The Swiss approach to contract interpretation –
Better suited to the realities of international construction contracts?

Say what? – The Rules of Interpretation at Civil and Common Law

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General perceptions of the civil law / common law divide

- Civilian approach said to be “subjective”, focused on the parties’ real intentions.
- Common law approach viewed as “objective”, more focused on the terms of the contract.
- BUT the difference between the systems is far more nuanced.
Particularities of international construction contracts

1. Parties with different cultural, commercial, and legal backgrounds;

2. Parties’ imperfect command of the language of the contract (usually English);

3. Complex and voluminous, numerous (often contradictory) documents, drafted and negotiated in different contexts.
Swiss approach to contract interpretation

- Two-tiered approach:
  1. Starting point: real and common intention of the parties
     - Very different to common law systems.
  2. "Principle of trust" (Vertrauensprinzip / principe de la confiance) – "objective" or "normative" interpretation
The two-tiered approach – the Supreme Court’s mantra

- "A judge will first seek to establish the real and common intention of the parties, adopting an empirical approach, without stopping at the inaccurate expressions or denominations they may have used. If he or she is unable to do so, he or she will seek, by applying the principle of trust, the meaning that the parties could and should have given, pursuant to the rules of good faith, to their reciprocal manifestations of intent, taking into account all the circumstances." (Decision of the Supreme Court 4A_124/2014 of 7 July 2014, para. 3.4.1.)

- But the tiers overlap in practice; can be difficult to distinguish.
Step 1: Real and common intention (subjective interpretation)

- The main objective of interpretation (in theory).

- Art. 18 Code of Obligations:

"In order to decide on the form and clauses of a contract, it is necessary to seek the real and common intention of the parties, instead of relying on the incorrect expressions and terms which the parties used in error or with the aim of dissimulating the real nature of the contract."
Step 1: Real and common intention (subjective interpretation) (cont’d)

- No limitations on admissible evidence.
- The wording of the contract is the "primary" means of interpretation.
  - BUT no strict hierarchy between the means of interpretation; merely implies that wording will be the \textit{starting point} of interpretation.
- "Complementary" means include:
  - Parties’ negotiations and conduct before conclusion;
  - Parties’ conduct after conclusion.
Step 2: Principle of trust (objective or normative interpretation)

- If the parties’ real intentions cannot be established, or are divergent.
- Based on the general duty of good faith.
- How the contract could and should have been understood, in good faith, by the other party;
  - taking into account all the circumstances which preceded or accompanied its conclusion.
Step 2: Principle of trust (cont’d)

- Wording is starting point, but cannot adopt a purely literal interpretation of the text, even if it is clear.

- Must take into account "all the circumstances" which preceded or accompanied the contract’s conclusion:
  - Include other clauses of the contract, its purpose, the parties’ respective interests, and usage in the relevant industry or field, and parties’ negotiations.
  - Do not include parties’ subsequent conduct.
Step 2: Principle of trust (cont’d)

- Nevertheless, wording has priority over other evidence, and will often be determinative.
  - Court or tribunal should not move away from literal meaning of the text adopted by the parties if there is no "serious reason" to think that it does not correspond to their intention (see for ex. Supreme Court Decision 136 III 186, para. 3.2.1).
  - Wording will be interpreted less strictly if parties are foreign or concluded the contract in a foreign language.
Interpretation of standard form contracts

- Unlike some other civilian jurisdictions, will not be interpreted in a strictly objective way.
- Must be interpreted in an "individualised" way, like any other contract.
- Recently confirmed by the Swiss Supreme Court in respect of the FIDIC Conditions of Contract (Decision of the Supreme Court 4A_124/2014 of 7 July 2014).
Swiss and English law: not so different after all

1. Normative / objective interpretation is predominant under Swiss law both legally and practically;
   - Party seeking to rely on subjective interpretation which diverges from normative interpretation has burden of proof.
   - In practice, subjective interpretation is exception rather than the rule.

2. Normative interpretation under Swiss law very similar to contextual approach under English law.
Distinguishing features of the Swiss approach

- Evidence of the parties’ negotiations and subsequent conduct is admissible.
  - Particularly helpful in the context of international construction contracts.

- Swiss approach to the admissibility of evidence is simple.

- Flexibility and sensitivity to the particularities of international construction contracts.
Thank you