</sup> December 1904, but what appears on the document is the 31<sup>st</sup> December 1905.

This is not the case of a mistake as the parties must have known that the apparent date was not what they intended and other factors must be taken into account to seek the true intention.<sup>89</sup> In other words, when the common understanding of the contacting parties can be found, the subjective approach plays a significant role, despite differing from the text or the apparent intention. The doctrine applied here is known as “*falsa demonstratio non nocet*”; there is no justification for making the “objective meaning of the intention” prevail over the parties’ mutual subjective intention.<sup>90</sup>

What can be concluded here is that the meaning of “true intention” under Section 133 theoretically covers both subjective (internal) and objective (external) intentions. It is treated as “subjective intention” in cases where there is a common understating between the parties, which may be different from the apparent text. Nonetheless, the objective approach (by relying on the application of Section 157, as explained below) will be applied in most cases.

## E. Factors That Can Be Used for Interpretation

The factors that can be used for interpretation include the alignment with the subject of a contract; interpreting a contract as a whole; the negotiations of the parties during the stage of its formation; foreseeable and recognised circumstances; ordinary meaning of the word; former practice between contracting parties, ordinary usage, and subsequent conduct of the parties.<sup>91</sup>

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<sup>88</sup> Ernest Joseph Schuster (n 85) 105.

<sup>89</sup> *ibid.*

<sup>90</sup> Jaap Baaij, David Cabrelli, and Laura Macgregor (n 17) 100.

<sup>91</sup> *ibid* 101–2.

## F. Doctrinal Foundation of Good Faith and Commercial Practice in Section 157

It is clear that good faith and commercial practice are consistent with the objective theory of interpretation. It is helpful to note again that, when the objective test applies, the actual understanding of the receiver of the declaration of intention is not automatically the outcome; instead, the declarer's interest that could have been understood by the receiver will need to be taken into account.<sup>92</sup> In other words, the parties are presumably aware that the literal meaning of the words may be different from the bargain they had in mind when forming the contract. It is also worth noting that the term "customary practice" is narrower than "customary law." It refers to practice in a particular group or class of people.<sup>93</sup>

Furthermore, an important function of Section 157 is to interpret a contract that contains a gap, the so-called "completive interpretation of contract," because it is not possible to find a common intention between the parties in this case. In interpreting a contract that contains a gap, it is necessary to determine how a recipient would have understood it.<sup>94</sup> Hence, how the parties would have agreed the issue of interpretation upon the formation of the contract must be assumed, when using Section 157 for the interpretation. This is referred to as a "hypothetical intention." Finally, it must be understood that the interpretation based on the use of a "hypothetical intention" can only be made if there are no applicable rules.<sup>95</sup>

## G. Approaches to the Interpretation of Contracts

There seems to be a slight inconsistency among the literature in terms of the theoretical structure of the approaches to the interpretation of a contract in German law. On the one hand, it is clearly affirmed that both Section 133 and 157 can be applied simultaneously.<sup>96</sup> The objective test is the default rule when interpreting a contract under this approach; hence, the contract will be enforced based on the reasonable understanding of the other party. However, if it can be found, the mutual understanding of the parties will be enforced instead, as an exceptional case. On the other hand, some<sup>97</sup> appear to treat Section 133 as the primary step of interpretation, which means that the application of Section 133 comes before that of Section 157. The requirement for this method is that the subjective intention of the parties can be

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<sup>92</sup> Gerhard Dannemann and Reiner Schulze (n 74) 207.

<sup>93</sup> Ernest Joseph Schuster (n 85) 105.

<sup>94</sup> Gerhard Dannemann and Reiner Schulze (n 74) 208.

<sup>95</sup> *ibid.*

<sup>96</sup> *ibid* 207; Gerard McMeel and Hans Christoph Grigoleit, "Interpretation of Contracts" in Gerhard Dannemann and Stefan Vogenauer (eds), *The Common European Sales Law in Context: Interactions with English and German Law* (Oxford University Press 2013) 343–44 <<https://doi.org/10.1093/acprof:oso/9780199678907.003.0010>>; Helmut Köhler, *BGB Allgemeiner Teil* (46th edn, Auflage 2022) 131–32 <<https://doi.org/10.17104/9783406791710>>.

<sup>97</sup> Jaap Baaij, David Cabrelli, and Laura Macgregor (n 17) 100.

commonly established, of which the case of *falsa demonstratio non necet* is a classic example.<sup>98</sup> However, if this cannot be applied for the interpretation, the second step is to use the objective test to determine if it is according to the meaning understood by a reasonable person.<sup>99</sup>

Nevertheless, it can be concluded that the difference between the German approaches that apply (i) Sections 133 and 157 simultaneously and (ii) Section 133 before Section 157, are not actually in conflict because there is an exception under the former whereby Section 133 is applied before Section 157 if the parties' mutual intention can be established. Hence, it is consistent with the latter, in which Section 133 is applied as the first step (if the parties' subjective intention can be found), and Section 157 is applied as the second step. Thus, their difference is about the format of the structure of the explanation, rather than the essence of the method.

## H. Conflict Between True Intention and Good Faith

The author was unable to find a direct answer to this question from the German literature. Again, like the case of the majority view of Thai scholars, this possibly stems from the fact that both Sections 133 (true intention) and 157 (ordinary usage and good faith) are said to be applied together in the German law. As a result, the issue regarding the conflict between true intention and good faith is unlikely to occur in principle. Nevertheless, it is worth considering what the German law's position would be in dealing with this kind of situation.

In recalling Illustration I in which the parties agreed to enter into a sale of facemasks for a price that was 10 times higher than the price control, it is likely that this contract would be void under the German law by virtue of Section 134, Statutory prohibition, in which it is stated that "A legal transaction that violates a statutory prohibition is void, unless the statute leads to a different conclusion." The same analysis as in the Thai law regarding partial voidness could be applied to the German law.<sup>100</sup> Nonetheless, hypothetically, it could still be possible that a contract that contradicts good faith, but is not contrary to statutory prohibition, could exist in the German law. This can be inferred from the fact that it is provided under the BGB that "Provisions in standard business terms are ineffective if, contrary to the requirement of good faith."<sup>101</sup> Hence, it could be assumed that it is possible for the contents of a regular contract, i.e., non-business one, to contradict good faith and still be valid.

In terms of interpreting the contract under discussion, based on the approach of the German law, which involves applying Sections 133 and 157 together, the answer is likely to be that lawyers can use the reasonableness test under Section 157 to

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

<sup>99</sup> *ibid.*

<sup>100</sup> Section 139 (Partial Invalidity) of the BGB provides that "If a part of a legal transaction is void, then the entire legal transaction is void, unless it is to be assumed that it would have been undertaken even without the void part."

<sup>101</sup> BGB, Section 307 (1).

interpret the contents of the contract, even if the parties' intention was agreed differently. Therefore, in Illustration II, where X agreed to pay a fare higher than the normal fare, the answer is that "good faith" could be used to interpret the content of the contract, namely, the amount of the agreed fare, with the result that X would be bound to pay a reasonable fare.

## I. Concluding Remarks

The "true intention" under Section 133 is viewed subjectively under German law; however, this provision is not applied alone when dealing with the interpretation of contracts. Section 157 is simultaneously applied as an objective test so that the innocent contractual party can be reasonably protected.

