SCOTTISH LAW COMMISSION
Discussion Paper No 101

Interpretation in Private Law

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The Commission would be grateful if comments on this discussion paper were submitted by 30 November 1996**.** All correspondence should be addressed to:

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NOTES

1. In writing a later report on this subject, the Commission may find it useful to be able to refer to and attribute comments submitted in response to this paper. If no request for confidentiality is made, the Commission will assume that the response is not intended to be confidential.

2. Those who wish copies, or further copies, of this discussion paper for the purpose of commenting on it should contact the Commission at the above address.

INTERPRETATION IN PRIVATE LAW

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Part I Introduction

Purpose of discussion paper

1.1 The purpose of this discussion paper is to seek views on proposals for restating the rules on the interpretation of expressions used in private law contexts and for reforming the law on the use of extrinsic evidence for this purpose. The discussion paper straddles several topics in our law reform programme on which we have been working for some time – including evidence,[1] obligations,[2] succession[3] and property.[4]

Background to discussion paper

1.2 The first item in the Commission's first programme of law reform[5] is the law of evidence. One of the most criticised parts of the law of evidence is the part dealing with the admissibility of extrinsic evidence in the interpretation of writings. The rules on the admissibility of extrinsic evidence cannot be reformed in a satisfactory way unless the substantive rules on interpretation are themselves restated in a way which is as clear as possible. This is because any restriction on the admissibility of relevant evidence has to be justified by good reasons. The question whether there are good reasons for restrictions can be assessed only when it is known what would be regarded as irrelevant, and hence inadmissible anyway, in the absence of any restrictions. That is the general background to this discussion paper.

1.3 The immediate background to the discussion paper is that in our recent report on *Three Bad Rules in Contract Law*[6] we decided not to make recommendations on the use of extrinsic evidence in the interpretation of contractual documents. We had consulted on proposals for reform and there was support for the proposals. However, it was suggested to us that it was too narrow to concentrate on the interpretation of contracts, given that similar problems arose in other legal contexts. We accepted this criticism and undertook to return to the question of interpretation. This discussion paper is the result of our reconsideration of the problem. It proposes rules for the interpretation, not just of expressions used in contracts, but of expressions used in any private law context.

1.4 A preliminary draft of this discussion paper was considered by our Advisory Group on Contract Law at its meeting on 11 June 1996 when useful and constructive suggestions were made. We have tried to take these suggestions into account in this final version of the discussion paper. We are grateful to those who attended the meeting and gave us the benefit of their experience and advice.[7]

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[1] Item 1 in our First Programme of Law Reform (1965).
[2] Item 2 in our First Programme of Law Reform (1965).
[3] Item 7 in our Second Programme of Law Reform (1968).
[4] Item 16 in our Fourth Programme of Law Reform (1990).
[5] Scot Law Com No 1 (1965).
[6] Scot Law Com No 159 (1995).
[7] A list of those who attended is given in Appendix B.

The need for reform

1.5 The existing law on the use of extrinsic evidence in the interpretation of writings in the private law field is notoriously complicated.[8] The basic rule that extrinsic evidence is inadmissible is subject to so many overlapping exceptions that it almost ceases to exist as a general rule. The law on this subject is confused and unsatisfactory.[9] It also appears to be increasingly out of line with practice.[10]

1.6 The substantive law on interpretation is in need of clarification and restatement rather than fundamental reform. Clarification and restatement would be useful in themselves and would enable the rules on the admissibility of evidence to be rationalised and simplified.

1.7 The interaction between the substantive law and the evidential law is also in need of clarification. It is our impression that some problems which should properly be solved by use of the substantive law have been solved by reliance on restrictive rules of evidence.

Scope of discussion paper

1.8 The discussion paper deals with the interpretation of expressions. It deals with "expressions" rather than "words" because questions may arise as to the interpretation of signs, figures of symbols of various kinds.

1.9 The paper is concerned with the interpretation of expressions actually used by parties. Pleaders have sometimes attempted to ignore the expressions used and to lead evidence of general underlying intention.[11] Such attempts have been stoutly resisted by the courts.

> "The question is neither what the testator meant, apart from the words used, nor what the words might mean, apart from intention, but what the testator meant by using them."[12]
>
> "The question to be answered always is, "What is the meaning of what the parties have said?" not, "What did the parties mean to say?"[13]
>
> "It [is] important to distinguish between an overall view of what would be sensible, and what, when looking at specific words in an existing provision, is a sensible interpretation of those words."[14]

In this discussion paper we are concerned only with the meaning to be attributed to expressions actually used. We are not concerned with the meaning which a party might have wished to express but did not. And we are not concerned with implied terms. Some of the Scottish Institutional writers[15] and some civil codes[16] have rules on the implication of

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[8] See Walker and Walker, *Evidence*, Chap. XXI.
[9] See Part VII.
[10] See para 7.8 below.
[11] See eg *Cowan v Magistrates of Edinburgh* (1887) 14R 682.
[12] *Easson v Thomson's Trs* (1879) 7R 251 at 253.
[13] *Wickman Machine Tool Sales Ltd v Schuler A.G.* [1974] AC 235 by Lord Simon of Glaisdale at 263.
[14] *Muir Construction Ltd v Hambly Ltd* 1990 SLT 830 by Lord Prosser at 833.
[15] See Bankton, *Institute* I.11.55 rule 10 – "all deeds imply the obligations incident by law to such kind of contracts, tho' nothing of them is mentioned therein"; Bell, *Principles* (4th ed, 1834) 205 rule 6 – "in the several contracts, sale location, &c. the naturalia of the particular contracts are tacitly part of the agreement".

terms in the middle of rules on interpretation. However, the implication of terms is a different matter from the interpretation of terms and is not covered in this paper.

1.10 The discussion paper deals with the interpretation of expressions whatever the medium in which they are made or recorded. It is not confined to writings. Most reported cases on interpretation have been concerned with writings, for fairly obvious reasons. However, there have been exceptions.[17] It would, in our view, be wrong to have one set of rules on the interpretation of written expressions and another set of rules on the interpretation of other expressions. Many contracts are entered into orally. Often they are entered into by telephone and the expressions used by the parties are recorded. Technological advances in the area of electronic data interchange make rules of interpretation which are restricted to writing old-fashioned and inappropriate to present and likely future conditions.

1.11 The discussion paper deals with expressions used in contracts, conveyances, wills and other similar private law contexts. It is convenient to have a term to cover all the cases with which we are concerned. We cannot use "deeds" as that is, in normal legal usage, confined to writings. We will refer therefore to "juridical acts", by which we mean any manifestation of will or intention by a person acting in the realm of private law which has, or is intended to have, a legal effect as such.[18] A juridical act will include a contract; a grant, assignation or renunciation of a right; a discharge of an obligation; a conveyance of property; a declaration of trust; a will or other testamentary deed; a grant of consent to what would otherwise be an invasion of a legal right; a notice required by law for any purpose; and an acceptance of office as an arbiter, trustee or guardian. It covers only what has, or is intended to have, a legal effect as a manifestation of will or intention: it will not include, for example, a negligent act (which has legal effects but not in that way) or actings such as possession (which also may have legal effects of various kinds but not as a simple manifestation of will or intention). The act must be in the realm of private law. We would therefore exclude from the term "juridical act" legislative, judicial or administrative measures. An Act of Parliament is not a juridical act. Neither is a court decree or a warrant granted by a court. Neither is a resolution passed by a local authority. We are not here concerned with questions of validity or effectiveness. Juridical acts may be invalid for various reasons, formal or substantial. Rules of law governing particular juridical acts may require something additional, such as delivery or registration or possession, before they will be effective. These are separate questions. Here we are concerned only with interpretation.

1.12 It follows from what has just been said that the discussion paper is concerned only with interpretation in the private law context. It is not concerned with the interpretation of Acts of Parliament or other legislative acts, or with the interpretation of court decrees or warrants, or with the interpretation of administrative measures.

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[16] See eg French civil code art 1160.

[17] See eg *Muirhead & Turnbull v Dickson* (1905) 7F 686.

[18] The French term is "*acte juridique*": the German is *"Rechtsgeschäft"*. Sometimes this idea is expressed in English by "legal transaction". See eg the Age of Legal Capacity (Scotland) Act 1991 ss 1 and 9. However, the word "transaction" has to be artificially extended, as it is in the 1991 Act, if it is to cover unilateral acts and, for that reason, we prefer the term "juridical act". The term "juristic act" has occasionally been used in Scottish legal writing. See eg Smith, *Short Commentary on the Law of Scotland,* 284 – 285. However, this may conjure up the image of an act of a type which would be done by a jurist, and seems less suitable than "juridical act". We note that "juridical act" is the term used in the English part of the three-language version of the new *Netherlands Civil Code: Patrimonial Law* published under the auspices of the Ministry of Justice of the Netherlands.

Approach adopted

1.13 This discussion paper carried forward, in a more generalised form, proposals on which we have already consulted in relation to contracts.[19] We have tried to keep it as brief as is consistent with a clear presentation of the issues on which we would welcome views. We do not therefore repeat in this paper the critical analysis of the existing rules of the admissibility of extrinsic evidence in the interpretation of contracts which we made in our earlier discussion paper.

1.14 Our objective in this exercise is to provide those who have to interpret expressions used in juridical acts with an efficient set of working tools, so that the results which, by and large, are reached under the existing law could be reached more easily. Our objective is not to arrive at a philosophically satisfactory conclusion on such questions as the meaning of meaning. It is necessary to say this because the subject of interpretation does give rise to philosophical difficulties[20] and we are well aware that some of the distinctions which we use as the basis of our proposed working rules would not necessarily stand up if pushed to logical extremes. This is true, for example, of the distinction which we drew between an objective approach to interpretation - based on the meaning which a reasonable observer would give to an expression - and a subjective approach - based on the meaning which the user of the expression intended. The reasonable observer might well have some idea that meaning depends on intention and, if permitted to look at evidence of actual intention, would no doubt take that into account at least in some cases of unresolved ambiguity. So the difference between the objective and the subjective approach depends in certain cases on the information which the hypothetical reasonable observer is supposed to have available.

Policy considerations

1.15 Four main policy considerations underlie our proposals.

1. The same rules of interpretation ought to apply, unless there is good reason to the contrary, to expressions used in juridical acts, whatever the nature of the juridical act and whatever the medium used.

2. The rules of the substantive law on interpretation ought to be such that it is possible to determine what facts and circumstances the interpreter can properly take into consideration, whether the interpreter is or is not a court.

3. Third parties ought not to be affected by secret meanings attached to expressions in juridical acts.

4. Relevant evidence should be admissible and irrelevant evidence should be inadmissible.

1.16 If effect can be given to these policy considerations in an acceptable manner then the result would, we believe, be a more principled and efficient set of rules both on interpretation as a matter of substantive law and on the admissibility of evidence. The

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[19] Discussion Paper No 97 on *Contract Law: Extrinsic Evidence, Supersession, and the Actio Quanti Minoris* (1994).
[20] Some of these are touched on in Phipson, "Extrinsic Evidence in Aid of Interpretation" (1904) 20 L Q R 245.

problem is very largely one of restating the law in a more principled way rather than changing the results likely to be reached.

1.17 A more general background policy consideration is the desirability of developing Scottish private law in a coherent way. We are enjoined by the Law Commissions Act 1965 to keep the law under review "with a view to its systematic development and reform, including in particular the codification of such law, the elimination of anomalies ... and generally the simplification and modernisation of the law".[21] The proposals made in this paper form part of that review. They are consistent with the recommendations made in other reports, including in particular our reports on the *Formation of Contract*[22] and on *Three Bad Rules in Contract Law*[23]. If approved and enacted, the rules proposed in this paper could be embodied in a self-contained law reform Act. They would belong, in a codified system, in a general part at the beginning of a civil code or code of private law.[24]

1.18 It was pointed out at the meeting or our Advisory Group on Contract Law that another aspect of coherence in the development of the law is the need to ensure that account it taken, in developing one area, of developments which have taken place in others, not only in order to avoid conflicts but also to ensure that one branch of the law is not distorted so that it can perform a function which is already being performed in a direct way by another. In the present context this suggests that the rules on interpretation should not be distorted in order to do the work which can more properly be done by, for example, rules on rectification, or variation of contracts, or unfair contract terms.

Comparative law

1.19 The interpretation of juridical acts is, on the surface of things, one of the fault lines between civilian systems and systems heavily influenced by English law. In the development of Roman law there appears to have been a progression from an exaggeratedly objective to an exaggeratedly subjective approach to interpretation.[25] In the early Roman law the emphasis was all on outward form. In the Byzantine period the emphasis was all on subjective intention. In the intervening classical period there was something of a "happy equilibrium" between the two approaches.[26] The writers who influenced the content of the major European civil codes placed the emphasis on the actual will, in accordance with the theory which was then dominant.[27] This emphasis found its way into, and is still apparent in, a number of civil codes.[28] By contrast English law has, at least since the early nineteenth

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[21] Section 3(1).
[22] Scot Law Com No 144 (1993) (not yet implemented).
[23] Scot Law Com No 152 (1996) (not yet implemented).
[24] It is a defect in the French civil code that it does not have general rules on the interpretation of juridical acts. It has rules on the interpretation of contracts (see Appendix A) and these have to be extended by analogy to other juridical acts: Mazeaud, *Leçons de Doit Civil* (T. IV, 2d ed) 282. The German BGB is better in this respect as it has one section (§133) of general application. However, it has special rules for contracts and wills (§157 and §2084) which might well have been generalised.
[25] See Kaser, *Roman Private Law* (Dannenbring's translation, 2d ed) § 8, I.; Pringsheim, "Animus in Roman Law" (1933) 49 LQR 43 and 379.
[26] See Zimmermann, *The Law of Obligations: Roman Foundations of the Civilian Tradition* (1990) 634.
[27] Pothier's first rule of interpretation was that the interpreter should consider the general intention of the contracting parties rather than follow the literal meaning of the words. §91. The German Pandectists adopted a similar approach. See Kaser, cited above.
[28] See eg the French Code Civil, art 1156; the German BGB § 133; the Italian Civil Code, art 1362. These provisions are set out in Appendix A to this Discussion Paper.

century, placed the emphasis on the ordinary, objectively determined meaning of the words used and has discouraged attempts to seek actual intention.[29]

1.20 The earlier Scottish Institutional writers used civilian sources extensively[30] but, with the exception of Kames,[31] adopted a balanced rather than an excessively subjective approach.[32] Since the early nineteenth century the Scottish approach has been similar to the English, and English cases on interpretation have been freely cited in Scottish textbooks.[33] South African courts have in general also followed the English approach, although the cases contain conflicting statements on the subject.[34]

1.21 Appearances can, however, be deceptive and it is probable that there is less of a difference in the two approaches, as they actually operate, than might appear from a superficial reading of isolated provisions of the codes and isolated judicial statements.

1.22 The introductory provisions on interpretation in certain civil codes are not so subjective as they might appear at first sight. The "common intention" of the parties is not the same as their individual subjective intentions. And the apparently subjective initial provisions are supplemented by other, more objective, provisions.[35] It is well recognised in civilian systems that there very often is no ascertainable common intention of the parties to a contract; that judges cannot be allowed, under the guise of interpretation, to rewrite a juridical act; and that the interests of those who rely on the apparent content of a juridical act cannot simply be ignored.[36] Modern German law, for example,

> "tends to follow a more objective, or normative, approach; the emphasis is not so much on what a party may have meant, but on how a reasonable man would have understood his declaration. There is no room for an inquiry into the 'true intention' of the parties if the justifiable reliance of the addressee deserves protection."[37]

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[29] The classic statement is by Lord Wensleydale in *Grey v Pearson* (1857) 6 HL Cas 61 at 106 - "the grammatical and ordinary sense of the words is to be adhered to, unless that would lead to some absurdity, or some repugnance or inconsistency with the rest of the instrument...".

[30] See Stair, *Institutions* IV. 42. 20 and 21; Bankton, *Institute* I. 11. 53-61; IV.45.15; IV.45.25-30; Erskine, *Institute* III.3.87.

[31] Kames is pure subjectivity. Equity "endeavours to reach will, which is the substantial part; and if, from the end and purpose of the engagement, from collateral circumstances, or from other satisfying evidence, will can be ascertained, it is justly made the rule, however it may differ from the words". *Principles of Equity*, (1825 ed) 133.

[32] Stair, for example, gives the following as his fourth and fifth rules of interpretation. (IV.42.21.)

> "Fourthly, *Plus valet quod agitur, quam quod simulate concipitur:* more respect is to be had to what appears by the writ, to have been the interest and design of the parties, than to what the style appears. (Underlining added.)
>
> Fifthly, *In claris non est locus conjecturis.* This is a correctory to the former rules, that judges may not arbitrarily interpret writs, or give them a sense inconsistent with their clear words."

Bankton states the first rule of interpretation as being that "In interpretation of writings, the Intention of the parties, express or implied, must be the rule." (IV.45.50) But he then comments immediately that

> "The first rule of interpretation is the express tenor of the deed, and the intention of parties thence appearing". (Underlining added.)

[33] This was already apparent in Bell's *Principles* (4th edn 1834).

[34] See Christie, *The Law of Contract in South Africa* (2d edn 1991) 247-248.

[35] See eg French Civil Code arts. 1158 - 1162; Italian Civil Code arts. 1363, 1366 - 1371; German BGB, § 157. There is a particularly interesting discussion of the subjective and objective approaches in Italian law in Criscuoli and Pugsley, *Italian Law of Contract*, 145 - 151.

[36] See Marty & Raynaud, *II, Les Obligations*, para 218; Mazeaud, *Leçons de Droit Civil; Successions, Liberalités* (2d ed) 282; Cohn, *Manual of German Law* (2d ed) 82; Zimmermann, *The Law of Obligations*, cited above, 636-637; Criscuoli and Pugsley, *Italian Law of Contract*, 148.

[37] Zimmermann, *The Law of Obligations* (cited above) 636. See also Horn, Kötz and Leser, *German Private and Commercial Law* (transl by Weir) 75 - 76.

1.23 On the other hand it is well recognised in English law, and in the systems which have been heavily influenced by it, that there are cases where it would be absurd to ignore a special meaning which the parties to a contract had attached, by mutual agreement, to an expression; or to ignore the apparent actual intention of a testator where there was no other way of resolving an ambiguity as to the identity of a legatee; or to ignore the context of an expression or the circumstances surrounding the making of a juridical act. It is most certainly not the case that the literal meaning of an expression is always followed.[38]

1.24 The truth is that there is a tension, inherent in the very nature of the interpretative process, between the objective and the subjective approaches. The lesson to be drawn from comparative law is that a pragmatic way has to be found to accommodate this tension, so that the law can operate fairly, predictably and efficiently.

1.25 Most European countries make use of canons of construction which are derived, in many cases, from Justinian's Digest and which form part of a common European legal heritage.[39] Paradoxically, more use is made of these civilian canons of construction in English and Scottish law than in some more heavily civilian countries.[40]

1.26 In Appendix A to this paper we set out excerpts on interpretation from Justinian's Digest, from the Scottish Institutional writers, from Pothier's seminal work on obligations, from a modern English textbook on the interpretation of contracts and from the French, German and Italian civil codes. We also set out the corresponding rules from the American Law Institute's, *Restatement of the Law Second: Contracts 2d* and the relevant provisions from the Unidroit *Principles of International Commercial Contracts*, and from the United Nations *Convention on Contracts for the International Sale of Goods*. The reader will easily be able to trace certain rules from the earliest to the latest of these sources. We have found the international instruments, which represent the results of a great deal of discussion between lawyers from different legal traditions, particularly interesting and useful. The rules which we propose in this discussion paper are part of a long tradition and are, we believe, in line with current international developments.

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[38] For a striking recent example, see *Charter Reinsurance Co Ltd v Fagan* [1996] 3 All E R 46, where the House of Lords interpreted "actually paid" as meaning "exposed, in the event when finally ascertained, to liability as a result of the loss insured under clause 1" – a meaning far removed from the literal meaning of the words.

[39] See Appendix A for Scotland, England and some countries from continental Europe.

[40] In Germany the drafters of the BGB largely abandoned the canons of construction of the *ius commune*, preferring to let construction depend on the circumstances of each case and the requirements of good faith. See Zimmermann, *The Law of Obligations* 638. §2084 of the BGB is, however, an example of the rule favouring the construction which gives, rather than denies, effect to a juridical act.

Part II General rule

Introduction

2.1 The question with which we are concerned in this part is whether the general rule for the interpretation of expressions in juridical acts should be based on an objective or a subjective approach. Under an objective approach the general rule would be that an expression should be interpreted as a reasonable third party would interpret it in its context and factual matrix.[1] Under a subjective approach the general rule would be that an expression used by a party should be interpreted in the way that that party intended, even if that required an unnatural meaning, which would not be apparent from the terms of the juridical act in its context and surrounding circumstances, to be given to the expression.

Existing law

2.2 *Objective approach favoured*. It is reasonably clear that, apart from special cases, only an objective approach is consistent with the results actually reached by the existing law. However, it is equally clear that the existing law does not require expressions to be considered in isolation from their context and surrounding circumstances. That would be unrealistic. Expressions have to be considered in the context of the whole juridical act in which they are used and, at least if there is any ambiguity,[2] in the light of the surrounding circumstances at the time when they were used. The general approach of the existing law can be illustrated by reference to dispositions and other conveyancing deeds; contracts; wills and other testamentary writings; and other miscellaneous juridical acts. There is an exception to the general rule for contracts, not affecting the interests of third parties, where a special meaning has been assigned to an expression by both parties, or by one party to the knowledge of the other. We deal with that later.[3] Here we are concerned only with the general rule.

2.3 *Conveyancing deeds.* In relation to dispositions, feu contracts and other conveyancing deeds which appear on the Register of Sasines an objective approach is adopted. In the typical case of a disposition,

> "a purchaser is entitled to rely on the faith of the record. He is not concerned with the intention of the person who created the burden."[4]

Similar policy considerations would undoubtedly lead to the same conclusion in relation to documents submitted in support of an application for registration in the Land Register.

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[1] It should be noted that this is not the same as a literal approach. A reasonable third party, interpreting an expression in its context and factual matrix, would not necessarily give in its literal meaning. Indeed such a third party might have no difficulty in dismissing a literal meaning out of hand. See eg *Watson v Neuffert* (1863) 1M 1110 at 1114 where Lord Justice-Clerk Inglis rejected the literal meaning of a provision as "a most violent and forced construction".