## V. THEORETICAL FRAMEWORK OF THE INTERPRETATION OF CONTRACTS IN THE DRAFT COMMON FRAME OF REFERENCE (DCFR)

The structure of the DCFR is different from the BGB in that the DCFR treats a contract as a general concept and then deems that the general rules can be applied to other juristic acts, namely, unilateral juristic acts, to the extent that they fit them. This is in contrast with the German law and also the Thai law, which provide general provisions on juristic acts, and specific provisions on contracts. The commentators of the DCFR begins the explanation of this issue by stating that the purpose of interpreting a contract is to determine the contractual contents.<sup>102</sup> This reflects the purpose of this article that uses the term "interpretation of contracts" to determine the contents of a contract, rather than to determine its formation.

### A. Relevant Provisions Under the Draft Common Frame of Reference

"Chapter 8: Interpretation Section 1: Interpretation of Contracts," which deals with the interpretation of a contract contains seven provisions. However, only two of them

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<sup>102</sup> Christian Von Bar et al. (n 14) 553.



are directly concerned with the issue under discussion here, namely, Article II. – 8:101: General rules<sup>103</sup> and Article II. – 8:102: Relevant matters.<sup>104</sup>

## B. Reasons for Interpreting a Contract

Although the reasons for interpreting a contract are not stipulated under the DCFR, they are given in the Commentary.<sup>105</sup> Examples of reasons for interpreting a contract include contracts that contain an unclear, ambiguous, uncertain, or vague term. This basically means that the meaning of the term cannot be immediately understood.<sup>106</sup> The reasons also cover circumstances in which, despite its clarity *per se*, a contractual term contradicts another one, or the contract as a whole. It is also important to interpret a contract if there is a gap in it.<sup>107</sup>

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<sup>103</sup> 5.1.1 Article II. – 8:101: General Rules.

“(1) A contract is to be interpreted according to the common intention of the parties even if this differs from the literal meaning of the words.

(2) If one party intended the contract, or a term or expression used in it, to have a particular meaning, and at the time of the conclusion of the contract the other party was aware, or could reasonably be expected to have been aware, of the first party’s intention, the contract is to be interpreted in the way intended by the first party.

(3) The contract is, however, to be interpreted according to the meaning a reasonable person would give to it:

(a) if an intention cannot be established under the preceding paragraphs; or

(b) if the question arises with a person, not being a party to the contract or a person who by law has no better rights than that party, who has reasonably and in good faith relied on the contract’s apparent meaning.”

<sup>104</sup> DCFR, Article II. – 8:102.

“(1) In interpreting the contract, regard may be had, in particular, to:

(a) the circumstances in which it was concluded, including the preliminary negotiations;

(b) the conduct of the parties, even subsequent to the conclusion of the contract;

(c) the interpretation already given by the parties to terms or expressions which are the same as, or similar to, those used in the contract and the practices they have established between themselves;

(d) the meaning commonly given to such terms or expressions in the branch of activity concerned and the interpretation such terms or expressions may already have received; (e) the nature and purpose of the contract; (f) usages; and (g) good faith and fair dealing.

(2) In the question of a person, not being a party to the contract or a person such as an assignee who, by law, has no better rights than that party, who has reasonably and in good faith relied on the contract’s apparent meaning, regard may be had to the circumstances mentioned in sub-paragraphs (a) to (c) above only to the extent that those circumstances were known to, or could reasonably be expected to have been known to, that person.”

<sup>105</sup> Christian Von Bar et al. (n 14) 553.

<sup>106</sup> *ibid.*

<sup>107</sup> *ibid* 554.

### C. When Is It Permitted to Interpret a Contract?

Although the DCFR does not clearly provide a rule on whether or not a contract can only be interpreted when terms are unclear, it can be inferred that it does not prohibit the interpretation of clear terms, given that, it recognises the notion of “*falsa demonstratio non nocet*”, which will be used to search for the parties’ common intention, despite it being different from the expressed words.<sup>108</sup>

### D. Meaning of “Common Intention”

As the DCFR primarily deals with a contract as a general concept, it adopts the term “common intention,” rather than the “true intention,” of the parties. As can be seen in Article II. – 8:101, both the subjective and objective theories are relied on in seeking the common intention. The subjective test respectfully reflects the parties’ autonomy of wills,<sup>109</sup> which can be seen from sub-section (1) and the first part of sub-section (2) of the foregoing article, that the contract is interpreted to the subjective common understanding of the parties, despite differing from the apparent text. Also, according to sub-section (2), even if one party was not aware of the other party’s intention, but could have reasonably been aware of it, it is to be interpreted as such. This reflects the objective theory of interpretation, which is supported by other external factors, such as reasonableness and good faith.<sup>110</sup> In short, the compromise of the subjective and objective tests is adopted under the DCFR by establishing a common intention between the parties.

### E. Factors That Can Be Used for Interpretation

The DCFR points out a number of factors that can be used for interpretation.<sup>111</sup> These include the relevant circumstances of the formation of the contract, including the negotiation stage; both prior and subsequent parties’ conduct; the outcome of the interpretation already given by the parties; the common meaning in the context of the subject area; contractual nature and purpose; ordinary usages; and good faith and fair dealing.<sup>112</sup>

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<sup>108</sup> Nonetheless, when dealing with the application of Article 8:101, the commentators of the DCFR point out that “the interpretation must not, under the guise of interpretation, modify the clear and precise meaning of the contract where there is nothing to indicate that this is required by the Article. This would be to ignore the principle of the binding force of contract.” *ibid* 555. It appears to the author that this does not mean the DCFR prohibits the interpretation of clear contractual terms. Rather, it suggests that the parties should not seek the method of interpretation to change the terms that were actually intended by them.

<sup>109</sup> Christian Von Bar et al. (n 14) 554.

<sup>110</sup> *ibid*.

<sup>111</sup> DCFR, Article II. – 8:102 Relevant Matters.

<sup>112</sup> *ibid*.

## F. Method of Interpretation

In terms of sequences of interpretation of a contract, it may be divided into two steps. Firstly, the primary step of interpreting a contract under the DCFR is to seek a common intention between the parties.<sup>113</sup> This common intention could mean either (i) the subjective common intention of both parties (which contradicts the apparent meaning), or (ii) the subjective intention of one party that matches the objective intention of the other, given that the latter could reasonably be expected to have been aware of the former.

### **Illustration IV**

An illustration given by the commentators of the DCFR is where the title of the contractual document appears as a “loan,” but the subjective intention, i.e., commonly understood by the parties, is a lease, it is to be interpreted as a lease.<sup>114</sup>

This is an illustration of the (i) scenario mentioned above. As for the (ii) scenario, if the facts change, so that one party understood it as a lease, but the other subjectively understood it as a loan, but could have been aware that it was actually a lease, the outcome of the interpretation would be the same, i.e., that the common intention of the parties was to enter into a lease.

Secondly, if a common intention of the parties cannot be established, or a party to the contract acted in good faith and reasonably relied on the apparent meaning, the next step is to interpret a contract by adopting the “pure” objective theory of interpretation.<sup>115</sup> This objectivity refers to how a reasonable person would interpret such a contract by taking the objective circumstances into account. Of course, this step would be applicable when the parties did not agree on the disputed issue, namely, it is used to fill a gap, because in this case it would not be possible to establish the parties’ common intention. Moreover, it can also be widely used when the parties actually expressed their intention in the contract, but they did not have a subjective understanding of that term. In this case, the objective test will be used to interpret the text.

## G. Conflict Between True Intention and Good Faith

It is evident that the DCFR primarily regards the parties’ true intention, given that it can be established. As a result, at first glance, it can be assumed that the true intention, namely, the subjective test, prevails over good faith, namely, the objective one.

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<sup>113</sup> DCFR, Article II. – 8:101 General Rules, “(1) A contract is to be interpreted according to the common intention of the parties even if this differs from the literal meaning of the words.” Christian Von Bar et al. (n 14) 554; Scottish Law Commission (n 17) 70; Gerard McMeel and Hans Christoph Grigoleit (n 96) 344.