[2] We consider later whether there should be an initial requirement of ambiguity before surrounding circumstances can be considered. See paras 2.14 to 2.18.

[3] Part III.

[4] *Hunter v Fox* 1964 SC (HL) 95 by Lord Reid at 99. It would be superfluous to cite further authority for such an obvious proposition.

However, even in relation to conveyancing deeds on which third parties may have to rely, the adoption of an objective approach does not mean that expressions have to be interpreted without reference to surrounding circumstances.[5] If there is any ambiguity as to the meaning of an expression relating to property, regard may be had, for example, to the physical characteristics of the property in question.[6] It also seems clear that the hypothetical reasonable person must be supposed to be familiar with the field of activity concerned.[7]

2.4 *Contracts in general.* The position is the same in relation to contracts in all those cases, and they are many, where the special rule which we consider later[8] does not apply. It is clear that the subjective intention of the party who uses an expression is irrelevant, if the other party does not know and cannot reasonably be expected to know of that intention.[9] The approach is to ask what meaning a reasonable person, familiar with the field of activity concerned,[10] would give to the expression in its context[11] and, if there is any ambiguity,[12] surrounding circumstances.[13]

2.5 *Testamentary writings.* In relation to wills and other testamentary writings it is often said that the object of interpretation is to discover the intention of the testator; but it is the intention expressed in the deed which is alone relevant.[14]

> "It is said that the main question is, what was the intention of the testator? No doubt of it. But that question can only be, what is the intention *expressed in the executed deed*, on which alone the Court can be called, or are entitled, to form any judgment?" … "if the result should be … not in accordance with what is supposed to have been the

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[5] See eg *Burnett v Great North of Scotland Railway Co* (1884) 12R (HL) 25 where in relation to a condition in feu-charter, the Lord Chancellor said, at 28, that the court had to look to "the intention of the contract, as that intention is to be gathered from its terms with due regard to extrinsic facts".

[6] See eg *Logans v Wright* (1831) 5 W & S 242 at 246 (where help was derived from the "position of the land"); *Buchanan v Andrew* (1873) 11M (HL) 13 (where, in interpreting a provision on the right to work minerals, the court took into account the nature of the neighbourhood and the nature of mining operations under the land in question at the time of the feu contract); *Currie v Campbell's Trs* (1888) 16 R 237 (where in interpreting a provision in a feu contract there was a remit to a civil engineer to inspect the site); *Brown v North British Ry Co* (1906) 8F 534 (where it was held to be competent to identify by extrinsic evidence the area of ground measured off at the time of a disposition) *Hunter v Fox*, above (where the court had regard to the physical situation of the properties).

[7] See eg *Magistrates of Dundee v Duncan & Co* (1883) 11R 145 where, in relation to an expression in a feu contract, Lord Young referred to the conclusion which "any conveyancer or man of business" would reach on coming across it.

[8] See Part III.

[9] Gloag, *Contract* (2d ed 1929) 398; *Muirhead & Turnbull v Dickson* (1905) 7F 686 at 694.

[10] See eg *Mackill & Co v Wright Bros & Co* (1888) 16R (HL) 1 at 6.

[11] The context may require the literal meaning of an expression to be departed from. See eg *Glen's Trs v Lancashire and Yorkshire Accident Insurance Co Ltd* (1906) 8F 915 (where the context made it clear that the word "not" had been inserted by mistake); *Adamastos Shipping Co Ltd v Anglo-Saxon Petroleum Ltd* [1959] AC 133 (where the context required "bill of lading" to be interpreted as "charterparty"); *Charter Reinsurance Co Ltd v Fagan* [1996] 3 All ER 46 (where the context required "actually paid" to be interpreted in a special way). The context includes punctuation: *Turnbull's Trs v The Lord Advocate* 1918 SC (HL) 88.

[12] On the need for ambiguity before there can be reference to surrounding circumstances under the existing law, see *Parochial Board of Greenock v Coghill & Son* (1878) 5R 732 at 734; *Gillingham v Solway Holdings Ltd* 1989 GWD 12-509; *M W Wilson (Lace) Ltd v Eagle Star Insurance Co Ltd* 1993 SLT 938 at 947; *Brennan v Robertson's Exrs* 1995 GWD 19-1087.

[13] See Gloag, *Contract* (2d edn 1929) 398 - 399; McBryde, *Contract* 422 ("A contract is construed by considering the express terms of the contract and any admissible surrounding circumstances"); *Forlong v Taylor's Trs* (1838) 3 S & McL 177 at 210; *Taylor v John Lewis Ltd* 1927 SC 891 at 897; *Alloa Brewery Ltd v Investors in Industry plc* 1992 SLT 121 at 122; *Stewart Milne Group Ltd v Skateraw Development Co Ltd* 1995 GWD 1650 (where a stipulation "was unintelligible without an explanation of the context in which it was made").

[14] See Stair, IV.42.21. *"In claris non est locus conjecturis* … judges may not arbitrarily interpret writs, or give them a sense inconsistent with their clear words."

> *actual* intention of the testatrix, I can only say that … I can only judge of her intentions by what she has told me in her deed."[15]

The intention expressed in the deed will as a general rule be interpreted objectively. Under the existing law this result is achieved by saying that most types of extrinsic evidence, including evidence as to the meaning which the testator assigned to a particular expression, will be regarded as inadmissible[16] but it would be possible to obtain the same results by saying that the true question is as to the meaning which a reasonable person would place on the words used by the testator in the will or other document, having regard to the context[17] and, at least in a case of ambiguity, the surrounding circumstances.[18]

2.6 *Other juridical acts.* The same objective approach is taken to the interpretation of other juridical acts. The need for an objective approach is manifest in the case of negotiable instruments and bills of lading, which are meant to pass from person to person.[19] It is equally manifest in the case of other shipping documents or juridical acts which are inherently capable of conferring rights on third parties.[20] The courts have also adopted an objective approach in relation to such miscellaneous juridical acts as assignations,[21] articles of roup drawn up for a judicial sale,[22] or scrip notes containing an obligation to deliver goods.[23]

Assessment of existing law

2.7 *Importance of reliance interests.* Juridical acts, by definition, have legal effects. Generally speaking they affect the legal position not only of the granter but also of other persons. It is therefore not surprising that the general approach of the existing law is to adopt an objective approach to the question of interpretation. Those whose rights and obligations are liable to be affected by a juridical act ought to be able to assume that the expressions used in it have a normal and reasonable meaning in the context and circumstances in which they were used. They should not be liable to find that their position has been affected by a secret meaning attached to an expression by the user of it. In most cases the policy of protecting reasonable reliance interests can be put into effect by looking at the juridical act from the point of view of an objective third party. There is room for a qualification to this approach in relation to certain contracts where, so long as third parties are not affected, effect can properly and harmlessly be given to the meaning which one party

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[15] *Blair v Blair* (1849) 12D 97 at 108. See also *Spencer's Trs v Ruggles* 1981 SC 289.
[16] In *Blair v Blair*, above, the testator clearly meant the word "heirs" to refer to the eldest son of a particular person. The court, however, interpreted the word objectively without regard to actual intention. On an objective interpretation, the word, in relation to moveables, meant all the children of the person. See generally Walker and Walker, *Evidence* 293; *Farquhar v Farquhar's Exrs* (1875) 3R 71 at 73; *Trs of Free Church of Scotland v Maitland* (1887) 14R 333 esp. at 344 ("evidence to prove intention as an independent fact is inadmissible"); *Devlin's Trs v Breen* 1945 SC (HL) 27 esp. at 38.
[17] See eg *Hunter v Nisbett* (1839) 2D 16; *Easson v Thomson's Trs* (1879) 7R 251; *Elrick's Trs v Robinson* 1932 SC 448; *Scott's Trs v Smart* 1954 SC 12; *Borthwick's Trs v Borthwick* 1955 SC 227 at 231.
[18] See eg *McGowan v Anstruther's Trs* (1827) 5S 297; *Milne v Scott* (1880) 8R 83; *Trs of Free Church of Scotland v Maitland* (1887) 14R 333; *Nasmyth's Trs v NSPCC* 1914 SC (HL) 76; *Craw's Trs v Blacklock* 1920 SC 22; *Cathcart's Trs v Bruce* 1923 SLT 722; *Scott's Trs v Smart* 1954 SC 12; *Fortunato's J F v Fortunato* 1981 SLT 277; *McGinn's Exrx v McGinn* 1994 SLT 2.
[19] See eg *Miramar Maritime Corpn v Holborn Oil Trading Ltd* [1984] AC 677 at 682.
[20] At present sea waybills and ship's delivery orders. See the Carriage of Goods by Sea Act 1992, which allows the category to be expanded by regulations to cover other documents and also non-documentary techniques.
[21] *Brownlee v Robb* 1907 SC 1302. See also *Robertson's Trs v Riddell* 1911 SC 14.
[22] *Stevenson v Moncrieff* (1845) 7D 418 where it was held to be "incompetent to control or modify the construction" of the articles by evidence of the actual intention of the person who drew them up. "The question" said Lord Jeffrey at 419 "is, what is the meaning of that on which the purchaser, who had nothing to do with the *animus*, proceeded?"
[23] *Mackenzie v Dunlop* (1856) 3 Macq 10 (regard had to "the mode in which persons dealing in this commodity would construe that document").

has, at the time of contracting, given to an expression with the knowledge of the other party or parties.[24] So far as the general rule applicable to juridical acts is concerned the objective approach seems sensible and satisfactory.

2.8 *Importance of context and surrounding circumstances.* There is also clearly merit in the existing emphasis on considering expressions in the context of the whole juridical act and in the light of surrounding circumstances. The emphasis on internal context is clearly important and appears in most laws on interpretation.[25] The emphasis on looking at the surrounding circumstances is also important.[26] A reference in a contract or disposition to property of a certain description, or to certain boundary features, or to obligations to construct or maintain, may be understandable only in the light of information as to the actual physical characteristics of the property in question.[27] A reference in a feu-contract to mineral workings may be capable of being understood only against the background of the type of mining operations carried on in the area at the time.[28] A provision restricting an employee from carrying on business in a certain town for a certain time after leaving his employment may have to be interpreted by reference to the type of business in which his employer is engaged.[29] A reference in a will to the children presently living with the testator may be understandable only after inquiry as to which children were in fact living with the testator at the time.[30] A contract to sell "my stock" at current market value might be void for uncertainty if it had to be interpreted without regard to surrounding circumstances. The word "francs" in a contract might mean French francs or Belgian francs. Reference to the surrounding circumstances, which would include the country in which the contract was made, might make it clear that the term should be interpreted as meaning French francs.[31]

2.9 *Tension between two approaches: conveyancing deeds and contracts.* Although there are clear advantages in the objective approach there is nonetheless an unavoidable tension in the law between the objective and the subjective approaches. In the case of registered conveyancing deeds which affect the rights of third parties, the tension must be relieved, if at all, only by means of rectification.[32] The objective approach must clearly be preferred at the interpretation stage. It would not be acceptable to have on the record a deed which said one thing but which, because of some secret mental reservation by the granter, really meant

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[24] See Part III. This special qualification for certain contracts is an exception to the rule of looking at juridical acts from the point of view of an objective third party. It is not, however, an exception to the underlying policy of protecting reasonable reliance interests. It is just that in relation to certain contracts it is only the parties who have reliance interests to be protected.

[25] See eg the texts in Appendix A to this paper.

[26] Some of the specific rules in the French and Italian civil codes would be covered in Scottish or English law by the reference to surrounding circumstances.

[27] See eg *Brown v North British Ry Co* (1906) 8F 534 at 543 (extrinsic evidence admissible to prove position of boundary features no longer visible on the ground); *McClymont v McCubbin* 1995 SLT 1248 (a rectification case); *Stewart Milne Group Ltd v Skateraw Development Co Ltd* 1995 GWD 1650. The common type of description of a tenement flat – for example, "the southmost house on the second floor of the tenement entering by 44 Low Street, Edinburgh" – may only be capable of being given a meaning after consideration of the physical characteristics of the property. Without reference to such characteristics it cannot be known whether, for example, there is only one southmost house at the address mentioned. Descriptions of property by postal address have given rise to difficulty in relation to standard securities because of the statutory requirement of a "particular description". See *Bennett v Beneficial Bank plc* 1995 SLT 1105 (and the note on it at 1995 JLSS 481) and *Beneficial Bank plc v McConnachie* 1996 SLT 413 (and the article on it by Professor Cusine at 1996 JLSS 209). But that does not affect the general point made in the text.

[28] *Buchanan v Andrew* (1873) 11M (HL) 13.

[29] *Watson v Neuffert* (1863) 1M 1110.

[30] See eg *McGinn's Exrx v McGinn* 1994 SLT 2.

[31] This point is covered expressly in art. 1159 of the French Civil Code and art. 1368 of the Italian Civil Code. See the Appendix.

[32] Under the Law Reform (Miscellaneous Provisions) (Scotland) Act 1985 s 8.

another. In the case of many contracts, the tension can be resolved not only by rectification in appropriate cases but also, where third parties are not involved, by recognising an exception to the objective approach at the interpretation stage so as to allow a meaning given to an expression by one party to the knowledge of the other party, or all the other parties, to receive effect.

2.10 *Tension between two approaches: testamentary writings.* It is in relation to wills and other testamentary writings that the tension between the objective and the subjective approaches is most apparent. There is sometimes a strong temptation to try to give effect to the testator's actual intention.[33] The argument for giving effect to the testator's actual intention is strongest where a solicitor, or someone else asked to prepare a will, has made a mistake and has demonstrably failed to give effect to the testator's instructions.[34] However, the remedy for this situation is to allow rectification of the will. That is not possible at present[35], but we have recommended in our report on *Succession* that it should be possible in the narrow type of case just mentioned.[36] The argument for giving effect to the testator's actual intention is also strong where a description of a beneficiary or bequest is equally applicable to two or more persons or things and the general objective approach fails to resolve the ambiguity. If the testator's actual intention corresponds to one of the two possible meanings, and if there is no other way of solving the problem, it is arguable that the actual intention should prevail to this limited extent. There is an exception for this case in the existing law and we suggest later that it should continue to be recognised.[37]

2.11 In other testamentary cases there are practical objections to giving effect to actual intention. The main objection is that actual intention at the time of death is a matter of conjecture. Suppose, for example, that there is evidence that a testator, before making a will, said to X that he was going to leave the residue of his estate to X. In his will the testator does not name X as a beneficiary but does leave the residue of is estate to "the eldest son" of X's father. In fact X is the second son of his father. It is possible that the testator intended the bequest to go to X but it is equally possible that he changed his mind before making his will. The matter is one of conjecture. It is also a matter of conjecture if the evidence of intention consists of statements made after the date of the will. Suppose that in the above example the testator had said to X or to someone else that he had left the residue of his estate to X. He may have simply forgotten what he had said in his will or he may have had some reason for giving false information.

2.12 There are other practical considerations which point against a subjective interpretation of wills and other testamentary writings. An executor could not safely proceed to administer an estate on the basis of a testamentary writing if the meaning of an apparently clear expression was liable to change depending on whether certain witnesses chose to come forward and recall conversations they had had with the deceased. There would also be a danger of fraud and abuse if the clear meaning of a will could be changed to

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[33] See eg *Farquhar v Farquhar's Exrs* (1875) 3R 71 at 73; *Livingstone v Livingstone* (1864) 3M 20.
[34] See eg *Keiller v Thomson's Trs* (1824) 3S 279 where the "Judges were clearly of opinion that ... the name Williamson must have been erroneously transcribed, instead of Wedderspoon, by the clerk who had copied it from the holograph will".
[35] S 8 of the Law Reform (Miscellaneous Provisions) (Scotland) Act 1985 does not apply to testamentary documents. See s 8(6).
[36] Scot Law Com No 124, 1990, paras 4.21 to 4.28. The main recommendation was that "Provision should be made for the judicial rectification of a will prepared by someone other than the testator where the court is satisfied that the will is so expressed that it fails to give effect to the testator's instructions".
[37] See Part IV.

anything at all by the concocted evidence of witnesses as to what the testator had said. There is also a more general practical consideration. It is in the interests of everyone that language should have a settled meaning so far as possible. It is probably better that in a few cases the actual wishes of testators should be frustrated than that the advantage to all of knowing that words generally mean what they say should be lost. It is in this context that the maxim "Hard cases make bad law" seems particularly apposite.

2.13 We would not, therefore, suggest any change in direction so far as the results reached by the existing law in testamentary cases are concerned. We think, however, that it is unsatisfactory to seek to achieve these results by means of the law of evidence. To say that the objective of the process of interpretation is to discover the meaning which the testator intended to give to an expression, and then to say that only certain restricted types of evidence are admissible, is open to two objections. First, it raises the question why relevant evidence should be excluded.[38] Secondly, it frames the law in terms of court proceedings. It is not only judges who have to interpret wills. Very few wills come before a court for interpretation. Most are interpreted by executors and beneficiaries and their advisers. In relation to such people the concept of admissibility of evidence has no relevance. It would, in our view, be better to frame the law in terms of rules of interpretation rather than in terms of rules of evidence.

2.14 *Ambiguity as a requirement for considering surrounding circumstances.* An important question is whether a new general rule on interpretation should allow reference to surrounding circumstances only where there is ambiguity. This is the existing law.[39] The word "ambiguity" in this context is used in a wide sense, to cover not only the case where it is immediately obvious that an expression is capable of two meanings but also cases where the expression is unclear or uncertain.[40] There are arguments both ways on the question whether the requirement of ambiguity should be continued.

2.15 On the one hand it can be said that the practical result of the existing requirement is to discourage parties from referring to surrounding circumstances as a matter of course. If the requirement were removed there might be a danger of encouraging attempts to put forward interpretations which would have no change of being accepted in the face of the clear words actually used. There might be a danger of depriving the courts of a useful way of cutting off hopeless forays.

2.16 Another argument in favour of some such requirement as the ambiguity requirement is that it would be wrong to give the impression that an interpreter had to look at the surrounding circumstances in every case. The interpreter should always read the expression in dispute in its context, even if the parties do not suggest that anything in particular depends on the context, simply because meaning depends on context. It would, however, be wasteful and unnecessary to require interpreters to consider the surrounding circumstances in every case. We think that there is a lot of force in this argument. It suggests, however, that recourse should be had to surrounding circumstances only "where necessary for the

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[38] See eg *Farquhar v Farquhar's Exrs* (1875) 3R 71 at 73 - "in judging of a question of intention it is a strong thing to leave out of view altogether that which may be the best evidence of the subject".
[39] See Walker and Walker, *Evidence* 282 - 286; *Parochial Board of Greenock v Coghill & Son* (1878) 5R 732 at 734; *Nasmyth's Trs v NSPCC* 1914 SC (HL) 76 at 82, 83, 84; *Fortunato's J F v Fortunato* 1981 SLT 277; *Gillingham v Solway Holdings Ltd* 1989 GWD 12-509; *M W Wilson (Lace) Ltd v Eagle Star Insurance Co Ltd* 1993 SLT 938 at 947; *Brennan v Robertson's Exrs* 1995 GWD 19-1087.
[40] Walker and Walker, *Evidence*, 282 and 290.

proper consideration of any dispute" rather than only where there was an ambiguity on the face of the juridical act. The necessity might arise because it might be argued by one party that recourse to the surrounding circumstances showed that there was an ambiguity. For example, an apparently clear word like "sand"[41] or "dozen"[42] might have a special meaning in a certain trade. It might also arise because the juridical act itself referred, in perfectly clear and unambiguous terms, to something which could only be identified with precision by reference to the related facts – for example, "the children living with me at the time of my death"[43] or "the access currently enjoyed"[44] or "the parts of the development which are common to the premises and other parts of the development".[45]

2.17 Against the requirement of ambiguity it can be said that it is illogical. Meaning sometimes depends on the surrounding circumstances, or factual matrix, and it is therefore wrong to refuse to look at the surrounding circumstances because the textual or apparent meaning is clear. It may also be said that a requirement of ambiguity is unnecessary if the law makes it clear that certain types of circumstances, such as negotiations and prior communings, are in inadmissible in any event when the objective approach to interpretation is being applied.[46] Once this has been made clear a requirement of ambiguity as a pre-condition of looking at admissible surrounding circumstances adds little or nothing to the interpretation process. If there is no properly arguable dispute the interpreter will have little difficulty in coming to a conclusion in any event. Against the requirement of ambiguity it may also be said that it complicates the process of interpretation by requiring the interpreter to go through a rather artificial extra stage.

2.18 We have reached no concluded view on the question of including a requirement of ambiguity in a new general rule.[47] On grounds of logic, principle and simplicity we would prefer to have no such requirement, although we can see the advantage of having some such words as "where necessary for the proper consideration of any dispute" to make it clear that, for example, these does not have to be a site inspection in every case relating to land, or evidence of trade usages in every commercial case. However, we recognise that the requirement of ambiguity forms part of the existing law and we would be reluctant to delete it without the support of consultees. In order to focus discussion of this question we have included both the requirement of ambiguity and a "where necessary" type of requirement within square brackets in our proposed general rule.

"Context" and "surrounding circumstances"

2.19 The difference between context and surrounding circumstances is not always clear in current usage. The terms are often used in an overlapping way. By "context" we mean the rest of the juridical act. So context refers primarily to material forming part of the juridical

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[41] Cf *Parochial Board of Greenock v Coghill & Son* (1878) 5R 732. In this case there was a suggestion that there was a custom in the trade of adding ground up stone chippings to ordinary sand. In the case it was held that this mixture could not be regarded as "sharp fresh water sand" – a term which the court regarded as unambiguous. However, if the term used in the contract had been "sand" on its own it might not have been right to conclude that it was unambiguous without reference to the trade custom.

[42] Cf *Smith v Wilson* (1832) 3 B & Ad 728 (local custom resulted in "1000 rabbits" being interpreted as "1200 rabbits").

[43] Cf *McGinn's Exrx v McGinn* 1994 SLT 2.

[44] Cf *Argyllshire Commissioners of Supply v Campbell* (1885) 12R 1255 ("the whole rights and privileges which they at present possess").

[45] Cf *Marfield Properties v Secretary of State for the Environment* 1996 GWD 21-1217.

[46] See paras 2.23 to 2.28 below.

[47] Opinion on this question was divided at the meeting of our Advisory Group on Contract Law on 11 June 1996.

act or imported into it by reference – essentially, the material into which the particular expression has been woven by the party or parties - but includes the nature and purpose of the juridical act. By "surrounding circumstances" we mean facts external to the juridical act - the background to it or factual matrix within which it is entered into.

2.20 *Meaning of "context".* The context of an expression clearly includes the other terms of the juridical act. One of the most important rules of interpretation is that all the terms must be read together.

> "The meaning of any expression is to be arrived at on a consideration of the context and of its relation to the whole deed. ... Even if words are used which are not, in any ordinary sense, ambiguous, yet if it is clear that the party used them throughout the contract with an exceptional meaning, they will be read with that meaning wherever they occur"[48]

The rule appears prominently in the French and Italian civil codes and in the American *Restatement* and Unidroit *Principles of International Commercial Contracts,* excerpts from which are reproduced in the Appendix.[49] An important consequence of the rule is that expressions in a juridical act must be read in the light of any interpretation clause contained in the juridical act itself. Another consequence of the rule is that a mere false description will not prevent a provision from taking effect if it is clear from the context what is intended (*falsa demonstratio non nocet*).[50]

2.21 A juridical act may itself wider its context for the purposes of interpretation. It may import context. It may, for example, provide that it is to be interpreted in the light of a standard glossary of technical terms produced by a professional organisation. Or it may refer, for brevity, to the way something was defined in a document forming part of the prior negotiations. Or it may simply use an expression which can only be understood by reference to something outside the juridical act itself. A reference in a juridical act to "the purposes previously stipulated" clearly imports some previous stipulation into the context.[51] A reference in a contractual document to "your proposals regarding the limitation of damages" brings these proposals into the context.[52] A reference in a disposition to a decree-arbitral to which the disposition is designed to give effect makes that decree-arbitral part of the context of expressions used in the disposition.[53] To allow material imported by reference to be regarded as part of the context is not to let in secret meanings, because the fact that there is a wider context is apparent from the juridical act itself.

2.22 An expression appears not just in the context of other terms but also in the context of a juridical act of a particular type and having a particular aim or purpose, even if these

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[48] Gloag, *Contract*, 399, referring to *Martin v Kelso* (1853) 15D 950 in support of the second proposition.
[49] See French civil code, art 1161; Italian civil code, art 1363; Restatement §202 (2); Unidroit Principles, art 4.4.
[50] *Stair Memorial Encyclopaedia* Vol 25, para 824. Typing errors, and other similar errors, in names are quite common. A reference to "Derryck Forves" could readily be interpreted as a reference to "Derryck Forbes" if it was clear from the context that this was what was intended. Many points of this nature are so obvious that they would not even be argued. Cf *Stewart Milne Group Ltd v Skateraw Development Co Ltd* 1995 GWD 32-1650.
[51] Cf *The Temperance Halls Co-operative Society Ltd v The Glasgow Pavilion Co Ltd* (1908) 16 SLT 112.
[52] See *Bovis Construction Ltd v Whatlings Construction Ltd* 1994 SLT 865. Lord President Hope said (at p 870) that "The purpose of admitting this evidence [ie of the proposals made in an earlier letter] is to relate the limitation agreement to the context in which it was written."
[53] *Earl of Fife v Great North of Scotland Railway Co* (1901) 3F (HL) 2. Lord Chancellor Halsbury said at p 10 that the reference to the decree-arbitral in the disposition was "in truth an exposition by the very deed itself of what was its bearing and intention" and Lord Macnaghten at p 12 criticised the Court of Session for taking words in the disposition "by themselves without attending to the context" ie to the decree-arbitral which was mentioned in it.

maters are not spelled out expressly in the juridical act. There may be an implied preamble even if there is no express preamble, and that will be part of the context. The nature and purpose of a transaction, in so far as these can be objectively ascertained, are regarded as relevant and important in the interpretation of contracts and other juridical acts under the existing law.[54] One important consequence of looking at the nature and purpose of a transaction, in so far as they can be objectively ascertained, may be to confine to the particular subject matter the meaning of words which, taken literally, would apply quite generally.[55] If, for example, it would be clear to an objective observer that a transaction was of the nature of a settlement of a particular dispute then words discharging "all sums due by you" or "all claims" might well be construed, in that context, as referring only to claims related to that dispute and not as covering any unrelated claim which might emerge.[56]

2.23 *Meaning of "admissible surrounding circumstances".* The admissible surrounding circumstances clearly include the facts to which the juridical act relates, and the field of activity within which it takes place. A reasonable person, familiar with the field of activity concerned, would also have regard to any usages of practices in that field of activity which would be known to such a person. It should, we think, be made clear in the rules that these are part of the admissible surrounding circumstances. Again, it is well recognised in the existing law that, in any case of ambiguity, extrinsic evidence of custom or usage of trade is admissible to show that words have been used in a special meaning.[57]

2.24 The benefits of an objective approach would, however, be lost if the surrounding circumstances which could be taken into account included direct statements of intention by the granter of, or a party to, the juridical act in question. It seems clear on principle, although opinion was reserved on the point in a recent case,[58] that such statements should not be regarded as part of the surrounding circumstances which it is permissible to take into account for the purposes of the general rule. They are not part of the factual matrix.

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[54] See eg *Adamastos Shipping Co Ltd v Saxon Petroleum Co Ltd* [1959] AC 133 (court can look at broad purpose and intent of parties - what, objectively considered, they were obviously trying to do); *Prenn v Simmonds* [1971] 1 WLR 1385 (court can look at genesis and, objectively, the aim of the transaction); *Antaios Compania Naviera SA v Salen Rederierna AB* 1985 AC 191 at 201 (court should have regard to "business commonsense"); *Alloa Brewery Co Ltd v Investors in Industry plc* 1992 SLT 121 (genesis and objectively ascertained aim of transaction); *City of Glasgow District Council v Doyle* 1993 SLT 604 (purpose of transaction considered); *Eurocopy (Scotland) plc v Lothian Health Board* 1995 SLT 1356 (contract construed in accordance with its apparent commercial purpose); *Charter Reinsurance Co Ltd v Fagan* [1996] 3 All E R 46 (where the House of Lords considered the history, nature and purpose of reinsurance contracts). Note also art. 1158 of the French Civil Code and art. 1369 of the Italian Civil Code – reproduced in Appendix A.

[55] See eg *Mackill & Co v Wright Bros & Co* (1888) 16R (HL) 1 at 5 ("it would be unreasonable in construing a mercantile contract of this character not to suppose that both parties used the general language with reference to the particular subject-matter as to which they were contracting").

[56] See Bankton, *Institute*, I.11. 53-62 ("Deeds of parties must be limited to the subject-matter presumed to have been treated of. Thus, a general clause contained in a discharge, subjoined to an accompt of charge and discharge, will not comprehend other claims of a different kind …"; Bell, *Principles* (4th edn 1839) s. 524, rule (5) ("words, however general, are to be confined to the subject and matter of the agreement contemplated by the parties.") In *McAdam v Scott* (1912) 50 SLR 264 the First Division held that it would not be safe to construe a provision that "all sums of money due by you to me, and all claims by me against you … are hereby discharged" without knowledge of the facts to which it related. Lord Kinnear referred, at 266, to the canon of construction that general words in a release are limited always to what was in the contemplation of the parties at the time. This rule can be traced back through Pothier to Justinian's Digest. See Appendix A, Part I, para (7) (limitation of contracts to subject matter). It appears in a number of continental laws and was applied by the House of Lords in the English case of *London & South Western Ry Co v Blackmore* (1870) 4 E & I App 610 at 623 – 624.

[57] Walker and Walker, *Evidence* 299; Gloag, *Contract* (2d ed 1929) 365, 381 - 382; McBryde, *Contract* 432 - 434.

[58] *Dunedin Property Management Services Ltd v Glamis Property Co Ltd* 1993 GWD 31-2006. Opinion was reserved on the argument that, in construing a disposition, "the only extrinsic evidence which could be led was that of circumstances such as physical configuration and not that as to parties' actual intentions".

2.25 The same applies to prior instructions, communings or negotiations leading up to the juridical act. These are not "surrounding" circumstances at all so much as circumstances which are actually part of the process of formulating the juridical act. They are part of the negotiating history rather than part of the factual matrix. Surrounding circumstances, for the purpose of the proposed rule, must be confined to those which surround, and are external to, the process of preparation of the juridical act itself.[59] In relation to a disposition, for example, they would include the physical characteristics of the property and its surroundings. In relation to a will they would include the nature and extent of the testator's estate, his or her family circumstances and any objectively ascertainable facts relevant to the identification of a beneficiary or the subject of a bequest – such as the fact that a charity had changed its name since the date of the will. They would not include a letter of instructions to a solicitor.

2.26 The approach suggested in the preceding two paragraphs is consistent with the results reached under the existing law where, in general, evidence of statements of intention and of instructions, prior communings and negotiations is inadmissible.[60]

2.27 It is unclear under the existing law whether, or in what circumstances, reference may be made, for purposes of interpretation,[61] to other writings of the granter or of the parties, not falling within the category of statements of intention, instructions, prior communings or negotiations.[62] To what extent can such writings, or other non-written juridical acts, properly be regarded as part of the surrounding circumstances? This, we think, must be a question of fact and degree. A will which was made and revoked many years previously would not normally be regarded as part of the circumstances surrounding the making of a new will. On the other hand a will might be part of a whole estate planning scheme including contemporaneous trust deeds and other documents and in such circumstances it might be quite natural and reasonable to regard the other documents as part of the surrounding circumstances.[63] Similarly, a contract might be part of a network of contemporaneous contracts and it might be unrealistic to regard the other contracts as not being part of the surrounding circumstances.[64] Even a disposition may have to be construed in the light of some other closely related writing but this would, we think, be exceptional.[65] The same considerations apply to contemporaneous maps or plans.[66]

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[59] In *McAdam v Scott* (1912) 50 SLR 264 at 266 Lord Kinnear explained "surrounding circumstances" as meaning the facts to which the transaction related.

[60] See Walker and Walker, *Evidence* 286 - 295. *Miller v Miller* (1822) 1 Sh App 308 at 317; *Blair v Blair* (1849) 12D 97; *Inglis v Buttery* (1878) 5R (HL) 87; *North British Ry Co v Moon's Trs* (1879) 6R 640 at 651; *Trs of Free Church of Scotland v Maitland* (1887) 14R 333; *Prenn v Simmonds* [1971] 1 WLR 1381; *British Coal Corporation v SSEB* 1991 SLT 302 at 310.

[61] For purposes of rectification reference may be made to all relevant evidence: Law Reform (Miscellaneous Provisions) Act 1985, s 8(2).

[62] See *Wedderspoon v Thomson's Trs* (1824) 3S 396 (terms of earlier wills and codicils considered); *Devlin's Trs v Breen* 1945 SC (HL) 27 (evidence of revoked settlements inadmissible).

[63] See eg *Livingston v Livingston* (1864) 3M 20; *Catton v Mackenzie* (1870) 8M 1049.

[64] See eg *Claddagh Steamship Co v Steven & Co* 1919 SC (HL) 132; *Modern Engineering v Gilbert-Ash* [1974] AC 689 at 696 - 697.

[65] In *Duke of Fife v Great North of Scotland Railway* (1901) 3F (HL) 2 a disposition was construed in light of decree arbitral which preceded it but the decree arbitral was referred to in the disposition and could more accurately be regarded as part of the context of the expression than as part of the surrounding circumstances. In *Dunedin Property Management Services Ltd v Glamis Property Co Ltd* 1993 GWD 31-2006 the court said that, even if there had been an ambiguity (which there was not) leases could not be used in considering the extent of property covered by a disposition.

[66] See eg *Luss Estates Ltd v B P Oil Grangemouth Refinery Ltd* 1987 SLT 201, where the court referred to a contemporaneous ordnance survey map in interpreting a feu contract of 1837.

2.28 It seems clear on principle that, if an objective approach to interpretation is adopted,[67] subsequent conduct of the granter of, or parties to, a juridical act should not be regarded as part of the surrounding circumstances which a hypothetical reasonable person is permitted to take into account. Such later conduct cannot be part of the factual matrix within which the juridical act was done at the time. Subsequent conduct cannot affect the view which a reasonable third party would have taken as to the meaning of an expression immediately after the juridical act. To allow subsequent conduct to be taken into account in the application of the general rule would mean that an expression which was supposed to be objectively construed would have a meaning which varied over time. The existing Scottish law on this point is not clear. There are conflicting cases and statements.[68] The confusion probably reflects the unresolved tension in the law between the objective and the subjective approach to interpretation. For the purposes of a new rule expressing an objective approach to the interpretation of juridical acts in general we think it is clear that subsequent conduct should be left out of account.[69] There may well be cases where subsequent conduct suggests that a contract has been varied, but variation is a different matter from interpretation.

2.29 In the existing law evidence of subsequent conduct is admissible for the purpose of interpreting writings of ancient date.[70] This seems both vague and unprincipled. It is not clear where the dividing line between old and ancient lies. And it is not clear why the matters which can relevantly be taken into consideration should be affected by the age of a juridical act which falls to be interpreted objectively. Our provisional view is that there is no need to reproduce an exception for ancient writs but we would welcome views.

2.30 In the case of certain types of expression in conveyancing deeds affecting land (such as descriptions of barony lands,[71] other "general descriptions"[72] and possibly expressions creating servitudes or similar rights[73]) subsequent possession may be relevant under the existing law, and useful, for the purposes of interpretation. We propose later that special rules of interpretation for particular types of expression should be preserved.[74]

Proposed general rule

2.31 We would welcome comments on the following proposed general rule on the interpretation of expressions in juridical acts.

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[67] It may be different in relation to certain contracts where, in some cases, evidence of subsequent conduct may be relevant as showing that an expression was used by a party in a particular sense of which the other party or parties could not have been unaware. See para 7.12 below.

[68] See Discussion Paper No 97 (1994) paras 3.29 – 3.37; Walker and Walker, *Evidence* 295 – 298. English law is now clear that in the interpretation of contracts subsequent conduct cannot be referred to. See *Whitworth Street Estates Ltd v Miller* [1970] AC 583; *Wickman Tools Ltd v Schuler AG* [1974] AC 235.

[69] This is subject to the preservation of special rules of interpretation for particular types of expression. See Part VIII below. Some of these rules may allow reference to subsequent possession to explain an expression.

[70] See Walker and Walker, *Evidence* 295 - 296.

[71] See eg *Buchanan and Geils v Lord Advocate* (1882) 9R 1218 at 1234; *Mather v Alexander* 1926 SC 139 at 146; *Luss Estates Ltd v B P Oil Grangemouth Refinery Ltd* 1981 SLT 97 at 100 (sequel at 1982 SLT 457 and 1987 SLT 201).

[72] See *Beneficial Bank plc v McConnachie* 1996 SLT 413 at 417.

[73] See *Boyd v Hamilton* 1907 SC 912. But the result in this case seems inconsistent with *Baird v Fortune* (1861) 4 Macq 127.

[74] See Part VIII.

1.(1) The general rule on interpretation is that an expression used in a juridical act is given the meaning which would be given to it by a reasonable person, familiar with the field of activity concerned, considering the expression in its context and, [where there is any ambiguity] [where necessary for the proper consideration of any dispute], in the light of the admissible surrounding circumstances.

(2) For the purposes of this rule

(a) the context of the expression means the other terms of the juridical act, any material imported into the juridical act by reference, and the nature and purpose of the juridical act in so far as they can be objectively ascertained

(b) the admissible surrounding circumstances include the facts to which the juridical act relates, the field of activity in which it is entered into, and any usages or practices in that field of activity which would have been known to a person familiar with it

(c) the admissible surrounding circumstances do not include statements of intention; instructions, communings, or negotiations forming part of the process of preparation of the juridical act; or conduct subsequent to the juridical act.

Part III Contracts

Introduction

3.1 The general rule set out above is suitable for most cases on the interpretation of contracts. Very often the question of interpretation which arises is one to which the parties did not direct their attention at the stage of entering into the contract.[1] In such circumstances there is no point in seeking to discover the parties' actual intentions as to the meaning of an expression.

3.2 Even where one party had a clear intention as to the meaning to be given to an expression, there can be no question of seeking to give effect to that intention if it was not known to the other party.

> "A party who has made an offer in terms calculated to convey a particular impression cannot refuse performance on the easy plea that he did not mean what he said."[2]

This rule applies also where both parties happened to have the same undisclosed intention.[3]

> "[C]ommercial contracts cannot be arranged by what people think in their inmost minds. Commercial contracts are made according to what people say."[4]

There may, however, be cases where it would be wrong to apply a completely objective interpretation to contracts. Contracts are different from many other juridical acts because the legal position of third parties is not usually affected. The parties operate in a sealed-off legal area and, it may be said, there is no reason why they should not use an expression in any way which they have determined between themselves and no obvious reason why the law should refuse to give effect to that meaning if it can be established and if third parties have not relied on it.

Existing law

3.3 It is accepted in the existing law that a party using an expression in an offer or acceptance can assign a meaning to that expression and that this meaning, if the other party knew of it or could be presumed to know of it, will prevail.[5] For example, a party offering to transport the contents of a villa can make it clear to the other party, in the negotiations leading up to the offer, that a reference in the offer to "statuary" does not include pots and other objects made of fired clay, and that meaning will then rule.[6] Again, a party offering to sell the estate of Dallas can make it clear in the advertisements and negotiations that "the estate of Dallas" is intended to mean the estate marked on an identified plan as the estate of

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[1] See McBryde, *Contract* 420.
[2] Gloag, *Contract* (2d ed 1929) 398.
[3] See *New Hampshire Insurance Co v MGN Ltd*, The Times, 25 July 1995.
[4] *Muirhead & Turnbull v Dickson* (1905) 7F 686 by Lord President Dunedin at 694.
[5] We are here talking of the substantive law, on the assumption that there are no difficulties as to the admissibility of evidence. It may be supposed, for example, that all relevant facts are admitted on record.
[6] *Sutton & Co* v *Ciceri & Co* (1890) 17R (HL) 40.

Dallas and not some other property which sometimes goes by that name and that meaning will then prevail.[7] Other examples of the same kind could be given.[8]

3.4 It is probably also the case that if it is admitted, or proved by admissible evidence, that the parties contracted on an agreed basis as to the meaning of a particular expression then that meaning will rule. Where, for example, it was clear from extrinsic evidence, which was held to be admissible, that the parties had used the term "Whitsunday" in an unusual sense, to mean 26th May, that meaning had to prevail."[9]

3.5 In a more recent English case there was a contractual option to redeliver a chartered vessel "after 12 months trading". The question arose whether this meant "on the expiry of" or "at any time after the expiry of". Pre-contractual telexes made it clear that the parties had used the expression to mean "on the expiry of". Kerr J allowed reference to be made to the pre-contractual exchanges.

> "If a contract contains words which, in their context, are fairly capable of bearing more than one meaning and if it is alleged that the parties have in effect negotiated on an agreed basis that the words bore only one of the two possible meanings, then it is permissible for the Court to examine the extrinsic evidence relied upon to see whether the parties have in fact used the words in question in one sense only."[10]

International models

3.6 Article 8 of the United Nations Convention on Contracts for the International Sale of Goods provides as follows.

> "(1) For the purposes of this Convention statements made by and other conduct of a party are to be interpreted according to his intent where the other party knew or could not have been unaware what that intent was.
>
> (2) If the preceding paragraph is not applicable, statements made by and other conduct of a party are to be interpreted according to the understanding that a reasonable person of the same kind as the other party would have had in the same circumstance."

3.7 There are similar provisions in the Unidroit *Principles of International Commercial Contracts* published in 1994[11] and we understand that there will be similar provisions in the New *Principles of European Contract Law* being prepared by the Lando Commission on European Contract Law.[12]

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[7] *Houldsworth* v *Gordon Cumming* 1910 SC (HL) 49.
[8] See our Discussion Paper No 97 (1994), para 3.3.
[9] *Hunter* v *Barron's Trs* (1886) 13R 883.
[10] *The "Karen Oltmann"* [1976] 2 Ll L R 708 at 713.
[11] Articles 4.1 and 4.2. See Appendix A, Part VII.
[12] Article 5:101 (2) and (3). We are grateful to Professor Hector MacQueen for showing us the latest draft (April 1996) of these principles.

Earlier proposals

3.8 We have already recommended in our report on the *Formation of Contract*[13] the adoption of a solution based on article 8 of the United Nations Convention in relation to the question whether a contract has come into existence. As several consultees pointed out at that time, it is useful to have the same or similar rules for formation and interpretation of contracts.

> *Example.* A trader, by fax, offers to sell 50 pounds of tea to a retailer at £x per ton. This would be the normal price for a pound, not a ton. The retailer telephones the trader to check the position and is told that the word "ton" is a mistake for "pound". The retailer accepts the faxed offer by fax without mentioning the telephone conversation.

A court applying the rule we have recommended for the formation of contracts would conclude that a contract had been entered into for the purchase of 50 pounds of tea at a price of £x per pound.[14] It would clearly be absurd to then apply a different rule at the interpretation stage and to hold that, once it has been decided that there is a contract, "ton" must mean "ton" because that is how it would be interpreted on an objective view. Rectification would be a possibility but it ought not to be necessary to rectify a contract of this nature, which has no continuing effect, if the desired result can be achieved by interpretation.

3.9 In relation to the interpretation of contracts a solution based on the language of article 8 was put forward for consideration in our earlier discussion paper on *Contract Law: Extrinsic Evidence, Supersession, and the Actio Quanti Minoris* and attracted general support from consultees.[15] We included a similar proposal in an earlier version of this discussion paper which was considered by the meeting of our Advisory Group on Contract Law on 11 June 1996. The proposal distinguished, however, between the case where an expression is used by one party and the case where it is used by both. It was in the following terms.

> "In interpreting a contract
>
> (a) an expression used by one party is interpreted according to the intention of that party if the other party knew or could not have been unaware what that intention was, and
>
> (b) an expression used by both parties to represent their common intention (as in a document executed by both) is interpreted according to that common intention if it can be ascertained."

In any case where the requisite intention could not be ascertained the general objective rule was to apply.

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[13] Scot Law Com No 144 (1993).