<sup>114</sup> Christian Von Bar et al. (n 14) 555.

<sup>115</sup> *ibid* 556; Scottish Law Commission (n 17) 70.

Nonetheless, the DCFR also contains a rule that deals with the infringement of fundamental principles or mandatory rules.<sup>116</sup>

The DCFR does not set good faith as a fundamental requirement of a contract in terms of a contract being unable to contradict good faith, but instead, gives effect to the rule of good faith in each European system. This is justified by the fact that the extent to which good faith is recognised in each system varies. While some regard it as fundamental principle, others treat it as specific one.<sup>117</sup> As a result, it is admitted that the drafters could not have assumed the direct application of good faith in a contract. Such a direct application was only possible, and indeed was made so, by expressly incorporating it in a Directive, as exemplified by the Directive on Unfair Terms in Consumer Contracts.<sup>118</sup> As a result, the infringement of good faith (and other fundamental rules), does not automatically make a contract void.<sup>119</sup>

## H. Concluding Remarks

The DCFR sets out the direct rules dealing with the interpretation of a contract, rather than with the wider scope of a juristic act or declaration of intention. It primarily enforces the parties' common intention, which could be either the common subjectivity or a combination of subjectivity and objectivity, when it is necessary to protect the other party. Pure objectivity is used in the second step when the common intention cannot be established. In addition, it does not offer a clear answer to the question of the conflict between true intention and good faith, since it is subjected to the role of good faith in each system.

## VI. ANALYSIS OF THE STUDIED ISSUES

This section contains an analysis of the issues involved in interpreting a contract in Thai law in relation to the interpretive rules under the German law and the DCFR, where appropriate.

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<sup>116</sup> DCFR, Article II. – 7:301: Contracts Infringing Fundamental Principles.

“A contract is void to the extent that:

(a) it infringes a principle recognised as fundamental in the laws of the Member States of the European Union; and  
(b) nullity is required to give effect to that principle.”

<sup>117</sup> Christian Von Bar et al. (eds), *Principles, Definitions and Model Rules of European Private Law: Draft Common Frame of Reference (DCFR) Outline Edition* (European Law Publishers 2009) 43 <<https://doi.org/10.1515/9783866537279>>.

<sup>118</sup> *ibid.*

<sup>119</sup> Christian Von Bar et al. (n 14) 536.

## A. When Is It Permitted to Interpret a Contract?

In Thai law, when to interpret a contract is debatable. While the majority, including the Thai courts, take the view that the interpretation of clear terms is prohibited, the minority argue that contracts can always be interpreted, despite having clear terms, which is the approach supported in this article. It is clear that an interpretation is required when the parties' internal intention differs from their external one, despite the clarity of the external intention. This is consistent with the position under the German law and the DCFR, where the parties' subjective mutual intention will be enforced, even if it is different from its literal meaning.

Moreover, it is possible to argue that, when the courts or lawyers explain that the contractual terms are so clear that an interpretation is prohibited, they have already interpreted the terms and the outcome, and they are consistent with their literal meaning. For instance, in recalling the Supreme Court Decision No. 1229/B.E. 2501 (1958), which contained the term "... the third instalment of 3,000 baht is to be paid when the case is completely finished and . . . ,” although the court reasoned that, since this term is already clear, no interpretation is permitted, it can be argued that this term is, in fact, unclear because it has two meanings: the payment is due either (i) after the decision of the Supreme Court or (ii) after the decision of lower courts, but it can no longer be appealed. Then, the Supreme Court interpreted the foregoing phrase as “after the decision of the Supreme Court” in this case.

Nonetheless, the observation made by the commentators of the DCFR that the interpretation of a contract must not be used to modify its contents is useful, provided that there is nothing to indicate that an interpretation is required. This is to respect the binding force of the contract and to prevent a contracting party from acting in bad faith by using the means of interpretation to escape liability by modifying the contractual terms. In this case, such contractual terms should be interpreted according to their literal meaning.

## B. Meaning of True Intention

In Thai law, there are three different approaches to interpreting the meaning of “true intention” under Section 171, each of which is analysed below.

### 1. First interpretative approach: Pure subjective intention.

The majority of Thai writers and the courts treat “true intention” under Section 171 as the internal intention of the declarer, namely, the subjective intention. However, it must be understood that the view of the subjective theory does not predominate the objective one. By virtue of Section 368, the objective test will be applied with Section 171 when interpreting a contract in order to weigh the power of the subjective intention to protect the other, innocent party. This aspect is represented by the familiar statement that Sections 171 and 368 can be applied together. The analysis of the

combination of these two provisions in connection with the means of interpretation, will be revisited in the next section (VI.C).

This approach is indeed similar to the German one, which balances the subjective and objective theories of interpretation by applying Sections 133 and 157 together when seeking the parties' true intention. As with Thai law, there is a well-known statement in legal textbooks that Sections 133 and 157 can be applied simultaneously when dealing with the interpretation of a contract under the German law. For the sake of a simple comparison, the advantages and disadvantages of this approach will be compared with the second approach below.

## 2. Second interpretative approach: Pure objective intention.

Under this approach, the "true intention" is viewed as an external or apparent intention, namely, an objective intention. The outstanding benefit of this approach is that it protects the innocent contractual party by considering the result of the interpreted text based on the meaning understood by a reasonable person by virtue of Section 171 alone, i.e., without the need to rely on Section 368. Nevertheless, in a contractual context, those who support this approach also explain that, in interpreting a contract, both Sections 171 and 368 are applied together. Leaving the analysis of the method of interpretation for now (as it will be discussed in the next section (VI.C)), the benefits and drawbacks of these two approaches are analysed below.

*a) Comparison of the first and second interpretative approaches.* There is no real difference between the outcome of the interpretation of these approaches in the contractual context, given that they both provide a just outcome that protects the innocent party, i.e., the one who should be reasonably protected. However, outside the contractual framework, the second interpretative approach has a more systematic function. This can be seen from a case of interpreting a unilateral declaration that does not eventually constitute a contract, e.g., a declaration to rescind a contract,<sup>120</sup> to renounce a betrothal agreement,<sup>121</sup> to release an obligation,<sup>122</sup> or to avoid or to ratify

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<sup>120</sup> Section 386 para 1 of the Thai Civil and Commercial Code provides that "If by contract or by the provisions of law one party has the right of rescission, such rescission is made by a declaration of intention to the other party."

<sup>121</sup> Section 1442 of the Thai Civil and Commercial Code provides that "In case where there is an essential event happening to the betrothed woman that make the marriage to the woman unsuitable, the man is entitled to renounce the betrothal agreement and the woman shall return the *Khongman* to the man."

Section 1443 of the Thai Civil and Commercial Code provides that "In case where there is an essential event happening to the betrothed man that makes marriage to the man unsuitable, the woman is entitled to renounce the betrothal agreement and the *Khongman* need not to be returned to the man."