[14] The same result would probably be reached under the existing law because the mistake was "brought under the other party's notice before acceptance". See *Seaton Brick and Tile Co Ltd v Mitchell* (1900) 2F 550 at 556. Under the rule we have recommended the same result would follow, even in the absence of the telephone call, if the court concluded that the retailer could not have been unaware that "ton" was a mistake for "pound".

[15] Discussion Paper No 97 (1994). We have been interested to note that the Unidroit *Principles of International Commercial Contracts* (1994) which was published just after our Discussion Paper and the proposed new *Principles of European Contract Law* (draft of April 1996) also draw on the wording of article 8 of the United Nations Convention on Contracts for the International Sale of Goods in their provisions on interpretation.

Views of Advisory Group

3.10 At the meeting of our Advisory Group on Contract Law on 11 June 1996 the question was raised whether a special rule for contracts on these lines was necessary or desirable. In the light of the comments made we undertook to reconsider this question and expand the treatment of it.

Re-assessment

3.11 The earlier version of the rule did not expressly cover multilateral contracts (although the Interpretation Act 1978 might have helped in this respect) and its reference to common intention was perhaps open to misinterpretation in subsequent practice. We think that these points can be met by redrafting and we have modified our proposal to try to meet them.

3.12 It is also arguable that it is unnecessary to have two separate branches of the rule to cover two variants of what is essentially the same situation. The problem can be illustrated by an example.

> *Example.* A document setting out the terms of a multilateral contract has been drawn up by the solicitors for the parties. At a meeting to read over and execute the contract one of the proposed signatories points out that an expression is ambiguous. He asks whether he is right in assuming that it bears a certain meaning. All those present agree that it must be taken as bearing that meaning, which is not necessarily the one which a court would assign to it if it were interpreted on its own. One party asks whether the contract should be altered to make the meaning of the expression clear but all agree that this is unnecessary and that the terms of the contract should remain unaltered. The minute secretary is asked to ensure that the parties' common understanding of the meaning of the expression is noted in the minutes of the meeting. On this basis the contract is signed.

It seems clear that the Scottish private law on interpretation would be open to criticism if, in this type of case, the expression were to be interpreted otherwise than agreed by the parties. However, it is not so clear that this type of case would not be covered by a rule on the lines of article 8(1) of the United Nations Convention on Contracts for the International Sale of Goods. It is in fact just a variant of the situation where an expression is used by one party in a particular way which is known to, or ought to be known to, the other party or parties. If both parties, or all the parties, use an expression, to the knowledge of each other, in a particular way then clearly each one of them is using it in a sense of which the others are aware. In any event cases of the above type, where both or all of the parties have agreed on a particular meaning, will very often be cases where there is an additional express term of the contract.[16] We have had to tailor the above example carefully, by inserting the rather artificial point that the parties agreed that the terms of the contract should not be altered, to exclude this way of dealing with the problem.

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[16] Under the existing law there can be difficulty in leading extrinsic evidence of such an additional term but we have recommended in our report on *Three Bad Rules in Contract Laws* (Scot Law Com No 152, 1996) that the so-called parole evidence rule, which restricts relevant evidence of additional express terms of a contract in this type of case, should be abolished.

Revised proposal

3.13 In the light of the comments of the Advisory Group we have merged the two branches of our earlier proposal into one rule and have tried to make it more clear that the general objective rule would be the norm in contract cases. We would be grateful for views on the following rule.

> **2.(1) An expression in a contract is interpreted in accordance with the general rule on interpretation except in so far as it is established that the following rule applies.**
>
> **(2) An expression in a contract which is used by one party in a particular sense (whether or not it is also used in that sense by the other party or any other party) is interpreted in that sense if the other party, or all the other parties, at the time of contracting knew or could not have been unaware that it was being used in that sense.**

We have considered whether it would be necessary to add at the end of this rule something like "and made no objection". We do not think this is necessary. If there is an objection there would be a failure of agreement and, unless the matter was resolved between the parties, no contract.

Arguments for and against a special rule

3.14 Arguments for a special rule on these lines are as follows. First, it could lead to injustice to apply the normal objective rule to all contracts. Secondly, the exception would be in line with internationally accepted principles, at least in relation to commercial contracts. Thirdly, the exception would be consistent with the approach we have recommended in relation to the formation of contracts. Fourthly, the special rule would in practice apply only infrequently. In many cases none of the parties would have had any particular view at the time of contracting as to the meaning of the expression being interpreted. Fears that those interpreting contracts would be forced to have regard to the conflicting subjective intentions of the parties are unfounded. The special rule would come into operation only in carefully defined circumstances. Both parties or, in the case of a multilateral contract, all the parties would have had to know, or be in a position where they could not have been unaware of, the sense in which the expression was being used at the time of entering into the contract.

3.15 Arguments against a special rule for contracts are as follows. First, it complicates the law on interpretation to have special rules for certain cases: this conflicts with the stated objective of having the same rules for all juridical acts so far as possible. Secondly, it leads to expense and inconvenience if evidence of prior communings is relevant even in carefully limited cases. Thirdly, it leads to uncertainty if people cannot rely on an objective interpretation being adopted. Fourthly, parties should not be encouraged to use expressions in strange ways or to leave ambiguities unresolved. If they want "foot" to mean "square foot" they should say so in their contract. If they want an ambiguous expression to bear one meaning rather than another they should define it in their contract. They have only themselves to blame if they depart from the normal meanings of expressions or leave ambiguous expression undefined. Fifthly, the general objective rule allows reference to the context and to the admissible surrounding circumstances and is sufficiently flexible to cater for all except the most unusual cases. Sixthly, unusual cases where an expression is used in

an agreed special sense could often be resolved in a satisfactory manner by regarding the agreement on the special sense as an additional term of contract.

3.16 A possible argument against a special rule on the lines proposed is that there may be cases where it can be established that each party to a bilateral contract knew the other was using an expression in a different sense. However, in such a case there will simply be no contract, because there will be no consensus. The same result would follow in a multilateral contract if two or more parties knew that that an expression was being used in different senses by different parties.

3.17 Another possible argument against the special rule is that there may be cases where one party has a shrewd suspicion that the other party must be using an expression in a particular sense, but where it cannot be established that the first party knew or could not have been unaware of this. In such a case the contract will be interpreted according to the usual objective rule. This situation does not constitute an objective to the special rule for contracts because the party who has used the expression in a particular sense is no worse off that if there had been no special rule. Contracting parties who use contractual expressions in particular senses, without making it clear to the other party or other parties to the contract that they are doing so, have only themselves to blame if the contract is interpreted objectively.

Conclusion

3.18 In relation to the more simple contracts, entered into without professional advice, the arguments against a special rule probably expect too much of the parties. Parties will not always take care to ensure that meanings are embodied in clear contract terms. They may well assume that if it has been made clear in the negotiations that an expression is being used in a particular way then that suffices. The balance between just and certainty may come down in favour of justice in such cases. In relation to more complicated contracts, drawn up by professionals, it may be that certainty should be more highly valued. Even in such cases, however, it may seem unacceptable to achieve certainty at the price of obvious injustice. An important consideration in relation to such complex contracts is the extent to which the parties can protect themselves against uncertainty. There is no reason why they should not opt into an objective rule if they so wish. We are not talking here of the rules of evidence, which the parties to contracts cannot change, but of the meanings to be given to the expressions they use, which are entirely within their control.

3.19 On balance, we conclude that a special rule for certain contracts is desirable but we would welcome views.

Scope of special rule

3.20 When we consulted on the interpretation of contracts in 1994 there was a strong view, expressed by several consultees, that the rule for ordinary commercial contracts should not apply to contracts which operated as, or formed the basis of, a registered title in relation to land. We agree with this view. We suggest therefore that the normal objective approach to interpretation, and not the special rule for contracts, should apply to contracts recorded, or intended by the parties to be recorded, in the Register of Sasines or presented, or intended by the parties to be presented, in support of an application for registration in the Land Register. The faith of the records and the reliance interests of third parties are of

paramount importance in such cases. We think that the objective interpretation ought to apply even as between the parties to the contract. The close link between such contracts and the public land registers takes them out of the realm of ordinary contracts which affect only the parties to them.

3.21 One consultee suggested in response to our Discussion Paper No 97 that contracts which are registered for execution should be subject to the normal objective approach. Such contracts, it was suggested, operate in effect as court decrees and it seemed inappropriate that their meaning should be affected by secret understandings between the parties. We were initially attracted by this argument. However, on reflection, and after discussion with our Advisory Group on Contract Law, we have concluded that it cannot reasonably be supported. A clause of consent to registration may be inserted without much thought. Registration may never be used as a basis for execution. In any event it is just a short route to execution and it would be anomalous if an unregistered contract which was enforced by the longer route of a court decree were to be given a different effect from that given to a contract in the same terms, concluded in the same circumstances, but registered for execution.

3.22 So far as other contracts are concerned, the governing principle is, we would suggest, that the rights and obligations of those who are not parties to the contract[17] but who have relied on it ought not to be affected by a special meaning attached to an expression in it, unless at the time of reliance they knew or could not have been unaware of the special meaning. This result could possibly be achieved by the normal application of the principle of personal bar but it is of sufficient importance to justify special mention in the proposed new rule.

3.23 It is important that parties who want certainty above all else should be able to protect themselves against reference to anything extraneous to their contractual documents if they so wish. We considered, therefore an express provision to make it clear that the parties could opt out of the special rules for contracts and into the objective general rule. However, we do not think that any such express provision is necessary. The parties have control of the meanings of the terms they use and can provide that they are to be interpreted in any way they wish.

3.24 We propose that there should be exceptions on the following lines to the proposed special rule for contracts.

> **(3) Paragraph (2) does not apply, and the general rule accordingly does apply.**
>
> **(a) to a document which is recorded, or intended by the parties to be recorded, in the Register of Sasines or which is presented, or intended by the parties to be presented, in support of an application for registration in the Land Register; or**

[17] For this purpose we regard an assignee as a party to the contract.

(b) in any question with a person, other than a party to the contract, who has relied on the meaning which would be given to an expression in the contract by the application of the general rule, unless that person at the time of the reliance knew or could not have been unaware of the meaning which would have been given to the expression in accordance with paragraph 2 above.

Part IV Wills

Introduction

4.1 Testamentary writings do not operate in a closed area in the way in which certain contracts do. They affect the rights and interests of people other than the granters of them. It might be thought that they should receive a liberal and subjective interpretation because they generally confer gratuitous benefits and because the testator can no longer be prejudiced. However, a benefit for a specific legatee affects the amount left for a residuary legatee and a benefit for the residuary legatee affects the amount left for the heirs on intestacy. Executors and their advisers have to have a reasonably secure basis on which to distribute the estate. Certainly, the inherent tension between the objective and the subjective approaches is present in the interpretation of testamentary writings but that is not in itself an argument for a general exception. There is, however, a case for a special exception in certain cases of ambiguity which cannot be otherwise resolved. Such an exception is recognised in the existing law.

Existing law

4.2 In the existing law there is an exception which allows evidence, of a type which would not normally be admissible, of the actual intention of a testator as to the meaning of an expression.[1] The exception applies in cases of latent ambiguity where a description of the beneficiary or of the thing bequeathed is equally applicable to two or more persons or things. The leading nineteenth century textbook on wills and succession expressed the rule and exception as follows.

> "subject to the exception which has been admitted in the case of latent ambiguities, it is an inflexible rule of construction that evidence of intention – that is, direct evidence proving the sense in which particular words were used – is not admissible."[2]

More recent textbooks are to the same effect.[3] Gloag and Henderson, for example, say that

> "Evidence of statements by the testator as to his intention is not allowed except in one case, namely, where the description of the legatee, or of the thing bequeathed, is equally applicable in all its parts to two persons, or to two things."[4]

4.3 The type of situation in which the exception might apply can be illustrated by several cases.

4.4 In *Wedderspoon v Thomson's Trs*[5] a legacy of £500 was left to "Janet Keiller or Williamson, confectioner in Dundee". There was no such person. The question was whether

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[1] See Walker and Walker, *Evidence* 286 – 288.
[2] McLaren, *Wills and Succession* (3d edn, 1894) Vol I, 723.
[3] See Walker and Walker, *Evidence* 286 – 288, 293; Smith, *A Short Commentary on the Law of Scotland* 426; Walker, *Principles of Scottish Private Law* (3d ed 1983) Vol IV, 165.
[4] *The Law of Scotland* (10th edn, 1995) 773.

the legacy should go to Agnes Keiller or Wedderspoon, confectioner in Dundee or to Janet Keiller or Whitton, housewife in Broughty Ferry. The court considered evidence that Agnes Keiller or Wedderspoon was known to and was in regular correspondence with the testator who called her Mrs Wedderspoon. It also considered the terms of earlier holograph wills and codicils which indicated that the testator had intended to provide something for Mrs Wedderspoon and that he was unsure of her first name. The court concluded that "no other person could be meant except the claimant", Mrs Wedderspoon, and that "the name Williamson must have been erroneously transcribed, instead of Wedderspoon, by the clerk who had copied it from the holograph will".

4.5 In *Keiller v Thomson's Trs*,,[6] which involved the same will but a different beneficiary, a legacy was left to "William Keiller, confectioner in Dundee". There was no such person. The legacy was claimed by William Keiller, a confectioner in Montrose. William Keiller had only become a confectioner a few months before the testator's death and had set up business in Montrose from the beginning. The court concluded that the circumstances were not sufficient to establish that William Keiller, confectioner in Montrose, was the "person described by the said testator as William Keiller, confectioner in Dundee". At this stage James Keiller, a confectioner in Dundee, and a friend and relation of the deceased, lodged a claim and William Keiller of Montrose "retired from the competition". The court allowed the claim of James Keiller.

4.6 In *Cathcart's Trs v Bruce*[7] a legacy was left to the children of "General Alexander Fairlie Bruce". There was no such person. There was a General Alexander James Bruce. There was also a Mr Alexander Fairlie Bruce. The Lord Ordinary considered the surrounding circumstances, including the fact that General Bruce was related to the testator and was alive at the date of the will whereas Mr Bruce was not (and might therefore have been more properly described as the "late" Mr Alexander Fairlie Bruce). In the circumstances the Lord Ordinary considered that General Bruce was the legatee. However, the Lord Ordinary was confirmed in this impression by a letter written by the testator's wife to the testator's solicitors in connection with the will in which she referred to General Bruce's sons as "young men". This fitted General Bruce's sons better than Mr Bruce's sons, who were aged between 34 and 50.

4.7 Although these cases illustrate the type of situation in which the exception might apply, and although it is probable that the courts in these cases were seeking to ascertain the actual intention of the testators, it is possible that the same results could have been achieved in all of them by reference to admissible surrounding circumstances under the general rule.

4.8 In *Nasmyth's Trs v The National Society for the Prevention of Cruelty to Children*[8] a legacy had been left by a Scottish testator, domiciled and resident in Scotland, to the National Society for the Prevention of Cruelty to Children. The legacy was claimed by the society of that name which was based in London and by the Scottish National Society for the Prevention of Cruelty to Children. The Court of Session, after considering evidence which showed that it was more likely that the testator would have wished to benefit the Scottish

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[5] (1824) 3S 396.
[6] (1826) 4S 724.
[7] 1923 SLT 722.
[8] 1914 SC (HL) 76. For a criticism of this case as an example of "rigid legalism", see Zweigert and Kötz, *An Introduction to Comparative Law* (trans. by T Weir, 2d ed 1987), Vol 2 at 90.

society, held that it should take the legacy. The House of Lords reversed this decision. Several of the judges thought there was no ambiguity (even although several judges in Edinburgh thought it meant one thing and several judges in London thought it meant another).[9] All thought that, in any event, there was not sufficient evidence to show that the testator intended to benefit any society other than the one which he had accurately described in his will.

Assessment of existing law

4.9 We are not convinced that a special exception for ambiguities as to the identity of a legatee or subject matter of a bequest is absolutely necessary. Cases of clerical error where a solicitor or other third party has made a mistake in drawing up a will could be dealt with by rectification if our recommendation on rectification of testamentary documents were implemented.[10] Most other cases could be resolved, we suspect, by reference to the normal range of surrounding circumstances. However, the exception has been referred to in Scottish textbooks for over a hundred years. It seems to have done no harm and may have been found useful.

4.10 One possible justification for the exception is that there is not the same danger of doing violence to ordinary language if a special exception is recognised for what will often be a proper name. There is no ordinary meaning of James Keiller or Agnes Williamson which has to be protected from misuse. Also, there are not the same practical difficulties if the exception is confined to unresolved ambiguities in the identification of beneficiaries or bequests and if the choice is limited to one of the objectively possible names. We would welcome views but our preliminary proposal is that the exception should continue to be recognised. The exception should, however, in line with our general approach, be expressed as a rule of the substantive law rather than as a rule of evidence.

4.11 At present the exception applies in the case of latent but not patent ambiguities. The distinction between latent and patent ambiguities crept into Scottish law from England in the early nineteenth century.[11] We have not been able to find any persuasive explanation of its purpose in this context. It may be that in the case of a blatant patent ambiguity - so patent that it must have been obvious to the testator - the only reasonable conclusion is that the testator was playing games or leaving the choice of beneficiary or bequest to the executor. In such a case there will be no point in looking for the testator's actual intention or doing anything other than treating the bequest as void for uncertainty. If, for example, a testator left a bequest to "James Keiller, the confectioner" and added "(being either James Keiller, the confectioner in Dundee or James Keiller, the confectioner in Montrose)" then there is no point in looking further. It does not seem to be necessary, however, to have a special rule to solve that kind of case. So far as we can see the distinction between latent and patent ambiguities serves no useful purpose. Indeed in cases less blatant than the type of case just discussed the distinction seems to be positively harmful. The fact that an ambiguity which was not obvious to the testator is obvious to the interpreter ought not to prevent the application of a beneficent rule of interpretation. We do not therefore reproduce the distinction between latent and patent ambiguities in the proposed rule.

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[9] See pp 82 - 83.
[10] See our Report on *Succession* (Scot Law Com No 124, 1990) para 4.28.
[11] See *Morton v Hunter & Co* (1830) 4 W & S 379 at 386 - 387; *Logan v Wright* (1831) 5 W & S 242 at 247; Walker and Walker, *Evidence*, 285 - 286.

Proposed special rule

4.12 We would welcome views on the following proposed rule.

> **3.(1) An expression in a testamentary writing is interpreted in accordance with the general rule on interpretation except in so far as it is established that the following rule applies.**
>
> **(2) An expression in a testamentary writing which describes a beneficiary or a bequest in terms which are applicable to two or more persons or things is interpreted as applying to such one of those persons or things as corresponds to the intention of the testator.**

Part V Ordinary words and technical words

Introduction

5.1 In this part of the report we consider two general rules which are recognised in the existing law on the interpretation of expressions in a private law context. We ask whether they should be included in a statutory restatement of the law on interpretation and provisionally conclude that, in the new context created by the general rule of interpretation proposed above, they are so obvious that they would add nothing.

Ordinary words

5.2 One of the most commonly stated rules of interpretation is that ordinary words are presumed to bear their ordinary meaning.[1]

> "The most general rule of construction - without which, indeed, all interpretation would be impossible - is that ordinary words are to be taken as used in their ordinary meaning, if there is nothing in the context or in the rest of the contract to imply the contrary."[2]

The contrary may be implied if, for example, the result would be "some absurdity, or some repugnance or inconsistency with the rest of the instrument".[3] It would be otiose to cite further authority for the proposition that ordinary words should normally be taken as used in their ordinary meaning, which is often described as the "golden rule" of interpretation.[4]

Technical or legal expressions

5.3 A corollary of the rule on ordinary words is the rule that technical expressions or expressions with an established legal meaning are normally taken to bear their technical or legal meaning when used in a context where that meaning is appropriate. This is well-established in the existing law.

> "The reception of evidence in explanation of the meaning of terms of art is matter of daily practice in actions upon contracts. It is of course equally admissible where such terms occur in a will."[5]

> "There is a presumption that the words of a writing are to be understood according to their plain, ordinary and obvious acceptation, unless the law has attached to them a recognised meaning, in which case they are presumed to bear that meaning."[6]

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[1] See Walker and Walker, *Evidence*, 283; *MW Wilson (Lace) Ltd v Eagle Star Insurance Co Ltd* 1993 SLT 938, by Lord Kirkwood at 947. "The general rule of construction of a contract is that the words used are to be given their ordinary and natural meaning."
[2] Gloag, *Contract* (2d ed 1929) 399.
[3] *Grey v Pearson* (1857) 6 HL Cas 61 at 106. See also *Caledonian Ry Co v North British Ry* (1881) 8R (HL) 23 at 31.
[4] See eg *Encyclopaedia of the Laws of Scotland* Vol 12, 507.
[5] McLaren, *Wills and Succession* (3d ed 1894) 377. See also Gloag, *Contract* (2d ed 1929), 400; McBryde, *Contract* 432 – 434.

Technical meanings are likely to be particularly important in specialised areas such as shipping, construction, agriculture or finance In the existing law it is well recognised that extrinsic evidence is admissible for the purpose of explaining the meaning of technical expressions.[7] There is of course no reason why this rule should apply only to writings.

Assessment

5.4 The above rules seem eminently reasonable at first sight and, in the context of the cases where they have been cited, have no doubt been found useful. However, the question for us is whether they would be worth reproducing in a statutory restatement which already contained the general rule proposed above. That general rule already refers to the reasonable person, who may be supposed to use language reasonably; it already supposes that the reasonable person is familiar with the field of activity concerned, so that in a technical context technical expressions would already be read in the appropriate way; and it already directs attention to be paid to the context of the expression being interpreted and, at least in some cases, to the admissible surrounding circumstances. We also suggest later that there should be a saving provision for expressions which have a fixed legal meaning.[8] To say, in addition to all that, that an interpreter should begin by giving ordinary words their ordinary meaning and, in an appropriate context, technical words their technical meaning would hardly seem to be necessary.

5.5 The rule on ordinary words and technical expressions is deceptively simple. It seems to imply that ordinary words have only one ordinary meaning and that technical expressions have only one technical meaning. That is not always the case, as a reference to any dictionary shows. Indeed ordinary words may well have a technical or legal meaning when used in certain contexts. There are many situations in which the rule on ordinary words and technical expressions is not only trite but also unhelpful.