<sup>122</sup> Section 340 para 1 of the Thai Civil and Commercial Code provides that "If the creditor declares to the debtor an intention to release the obligation, it is extinguished."

a voidable juristic act.<sup>123</sup> If the declarers of these juristic acts did not intend their intentions to take the apparent effect, but the receivers of the intention objectively understood them to do so, the latter would be protected under the second approach if the objective test was used to interpret the intention. However, it may be argued that the receivers of these intentions could still be protected under the first interpretive approach by applying Section 368 to the case, namely, the reasonableness test. Nonetheless, it could be theoretically difficult to explain why Section 368 can be applied to unilateral juristic acts, given that they are not contractual in nature, when Section 368 only deals with the interpretation of a contract. Again, it may be argued that, by following the German approach within the scope of Section 157 of the German law, dealing with interpretation of a contract is exactly the same as Section 133 in dealing with interpretation of a declaration of intention in that the application of Section 157 can be extended to the wider scope of a juristic act. Still, it can be questioned if this is theoretically correct based on the doctrine of the application and interpretation of Thai law, in which it is stated in the Thai Civil and Commercial Code that “The law must be applied in all cases which come within the letter or the spirit of any of its provisions.”<sup>124</sup> Given this statement, as already explained, in the structure of the foregoing Code, Section 171 belongs to the part of juristic acts in Book I: General Provisions, whereas Section 368 appears in the part related to contracts in Book II: Obligations. Hence, it is conceptually hard to prove that the scope of the latter is the same as that of the former. A better explanation for the adoption of this approach may be that it is probably by way of an analogy, namely, as the provision that is most nearly applicable under Section 4 para 2.<sup>125</sup>

*b) Consistency with the “falsa demonstratio non nocet” rule and similar cases.* The second approach is difficult when dealing with a *falsa demonstratio non nocet* case, namely, when the parties’ subjective intentions can be commonly established, despite being different from the apparent text. If the “true intention” means the pure objective intention, how can the parties’ common subjective intention be enforced? This is also problematic in cases where a party’s external intention differs from the internal one, but the other party knew, or should have known, about the former’s internal intention. By applying the pure objective test, the outcome of the interpretation could be that the meaning of the text as understood by a reasonable person is enforced, although it is different from the declarer’s mutual subjective intention. Hence, in this case, the subjective test does not only function better structurally, but also provides a fairer outcome than the adoption of the pure objective

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<sup>123</sup> Section 178 of the Thai Civil and Commercial Code provides that “The avoidance of or ratification to a voidable act could be made by a declaration of intention made to the other party who is a determinate person.”

<sup>124</sup> Thai Civil and Commercial Code, Section 4 para 1.

<sup>125</sup> Section 4 para 2 of the Thai Civil and Commercial Code provides that “Where no provision is applicable, the case shall be decided according to the local custom. If there is no such custom, the case shall be decided by analogy to the provision most nearly applicable, and, in default of such provision, by the general principles of law.”

test. As a result, if the second interpretative approach is to be adopted, exceptions where the subjective test should prevail, e.g., where the common subjective intention is shown, must be acknowledged.

### 3. Third interpretative approach: Mixture of subjective and objective intentions.

The final interpretative approach that views the “true intention” as either the subjective or the objective intention, depending on the circumstances, is a compromise of the former two approaches. Firstly, the subjective test is used when the parties’ common intentions can be established, and also when one party knew the other’s subjective (internal) intention. In addition, the scope of the application extends to cases in which the former did not know the latter’s subjective intention, but should have known it, being justified that there is no need for him to be protected. Hence, this approach avoids the weakness of the second approach, which fails to recognise the binding force of subjectivity. However, in other circumstances, the reasonableness test is adopted in the interests of the other party, who should be justifiably protected. Secondly, outside the contractual context, the weakness of the first approach, in that it requires the application of Section 368 to deal with non-contractual cases, can be overcome in order to protect the benefits of the receiver or party to a unilateral juristic act, who is not regarded as a contracting party. The objective method may be employed independently to afford this protection.

Furthermore, this approach shares essential similarities with the rules of interpretation of contracts under the DCFR. The DCFR primarily prefers the subjective method by which the contracting parties’ common intention can be established. This applies to both a situation in which one party knew the subjective intention of the other, and one in which he did not know it, but could reasonably be expected to have known it. However, the objective test is adopted for the interpretation in other situations, such as the absence of a common intention.

## C. More Suitable Approach to the Interpretation of a Contract

There are two approaches to interpret a contract in Thai law, each of which is analysed below with reference to the reasons for the interpretation, making it easy to follow and compare.

### 1. First interpretative approach: application of Sections 171 and 368 simultaneously.

This approach makes sense from a doctrinal perspective; in fact, it is essential, because most Thai lawyers and courts view the party’s “true intention” under Section 171 as his “subjective intention.” Therefore, the reasonableness test is necessary to protect the other party when taking ordinary usage and good faith into account, as stated in Section 368. Nevertheless, it should be noted again that a number of writers who only



treat the “true intention” under Section 171 as the “objective intention,” still apply Sections 171 and 368 together when interpreting a contract. The problem here is that this seems to suggest that the “reasonableness test” is applied in two steps. In the first step, when interpreting the true intention in Section 171, its meaning is based on the recipient’s reasonable understanding, and the “ordinary usage and good faith” under Section 368 is taken into account in the second step. However, it is unclear how the method of adopting the interpretation’s theoretical structure works, and what the difference or distinction is between the “reasonableness test” under Sections 171 and 368. Also, as mentioned earlier, this view is the least favourable one because it fails to acknowledge cases of *falsa demonstratio non nocet* and likewise. Hence, the analysis in this section will rely on the prevalent view that treats the true intention as the pure subjective intention only.

*a) Unclear or contradictory contractual terms.*

**(1) General scenario**

In this case, a contract contains an ambiguous term or a clear term *per se*, but it contradicts others when read as a whole (making them unclear). The first approach operates well in this case because, in a contractual context, the true intention of the contracting parties should be objectively assessed, rather than the unilateral intention of each party. This is justified to protect the benefit of the other, who should be protected, given that it is bilateral in nature and a subjective assessment would not make sense. In the Supreme Court Decision No. 1229/B.E. 2501 (1958), mentioned in Section II.B.1, although the court referred to neither Section 171 nor 368 because it reasoned that the disputed contractual terms were already clear, so that no interpretation was necessary, it could be argued that, in this case, the contract did contain an unclear contractual term, namely, the phrase “. . . the case is completely finished.” On the one hand, a layman may understand this as meaning the “Supreme Court’s decision”; on the other hand, legal professionals generally understand it as the decision of either the Court of First Instance, the Court of Appeal or the Supreme Court.<sup>126</sup> Hence, it can be analysed that the reason for the interpretation here is that it is an unclear contractual term, so that the court used the ordinary usage, namely, the

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<sup>126</sup> Section 147 of the Thai Civil Procedure Code B.E. 2477 (1934) provides that:

“Any judgment or order which may not be appealed or petitioned or with respect to which a request for a new trial is not allowed according to law shall be deemed final from the date of its pronouncement.

Any judgment or order which may be appealed, petitioned or with respect to which a request for a new trial is allowed shall, if it is not appealed, petitioned or a request for a new trial is not made within a prescribed period of time, be deemed final from the expiration of such period of time. If it is appealed, petitioned or a request for a new trial is made and the appeal court or the Supreme Court or the court of first instance of retrial issues an order of disposal of the case from the case list as provided in section 132, such judgment or order shall be deemed final from the date of issuance of the order of disposal of the case from the case list.

Any party may file a request with the court of first instance trying the case for issuance of a certificate presenting that such judgment or order of the case has become final.”

common understanding of legal professionals that any level of the court's decision can be used for the interpretation. In terms of a legal analysis, it could be concluded that the court relied on the reasonableness test of Section 368, namely, ordinary usage, to interpret the forgoing text, despite it differs from the employer's subjective (internal) intention. This reflects the fact that it is necessary to apply a combination of Sections 368 and 171 in this kind of scenario to make the outcome of the interpretation fair and justifiable.