5.6 Any attempt to put the so-called golden rules on ordinary words and technical words into statutory form would also reveal hidden difficulties. These rules are sometimes described as presumptions, as can be seen from one of the above quotations, but that is inappropriate. The term "presumption" is better left for questions of fact where the presumption can be rebutted by proof to the contrary. However, the use of the word "presumption" is significant because it indicates that the ordinary or technical meaning can be departed from in certain cases. That is where the difficulty starts. It would be too narrow to say that the ordinary meaning of an ordinary word could be departed from only in cases where the ordinary meaning would lead to absurdity, repugnance or inconsistency. The context might well show clearly that an ordinary word was used throughout in a special meaning even although the ordinary meaning might not lead to absurdity, repugnance or inconsistency. This is recognised in Gloag's formulation which is quoted above. However, even a reference to the context might be too narrow. A permissible reference to surrounding circumstances might show that the word was used in a special sense. However, even that

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[6] Walker and Walker, *Evidence* 283. Contrast *Hunter v Nisbett* (1839) 2D 16 (where the technical meaning of the word "heirs" was departed from because the context so required) with *Blair v Blair* (1849) 12D 97 (where the word "heirs" was given its recognised legal meaning). And, on the interpretation of terms such as "heirs" and "issue", see Wright's Trs v Callender 1993 SLT 556.

[7] Walker and Walker, *Evidence*, 289 - 290; *Inglis v Buttery* (1878) 5R (HL) 87 at 90. For a recent example, see *Leverstop Ltd v Starling* 1993 GWD 23-1461 where "witnesses of experience in the market" gave assistance as to the meaning of the expression "LSSD" (which referred to "Lloyds Syndicates' Survey Department").

[8] See Part VIII.

would not exhaust the cases where the ordinary meaning might have to be departed from. If the case came under the special rule for contracts then effect would have to be given to a special meaning used by one party if the other party knew or could not have been unaware of that meaning. Again, if one of the canons of construction for cases of doubt had to be applied (such as adopting a construction which gave effect, rather than denied effect, to the juridical act) it might be necessary to depart from the ordinary meaning. What the rules on ordinary words and technical words come to is that the interpreter should use the ordinary meaning or technical meaning of words, as appropriate in the context, unless the rules of interpretation suggest that some other meaning should be given to them. Again, this seems fairly obvious. It is difficult to imagine what else the reasonable interpreter might be tempted to do. He or she could hardly start the interpretation process by deliberately reading ordinary words in extraordinary ways or by inventing strange meanings for technical terms or novel meanings for terms which already had a clear legal meaning.

5.7 It would be possible to have a rule of the following lines.

> **4. In interpreting an expression in a juridical act**
>
> > **(a) ordinary words are to be taken to bear their ordinary meaning, and**
> >
> > **(b) technical expressions or expressions with an established legal meaning are to be taken to bear their technical or legal meaning when used in a context where that meaning is appropriate**
>
> **unless the contrary is indicated on the application of these rules.**

We invite views on that and, in order to keep the possibility before the eyes of our consultees, we include this rule within square brackets in the summary of our proposals. However, our provisional view is that such a rule would add little of value.

Part VI Canons of construction

Introduction

6.1 In this part we deal with certain canons of construction, or rules of preference, which relate, not to the interpretation of particular expressions, but rather to the construction of a juridical act as a whole. Similar rules are found in many legal systems. Many of them are derived from texts in Justinian's Digest.[1]

6.2 The value of setting out such rules in legislation may be doubtful. They are largely a matter of simple common sense, and if too many of them are expressed in the law, the result is likely to be more confusion than would result without them.[2] We confine our proposals to the more important rules but even that may be thought by some to go too far and we would welcome views on the question whether it would be better to omit all or most of these canons of construction from any restatement of the law. In favour of that course it can be argued that any reasonable interpreter would apply them anyway,[3] and that

> "It is not really for the legislator to instruct the judge [or other interpreter] in what is practically reasonable or to control his application of the law by technical rules which are virtually empty of content".[4]

On the other hand some of these canons of construction are regularly referred to and are found useful. They are not in fact empty of content. They can provide solutions in difficult cases. The more important ones feature in international instruments. They have been part of the European legal tradition since at least the time of Justinian's Digest and it might seem unhelpful to omit them from any restatement of the law at this stage. It may not be strictly necessary to include them in a legislative restatement of the rules on interpretation but they may be worth restating all the same.

6.3 A related problem is the legal status of these canons of construction or rules of preference. If they are just aids to construction among which an interpreter can pick and choose then it is clearly arguable that they have no place in legislation. On the other hand if they are binding rules of law then not only is there the risk of constraining interpreters inappropriately but also there is a need to regulate conflicts between them and to decide whether the statutory list is exhaustive. Perhaps they are best regarded as weak rules of law in a non-exhaustive list. Their weakness can be reflected in the way they are drafted. If the rules are rules which "may be applied" in appropriate cases, and if there is merely a "preference" for a certain construction, that does not oblige an interpreter to adopt that construction, and leaves some freedom if two or more canons point in different directions.

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[1] See Zimmermann, *The Law of Obligaations* 637 – 642 and Appendix A to this discussion paper.
[2] Zimmermann notes that in one 18th century German work there were "no fewer than 100 different rules of interpretation". *The Law of Obligations* 638.
[3] See our Discussion Paper No 97 (1994) at para 3.9.
[4] Zweigert and Kötz *An Introduction to Comparative Law* (trans by T Weir, 2d ed, 1987) 430 – 431.

6.4 Another related problem is the relationship between any statutory restatement of the canons of construction and the underlying common law. If the canons are merely hallowed rules of commonsense which would be applied by an reasonable person where appropriate then it is clear that they cannot be exhaustive and cannot replace any other equally reasonable canon of construction which may be developed or discovered. In practice the listed canons might be expected to meet most practical needs and it would only be rarely if at all that any other canon would be useful.

6.5 It is clear that a particular canon of construction or rule of preference will apply only where appropriate – that is, only where the particular type of conflict or doubt which arises is such as to lend itself to resolution by that particular canon of construction. It is also clear that there will only be a need to apply a canon of construction if there is a doubt or conflict. Indeed it would be improper to apply a canon of construction, such as the *contra proferentem* rule, if the meaning of a juridical act was perfectly plain in its absence. That would be to rewrite the juridical act so as to show disfavour to one party.

6.6 The canons of construction can be classified according to whether they relate to the terms or to the result. Some of them express a preference for looking at the terms in a certain way, or giving effect to terms of one type rather than another. These are result-neutral: they can operate in favour of either party and nothing turns overtly on the fairness or reasonableness of the result to which the process of interpretation leads.[5] The other canons are result-related. They express a preference for a construction which leads to a certain result - such as freedom from a burden - or away from a certain result - such as donation.

Term-related preferences

6.7 *Give effect to the whole terms*. There is a well-established rule that a construction of a juridical act which enables it to take effect is preferred to one which does not (*ut res magis valeat quam pereat*). In relation to contracts, Gloag expresses the rule as follows.[6]

> "Again, if one of two constructions will make the contract valid, the other deprive it of any operative effect, the former is generally to be preferred."

In relation to wills the well-known preference for testacy is simply a particular example of the canon of construction under discussion.[7] There is no reason to suppose that the rule is confined to contracts and wills.

6.8 A closely related rule is that a construction of a juridical act which gives effect to all its terms is preferred to one which gives effect to only some of them. Gloag expressed this rule of preference as follows.

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[5] We say "overtly" because in reality an interpreter in applying a rule which expresses a preference for a construction which gives effect to one type of term rather than another will have some regard to the nature of the "effect". The rules would not, and should not, be read as requiring a construction to be preferred if it gave a totally fanciful and unreasonable effect to the preferred type of term.

[6] *Contract* 402. See also McBryde, *Contract* 429. For a recent application, see *Scottish Wholefoods Collective Warehouse Ltd v Raye Investments Ltd* 1993 GWD 36-2346.

[7] See *Easson v Thomson's Trs* (1879) 7R 251; *Macduff v Spence's Trs* 1909 SC 178 at 184; *McGinn's Exrx v McGinn* 1994 SLT 2 at 3.

> "It is an argument not without weight, though far from conclusive, that the construction is to be preferred which gives a meaning to every word and clause of the contract…"[8]

The Unidroit Principles of International Commercial Contracts provide that contract terms are to be interpreted so as to give effect to all the terms rather than to deprive some of them of effect.[9] This way of formulating the rule embraces both the rule in favour of giving effect to the juridical act as a whole and the rule in favour of giving effect to all its terms.

6.9 The rule favouring the construction which gives effect to all the terms is not confined to contracts. It applies generally. In one case, for example, a testamentary deed provided in one clause that the testator's daughter was to receive a certain sum as an outright capital payment and in another clause that the sum was to be held for her in liferent and her children in fee. There was an apparent inconsistency between the two provisions. The court managed to give some effect to both provisions by holding that the liferent clause applied only if the daughter could have children. If, as was the situation in the case, she could not have children she took the fee.[10]

6.10 *Give effect to precise terms, rather than vague terms*. If in the same juridical act parties have used precise terms and vague general language, and if there is a conflict between the two, it is reasonable to prefer the construction which gives effect to the precise terms rather than one which gives effect to the general language or to any implication which might be drawn from it (*specialia generalibus derogant*).[11] If, for example, the board of managers of an old people's home is given power to appoint officers in quite general terms without any restriction, and then later in the document it is provided that the same person cannot be appointed as both governor and medical officer, it is reasonable to conclude that the precise words precluding such an appointment must prevail over the earlier general power.[12] Again, if one clause in a trust deed gives trustees "the usual powers of investment" and a later clause provides that they can invest "only" in investments from a much more restrictive list, it is reasonable to conclude that the drafter of the deed must have had only a hazy idea of the usual powers and to prefer a construction which gives effect to the later specific provision.[13]

6.11 A particular example of the preference for the specific is that in appropriate cases the expression of one thing may be held to imply the exclusion of another (*expressio unius est exclusio alterius*).[14] This should not, however, in our view, be elevated into a separate rule of preference. There are many cases where it would be unreasonable to conclude that an

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[8] Gloag, *Contract* 399. See eg *Bank of Scotland v Secretary of State for Scotland* 1996 GWD 9-470.
[9] Art. 4.5.
[10] *Lindsay's Trs v Lindsay* (1880) 8R 281.
[11] See the American Law Institute's *Restatement of the Law (Second), Contracts 2d* s 203(c) and comment. See also *Earl of Kintore v Lord Inverury* (1863) 4 Macq 522.
[12] *Kilwinning Parish Council v Cunninghame Combination Board* 1909 SC 829.
[13] Example based on *McMillan's Trs v Children's Catholic Refuge, Glasgow* (1908) 16 SLT 236 where the court reached the same resu lt by construing "the usual powers conferred by law" as meaning the very restricted powers conferred by the common law. Lord Johnstone noted, at 238, that the drafting of the deed suggested that "the draftsman had no very extended or accurate conception of what were the 'usual powers'".
[14] See Gloag, 404-406. We have said "in appropriate cases" and "may be held to imply" because the *expressio unius* maxim cannot be applied rigidly. "It is often a valuable servant, but a dangerous master to follow in the construction of statutes or documents. The *exclusio* is often the result of inadvertence or accident…": *Colquhoun v Brooks* (1888) 21 QBD 52 at 65. See also *Stevenson v Hunter* (1903) 5F 761 at 765.

express reference to one thing excluded others. Indeed, the French and Italian civil codes provide that a reference to one illustrative example is presumed not to exclude other cases.[15]

6.12 *The eiusdem generis rule.* This rule has been described as follows.

> "Where a list of things of the same class is followed by general words, the general words may be construed as limited to members of that class."[16]

> "Where a list of things is given, to which some provision of the contract applies, and that list concludes with wide general words, the meaning of these general words is so far controlled by the context that they apply only to things of the same class (*ejusdem generis*) as those in the preceding list"[17]

Although the *eiusdem generis* rule could be regarded as simply an example of the importance of construing terms in their context it is such a specific rule, and such a familiar rule, that it should perhaps feature in its own right in the proposed list of canons of construction. Opinions to this effect were expressed at the meeting of our Advisory Group on Contract Law. It is clear from the rule itself that there must be a class or *genus* before the rule comes into operation.[18] And it can only come into operation where there is room for doubt. If the general words make it clear that they are intended to be absolutely general, the rule cannot apply.[19]

6.13 *Prefer a construction against the party who supplied the term.* A canon of construction which is frequently called in aid in the Scottish courts is the rule that, where any terms which have not been separately negotiated have been supplied by one party, there is a preference for their interpretation against that party (*contra proferentem*).[20] The rule comes into operation only in the event of doubt or ambiguity.[21] It is based on the consideration that the party who supplied the term had the opportunity to make it clear and has only himself to blame if, in a case of doubt, it is construed against him.[22] There is some doubt in the existing law as to the precise circumstances in which the rule applies and as to the way in which it should be formulated.[23] The formulation at the beginning of this paragraph is limited to terms which have not been individually negotiated. In this respect it differs from

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[15] French Civil Code art. 1164; Italian Civil Code art. 1365.

[16] McBryde, *Contract* 431. See eg *Abchurch SS Co Ltd v Stinnes* 1911 SC 1010. The rule is not always described in the way which has become standard in Scotland. It is sometimes regarded as relating to the whole subject matter of the contract - so that, for example, in a contract about gold mining a general assignation of all claims or rights might be read as being limited to claims or rights relating to gold and as not extending, for example, to grazing rights. See Christie, *The Law of Contract in South Africa* (2d edn 1991) 255-256.

[17] Gloag, *Contract* (2d ed 1929) 403.

[18] *The Admiralty v Burns* 1910 SC 531.

[19] *Glasgow Corporation v Glasgow Tramway and Omnibus Co Ltd* (1898) 25R (HL) 77 (words "free from all expenses whatever" could not be cut down by the *eiusdem generis* rule without denying effect to "all" and "whatever").

[20] See Gloag, *Contract* (2d ed 1929) 400; McBryde, *Contract* 19-26 to 19-31; Rankine, *The Law of Leases in Scotland* (3d ed, 1916) 98; *Aitken's Trs v Bank of Scotland* 1944 SC 270; *Carrick Furniture House Ltd v General Accident* 1977 SC 308. Recent cases where the rule has been considered include:- *G A Estates Ltd v Caviapen Trs Ltd* 1993 GWD 24-1482; *Shanks & McEwan (Contractors) Ltd v Strathclyde Regional Council* 1994 GWD 10-576; *Eurocopy Rentals Ltd v McCann Fordyce* 1994 GWD 19-1155; *Huewind Ltd v Clydesdale Bank plc* 1995 GWD 25-1345. It is doubtful whether the rule applies where the parties contract on the basis of standard terms drawn up by a trade or professional organisation: in such a case neither party can properly be said to have supplied any particular term. See *SSHA v Wimpey Construction (UK) Ltd* 1986 SC (HL) 57.

[21] See *M W Wilson (Lace) Ltd v Eagle Star Insurance Co Ltd* 1993 SLT 938, where the *contra proferentem* rule did not apply because there was no ambiguity.

[22] See D. 45,1,99 (*De verb. oblig.*) (Celsus); Bankton, *Institute*, I.11.62 (Rule 1); Erskine, *Institute*, III.3.87.

[23] See McBryde, *Contract* 19-26 to 19-31.

the formulation in the Unidroit *Principles of International Commercial Contracts*[24] but is similar to the formulation in the proposed new *Principles of European Contract Law*.[25] The question would be whether an individual term had been separately negotiated, not whether the juridical act as a whole had been. It seems to us that it would be difficult and rather artificial to seek to identify which party had "supplied" a term which had been inserted as a result of negotiation between the parties.[26] We accept, however, that it could also be difficult in some cases to decide whether a term had been separately negotiated. We would welcome views on the suitability of the above formulation for future use.

6.14 The *contra proferentem* rule is usually referred to in the context of contracts. In that context it can be applied without modification. However, in the wider context of juridical acts generally it has to be restricted to onerous juridical acts. There is no justification for construing a gratuitous juridical act against the person who has been kind enough to grant it.

6.15 *Give effect to more important terms, rather than less important terms.* If it is not possible to give effect to all the terms of a juridical act by construing them together,[27] and a conflict remains between an essential term and an incidental term, it is reasonable to attach more weight to the essential term than to the incidental term. A well-known application of this rule in the existing Scottish law is the preference given to the dispositive or operative clause in a disposition.[28] The rule has been applied in English cases to deeds of various kinds.[29]

> "If both the recitals and the operative part are clear, but they are inconsistent with each other, the operative part is to be preferred."[30]

In South Africa there have been several cases in which it has been held that operative clauses prevailed over preambles and similar narrative clauses.[31] The reasoning is that the decision by the parties to put something into a mere narrative clause indicates a deliberate choice to refrain from incorporating it in the operative clauses.[32]

6.16 *Give effect to separately negotiated terms, rather than standard terms.* It very often happens that a contract or similar juridical act consists partly of standard terms and partly of

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[24] Article 4.6 provides that "If contract terms supplied by one party are unclear, an interpretation against that party is preferred". The comment on the article states that "the less the contract term in question was the subject of further negotiations between the parties, the greater the justification for interpreting it against the party who included it in the contract".

[25] Article 5:103 of the draft of April 1996 provides that "Where there is doubt about the meaning of a contract terms not individually negotiated, an interpretation of the term against the party who supplied it is to be preferred."

[26] See *Birrell v Dryer* (1884) 11R (HL) 41 at 47 where it was said that the *contra proferentem* rule did not apply to a term when "in substance, its authorship is attributable to both parties alike".

[27] For example, an essential term of a deed in apparently general terms may be read as qualified by a later term. See eg *Sutherland v Sinclairs and Baillie* (1801) M App voce Tailzie No 8; *Dick-Lauder v Leather-Cully* 1920 SC 48 in both of which the dispositive clause was read as qualified by a later clause, it being possible to read the two together.

[28] The leading case is *Orr v Mitchell* (1893) 20R (HL) 27. See also Menzies, *Lectures on Conveyancing* I, 586-587; Halliday, *Conveyancing* I, para 4-26; II, para 22-04; *Lord Advocate v McCulloch* (1874) 2R 27. It is sometimes said or implied that the dispositive clause, if clear, rules absolutely and prevails over everything else in the deed but, even if that is the existing law (and the authorities are inconsistent), it is too extreme and technical for a new statutory statement of rules of preference. It seems clear, for example, that a later clause ought to be able to define or qualify a term in the dispositive clause. To ignore such a clause would be to contravene the rules that the deed must be read as a whole and that a preference should be given to a construction which gives effect to all its terms.

[29] See Lewison, *The Interpretation of Contracts* 216 - 222.

[30] *Ex p. Dawes. Re Moon* (1886) 17 QBD 275 at 286.

[31] See Christie, *The Law of Contract in South Africa* (2d edn 1991) 244-245.

[32] *Ex parte Johannesburg City Council* 1975 1 SA 816(W) at 819.

terms which have been separately negotiated. In such cases the separately negotiated terms are more likely to express the intentions of the parties and, in case of any conflict which cannot otherwise be resolved, it is reasonable to give the preference to them.[33] A rule to this effect appears in the proposed new *Principles of European Contract Law*.[34]

6.17 *Prefer original language*. The *Unidroit Principles of International Commercial Contracts* contain a rule that

> "Where a contract is drawn up in two or more language versions which are equally authoritative there is, in case of discrepancy between the versions, a preference for the interpretation according to a version in which the contract was originally drawn up."[35]

We seek views on whether this could usefully be included in a statutory provision on interpretation and, if so, whether it should be generalised and extended to juridical acts in general.

Result-related preferences

6.18 *Prefer a result other than donation*. There is a well-known presumption against donation.[36] Stair refers to the presumption in the context of interpretation of writs generally.[37] However, in the context of interpretation it is better to avoid the use of the word "presumption". Presumptions are of much wider application in the law. Their most important role is in relation to proof of matters of fact. It is better to frame canons of construction in terms of preferences rather than presumptions.

6.19 The stock example of the preference for a result other than donation in any case of doubt is that if a debtor sends money to his creditor with some such ambiguous words as "I am paying you £100" the words are interpreted as meaning "I am repaying £100 of what I owe you" rather than "I am making you a gift of £100".[38] More difficult cases have involved ambiguous words which could be construed either as gifts or as transfers for the purposes of a mandate or trust.[39]

6.20 The idea behind the presumption against donation suggests also that in interpreting a juridical act which is gratuitous there should, in a case of doubt, be a preference for the construction which is least burdensome to the donor or debtor. This is reflected in article 1371 of the Italian civil code which provides that a contract which remains obscure after the other rules of interpretation have been applied

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[33] See Gloag, *Contract* (2d ed 1929) 399 ("It is a general rule that if the record of the contract consists of a printed form with alterations or additions in writing, the written portion is to rule in the event of any discrepancy."); *Barry D Trentham Ltd v McNeil* 1996 SLT 202 at 207 ("it is necessary on general principle to have regard to the rule that typewritten elements of the documents have priority over standard printed conditions"). And see the American Law Institute's *Restatement of the Law (Second), Contracts 2d* s 203(d) in Appendix A.

[34] Article 5:104 of the draft of April 1996 provides that "Terms which have been individually negotiated take preference over those which are not."

[35] Article 4.7. There is a similar provision in article 5:107 of the proposed new *Principles of European Contract Law* (draft of April 1996).

[36] See eg *Brownlee's Exr v Brownlee* 1908 SC 232; *Grant's Trs v McDonald* 1939 SC 448; *Macauley v Milliken* 1967 SLT (Notes) 30.

[37] See his sixth rule in IV.42.21 - "*Nemo praesumitur donare*." No-one is presumed to give.

[38] See Stair IV.42.21. "*Debitor non praesumitur donare*". The debtor is not presumed to make a donation.

[39] In *Grant's Trs v McDonald* 1939 SC 448 the words were "I give this money in deposit-receipt for £2000 to Mrs M for anything she has had to get for me, and to do with it as I have instructed her".

"shall be understood in the sense least burdensome for the debtor, if it is gratuitous".

We would welcome views on whether this notion could usefully be incorporated in a restatement of the canons of construction.

6.21 *Prefer freedom.* In the case of real burdens or other restrictions on the use of property which admit fairly of two readings there is a well established rule of preference for the construction which favours freedom from the restriction.[40] The rule was clearly recognised in relation to entails.

> "If a deed of entail is reasonably capable of two constructions, one of which prohibits the free disposition of the estate, and the other does not, the presumption is in favour of freedom."[41]

More generally, it has been said that

> "It is a general presumption that words limiting the exercise of the ordinary rights of property are to be construed in a sense as narrow as the words will fairly bear."[42]

Although this is sometimes described as an example of the *contra proferentem* rule, it is a distinct rule of preference which applies even in cases where the *contra proferentem* rule would not apply. It applies, for example, as between singular successors to the original parties to a conveyance and it applies even where a term has been individually negotiated. The rule could be expressed, conservatively, in the form that where any terms of a juridical act purport to impose a restriction on the use of property, there is a preference for a construction in favour of freedom from the restriction. However, the rule is of wider application.[43] In a more general form it might be expressed as a preference, in any case of doubt, for a construction which leads to freedom from a burden or restriction.

6.22 *Prefer what is lawful, fair and reasonable*. Bankton said that

> "Where the words of a deed may have a double intendment, and the one stands with law and right, and the other is wrongful, and against law; that which stands with law and right shall be taken to be the meaning and intention of the parties."[44]

In England, Cole said that there was a general rule in favour of a construction which was in accordance "with law and right".[45] This statement was later approved by the Privy Council.[46] In modern Scottish case law it has been recognised that a construction favouring legality is to be preferred.[47]

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[40] There are many cases in which the rule is referred to. See eg *Governors of Heriot's Hospital v Ferguson* (1774) 3 Pat App 674; *Tailors of Aberdeen v Coutts* (1837) 2 Sh & Macl 609 at 667; *Dykehead and Shotts Co-operative Society v The Public Trustee* 1926 SC 157 at 162 and 167; *Kemp v Magistrates of Largs* 1939 SC (HL) 6 at 12; *Carswell v Goldie* 1967 SLT 339 at 341.

[41] *Earl of Kintore v Lord Inverury* (1863) 4 Macq 522.

[42] Gloag, *Contract* (2d ed 1929) 401.

[43] See Stair, IV.42.21 (referring to the maxim *in dubio pro libertate respondendum*) and IV.45.17; Bankton, I.11.61 - "the law in interpretation of deeds, favours liberation rather than obligation".

[44] I.11.58, rule 6.

[45] Co. Litt. 42a.

[46] *Rodger v Comptoir D'Escompte de Paris* (1869) LR 2PC 393. See also *Fausset v Carpenter* (1831) 2 Dow & C1 232.

[47] See *Scottish Farmers Dairy Co (Glasgow) Ltd v McGee* 1933 SC 148 at 154 and 155; *A & J Beveridge Ltd v Levi* 1996 GWD 12-679. See also *City of Glasgow District Council v Doyle* 1993 SLT 604 at 610 - "no ordinary reader of the offer to sell

6.23 Any reasonable person interpreting a doubtful provision would lean in the direction of an equitable construction rather than an inequitable one.[48] In the case of a gratuitous transaction the concern for fairness finds expression in the preferences against donation and in favour of the donor. In the case of a non-gratuitous transaction it finds expression in a preference for a sense which, in the words of the Italian civil code, "equitably reconciles the interests of the parties".[49] In Scottish and English law, the many cases to the effect that clauses purporting to exclude liability for a party's own wrongdoing or negligence will be construed strictly[50] can be seen as illustrations of the policy of not favouring a construction which gives one party an unfair advantage.[51] There is also a "well known rule of construction"[52] in favour of an interpretation which does not allow a party to take advantage of his own wrong.[53] In South African law there is a preference, derived from texts from the Digest, for an equitable construction.

> "An interpretation that does not give one party an unfair or unreasonable advantage over the other is to be preferred to one that does"[54]

6.24 There is, not surprisingly, a preference for the reasonable rather than the unreasonable.

> "One must, above all other considerations as I think, in a case where the agreement is in obscure terms, see whether an interpretation proposed is likely to lead to unreasonable results, and if it is, be reluctant to accept it."[55]

Sometimes this canon of construction finds expression in an even more negative form. The court, it may be said, will try to avoid a construction which is "repugnant to common sense".[56]

6.25 Stair recognised a general rule of interpretation in favour of "matters favourable, or persons ... favourable".[57] He intended this general formulation to embrace a number of Latin maxims including the maxims favouring interpretation in favour of freedom (*in dubio pro libertate respondendum*); innocence (*in dubio pro innocentia respondendum*); and the existing possessor (*in dubio pro possessore respondendum*). A general idea underlying these maxims is that an interpretation should be favoured which avoids harsh results (*in dubio pars mitior est*

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would be ...likely to suppose from the words actually used that a public authority ... was deliberately intending to defy the clear words and intent of the Act".

[48] See eg *Watson v Neuffert* (1863) 1M 1110 by Lord Justice-Clerk Inglis at 1114 - "I am disposed to read this contract in what appears to me the fair and reasonable sense".

[49] Art 1371.

[50] See McBryde, *Contract* paras 13-33 - 13-43.

[51] These cases are sometimes explained by reference to the *contra proferentem* rule but this is misleading. The disfavour shown to unfair exemption clauses has little to do with which party proferred them at the time when the contract was concluded and everything to do with the unfairness of allowing one party to rely on them.

[52] *Cheall v APEX* [1983] 2 AC 181 at 189.

[53] See Gloag, *Contract* (2d ed 1929) 400 and 406; Lewison, *The Interpretation of Contracts* 138 -140.

[54] See Christie, *The Law of Contract in South Africa*, (2d edn 1991) 253.

[55] *Wickman Tools v Schuler AG* [1974] AC 235 by Lord Kilbrandon. See also *Mackay's Exrs v Firth* 1972 SLT 22 at 28. (Favoured interpretation would produce "a result which is not only reasonable but ... consistent with the intention of the parties as derived from the language of their contract".)

[56] *Bidoulac v Sinclair's Tr* (1889) 17R 144 at 147.

[57] IV.42.21. "Words are more extensively to be interpreted in matters favourable, or in persons favourable."

sequenda)[58] and does not overturn a settled state of affairs. A benign interpretation should be preferred to a harsh one (*semper in dubiis benigniora praeferenda sunt*).[59]

6.26 We have tried to find a way of expressing all the above notions in one neat formula. They all reflect the same underlying idea. Stair saw this, and his use of the words "favourable" suggests one solution. It could be said that there is a preference for what ought to be favoured. What is lawful, right, fair and reasonable ought to be favoured over what is unlawful, morally wrong, unfair or unreasonable. However, the word "favourable" is not apt in this sense now an it is circular to say that one should favour what ought to be favoured. A more modern way of expressing the same general idea would be to say that a construction which is in accordance with public policy ought to be favoured. Again public policy clearly supports what is lawful, right, fair and reasonable rather than what is unlawful, wrong, unfair or unreasonable. However, public policy is a vague concept and we are reluctant to use it in this context. We would welcome suggestions. In the meantime we have provisionally adopted the rather inelegant solution of simply referring to a preference for "what is lawful, fair and reasonable". We do not, on reflection, and taking into account the views of our Advisory Group on Contract Law, think it necessary to refer separately to what is right or benign. The word "fair" would exclude a preference for what was morally wrong and the word "reasonable" would exclude a preference for what was unduly harsh.

Conflict between rules

6.27 There might be a conflict between different rules of preference. We have considered whether any attempt ought to be made to regulate such conflicts and to have secondary rules of preference. Problems of conflict have not, however, proved to be a practical problem in the past and we do not consider that it would be necessary to provide for them now. The rules of preference come into operation only where applicable to the particular juridical act under consideration and they are merely directions to prefer one possible construction to another. They would not require any particular construction to be adopted. If we were to recommend a hierarchy we would probably wish to place term-related canons higher in the hierarchy than the others, because they are neutral and, at least in some cases, likely to reflect actual intention. The result-related canons present a temptation to rewrite the juridical act with hindsight and, for that reason, should be used only as a last resort. However, we are not convinced that any hierarchy is necessary and have not included any in our provisional proposals. We would welcome views.

Summary

6.28 We would be grateful for views on the following proposal.

> **5.(1) In construing a juridical act, the following canons of construction may be applied where appropriate in order to resolve any doubt or conflict.**
>
> > **(a) A construction of the juridical act which gives effect to all its terms is preferred to one which does not.**

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[58] This is translated in Trayner, *Latin Maxims and Phrases* (4th ed 1894) at 258 as "In a doubtful case, the most favurable – ie the most equitable view, is to be followed".

[59] D. 50,17,56; Bankton, IV.45.114 ("In all doubtful cases the most benign construction is to be preferred.")

(b) A construction which gives effect to precise terms is preferred to one which gives effect to general language.

(c) Where a list of items, all of which are members of the same class is followed by a general term, there is a preference for interpreting the general term as applying only to items of the same class as those in the specific list.

(d) Where, in an onerous juridical act, any terms which have not been separately negotiated have been supplied by one party, there is a preference for their interpretation against that party.

(e) A construction which gives effect to operative or essential terms is preferred to one which is in accordance with narrative or incidental terms.

(f) A construction which gives effect to separately negotiated terms is preferred to one which gives effect to standard terms not separately negotiated.

(g) Where a juridical act is drawn up in two or more linguistic versions which are equally authoritative, there is, in case of discrepancy, a preference for construction according to the version in which it was originally drawn up.

(h) There is a preference for a construction which favours a result other than donation and which, in the case of a gratuitous unilateral act, favours the result least burdensome to the granter.

(i) There is a preference for a construction in favour of freedom from burdens or restrictions.

(j) There is a preference for a construction which leads to results which are lawful, fair and reasonable.

6.29 There are some rules on construction which appear in the institutional writers but which we do not reproduce in our proposals. One is Stair's distinction between vulgar persons and skilful persons.[60] This is a gloss on the *contra proferentem* rule which has not stood the test of time. Another is Bankton's rule that if several clauses are inconsistent, the later prevails.[61] This is primitive, and cannot stand with other rules of preference, such as the rule that all the provisions must be construed together and the rule that more important provisions are to be preferred to less important ones. The rule favouring the later clause regardless of content or importance was abandoned by Pothier,[62] rightly in our view. A third rule which we have not reproduced is Bankton's rule that the construction of a testamentary writing is to be preferred which burdens the heir least.[63] In so far as this is not covered by the presumption in favour of freedom, it is inconsistent with the modern preference for giving effect to testamentary provisions, and avoiding intestacy, where possible. We do not think that any of these canons of construction would be applied nowadays by a reasonable

[60] IV.42.21.
[61] I.11.53.
[62] *Traité des Obligations* 96. See Appendix A.
[63] Bankton, *Institute* IV.45.25 - "where the words of the testator are indistinct, that sense is to be taken that burthens the heir least".

person interpreting a juridical act, at least in the form in which they are stated in the institutional writers. It is not necessary to repeal them because the general rule of reasonable interpretation prevails. It is sufficient not to reproduce them.

6.30 At the meeting of the Advisory Group on Contract Law it was observed that it was unhelpful to suggest, as an earlier version of this discussion paper rather did suggest, that the canons of construction had to be applied rigidly as part of a sequence. They were aids to construction which a reasonable interpreter would use anyway in an appropriate case, but in a subtle way which could not and should not be squeezed into a rigid framework. We have altered the way in which the canons are set out in the draft rules to try to reflect this view. The rules now say that the canons may be applied where appropriate in order to resolve a doubt or conflict but there is no suggestion that there is any need to go through any particular sequence of steps in the interpretation process. It was also observed at the meeting of the Advisory Group that new canons could emerge. An example of a new canon which had emerged to meet a new need was the preference for the original version of a juridical act drawn up in several different languages. It was suggested that it would be useful to make it clear that the list of canons or rules of preference was not intended to be exhaustive. We agree and propose that it might be expressly provided that

> **5.(2) The above list is without prejudice to any other rule of preference which would be applied by any reasonable person in interpreting a juridical act.**

Part VII Admissibility of evidence

Introduction

7.1 The preceding parts of this paper have been concerned with what is essentially a restatement of existing rules of interpretation. One of the main objects of the restatement is to clarify the law on matters such as the meaning of context and admissible surrounding circumstances and on the situations where regard may be had to a special meaning ascribed to an expression by a contracting party. That in turn paves the way for a much simpler approach to the rules on the admissibility of evidence.

7.2 Whereas the preceding parts were concerned with rules which apply whenever an expression is being interpreted in a private law context, and not just in court proceedings, the rules on the admissibility of evidence apply only to judicial and other proceedings where the rules of evidence apply. This affects the way in which the rules are formulated but it also means that they cannot be inconsistent with the substantive rules on interpretation because, in practice, rules of evidence have a "knock-back" effect on interpretation.

Existing law

7.3 The general rule under the existing law is that it is

> "incompetent to ... explain writings by parole or other extrinsic evidence".[1]

However, the exceptions to the rule are "so numerous and extensive"[2] that it has been said that little harm would probably result if the rule were turned round and expressed as a rule that extrinsic evidence is admissible subject to a few exceptions.[3] Extrinsic evidence means all evidence, written or oral, extraneous to the document in question.[4]

7.4 The scope of the exceptions to the general rule is a matter of great uncertainty. On one view there is an exception for any case of latent ambiguity.[5] However, the distinction between patent and latent ambiguities is not clear or satisfactory[6] and forms a very unsound basis for the structure of rules which is erected on it.[7] The distinction appears to have been borrowed from English law early in the nineteenth century.[8]

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[1] Walker and Walker, *Evidence,* 254.
[2] *Ibid*.
[3] *Ibid* at 255.
[4] *Ibid*.
[5] See eg Gloag, *Contract* 372; Walker, *Contracts* (2d ed 1985) para 24.13.
[6] Gloag says that the distinction between these two types of ambiguities is "not always very satisfactory or easy to apply": *Contract* 372. Walker says that it "has rarely, if ever, been strictly applied in Scottish cases": *Contracts* para 24.13.
[7] We criticised the distinction in our Discussion Paper on *Contract Law: Extrinsic Evidence, Supersession and the Actio Quanti Minoris* (No 97, 1994) 73 -75.
[8] See *Morton v Hunter & Co* (1830) 4 W & S 379 at 386-7; *Logan v Wright* (1831) 5 W & S 242 at 247.

7.5 Another view is that the distinction between latent and patent ambiguities is not important and that the key distinction is between direct and circumstantial evidence of intention.[9] This distinction has to be applied along with a distinction between a particular type of ambiguity, called in England an "equivocation", and all other ambiguities.[10] In relation to all ambiguities circumstantial evidence of intention is admissible: only in relation to equivocations is direct evidence of intention available.[11] The authors who support the view that this is the law of Scotland add that

> "In England, whence the doctrine was accepted, the distinction is arbitrarily made, and its origins seem to be obscure."[12]

Since those words were written, these distinctions have been severely criticised in a leading English case on the interpretation of contracts.

> "[T]he distinction between the admissibility of direct and circumstantial evidence of intention seems to me to be quite unjustifiable in these days. And the distinctions between patent ambiguities, latent ambiguities and equivocations as regards admissibility of extrinsic evidence are based on outmoded and highly technical and artificial rules and introduce absurd refinements."[13]

7.6 The uncertainty of the former law on proof by writ or oath means that there is doubt as to the effect of section 11(1) of the Requirements of Writing (Scotland) Act 1995 which provides that any rule of law or any enactment whereby the proof of any matter is restricted to proof by writ or oath ceases to have effect. On one view of the old law this would now let in a great deal of oral evidence in the interpretation of written documents.[14] However, on another view of the old law, the 1995 Act has made little difference in this area because the scope for proof of intention by writ or oath in matters of interpretation was always limited.[15]

7.7 The general rule excluding extrinsic evidence is subject to important specific exceptions. There is, for example, an exception for surrounding circumstances, which is subject to sub-exceptions, one of which is itself subject to five, or possibly six, sub-sub-exceptions.[16] We analysed these exceptions, sub-exceptions and sub-sub-exceptions, as they apply to contracts, at some length in our discussion paper referred to above and it would be wasteful to repeat the analysis here. Our assessment was that the law was complicated, uncertain and obscure. We doubted whether it was appropriate to try to exclude irrelevant matter by rules of evidence which, if applied strictly, would have the effect of excluding also a great deal of relevant matter.[17]

7.8 The law on the admissibility of extrinsic evidence is not as bad in practice as it is in theory. Not only do the numerous exceptions enable justice to be done in most cases but also there may be a changing judicial climate which is impatient with technical restrictions

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[9] Walker and Walker, *Evidence,* 285 - 288.
[10] *Ibid*. 288. An equivocation occurs when a term is equally applicable to two or more persons or things.
[11] *Ibid*.
[12] *Ibid* at 287, footnote 4.
[13] See *Wickman Tools Ltd v Schuler AG* [1974] AC 235, by Lord Simon of Glaisdale at 268.
[14] In *Turner v MacMillan-Douglas* 1989 SLT 293 proof by subsequent writ was allowed in a question of interpretation. The court referred with approval to the statement in Gloag, *Contract*, (2d ed 1929) 376 to the effect that proof of the parties' intention by subsequent writ was always competent. Under the 1995 Act anything which could formerly be proved only by writ can now be proved by any means.
[15] See *Miller Construction Ltd v Trent Concrete Cladding Ltd* 1996 GWD 2-69 in which the *Turner* case was doubted.
[16] See Discussion Paper No 97 (1994) paras 3.18 - 3.38.
[17] See Discussion Paper No 97 (1994) paras 3.39 - 3.40.

on relevant evidence. We were told at the meeting of the Advisory Group on Contract Law that, for procedural reasons, the law on the admissibility of extrinsic evidence in the interpretation of contracts is not now applied in practice with as much rigour as might be supposed from the textbooks and older cases. There is a predisposition now, under the new rules of court, to get parties into court on the facts as soon as possible and to discourage preliminary argument as to the admissibility of evidence. There is a preference for deciding questions of interpretation with, rather than without, relevant information about the surrounding circumstances or factual matrix. The Civil Evidence (Scotland) Act 1988, with its abolition of many technical restrictions on the admissibility of evidence, may have contributed to a certain impatience with technical and time-consuming objections. But none of this weakens the case for reform. Good practice may not be universal and in any event is not an argument for retaining bad law on the books.

The scope for a new approach

7.9 There ought, in our view, to be a general policy in favour of admitting relevant evidence and not admitting irrelevant evidence. There is scope for developing the law on these lines if the substantive law makes it reasonably clear what matters are relevant and what matters are irrelevant in the interpretation of expressions used in a private law context. The rules on interpretation which we have suggested above attempt to do this. Our preference would be to take full advantage of them in order to simplify the rules on the admissibility of extrinsic evidence in the interpretation of expressions used in private law contexts.

Proposed Rule

7.10 We propose that the existing rules on the admissibility of extrinsic evidence in the interpretation of juridical acts should be replaced by a rule on the following lines.

> **6. In judicial or other proceedings on the interpretation of an expression in a juridical act evidence of any relevant matter is admissible."**

Effect of proposed rule

7.11 *In relation to general rule of interpretation.* Where the general objective rule applies the definitions of "context" and "admissible surrounding circumstances" would make it clear what evidence was, or was not, relevant. In particular, evidence of direct statements of intention, or of prior communings would not be relevant, unless these matters had been imported into the juridical act by reference and had become part of the context. Evidence of subsequent conduct would not be relevant.

7.12 *In relation to the special rule for certain contracts.* Where the special rule on the interpretation of certain contracts applies, which would probably not be very often, evidence that an expression was used by one party in a special sense which was known to, or ought to have been known to, the other party or all the other parties, would be relevant. Such evidence might include evidence of the communication of the special meaning by one party to the other, or to all the others, during the negotiation of the contract.[18] However, much

[18] As in *Sutton & Co v Ciceri & Co* (1890) 17R (HL) 40 and *Houldsworth v Gordon-Cumming* 1910 SC (HL) 49. In *Hunter v Livingston Development Corporation* 1986 SC (HL) 31 the parties had, during the negotiations, deliberately rejected the use of model form D and had chosen to use model form B. The court allowed reference to be made to the

evidence of prior communings would still be irrelevant even in the application of the special rules for certain contracts. There would be no question of allowing a general trawl through the prior communings in the hope that a court might be persuaded of some vague subjective intention on the part of one or more parties. That is certainly not our intention and that would not, we believe, be the effect of our provisional proposals.

7.13 Similar considerations apply to the use of subsequent conduct in relation to the special rule for certain contracts. Evidence of subsequent conduct would be relevant if, but only if, it tended to establish that, at the time of contracting, an expression was used by one party in a particular sense of which the other party, or all the other parties, knew or could not have been unaware. It would not be often that subsequent conduct would meet this test of relevancy. Very often subsequent conduct would equally explicable on the ground that the parties had simply ignored, or departed from the terms of their contract. The existing law on this point is not consistent or clear.[19] The many Scottish cases allowing reference to subsequent conduct to establish the common intention of the parties at the time of the contract[20] now have to be read in the light of observations in more recent English Houses of Lords cases, which cast doubt on them.[21]

7.14 Another point on which the existing law is unclear is the admissibility of evidence of deletions.[22] Under our proposal deletions could be taken into account in so far as they tended to establish that, at the time of contracting, an expression was used by one party in a particular sense of which the other party, or all the other parties, knew or could not have been unaware. This approach, firmly based on the idea of relevancy, would enable a distinction to be drawn between a deletion which indicted nothing more than that the drafter of a provision had temporarily followed a false trail before having a change of mind and a deletion of a word in a standard form which indicated that both parties had the shared common intention of giving, or not giving, a particular meaning to an expression remaining in the contract.[23]

7.15 *In relation to the special rule for wills.* We have suggested that there should be a special exception for those cases where, in a testamentary writing, an expression describing a beneficiary or a bequest is applicable to two or more persons or things. In such a case, we have suggested, the expression should be interpreted as applying to such one of those persons or things as corresponds to the intention of the testator.[24] It follows that in the application of this limited exception evidence of any matter, including letters of instruction

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communings in support of an argument that, having rejected D, it was unlikely that the parties intended an ambiguous expression ("the works") in B to be interpreted in a way which would have had the same result as if D had been adopted.

[19] The point was left open in *R & J Dempster Ltd v The Motherwell Bridge and Engineering Co Ltd* 1964 SC 308 at 332.