## **(2) Where there is a former practice between parties**

It is worth analysing a scenario in which there was a former practice of the parties. This can be further classified into two sub-scenarios, namely (i) when it was similar, and (ii) when it was different from the ordinary usage.

### **(2.1) When the former practice was similar to the ordinary usage**

The fact in the former case changes: the defendant (employer) had hired the legal services of the claimant (contractor) before, and in their former practice, the last payment was always paid based on the decision of the Court of the First Instance if the appeal was not made within the time permitted, when its meaning was no different from normal practice. If the same phrase was used in the current contract and it caused a dispute, it would be interpreted by taking the former practice into account that the employer's performance was due when the decision of the Court of the First Instance was announced (and there was no appeal within the specified time or an appeal was not permitted). In fact, it could be explained that Section 368 (namely, reasonableness test) is the only provision that plays a crucial role in interpretation here.

### **(2.2) When the former practice was different from ordinary usage**

The application of this approach becomes more complex if the parties' former practice is different from the normal practice. If the facts change to the contractor always receiving the final payment upon the Supreme Court's decision, the outcome of the interpretation would be different from the former analysis, as the former practice would prevail over ordinary usage. Again, Section 368 is the only provision that takes effect in this case. This reflects possible differences within the realm of "ordinary usage" itself. To illustrate, there is a distinction between the "former practice," which is regarded as "ordinary usage" in the narrow sense, since it only refers to practice between the parties, and "ordinary usage" in the broad sense, namely, the practices of a group of people or professionals.

*b) Discrepancy between the contracting parties' internal and external intentions.* This is a case in which the apparent text in the contractual document literally differs from what the parties mutually intended it to be. This approach does not function effectively in this kind of situation, in which two illustrations can be given for the analysis. The first is Illustration III, when a contractor agreed with an employer to start work on the 31<sup>st</sup> December 1904, but the 31<sup>st</sup> December 1905 appeared on the document. Assuming there is evidence of a negotiation between the parties, it could be used as a factor to seek their common intention. Hence, it could be deemed that the parties had commonly agreed to start work on the 31<sup>st</sup> December 1904, despite the apparent text being the year 1905. The second is Illustration IV, mentioned in Section V, when the title of the document appeared as a "loan," but the parties mutually understood it as being a lease. These two illustrations demonstrate that the application of Section 171 alone is sufficient to solve the cases, without the need of ordinary usage or good faith under Section 368, given that the parties' subjective intention can be commonly established.

*c) Gaps in a contract.*

### **(1) General scenario**

This is a case in which a contract has been formed, despite the parties not agreeing to some of the terms, and a dispute arises later; hence, an interpretation is required to fulfil a gap. This can be criticised in that the first approach does not normally operate systematically in this scenario, which stems from the fact that the common intention of the parties is absent; hence, there is no need to apply Section 171 (to seek their true subjective intention).

#### **Illustration V**

X went to have dinner at Y's restaurant. The price of each dish was clearly stated on the menu. There was not an asterisk explaining that the price excluded 10 percent service charge. X verbally ordered a dish of fried rice, shown on the menu as costing 1,000 baht. The parties could not agree whether the customer had to pay the service charge or not. Upon checking, Y asked X to pay 1,100 baht, while X only paid 1,000 baht, claiming that he had not agreed to pay the service charge.

The outcome of the interpretation would be that the former has no duty to pay a service charge based on commercial practice in Thailand, where customers do not generally pay it. The reasonableness test will be used for the interpretation to complete a gap in the contract by taking ordinary usage and good faith into account. Therefore, reference is made to Section 368 alone.

This can be usefully compared with the approach adopted by German lawyers. The German approach of applying Sections 133 and 157 simultaneously does not make doctrinal sense in this scenario either. It will be recalled that it was explained in Section IV that the objective method of Section 157 is called the "completive

interpretation of a contract” because its function is to fill the contractual gap, given that the parties’ common intention is absent. Hence, German lawyers only apply Section 157 to solve this kind of problem without referring to the subjective test under Section 133. Hence, it can be argued that the statement that Sections 133 and 157 can be applied simultaneously in German law is misleading, or inaccurate in some cases.

## **(2) When there was a former practice between the parties**

Again, it is useful to assess how this approach works in cases in which a contract contains a gap, but as the parties have entered into that kind of transaction before, a former practice between them can be found. The same analysis as above will be made to both scenarios when the former practice is the same and contrary to ordinary usage.

### **(2.1) When the former practice was similar to ordinary usage**

Consider the following Illustration:

#### **Illustration VI**

X went to Y’s diner and ordered a dish of fried rice to take away, and the parties disagreed about whether the seller was bound to provide plastic utensils or not.

This contract contains a gap. If the fact also emerged that X had ordered takeaway food from Y’s place before and Y always provided X with plastic utensils, the outcome of the current contract would be that Y was bound to provide X with plastic utensils, which is similar to normal practice. This means that Section 368 is solely used for the interpretation.

### **(2.2) When the former practice was different from ordinary usage**

The analysis of this approach becomes more complex when the former practice of the parties was in stark contrast to normal practice. Based on the same illustration, if the fact emerges that X had always told Y that he did not want plastic utensils, the result of the interpretation would be the same as their former practice, but different from ordinary usage. However, in making a legal analysis, it is unclear if Section 171 or Section 368 is used in this context because, as will be recalled, the first approach treats “true intention” under Section 171 as the “subjective intention,” but applies it together with Section 368, in which a reasonableness test is required. Hence, whether the parties’ former practice should be treated as their common “true (subjective) intention” or as “ordinary usage” is problematic. In other words, it is unclear whether Section 171 should be applied together with Section 368 or whether Section 368 should be applied alone in this scenario. Nonetheless, it appears to the author that, since this approach views the “true intention” as the subjective intention, if the contract contains

a gap, it means that the parties' intention is absent. Hence, when using this approach, it makes more sense to treat the parties' former practice as a subset of the wider scope of "ordinary usage" under Section 368, rather than their common subjective intention. This analysis is also similar to the scenario of the interpretation of unclear terms discussed above when there is a former practice of the parties, so that only Section 368 applies.

### **(3) Interaction with the "presumption of intention by law" provision**

It is not altogether clear how this approach deals with the "presumption of intention by law" provision or non-mandatory provisions; in other words, whether Sections 171 and 368 can be applied together with that provision or not. However, compared to the explanation in German law, in which an approach similar to the combination of Sections 133 and 157 is adopted, as pointed out in Section IV, it can be concluded that the application of the objective test in Section 157 would only take place in a scenario in which the contract contains a gap if there is no non-mandatory provision. This is due to the fact that the main purpose of Section 157 (Section 368 in the Thai law) is to fill a gap; hence, when there is already a provision that directly applies to the case, it must prevail over the one that deals with the interpretation of contracts.

#### **Illustration VII**

X went to Y's diner and ordered a dish of fried rice to take away. The parties did not agree on the place of performance of the obligation.

With regard to this illustration, there is a non-mandatory provision under the Thai Civil and Commercial Code that deals with this case, namely, Section 324,<sup>127</sup> in which it is provided that the place of performance of a non-specific thing is the creditor's domicile, unless agreed otherwise. Therefore, the answer would be that the seller is obliged to deliver the fried rice to the buyer's house, which seems strange, because it contradicts the understanding of a reasonable person that the place of performance of the obligation in this situation should be where the contract is formed if there is no agreement between the parties.