[20] *Heriot's Hospital v McDonald* (1830) 4 W & S 98; *Scott v Howard* (1881) 8R (HL) 59 at 67; *Clyde Navigation Trs v Laird & Son* (1883) 10R (HL) 77; *Hunter v Barron's Trs* (1886) 13R 883 at 892; *Jopp's Trs v Edmond* (1888) 15R 271 at 282; *Dowling v Henderson* (1890) 17R 921; *Mackenzie v Liddell* (1893) 10R 705 at 714; *Macgill v Park* (1899) 2F 272 at 275; *North British Railway Co v Magistrates of Edinburgh* 1920 SC 409 at 425; *Welwood's Trs v Mungall* 1921 SC 911 at 929; *Watters v Watters* 1927 SC 310; *AM Carmichael Ltd v Lord Advocate* 1948 SLT (Notes) 88; *Smith v Johnstone* 1949 SLT (Notes) 11. See also *Hylander's Exr v H & K Modes Ltd* 1957 SLT (Sh Ct) 69.

[21] *Whitworth Street Estates (Manchester) Ltd v James Miller & Partnres Ltd* [1970] AC 583; *Wickman Tools Ltd v Schuler* [1974] AC 235.

[22] Contrast *Inglis v Buttery* (1878) 5R (HL) 87 with *Taylor v John Lewis Ltd* 1927 SC 891.

[23] On this distinction see *Timber Shipping Co SA v London & Overseas Freighters Ltd* [1972] AC 1 by Lord Reid at 15-16.

[24] Some problems could be solved by rectification if it were to be available in relation to testamentary writings. See our Report on *Succession* (Scot Law Com No 124, 1990) para 4.28.

to solicitors,[25] should be regarded as relevant if it sheds light on the testator's actual intention as to which of the two meanings was intended.

[25] As in *Cathcart's Trs v Bruce* 1923 SLT 722.

Part VIII Saving for special rules of interpretation

Introduction

8.1 The rules which we have considered in this paper are general rules of interpretation. They are not intended to replace special rules relating to the interpretation of particular expressions or particular types of expression.[1]

Special rules for particular expressions

8.2 There are many special statutory rules on the meanings of particular expressions used in private deeds or other private law contexts. For example, certain expressions relating to weights and measures have fixed statutory meanings;[2] the expressions "I assign the writs", "I assign the rents" and "I grant warrandice" have special statutory meanings when used in conveyancing deeds;[3] a reference to "full age" in certain deeds is by statute a reference to the age of 18;[4] and a reference to "Whitsunday" or "Martinmas" in certain deeds has a statutory meaning.[5] There are also common law rules on the meaning of numerous expressions, particularly in the fields of succession and conveyancing. In succession there are, for example, special rules on the interpretation of certain terms descriptive of classes of beneficiaries, such as "heirs".[6] In conveyancing there are, for example, special rules on the interpretation of terms like "common property" in the law of the tenement[7] and of certain terms used in bounding descriptions, such as "bounded by the sea" or by a loch or by a public road.[8] The rules which we suggest in this paper are intended to be without prejudice to any special rules for the interpretation of such particular expressions.

Special rules for particular types of expression

8.3 There are also special rules for the interpretation of particular types of expression. By rules relating to "particular type of expression" we mean to cover, first, those statutory provisions which provide that references, direct or indirect, and in whatever form, to a particular concept (such as "child" or "relative") are to be construed in a particular way[9] and, secondly, rules of the common law relating to expressions having a certain nature, such as

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[1] Stair took the same approach. At the end of his treatment of interpretation he said (IV.42.22) "As to the meaning and interpretation of special clauses, they are congested in the Indexes of the Decisions of the Lords observed by me. The particulars would be tedious and unnecessary to be here repeated, but by these indexes and decisions, they will easily be cleared; especially these clauses which are most frequently controverted, such as clauses concerning conquest, succession, and irritancies."

[2] See eg *Thomson v Garioch* (1841) 3D 625 (meaning of "acre" fixed by statute).

[3] Titles to Land Consolidation (Scotland) Act 1868 s 8.

[4] Age of Majority (Scotland) Act 1969 s1(2).

[5] See the Term and Quarter Days (Scotland) Act 1990.

[6] See eg *Blair v. Blair* (1849) 12D 97; *Wright's Trs v. Callender* 1993 SLT 556.

[7] See *Marfield Properties v Secretary of State for the Environment* 1996 GWD 21-1217.

[8] See eg *Magistrates of Musselburgh v Musselburgh Real Estate Co Ltd* (1904) 7F 308 at 315 - 317 and, generally, Gordon, *Scottish Land Law* (1989) 63 - 72.

[9] See eg Adoption (Scotland) Act 1978 s 39; Law Reform (Parent and Child) (Scotland) Act 1986 s 1(2).

expressions purporting to create real burdens, or expressions referring to lands by a barony title.

8.4 *Real burdens.* We considered recommending a change in the special rule for the interpretation of expressions purporting to create real burdens. Such expressions are interpreted in a particularly strict way under the existing law. Even in a case of ambiguity, surrounding circumstances will not be considered. There is no attempt to construe the deed containing the real burden in such a way as to give effect if possible to all its terms. Courts will quite readily hold the real burden to be ineffective because of uncertainty or ambiguity.

> "The wording must be so clearly expressed that the extent of the burden can be ascertained by a purchaser without travelling beyond the four corners of his titles....
>
> If the words are self-contradictory, or so obscure that one had to grope for the meaning, then the provision is ineffective. It is also ineffective if it is ambiguous or reasonably capable of having more than one meaning."[10]
>
> "There can be no benevolent construction in the sense of spelling a meaning out of obscure phraseology or preferring one of two or more reasonable possible meanings."[11]

The rules which we have proposed in this discussion paper would change the law on the interpretation of real burdens if it were not for the saving for existing rules relating to the interpretation of particular types of expression. It is true that one of the proposed canons of construction contains a preference for a construction in favour of freedom from a burden or restriction, but that does not go far enough to preserve the existing approach to real burdens. It might involve choosing the less burdensome of two possible constructions rather than striking the burden down altogether as would be done under the existing law.

8.5 There is no doubt that the rules on the interpretation of real burdens are anomalous. They appear to reflect a judicial unease with the concept of a burden on land binding on singular successors in perpetuity. The judges, having created this monster, wished to control it. The question is whether an anomalous rule of interpretation is the best way of dealing with the problem.

8.6 The strict rule on the interpretation of real burdens grew up at a time when there was no way of dealing with burdens which had become unreasonable or inappropriate or unduly burdensome compared with any benefit to the other party. Now there is.[12] It is therefore arguable that the time is ripe for a re-examination of the merits of the strict construction rule. However, we do not think that this paper is the place for such a re-examination. Our concern in this paper is with general rules of interpretation, not with special rules for the interpretation of particular types of expression. A more appropriate place for reconsidering the rule on the interpretation of real burdens would be in our work on property law.

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[10] *Lothian Regional Council v Rennie* 1991 SC 212 at 222.
[11] *Hunter v Fox* 1964 SC (HL) 79 at 99.
[12] Application can be made to the Lands Tribunal under the Conveyancing and Feudal Reform (Scotland) Act 1970, s 1 for the variation or discharge of land obligations. The Lands Tribunal can grant an order varying or discharging the obligation if, for example, it is unduly burdensome compared with any benefit which would result from its performance or if its existence impedes some reasonable use of the land.

8.7 *Explanatory possession.* Under the existing law reference can be made to subsequent possession in construing certain types of expression in conveyancing deeds, such as descriptions of barony titles[13] or other "general descriptions"[14] or, possibly, descriptions of servitude rights.[15] We do not intend our proposals to affect any such special rules. Nor do we think that this paper is the place to consider the precise nature and scope of any such rules.

Proposal

8.8 We propose that there should be a general saving provision on the following lines.

> **7. The above rules are without prejudice to the effect of any enactment or rule of law on the interpretation of any particular expression or particular type of expression.**

[13] See eg *Agnew v Lord Advocate* (1873) 11M 309; *Lord Advocate v Blantyre* (1879) 6R (HL) 72; *Buchanan and Geils v Lord Advocate* (1882) 9R 1218 at 1234; *Lord Advocate v Wemyss* (1899) 2F (HL) 1 esp. by Lord Watson at 9-10; *Mather v Alexander* 1926 SC 139 at 146; *Luss Estates Ltd v B P Oil Grangemouth Refinery Ltd* 1981 SLT 97 at 100 (sequel at 1982 SLT 457 and 1987 SLT 201)

[14] See *Beneficial Bank plc v McConnachie* 1996 SLT 413 at 417.

[15] *Boyd v Hamilton* 1907 SC 912. Contrast, however, *Baird v Fortune* (1861) 4 Macq 127 and *Fraser v Grant* (1866) 4M 596.

Part IX Application

Rules of interpretation

9.1 Most of the rules in our provisional proposals are simply a restatement of the existing law in a slightly different form. In most cases it would be unlikely that their application would produce any different results, although we would hope that the same results might be reached more easily. Even where a different result was produced (for example, because a court was prepared to look at surrounding circumstances even in the absence of an obvious ambiguity on the face of an expression) this would be likely to confirm rather than frustrate the expectations of the parties. We think therefore that the proposed rules on interpretation could safely be applied to juridical acts of any date.

Rules of evidence

9.2 So far as rules on the admissibility of evidence are concerned it is normal practice to apply new rules of evidence to any proceedings commenced after the new rules come into force, whatever the date of the underlying acts or events giving rise to the litigation, and this is what we suggest.

Proposal

9.3 We suggest the following rules for consideration.

> **8.(1) The above rules of interpretation apply whatever the date of the juridical act in question.**
>
> **(2) Rule 6 (on the admissibility of evidence) applies in proceedings commenced after the commencement of the new legislation.**

Part X Summary of Proposals

We would be grateful for views on whether the following propositions could usefully form the basis of a statutory restatement of the general rules of interpretation in Scottish private law. We would welcome suggestions as to possible additions to, or deletions from, the rules. We would be particularly grateful for views on whether it would be necessary or useful to include the words within square brackets.

General rule

1.(1) The general rule on interpretation is that an expression used in a juridical act is given the meaning which would be given to it by a reasonable person, familiar with the field of activity concerned, considering the expression in its context and, [where there is any ambiguity] [where necessary for the proper consideration of any dispute], in the light of the admissible surrounding circumstances.

(2) For the purposes of this rule

(a) the context of the expression means the other terms of the juridical act, any material imported into the juridical act by reference, and the nature and purpose of the juridical act in so far as they can be objectively ascertained;

(b) the admissible surrounding circumstances include the facts to which the juridical act relates, the field of activity in which it is entered into, and any usages or practices in that field of activity which would have been known to a person familiar with it; but

(c) the admissible surrounding circumstances do not include statements of intention; instructions, communings, or negotiations forming part of the process of preparation of the juridical act; or conduct subsequent to the juridical act.

(Para 2.31)

Contracts

2.(1) An expression in a contract is interpreted in accordance with the general rule on interpretation except in so far as it is established that the following rule applies.

(2) An expression in a contract which is used by one party in a particular sense (whether or not it is also used in that sense by the other party or any other party) is interpreted in that sense if the other party, or all the other parties, at the time of contracting knew or could not have been unaware that it was being used in that sense.

(Para 3.13)

(3) Paragraph (2) does not apply, and the general rule accordingly does apply,

(a) to a document which is recorded, or intended by the parties to be recorded, in the Register of Sasines or which is presented, or intended by the parties to be presented, in support of an application for registration in the Land Register; or

(b) in any question with a person, other than a party to the contract, who has relied on the meaning which would be given to an expression in the contract by the application of the general rule, unless that person at the time of the reliance knew or could not have been unaware of the meaning which would have been given to the expression in accordance with paragraph 2 above.

(Para 3.24)

Testamentary writings

3.(1) An expression in a testamentary writing is interpreted in accordance with the general rule on interpretation except in so far as it is established that the following rule applies.

(2) An expression in a testamentary writing which describes a beneficiary or a bequest in terms which are applicable to two or more persons or things is interpreted as applying to such one of those persons or things as corresponds to the intention of the testator.

(Para 4.12)

[Ordinary words and technical expressions

4. In interpreting an expression in a juridical act

(a) ordinary words are to be taken to bear their ordinary meaning, and

(b) technical expressions or expressions with an established legal meaning are to be taken to bear their technical or legal meaning when used in a context where that meaning is appropriate

unless the contrary is indicated on the application of these rules.]

(Para 5.7)

Canons of construction

5.(1) In interpreting a juridical act the following canons of construction may be applied where appropriate in order to resolve a doubt or conflict.

(a) A construction of the juridical act which gives effect to all its terms is preferred to one which does not.

(b) A construction which gives effect to precise terms is preferred to one which gives effect to general language.

(c) Where a list of items, all of which are members of the same class, is followed by a general term, there is a preference for interpreting the general term as applying only to items of the same class as those in the specific list.

(d) Where, in an onerous juridical act, any term which has not been separately negotiated has been supplied by one party, there is a preference for the interpretation of the term against that party.

(e) A construction which gives effect to operative or essential terms is preferred to one which gives effect to narrative or incidental terms.

(f) A construction which gives effect to separately negotiated terms is preferred to one which gives effect to standard terms not separately negotiated.

(g) Where a juridical act is drawn up in two or more linguistic versions which are equally authoritative, there is, in case of discrepancy, a preference for construction according to the version in which it was originally drawn up.

(h) There is a preference for a construction which favours a result other than donation and which, in the case of a gratuitous juridical act, favours the result least burdensome to the granter.

(i) There is a preference for a construction in favour of freedom from burdens or restrictions.

(j) There is a preference for a construction which leads to results which are lawful, fair and reasonable.

(Para 6.28)

(2) The above list is without prejudice to any other canon of construction which would be applied by any reasonable person in interpreting a juridical act.

(Para 6.30)

Admissibility of evidence

6. In judicial or other proceedings on the interpretation of an expression in a juridical act evidence of any relevant matter is admissible.

(Para 7.10)

Saving for special rules of interpretation

7. The above rules are without prejudice to the effect of any enactment or rule of law on the interpretation of any particular expression or particular type of expression.

(Para 8.8)

Application

8.(1) The above rules of interpretation apply whatever the date of the juridical act in question.

(2) Rule 6 (on the admissibility of evidence) applies in proceedings commenced after the commencement of the new legislation.

(Para 9.3)

APPENDIX A

HISTORICAL AND COMPARATIVE BACKGROUND

PART 1

TEXTS ON INTERPRETATION OF CONTRACTS ILLUSTRATING THE CIVIL LAW INFLUENCE ON SCOTTISH INSTITUTIONAL WRITINGS (1681-1839), POTHIER'S *TRAITÉ DES OBLIGATIONS* (1761), AND FRENCH *CODE CIVILE* (1804)

Note: except where otherwise stated, the English translations of texts in Justinian's *Digest* are taken from the Mommsen-Krüger-Watson edition (Pennsylvania, 1985). Footnotes are taken from original but footnote letters or numbers are changed and references to the *Digest* modernised.

(1) Intention

D. 50,16,219 (*de sig verb.*) (Papinian)
It was decided that in agreements between contracting parties intention rather than the actual words must be considered.[1]

D.18.1.6.1 (*de cont empt) (Pomponius)*
in contracts of sale and purchase, we must look to what the parties intended rather than what they said,..[2]

Stair, *Institutions* IV,42,21 (2d edn; 163)
Fourthly, *Plus valet quod agitur, quam quod simulatè concipitur:*[3] more respect is to be had to what appears by the writ, to have been the interest and design of the parties, than to what the style appears.

Bankton, *Institute* IV,45,56 (1751-1754)
the rule of law is, That the interpretation of words must be made according to the intention of the party who speaks or writes them. And hence it is commonly said, That every man is the best interpreter of his own words. This holds in testaments[4] … It holds likewise in the interpretation of laws.[5] But in contracts, the interpretation, in a doubtful particular, is to be made against the party who made the provision, and ought to have expressed himself more plainly.[6]

Bell, *Principles* s 524 rule (8) (4th edn; 1839)
(8.) That the true point of inquiry in all doubtful cases is not (as in a will) the intention of one party, but that meaning of the terms made use of which the adverse party understood, and on which he was entitled to rely.

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[1] *In conventionibus contrahentium voluntatem potius quam verbas pactari placuit.*
[2] "*in emptis … et venditis potius id quad actum, quam id quod dictum sit sequendum est".*
[3] ie that which is done is of more avail that which is pretended to be done (trans. Trayner, *Latin Maxims and Phrases* 4th edn).
[4] Citing D. 34,5,24 (*de reb dub*) (Marcellus) "Where a testamentary intention is either ambiguous or incorrectly drafted, it should be interpreted generously, and any credible intention on the testator's part should be credited"; D.35,1,19 (*de cond et demon*).
[5] Citing C.1,14,fin (*de legib*).
[6] Citing D.45,1,99. Quoted below, p .

Pothier, *Traité des Obligations*
91. *On doit, dans les conventions, rechercher quelle a été la commune intention des parties contractantes, plus que le sens grammatical des termes.*

Code Civile, Art. 1156.
On doit dans les conventions rechercher quelle a été la commune intention des parties contractantes, plutôt de s'arrêter au sens littéral des termes.

(2) Validity preferred to invalidity

D.45,1,80 (*de verb. oblig.*) (Ulpian)
Whenever there is an ambiguous phrase in a stipulation, the most convenient interpretation which preserves the object to be sued for is to be taken.[7]

Bell, Principles, s 524, rule 3
3. That the sense which gives validity and effect to the agreement, is to be preferred to that which invalidates or defeats it.

Pothier, *Traité des Obligations*
92. *Lorsqu'une clause est susceptible de deux sens, on doit plutôt l'entendre dans celui dans lequel elle peut avoir quelque effet, que dans celui dans lequel elle n'en pourrait avoir aucun.*

Code Civile, Art. 1157
Lorsqu'une clause est susceptible de deux sens, on doit plutôt l'entendre dans celui avec lequel elle peut avoir quelque effect, que dans le sens avec lequel elle n'en pourrait produire aucun.

(3) Interpretation agreeable to nature and subject-matter of contract

D. 50,17,67 (*de reg jur*) (Iulianus)
Whenever the same expression contains two views, the one is more readily to be accepted which is more suitable to the conduct of the affair.[8]

D.12,1,3 (*de rebus creditis*) (Pomponius)
…when a contract is made, the nature of the transaction is given effect just as though expressly provided for…[9]

Bankton, *Institute* I,11,56 (Rule 4)
4. The words of a contract are to be taken in the sense which is most agreeable to the subject-matter of it.[10]

Bankton, *Institute* IV,45,50
If the writing is not plain as to some particulars of the agreement, the nature of the contract may supply it, *in contrahendo quod agitur pro cauto habetur*,[11] ie What arises from the nature of the contract must be understood to have been covenanted, tho' it be not expressed.

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[7] *Quotiens in stipulationibus ambigua oratio est, commodissimum est id accipi quo res de qua agitur in tuto sit.*
[8] *Quotiens iden sermo duas sententias exprimit, ea potissimum excipiatur, quae rei gerendi potior est.*
[9] *in contrahendo quod agitur pro cauto habendum est, id autem agi intellegitur.*
[10] Citing D.50,17,67.
[11] Citing D.12,1,3.

Pothier, *Traité des Obligations*
93. *Lorsque, dans un contrat, des terms sont susceptibles de deux sens, on doit les entendre dans le sens qui convient le plus à la nature du contrat.*

Code Civile, Art. 1158.
Les terms susceptibles de deux sens doivent être pris dans le sens qui convient le plus à la matière du contrat.

(4) Local usage

D.50,17,34 (*de reg jur*) (Ulpian)
In stipulations and in other contracts we always follow [what has been done] [what was intended]; or if it is not clear what [has been done] [what was intended], the consequence will be that we shall follow what is the established practice in the region in which the action has taken place.[12]

Bankton, *Institute* IV,45,50 (commenting on D.50,17,34)
"The first rule is the express tenor of the deed, and the intention of the parties thence appearing. If, in any particular, That does not appear from the writing, the Custom of the place of the contract may clear the intention of the parties;…."

Bankton, *Institute* IV,45,52
The next means to find out what was intended by the parties, prescribed by this rule, is the Custom of the place.

Bell, *Principles* (4th ed 1839) 205
That usage enters into, extends, limits, and qualifies contracts, especially in matters of trade. But the usage must be consistent with law; and either general, universal

usage; or usage of the particular trade or line of dealing; or, if local, known and relied on by both parties: and when it is so, it tacitly enters into the contract.

Pothier, *Traité des Obligations*
94. Ce qui peut paraître ambigu dans un contract, s'interprête par ce qui est d'usage dans le pays.

Code Civile, Art. 1159
Ce qui est ambigu s'interprète par ce qui est d'usage dans le pays où le contrat est passé.

(5) Construe all parts of contract together

D. 1.3.24 (Celsus) (de legib.)
It is not lawyer-like practice to give judgment or to state an opinion on the basis of one particular part of a statute without regard to the whole.[13]

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[12] *Semper in stipulationibus et in ceteris contractibus id sequimur quod actum est; aut si non appareat quod actum est, erit consequens ut id sequamur quod in regione in qua actum est frequentatur.*
[13] *Incivile est nisi tota lege perspecta una aliqua particula eius proposita iudicare vel respondere.*

Bankton, *Institute* I,11,57 (Rule 5)
5. A contract ought to be considered in all its parts together, and one clause explained by another;[14] and if, upon the whole, the meaning of parties is clear, the words ought to yield to their intention.[15]

Pothier, *Traité des Obligations*
96. *On doit interpréter une clause par les autres clauses contenues dans l'acte, soit qu'elles précèdent ou qu'elles suivent.*

Code Civile, Art. 1161.
Toutes les clauses les clauses des conventions s'interprètent les unes par les autres, en donnant à chacune le sens qui résulte de l'acte entier.

(6) Interpretation *contra proferentem*

D. 34,5,26(27) (*De rebus dubiis*) (Celsus)
Where a question arises about the intention of a stipulation, any ambiguity works against the stipulator.[16]

D. 45,1,38,18 (*De verb. oblig.*) (Ulpian)
In the case of stipulations when it is asked [what action has been taken], the words are to be understood against the stipulator.[17]

D. 45,1,99 (*de verb. oblig.*) (Celsus)
we usually construe in favour of the promisor, because the stipulator was free to choose his words at large.[18]

Stair, *Institutions* IV,42,20
Secondly, *Verba sunt interpretanda contra proferentem*, where the parties are skilful, or are known to have trusted skilful persons in forming of the writs; and therefore the same should be as much extended in favour of the other party as their sense can bear.