Alternatively, it might be possible to propose that Sections 171, 368, and a non-mandatory provision can be applied together at the same time under this approach. If this proposal is adopted, it could provide a satisfactory outcome for the case under discussion, because ordinary usage under Section 368 could be used as a factor for interpretation and it would prevail over the "presumption of intention by law" provision; hence, the answer in the studied case is that the seller is bound to deliver

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<sup>127</sup> Section 324 of the Thai Civil and Commercial Code provides that "When there is no special declaration of intention as to the place of performance, if a specific thing is to be delivered, the delivery is to be made at the place where the thing was at the time when the obligation arose; other kinds of performance must be made at the place of the creditor's present domicile."

the fried rice at his store. However, this proposal can be criticised for causing uncertainty, and indeed inconsistency, given that a non-mandatory provision usually comes before ordinary usage and/or good faith under Section 368 in most cases when a contract requires interpretation to fill a gap.

Furthermore, it is worth noting that this theoretical difficulty does not occur within German law because there is a well-written German non-mandatory provision that deals with the place of performance, which reads as follows: “Where no place of performance has been specified or where it is not evident from the circumstances, particularly from the nature of the obligation, performance is to be made at the place at which the obligor had their residence at the time the obligation arose.”<sup>128</sup> As can be seen, the phrase “it is not evident from the circumstances” is included in the German provision; hence, when dealing with the problem under discussion, the “presumption of intention by law” provision can deal with the case perfectly without the requirement of ordinary usage in Section 157, even if the true intention of the parties is absent. Based on the circumstances and the nature of the contract under discussion, it is reasonable to expect the place of performance to be the creditor’s location. Hence, it can be concluded that the German approach that consists of applying a combination of Sections 133 and 157 is not inconsistent with the application of the “presumption of intention by law” provision in this kind of scenario.

## 2. Second interpretative approach: Application of Section 171 before Section 368.

The approach of applying Section 171 before Section 368 also makes doctrinal sense on its own because it treats the “true intention” under Section 171 as either the subjective or objective intention, so that Section 171 itself can protect the innocent party, i.e., there is no need to apply the reasonableness test in Section 368. However, in the contractual context, it should be noted again that the parties’ true (either subjective or objective) intention must be mutually established in order to apply Section 171. The same analytical structure as that in Section VI.C.1 will be made for the analysis of this approach for the sake of comparison, as explained below.

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<sup>128</sup> Section 269 (Place of Performance) of the BGB provides that:

“(1) Where no place of performance has been specified or where it is not evident from the circumstances, in particular from the nature of the obligation, performance is to be made at the place at which the obligor had their residence at the time the obligation arose.

(2) If the obligation arose in the commercial undertaking of the obligor, then the place of the commercial establishment takes the place of the residence if the obligor maintains their commercial establishment at another place.

(3) It is not to be concluded solely from the circumstance that the obligor has assumed the costs of shipping that the place to which shipment is to be made is intended to be the place of performance.”

*a) Unclear or contradictory contractual terms.*

**(1) General scenario**

This approach is also effective in interpreting ambiguous or inconsistent text. According to the fact in the aforementioned Supreme Court Decision No. 1229/B.E. 2501 (1958), the subjective intentions of the parties in this case can be analysed as being different under this approach under which the “true intention” can be viewed either subjectively or objectively. It is also not a case in which one party should be aware of the other’s understanding, hence the reasonableness test is not required. Therefore, as the parties have no common true intention, Section 171 does not apply. In addition, Section 368 will be adopted as there is no applicable mandatory rule. In this way, the ordinary usage, namely, the practice of lawyers, could be used to interpret that the phrase “. . . the case is completely finished” could be any level of the court’s decision and the outcome could also be similar to the first interpretative approach.

**(2) When there was a former practice between the parties**

Despite the interpretation having the same outcome, the analytical process of the second approach differs from that of the first one when there was a former practice between the parties.

**(2.1) When the former practice was similar to ordinary usage**

If the contract that is currently being disputed contains the same phrase under discussion, it would be interpreted as being similar to the former practice of the parties (which is also similar to ordinary usage), namely, the payment is due upon the decision of a court of any level. However, there is no need to apply Section 368 here. In terms of a legal analysis, it is deemed that the employer’s true intention is to make the last payment after the decision of the Court of First Instance, even if it is different from his subjective intention in the current contract. This is because his former practice caused the contractor to reasonably believe that he would be paid after the decision of the Court of First Instance. Hence, Section 171 alone is sufficient to be applied to this case, given that the parties’ true intention can be objectively established.

**(2.2) When the former practice was different from ordinary usage**

If the facts change and the parties’ former practice is different from ordinary usage, the process of analysis would still be the same as above, but the result will be different. It can still be assumed that the parties’ true intention is based on their former practice, according to Section 171, but the outcome of the interpretation will be that the payment is due after the Supreme Court’s decision, which is different from the practice of legal professionals.

*b) Discrepancy between the contracting parties' internal and external intentions.* The second interpretative approach is effective when there is a discrepancy between the parties' internal and external intentions. Based on the same facts, it can be analysed that, despite the start date appearing to be the 31<sup>st</sup> December 1905 in the contract, the parties' true intention that it was meant to be the 31<sup>st</sup> December 1904 prevails. Again, the negotiation between the parties could be the factor used for the interpretation. In another example, the nature of the contract will be mutually understood by the parties as being interpreted as a "lease," despite appearing to be a "loan." The only provision that plays a role here is Section 171, given that the parties' common intention can be revealed by adopting the subjective test; therefore, neither Section 368 nor a non-mandatory provision will be used.

*c) Gaps in a contract.*

### **(1) General scenario**

The second approach is generally systematic in this scenario, mainly because the parties' true intention would normally be absent if there was a gap in the contract; hence, Section 171 could not be applied. The next step is to determine if there is a non-mandatory provision, and if there is not, whether Section 368 will be applied. The same facts mentioned above will be used for the analysis. In recalling Illustration V, when X went to have dinner at Y's restaurant, the parties did not agree whether X had to pay a service charge or not. Here, ordinary usage and good faith would be used for the interpretation based on Section 368, and the outcome would be that he was not obliged to pay a service charge. As can be seen, while the answer is similar to the first approach, the second approach is more systematic in the sense that it provides a clear sequence of interpretation, and Section 368 only steps in when the parties' true intention and non-mandatory provisions are absent.

### **(2) When there was a former practice between the parties**

This approach is analytically complex to a certain extent when a former practice between the parties exists.

#### **(2.1) When the former practice was similar to ordinary usage**

Based on the Illustration VI, if X has ordered takeaway food from Y's place before and Y always provided X with plastic utensils, the outcome of the current contract would be that Y has a duty to provide plastic utensils, which is similar to commercial practice. However, unlike the first approach in which Section 368 is applied for the analysis, the second approach instead reasons that Section 171 prevails over Section 386. The justification for this prevalence is that the former practice can be used to interpret the



parties' true intention. Hence, it would be deemed that, by applying an objective test, any reasonable person would understand that the seller has a duty provide the buyer with plastic utensils, as he has always done.

## **(2.2) When the former practice was different from ordinary usage**

If the facts change to X always telling Y not to provide him with plastic utensils, the result would be that Y is not obliged to provide them to X. Although the outcome is different from the previous scenario, the analysis remains the same in that the parties' former practice is objectively used to interpret their true intention under Section 171, and the application of either non-mandatory provisions or ordinary usage/good faith is not required (Section 368).

## **(3) Interaction with the “presumption of intention by law” provisions**

### **(3.1) General scenario**

As observed in Section III, it is clear how the second approach deals with the “presumption of intention by law” provision, which is only applied if there is no common true intention between the parties, i.e., Section 171 is not applicable. However, if it is applicable, it must come before the application of Section 368. This sequence is systematic and makes doctrinal sense in most cases. It is also consistent with the nature of non-mandatory provisions, which, theoretically, can be agreed differently by the parties. For instance, X entered into a lease of a house with Y. As X was in urgent need, the parties agreed that Y could deliver the house to him in its current condition. There were a lot of defects in the house, making the property below the standard of hired property. The relevant provision here is Section 546 of the Thai Civil and Commercial Code, which reads: “[t]he lessor is bound to deliver the property hired in a good state of repair.” However, this provision can be agreed differently by virtue of the parties' private autonomy. This reinforces the fact that, if the parties' common intention, namely, Section 171, can be established, non-mandatory provisions should not be applied. However, they should be applied if there is no such common intention. Also, this method of interpretation is in accordance with the fact that Section 368 is treated as a hypothetical intention. Hence, it should be applied after the non-mandatory rules, given that the “presumption of intention by law” provisions themselves are the primary step of the presumption of the parties' intention provided by law.

### **(3.2) Difficult Scenario I**

As pointed out in Section III, as some “presumption of intention by law” provisions, e.g., Section 487, already recognise the parties’ true intention in the text of the provision, how this approach deals with this kind of situation may be unclear. For example, if Sections 171 and 487 are applied together, does it mean that it is different from the sequence of interpretation proposed by this approach, i.e., why the application of Section 171 does not precede that of non-mandatory rules. In response to this, it can be explained that the problem stems from the way in which Section 487 is written, not the method of interpretation of this approach itself. In fact, it can be argued that Section 487 should not have included the phrase “The price of the property sold may be fixed by the contract or may be left to be fixed in a manner thereby agreed, . . .”; rather, it should have been written as, for instance, “If the price of the property sold is not fixed by the contract or left to be fixed in a manner thereby agreed, . . .” so that the provision would be consistent with the nature of non-mandatory rules.

### **(3.3) Difficult scenario II**

Nonetheless, there are a few situations in which the use of this approach is difficult from a theoretical perspective. In Illustration VII, X went to Y’s diner and ordered a dish of fried rice to take away without agreeing on the place of performance. Section 324 is the non-mandatory rule that deals with this case, in which it is stipulated that the creditor’s domicile is the place of performance of a non-specific thing. Hence, when the common intention of the parties is not found, the answer would be that the seller was obliged to deliver the fried rice to the buyer’s house. However, this seems to produce an unsatisfactory result, given that it would be in contrast to the understanding of a reasonable person that the place of performance of the sale of an item in this situation should be where the contract was formed, rather than the domicile of the buyer, even if there is no mutual agreement or former practice between the parties.

Two possible analyses to solve this problem under this approach are suggested below.

#### **(3.3.1) Parties’ common intention approach**

Firstly, it is worth analysing the possibility of ascertaining the parties’ true intention based on the objective test. If it is, the analysis would be that the non-mandatory rule is unnecessary. Hence, objectively assessed, the answer would be that the place of performance is the seller’s diner by virtue of Section 171. However, this analysis is unlikely to work under the second approach, given that its sequence of interpretation is fundamentally conflicting. It is hardly convincing that the parties’ true intention can be mutually found, even if the reasonableness test is used, given that they did not express their intention in this respect, and there is no former practice to rely on.

### (3.3.2) General good faith approach

Secondly, this could be a situation in which the general concept of good faith has a role to play. This concept appears in Section 5, in which it is stated that “Every person must, in the exercise of his rights and in the performance of his obligations, act in good faith.” It is important to understand that, in the context of “good faith,” Section 5 is not regarded as the general law (*jus generale*) and Section 368 is not regarded as a specific law (*jus speciale*).<sup>129</sup> If that was the case, Section 368 would prevail over Section 5, which would suggest that it would be impossible to apply Section 5 whenever Section 368 is applied to the case; instead, good faith in Section 5 is a general principle of law, which covers all aspects of legal relationships (German: Generalklausel), even if the case is particularly governed by a specific rule.<sup>130</sup>

This may raise the question of why good faith under Section 5 is required for an interpretation, as it may be argued that good faith under Section 368 should be used. However, the response to this question is that Section 368 cannot be applied under the second approach on the basis that Section 324, which is a non-mandatory rule, is dealing with it already. Therefore, the normal outcome of the interpretation should be the same as the rule provided in Section 324. However, given that this produces an unfair outcome, Section 5, which is the general rule of good faith, steps into action. In other words, if there is a dispute in this kind of situation, the debtor can enjoy protection under Section 5 by claiming that the creditor, despite having the lawful right, has not exercised that right in good faith.

### 3. Concluding remarks.

In comparison, although both interpretative approaches provide a fair and satisfactory outcome, the analyses in this section have shown that the second approach is a more systematic method of interpretation. This mainly stems from the fact that it proposes the sequence of the interpretation, which begins with the parties’ true intention (Section 171), followed by non-mandatory rules, and the requirement of ordinary usage and good faith (Section 368), respectively. Firstly, the parties’ intention (Section 171) should be respected due to the doctrine of private autonomy. Secondly, non-mandatory rules, which can be agreed differently, are only used if the parties have no common intention. However, the application of the general rule of good faith under Section 5 can be used to diminish the result of the application of non-mandatory rules. Thirdly, the “hypothetical intention” (Section 368) is the last source available for the interpretation if there is no non-mandatory rule.

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<sup>129</sup> Somyot Chueathai (n 40) 259.

<sup>130</sup> *ibid.*

## D. Extent to Which True Intention Can Contradict Good Faith

In terms of the extent to which the parties' true intention can contradict good faith (if the contract is valid), the analysis of each interpretative approach under the Thai law differs, although it may result in the same outcome.

Based on the first approach, which involves applying Sections 171 and 368 simultaneously, it is more likely that the notion of good faith under Section 368 would prevail the parties' true intention under Section 171. The analysis of this approach in Illustration II would be that, using good faith to interpret the contents of the contract, the agreed fare between the parties could be reduced to a reasonable fare. The analysis under the German law would be similar to this approach, given that the objective test under Section 157 could be used to intervene in the parties' true intention.

On the other hand, according to the second approach that involves applying Section 171 before Section 368, although the objective test can be used based on Section 171, it is unlikely that good faith, as objective good faith, would be used under Section 171. Hence, the outcome would be likely to be that the parties' true intention would prevail over good faith under Section 368. Initially, it seems that this approach provides an unfair outcome, but, although this analysis is agreeable, the author has a different view that it does not mean that the parties' intention should always be respected if it infringes good faith. This is because, if the courts viewed it as being unfair, it would always be possible to apply the general rule of good faith under Section 5, which is the same as the analysis in the previous heading.

As for the approach under the DCFR, there appears to be no definite answer for this issue, as the DCFR leaves it for the role of the requirement of good faith in each system.<sup>131</sup> Nevertheless, the rule of the DCFR enhances the analysis in the Thai law that any contract that infringes good faith, which is a fundamental in the Thai private law, does not automatically become void because there is no rule under Thai law that provides for such an effect.

## VII. CONCLUSION AND RECOMMENDATIONS

### A. Conclusion

#### 1. Meaning of true intention.

Under the Thai Civil and Commercial Code, the theoretical problem of the "interpretation of a contract," in the sense of interpreting its problematic contents, mainly stems from the fact, *inter alia*, that Thai scholars understand the term "true intention" under Section 171 differently. While most writers, as well as the Thai courts,

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<sup>131</sup> DCFR, Article II. – 7:301: Contracts Infringing Fundamental Principles.

apply the subjective test (the first approach), critics argue that the objective test (the second approach) should be applied.