Bankton, *Institute,I,11,62* (Rule 1)
1. As, by the civil law, stipulations, when doubtful, were always construed against the stipulator who put the question, and ought to have spoken more clearly; as with us, writings are interpreted against the granter, when ambiguous, and in mutual contracts, against the person who made the condition, or is subject to the performance….[19]

Erskine, *Institute* III,3,87
Doubtful clauses in obligations are to be interpreted against the granter; for *sibi imputet* that he did not express his mind more clearly when it was in his power [citing D. 45,1,99pr].

Pothier, *Traité des Obligations*

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[14] Citing D.1,3,24 (*de legib*) (Celsus).
[15] Citing D.50. 16, 219; D.18,1,6,1; Nov. 1734. Brodie.
[16] *Cum quaeritur in stipulatione, quid acti sit, ambiguitas contra stipulatorem est.*
[17] *In stipulationibus cum quaeritur quid actum sit, verba contra stipulatorem interpretanda sunt*.
[18] *fere secundum promissorem interpretamur, quia stipulatori liberum fruit verba late concipere.*
[19] Citing Dec 20. 1665. MacLeod. Feb 13. 1677. Fraser. June 24. 1664. Moffat.

97. *Dans le doute, unse clause doit s'interpréter contre celui qui a stipulé quelque chose, et à la décharge de celui qui a contracté quelque chose, et à la décharage de celui qui a contracté l'obligation.*

Code Civile, Art. 1162
Dans le doute, la convention s'interprète contre celui qui a stipulé at en faveur de celui qui a contracté l'obligation.

(7) Limitation of contracts to subject matter

D.2.15.9.3 (Ulpian) (*Transactiones*)
"The compromise will operate as a bar only with respect to matters of which there is proof of intention….For where he afterward discovers that actions are available to him in respect of certain matters, it is unfair that these should be destroyed by the pact in that they refer to matters to which it is not shown that he had given consideration".[20]

Bell, *Principles* s. 524, rule 5.
5. That words, however general, are to be confined to the subject and matter of the agreement contemplated by the parties.

Pothier, *Traité des Obligations*
98. *Quelque généraux que soient les termes dans lesquels une convention est conçue, elle ne comprend que les choses sur lesquelles il parait que les parties se sont proposé de contracter, et non pas celles auxquelles elles n'ont pas pensé.*

Code Civile, Art, 1163
Quelque généraux que soient les termes dans lesquels une convention est conçue, elle ne comprend que les choses sur lesquelles il parait que les parties se sont proposé de contracter.

PART II

EXCERPTS FROM SCOTTISH INSTITUTIONAL WRITERS

Stair, *Institutions* IV,42,21

21. The general rules of interpretation of writs are, first, that they ought to be interpreted according to the parties that expressed the same, and the matter expressed therein. So if the person expressing be vulgar, the interpretation of their words and sentences ought to be understood according to the vulgar meaning and common sense thereof: and if the matter import that they must be legal terms, they are to be understood in the most common and vulgar sense these terms can bear. And therefore that brocard, that *verba sunt interpretanda contra proferentem, qui potuit sibi clarius legem dixisse,* or *mentem apertius explicasse*, holds not in such vulgar persons, but in skilful persons, or where skilful persons are trusted.

Secondly, *Verba sunt interpretanda contra proferentem*, where the parties are skilful, or are known to have trusted skilful persons in forming of the writs; and therefore the same should be as much extended in favour of the other party as their sense can bear.

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[20] *His tantum transactio obest,…,de quibus actum probatur. Nam ea, quorum actiones competere ei postea compertum est, iniquum est perimi pacto, id de quo cogitatum non est.*

Thirdly, Words are more extensively to be interpreted in matters favourable, or in persons favourable, than in other cases, especially when the matter is odious, as the Roman law saith, *in dubio pro dote respondendum*. And generally *in dubio pro libertate respondendum*, and *in dubio pro innocentia respondendum, in dubio pro possessore respondendum, in dubio pro debitore respondendum, in dubio pro reo respondendum*.

Fourthly, *Plus valet quod agitur, quam quod simulatè concipitur:* more respect is to be had to what appears by the writ, to have been the interest and design of the parties, than to what the style appears.

Fifthly, *In claris non est locus conjecturis*. This is a correctory to the former rules, that judges may not arbitrarily interpret writs, or give them a sense inconsistent with their clear words.

Sixthly, *Nemo praesumitur donare*, under which is comprehended, *debitor non praesumitur donare*: which is more pregnant than the former general rule. Yet in other cases, when the words may bear a design to oblige, they are not to be interpreted as a deed of more liberality; as if the words bear, that such a person delivers or obliges to deliver such and such things, they rather import loan than gift. Yet when the natural signification of the words importeth donation, or a gratuitous deed, it is to be interpreted accordingly [IV,45,15, *infra*].

Seventhly, Words in latter-wills, or donations or dispositions in contemplation of imminent death, are more favourably to be interpreted, and to be further extended than in deeds *inter vivos*. …

Bankton, *Institute* I,11,53 – 62

53. Rules in the interpretation of writings; first, doubtful clauses to be interpreted against the party on whom they are binding.

In the interpretation of writings, these rules generally hold. 1. As, by the civil law, stipulations, when doubtful, were always construed against the stipulator who put the question, and ought to have spoken more clearly; so, with us, writings are interpreted against the granter, when ambiguous, and in mutual contracts, against the person who made the condition, or is subject to the performance: for one who, as a party, subscribes a writing, is in the same case as if he had wrote it all himself, as well as subscribed it; and, in mutual contracts, is understood to have dictated what concerns the obligations upon himself in it.[21]

56. *Words of a contract to be taken in the most agreeable sense.*

4. The words of a contract are to be taken in the sense which is most agreeable to the subject-matter of it; [22] and the preamble, recital or narrative of a writing, serves to explain the obligatory or dispositive part.[23]

57. Where the intention of the parties is plain, it prevails; clauses inconsistent; errors of the writer.

5. A contract ought to be considered in all its parts together, and one clause explained by another;[24] and if, upon the whole, the meaning of parties is clear, the words ought to yield to

[21] Dec 20. 1665. MacLeod. Feb 13. 1677. Fraser. June 24. 1664. Moffat.
[22] D.50,17,67.
[23] D.45,1,134,1 ff. (*de verb oblig*).

their intention.[25] If the several clauses are plainly inconsistent, the posterior are understood to rectify and derogate from the prior;[26] but such parts of a writing as are unintelligible, are holden as not adjected; however mere errors of the writer are overlooked.[27]

58. A deed to be taken in such sense, as stands with law and right.

6. Where the words of a deed may have a double intendment, and the one stands with law and right, and the other is wrongful, and against law; that which stands with law and right shall be taken to be the meaning and intention of parties.[28]

60. Deeds of parties must be limited to the subject-matter treated of.

8. Deeds of parties must be limited to the subject-matters presumed to have been treated of. Thus, a general clause contained in a discharge, subjoined to an accompt of charge and discharge, will not comprehend other claims of a different kind from these in the accompt, or thereto relating:[29] nor will a general acquittance or discharge extend to a bond formerly assigned, tho' the assignation was not intimated,[30] because *bona fides* is always presumed.

61. The law, in interpretation of deeds, favours liberation.

9. But otherwise the law, in interpretation of deeds, favours liberation rather than obligation; and therefore a bill of exchange, drawn upon a third person by the debtor, payable to his creditor, not bearing value of him, will not create a new debt, but be ascribed in payment of the former; and discharges, mentioning receipt of the money from the debtor, tho' by the hands of another, and in that others possession, will not afford him recourse against the debtor; but the payment will be presumed by the debtor's own money.[31]

Erskine, *Institute* III,3,87 (1773)

Doubtful clauses, how to be interpreted.

87. Doubtful clauses in obligations are to be interpreted against the granter; for *sibi imputet* that he did not express his mind more clearly when it was in his power; D.45,1,99 pr. *De verb. obl*. Where the granter ranks among the lower orders of the people, and is unassisted by men of skill in drawing the obligation, the words ought to be understood in the vulgar sense; Stair, b.4, t.42, § 21. In a mutual contract, in which each contractor has the framing of the contract equally in his power, it would seem that dubious clauses ought to be explained, not in favour of the creditor, as some have affirmed, but of the debtor, agreeably to the rule, that obligations are not to be presumed. Where a clause in a contract obliges one of the parties to a fact which appears impossible, and where the alteration of a single word or two will bring it to a meaning which was obviously the intention of the contractors, our supreme court have presumed that the mistake proceeded from the inaccuracy of the writer, and have therefore exercised their pretorian power of correcting the clause accordingly; *Coutts & Company*, 9 Jan. 1758, M.11,549.

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[24] D.1,3,24 (*de legib*).
[25] D. 50,16,219 (*de verb sig*); D.18,1,6,1 (*de cont empt*) Nov 1734. Brodie.
[26] D.3,1,28 (*de legib*).
[27] D.50,17,73.,3; D.50,17,9,2 (*de reg jur*).
[28] D.50,17,168 pr. (*de reg jur*).
[29] D.2,14,47 (*de pactis*); D.50,17, 67 (*de reg jur*) Nov 1723. Sir John Sinclair contra the executors of Bairnsfather.
[30] Feb 3. 1671. Blair. Feb. 1736. Lady Logan contra Afflec of Edingham.
[31] July 26. 1711. Haliburton, eod. die, Nisbet.

… Most of the rules for interpreting laws, drawn from the intention of the lawgiver, or from the preamble, or from the subject matter of the statute, may be fitly applied to the interpretation of contracts and obligations.

Bell, *Principles* s 524 (4th and last personal edn) (1839)

Special Rules.--The rules seems to be,--

(1.) That the popular sense of the words, as known and used at the place and time, is to be followed, unless the words be technical.

(2.) That technical words are to be taken technically, if no doubt can be entertained of the meaning and application: And for their meaning, usage may be resorted to.[32]

(3.) That the sense which gives validity and effect to the agreement is to be preferred to that which invalidates or defeats it.

(4.) That usage enters into, extends, limits, and qualifies contracts, especially in matters of trade. But the usage must be consistent with law; and either general, universal usage; or usage of the particular trade or line or dealing; or, if local, known and relied on by both parties; and when it is so, it tacitly enters into the contract.

(5.) That words, however, general, are to be confined to the subject and matter of the agreement contemplated by the parties.

(7.) That if the meaning and import of the agreement is to be collected from what has passed in correspondence, the meaning is to be taken according to the import of the whole. And if a series of conversations and communings, or of letters, has resulted in a distinct written agreement, all correspondence and communings are discharged.[33]

Finally, that the true point of inquiry in all doubtful cases is not (as in a will) the intention of one party, but that meaning of the terms made use of which the adverse party understood, and on which he was entitled to rely.

PART III

EXCERPTS FROM NATIONAL CODES OF GERMANY AND ITALY

Excerpt from the BGB (transl by Forrester, Goren and Ilgen)

> **§ 133 [Interpretation of a declaration of intention]** In interpreting a declaration of intention the true intention shall be sought without regard to the declaration's literal meaning.
>
> **§ 157 [Interpretation of contracts]** Contracts shall be interpreted according to the requirements of good faith, giving consideration to common usage.

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[32] *Bowman v Horsey,* 2 Mood & Rob 85; 3 I11 145.
[33] *Kain v Old,* 2 B. & Cr. 634; 3 I11. 105; 26 R.R. 497. *Inglis v Buttery,* 1877; 5 R. 58; rev. *Ib.* H.L. 87. Even deleted words in the concluded agreement are excluded from consideration. Inglis, *cit Comp Forlong v Taylor's Exrs., infra Gordon v Hughes,* June 15, 1815; F.C.; rev. 1819, 1 Bligh, 287; 20 R.R. 52; and below,§ 2257, 2258, 760.

§ 2084 [Different ways of interpretation] If the content of a testamentary disposition admits of various interpretations, in case of doubt, the interpretation shall be preferred under which the disposition may have operative effect.

[Note. There are also specific rules on the effect of bequests of various kinds, such as bequests to heirs, relatives, children and descendants. See §2066 to §2073. These are not, however, general rules of interpretation.]

ITALY

Excerpt from the Italian Civil Code (Transl by Beltrama, Longo and Merryman)

Interpretation of Contract

1362. Intent of contracting parties. That which was the common intent of the parties, not limited to the literal meaning of the words, shall be sought in interpreting the contract.
In order to ascertain the common intent of the parties, the general course of their behaviour, including that subsequent to the conclusion of the contract, shall be taken into account.

1363. Comprehensive interpretation of clauses. Every clause of the contract is interpreted with reference to all the others, attributing to each the meaning resulting from the act as a whole.

1364. General expressions. No matter how general the expressions used in a contract, they only include the objects as to which the parties intended to contract.

1365. Illustrative examples. When a case is mentioned in a contract in order to explain a clause, unmentioned cases to which the same clause could reasonably be extended are not presumed to be excluded.

1366. Interpretation according to good faith. The contract shall be interpreted according to good faith.

1367. Preservation of contract. In case of doubt, the contract or the individual clauses shall be interpreted in the sense in which they can have some effect, rather than in that according to which they would have none.

1368. General interpretive practices. Ambiguous clauses are interpreted according to the general practice in the place in which the contract was concluded.
In contracts in which one of the parties is an enterpriser, ambiguous clauses are interpreted according to the general practice of the place where the enterprise has its headquarters.

1369. Expressions with several possible meanings. In case of doubt, expressions which can have more than one meaning shall be understood in the sense most suitable to the nature and object of the contract.

1370. Interpretation against author of provision. Provisions contained in the standard conditions of a contract or in forms or formularies which have been prepared by one of the contracting parties, are interpreted, in case of doubt, in favor of the other.

1371. Final rules. When, notwithstanding the application of the rules contained in this chapter, the contract remains obscure, it shall be understood in the sense least burdensome for the debtor, if it is gratuitous, and in the case of a non-gratuitous contract, in the sense which equitably reconciles the interests of the parties.

PART IV

EXCERPTS FROM THE AMERICAN LAW INSTITUTE'S *RESTATEMENT OF THE LAW SECOND : CONTRACTS 2d*

§ 200. Interpretation of Promise or Agreement

Interpretation of a promise or agreement or a term thereof is the ascertainment of its meaning.

§ 201. Whose Meaning Prevails

(1) Where the parties have attached the same meaning to a promise or agreement or a term thereof, it is interpreted in accordance with that meaning.

(2) Where the parties have attached different meanings to a promise or agreement of a term thereof, it is interpreted in accordance with the meaning attached by one of them if at the time the agreement was made

> (a) that party did not know of any different meaning attached by the other, and the other knew the meaning attached by the first party; or
>
> (b) that party had no reason to know of any different meaning attached by the other, and the other had reason to know the meaning attached by the first party.

(3) Except as stated in this Section, neither party is bound by the meaning attached by the other, even though the result may be a failure of mutual assent.

§ 202. Rules in Aid of Interpretation

(1) Words and other conduct are interpreted in the light of all the circumstances, and if the principal of the parties is ascertainable it is given great weight.

(2) A writing is interpreted as a whole, and all writings that are part of the same transaction are interpreted together.

(3) Unless a different intention is manifested,

> (a) where language has a generally prevailing meaning, it is interpreted in accordance with that meaning;
>
> (b) technical terms and words of art are given their technical meaning when used in a transaction within their technical field.

(4) Where an agreement involves repeated occasions for performance by either party with knowledge of the nature of the performance and opportunity for objection to it by the other, any course of performance accepted or acquiesced in without objection is given great weight in the interpretation of the agreement.

(5) Wherever reasonable, the manifestations of intention of the parties to a promise or agreement are interpreted as consistent with each other and with any relevant course of performance, course of dealing , or usage of trade.

§ 203. Standards of Preference in Interpretation

In the interpretation of a promise or agreement or a term thereof, the following standards of preference are generally applicable:

(a) an interpretation which gives a reasonable, lawful, and effective meaning to all the terms is preferred to an interpretation which leaves a term unreasonable, unlawful, or of no effect;

(b) express terms are given greater weight than course of performance, course of dealing, and usage of trade, course of performance is given greater weight than course of dealing or usage of trade, and course of dealing is given greater weight than usage of trade;

(c) specific terms and exact terms are given greater weight than general language;

(d) separately negotiated or added terms are given greater weight than standardized terms or other terms are not separately negotiated.

PART IV

THE CANONS OF CONSTRUCTION OF CONTRACTS UNDER ENGLISH LAW[34]

6.01 The function of canons of construction

The canons of construction are no more than pointers to discovering the presumed intention of the parties to a written contract. They are not to be slavishly applied, and where they point in different directions the court must select those which will produce a reasonable and just result.

6.02 Construing the document as a whole

In order to arrive at the true interpretation of a document, a clause must not be considered in isolation, but must be considered in the context of the whole of the document.

[34] K Lewison, *The Interpretation of Contracts*, (1989) Ch 6, pp 123 *et seq.*

6.03 Giving effect to all parts of a contract

In construing a contract all parts of it must be given effect where possible, and no part of it should be treated as inoperative or surplus.

6.04 Standard printed conditions and special conditions

Where the contract is a standard form of contract to which the parties have added special conditions, greater weight must be given to the special conditions, and in case of conflict between the general conditions and the special conditions, the latter will prevail.

6.05 Express mention of part of subject-matter

Where the contract expressly mentions some things, it is often to be inferred that other things of the same general category which are not expressly mentioned were deliberately omitted. Similar principles apply to the express inclusion of obligations dealing with a particular area of application.

6.06 Express terms negative implied terms

An express term in a contract excludes the possibility of implying any term dealing with the same subject-matter as the express term.

6.07 Construction against grantor

Where there is a doubt about the meaning of a grant, the doubt will be resolved against the grantor. Similarly words in a contract (particularly exclusion clauses) are construed against the person for whose benefit they are inserted. However, the rule is reversed in the case of a grant by the Crown.

6.08 Party not to take advantage of own wrong

A contract will be construed so far as possible in such a manner as not to permit one party to it to take advantage of his own wrong.

6.09 Contract to be construed so as to be lawful

Where the words of a contract are capable of two meanings, one of which is lawful and the other unlawful, the former construction should be preferred.

6.10 Expression of terms implied by law

The expression of a term which the law implies as a necessary part of the contract has no greater effect than the implied term would have had.

6.11 The *eiusdem generis* rule

If it is found that things described by particular words have some common characteristic which constitutes them a genus, the general words which follow them ought to be limited to things of that genus.

6.12 Saving the document

Where two constructions of an instrument are equally plausible, upon one of which the instrument is valid, and upon the other of which it is invalid, the court should lean towards that construction which validates the instrument.

6.13 The reasonableness of the result

The reasonableness of the result of any particular construction is a relevant consideration in choosing between rival constructions.

6.14 Presumption against impossibility

There is a presumption of construction that a contract does not require performance of the impossible, but this may be rebutted by clear words.

PART VI

EXCERPT FROM THE UNITED NATIONS CONVENTION ON CONTRACTS FOR THE INTERNATIONAL SALE OF GOODS

Article 8
(1) For the purposes of this Convention statements made by and other conduct of a party are to be interpreted according to his intent where the other party knew or could not have been unaware what that intent was.

(2) If the preceding paragraph is not applicable, statements made by and other conduct of a party are to be interpreted according to the understanding that a reasonable person of the same kind as the other party would have had in the same circumstances.

(3) In determining the intent of a party or the understanding a reasonable person would have had, due consideration is to be given to all relevant circumstances of the case including the negotiations, any practices which the parties have established between themselves, usages and any subsequent conduct of the parties.

PART VII

EXCERPTS FROM UNIDROIT, *PRINCIPLES OF INTERNATIONAL COMMERCIAL CONTRACTS*

Article 4.1
(Intention of the parties)

(1) A contract shall be interpreted according to the common intention of the parties.

(2) If such an intention cannot be established, the contract shall be interpreted according to the meaning that reasonable persons of the same kind as the parties would give to it in the same circumstances.

Article 4.2
(Interpretation of statements and other conduct)

(1) The statements and other conduct of a party shall be interpreted according to that party's intention if the other party knew or could not have been unaware of that intention.

(2) If the preceding paragraph is not applicable, such statements and other conduct shall be interpreted according to the meaning that a reasonable person of the same kind as the other party would give to it the same circumstances.

Article 4.3
(Relevant circumstances)

In applying Articles 4.1 and 4.2, regard shall be had to all the circumstances, including

(a) preliminary negotiations between the parties;

(b) practices which the parties have established between themselves;

(c) the conduct of the parties subsequent to the conclusion of the contract;

(d) the nature and purpose of the contract;

(e) the meaning commonly given to terms and expressions in the trade concerned;

(f) usages.

Article 4.4
(Reference to contract or statement as a whole)

Terms and expressions shall be interpreted in the light of the whole contract or statement in which they appear.

Article 4.5
(All terms to be given effect)

Contract terms shall be interpreted so as to give effect to all the terms rather than to deprive some of them of effect.

Article 4.6
(Contra proferentem rule)

If contract terms supplied by one party are unclear, an interpretation against that party is preferred.

Article 4.7

(Linguistic discrepancies)

Where a contract is drawn up in two or more language versions which are equally authoritative there is, in case of discrepancy between the versions, a preference for the interpretation according to a version in which the contract was originally drawn up.

APPENDIX B

Members of Advisory Group on Contract Law who attended meeting to consider draft discussion paper on 11 June 1996

Professor Robert Black, QC, University of Edinburgh
Dr Eric Clive, Scottish Law Commission (Chairman of the Group)
The Hon Lord Coulsfield, Senator of the College of Justice
Miss Laura Macgregor, Shepherd & Wedderburn, Edinburgh
Professor Hector MacQueen, University of Edinburgh
Ms Christine McLintock, McGrigor Donald, Edinburgh
Sheriff Principal Gordon Nicholson, QC, Edinburgh
Dr Hamish Patrick, Tods Murray, Edinburgh
Ms Lindy Patterson, Bird Semple, Edinburgh
Professor Kenneth Reid, Scottish Law Commission
Mr David Sellar, Advocate
Professor Joseph Thomson, University of Glasgow
Mr Niall Whitty, Scottish Law Commission
Mr James Wolffe, Advocate

In attendance: Dr David Nichols, Scottish Law Commission, (Secretary to the Group)

Professor Carole Lewis, University of Witwatersrand, South Africa (by invitation).