It is concluded that the first approach is more effective than the second one to a certain extent. This is fundamentally because, by the same token as German law, the subjective intention under Section 171 is not solely enforced, but the objective test under Section 368 is used simultaneously to balance the power of subjectiveness; hence, the receiver of the intention, who is the other contracting party, can be protected. Its drawback is that it causes theoretical uncertainty outside the contractual context, i.e., the interpretation of a unilateral juristic act, as to why Section 368, which particularly deals with the interpretation of a contract, can be applied. It may be proposed that the scope of Section 368, by the same token as German law, is the same as Section 171; hence, the reasonableness test under Section 368 can also be applied to unilateral juristic acts. Nevertheless, it can still be argued that, in terms of the structural framework of the Thai Civil and Commercial Code, Section 171 appears in the book of general provisions, whereas Section 368 appears in the book of contracts. Therefore, “ordinary usage and good faith” under Section 368 are not meant to be used to interpret a unilateral juristic act.

As for the second approach, it is concluded in this article that this is the least satisfactory approach because it fails to explain how the parties’ subjective intentions can be mutually established (*falsa demonstratio non nocet*). Also, it fails to deal with a situation in which a party is aware or should have been aware of the other’s subjective intention. These exceptions to the subjective test must be acknowledged if the second approach is to be adopted. In addition, since the proposers of this approach also explain that Sections 171 and 368 can be applied together, it causes uncertainty about the application of the objective test by these two provisions, i.e., why the objective test is simultaneously applied by two provisions is questionable.

Furthermore, there is a third approach that is a mixture of the former two, as it involves the application of both the subjective and objective theories of interpretation, depending on the nature of the declaration of intention or whether the recipient should be protected or not in the specific circumstances. It is concluded that this is the most effective approach because it avoids the weakness of both of the former approaches. While it acknowledges subjectivity in the case of *falsa demonstratio non nocet* and where the recipient knew, or is expected to have known, the declarer’s intention (i.e., similar to the first approach), it also recognises the reasonableness test *per se*. Hence, there is no theoretical difficulty in applying Section 171 to non-contractual cases, thereby avoiding the theoretical weakness of the first approach. Finally, it is observed that, in a contractual context, this approach is essentially similar to the rules of interpreting a contract under the DCFR.

## 2. Method of interpretation of a contract.

There is a dichotomy of the interpretation of contracts in Thai law. While the first approach of interpretation, which consists of a combination of Sections 171 and 368,

functions well in some cases, its application in others may be theoretically uncertain. It generally operates effectively when dealing with unclear or inconsistent contract terms, because the application of Section 368 is required to uphold the reasonableness test in order to balance the subjective test of Section 171; hence, it is necessary to apply both tests simultaneously. However, when there is a discrepancy between the parties' internal and external intentions, and they are shown to have a common internal intention, the subjective test under Section 171 is sufficient for the interpretation. Likewise, Section 171 cannot normally be applied in the case of a "completive interpretation of the contract" because there is no mutual agreement between the parties. Instead, ordinary usage and good faith under Section 368 are used as a hypothetical intention to fill the gaps in the contract. Moreover, the combination of Sections 171 and 368 causes inconsistent sequences of interpretation. For instance, both provisions must be applied together when interpreting an unclear contractual text; therefore, the reasonableness test is used to provide a just outcome. In contrast, only the reasonableness test under Section 368 is used when the interpretation is to fill a gap in the contract. Likewise, it is unclear when this approach deals with non-mandatory rules. In short, the notion of applying Sections 171 and 368 simultaneously is deficient, because it is clear that only one of them is applied in certain circumstances.

The second approach that proposes the sequence of the interpretation from Section 171, non-mandatory rules, and Section 368, respectively, functions effectively in most of the studied cases, with limitations in very few of them. Since this approach adopts both the subjective and objective theories when seeking the parties' common intention under Section 171, it generally operates effectively when dealing with the interpretation of unclear or contradictory contract terms; hence, the innocent party can be protected, even if the other party did not have a subjective intention as such. Also, it works well in cases where the parties' internal and external intentions conflict because the common intention of the parties can be shown by applying the subjective test. Moreover, it has no difficulty in dealing with an interpretation to fill a gap in the contract, whether there is a former practice between the parties or not. If there is one, the former practice can be used to support the parties' objective intention that they have an agreement that is similar to the former practice (even if they do not agree with it in the current contract). But Section 171 cannot usually be applied if there is no former practice on the ground that the parties had no common intention. Hence, pertinent non-mandatory provisions are applied as the first step of a hypothetical intention by the law. If there are no such mandatory provisions, the reasonableness test plays a role as the second step of a hypothetical intention under Section 368. As the scope of Section 368 is broad, and given that ordinary usage and good faith are used as factors of the interpretation, it should hypothetically be able to deal with all interpretation-related problems.

### 3. Conflict between true intention and good faith.

When there is a conflict between the parties' true intention and good faith and the contract is valid, the first approach, which entails applying a combination of Sections 171 and 368, is likely to take the objective test, namely, good faith, to determine the true intention, in order to protect the disadvantaged party. In contrast, the second approach, which involves applying Section 171 before Section 368, appears to respect the parties' subjective common intention, given that it can be established. Nonetheless, if the outcome of the contract is deemed to be unjust, it is still possible to protect the disadvantaged party by relying on general good faith under Section 5.

## B. Recommendations

Firstly, it is recommended that a contract can always be interpreted, regardless of whether it contains clear terms. This is because there are scenarios in which the parties' actual intention is different from what they expressed; hence, an interpretation is required to enforce their actual intention. However, if the contents of the contract are clear and the parties' intention is in accordance with that clear term, they will be interpreted according to their literal meaning.

Secondly, it is recommended that the interpreter of a contract should primarily ascertain the reasons for the interpretation. The most common reasons include unclear or contradictory contract terms, a discrepancy between the parties' internal and external intentions, and gaps in the contract. A clear understanding of the reasons for the interpretation enables the interpreter to apply the correct methods/sequences of interpretation.

Thirdly, it is proposed that the most satisfactory approach is the one that views the parties' true intention as "either the subjective or objective intention, depending on the nature of the declaration of intention" (the third interpretative approach) on the basis that it enables the interests of an innocent party to be protected *per se*; hence, its scope covers all declarations of intention, not only those in the contract. In addition, it provides a more systematic method of interpretation by clearly distinguishing the application of Section 171 and Section 368 from each other, as further clarified below.

Fourthly, in terms of the method of interpretation, a sequence of interpretation is proposed, the first step of which is to find the parties' common true intention. If this can be established (either subjectively or objectively), Section 171 must be applied; if not, the applicable non-mandatory rule takes precedence. It is particularly proposed that the non-mandatory rules on the interpretation of documents, namely, Sections 10–14, are only applied if the parties' common intention is absent. If the non-mandatory rules are not available, the final step is to interpret the contract based on ordinary usage and good faith under Section 368.

Finally, when a contract contradicts good faith, as a first step, it is recommended to consider if it is void on the grounds that it is either expressly prohibited by law or contrary to public order or good morals or not. If it is, it will be

void and the rule of partial voidness<sup>132</sup> could apply. If it is not, although the parties' common intention would prevail in the sequence of interpreting a contract, the fundamental rule of good faith under Section 5 can be used to protect the disadvantaged party.

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<sup>132</sup> Section 173 of the Thai Civil and Commercial Code provides that "If any part of an act is void the whole act is void, unless it may be assumed under the circumstances of the case that the parties intended the valid part of the act to be separable from the invalid part."

\* **Indexing Thai names.** "Although family names are used in Thailand, Thais are normally known by their given names, which come first, as in English names. The name is often alphabetized under the first name, but practice varies." The Chicago Manual of Style (18th edn, University of Chicago Press 2024) §15.93.