



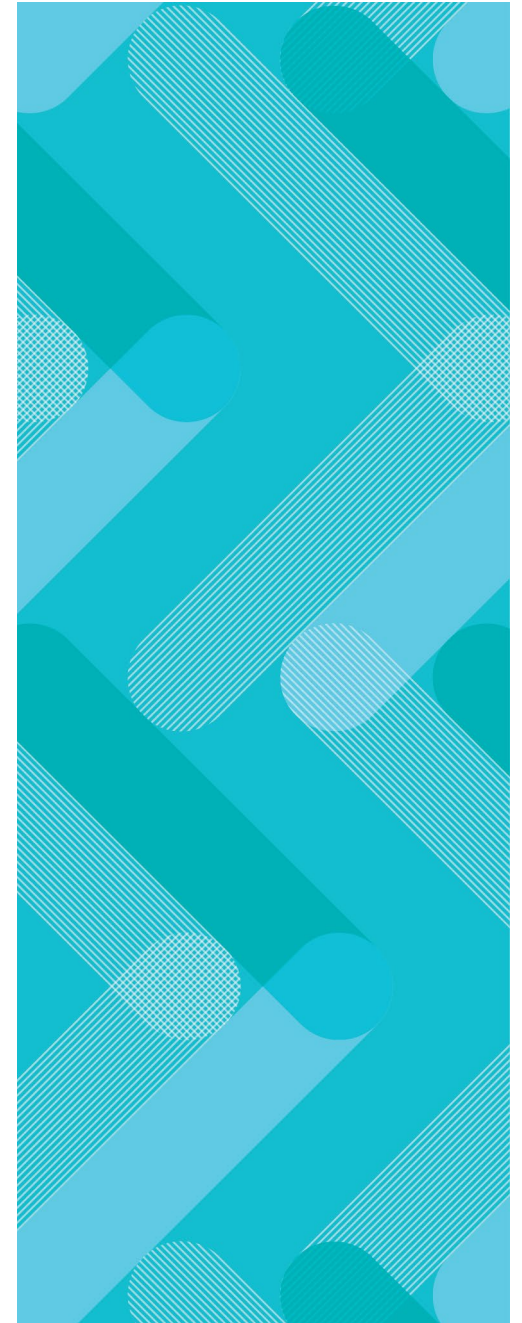
HERBERT
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Contemporary Legal Knowledge and Practice

Comparative Laws - Singapore Institute of Legal Education

Session 2

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1. Contract Formation

- Under general civil law, three requirements need to be met: (i) consent, (ii) capacity and (iii) a lawful and certain content.
- Query requirements for contractual interpretation

2. Contractual interpretation: Indonesian CC

Bagian 4. Penafsiran Persetujuan.

1342. Jika kata-kata suatu persetujuan jelas, tidak diperkenankan menyimpang daripadanya dengan jalan penafsiran. (KUHPerd. 855.)

1343. Jika kata-kata suatu persetujuan dapat diberi berbagai tafsiran, maka lebih baik diselidiki maksud kedua belah pihak yang membuat persetujuan itu, daripada dipegang teguh arti kata menurut huruf. (KUHPerd. 886, 1257, 1473, 1855.)

1344. Jika suatu janji dapat diberi dua arti, maka janji itu harus dimengerti menurut arti yang memungkinkan janji itu dilaksanakan, bukan menurut arti yang tidak memungkinkan janji itu dilaksanakan. (KUHPerd. 887.)

1345. Jika perkataan dapat diberi dua arti, maka harus dipilih arti yang paling sesuai dengan sifat persetujuan. (KUHPerd. 887.)

1346. Perkataan yang mempunyai dua arti harus diterangkan menurut kebiasaan di dalam negeri atau di tempat persetujuan dibuat. (AB. 15.)

1347. Syarat-syarat yang selalu diperjanjikan menurut kebiasaan, harus dianggap telah termasuk dalam persetujuan, walaupun tidak dengan tegas dimasukkan dalam persetujuan. (KUHPerd. 1339, 1492.)

1348. Semua janji yang diberikan dalam satu persetujuan harus diartikan dalam hubungannya satu sama lain; tiap-tiap janji harus ditafsirkan dalam hubungannya dengan seluruh persetujuan.

1349. Jika ada keragu-raguan, suatu persetujuan harus ditafsirkan atas kerugian orang yang minta diadakan perjanjian dan atas keuntungan orang yang mengikatkan dirinya dalam perjanjian itu. (KUHPerd. 1273, 1473, 1509, 1865, 1879.)

1350. Betapa luas pun pengertian kata-kata yang digunakan untuk menyusun suatu persetujuan, persetujuan itu hanya meliputi hal-hal yang nyata-nyata dimaksudkan kedua pihak sewaktu membuat persetujuan. (KUHPerd. 1854.)

1351. Jika dalam suatu persetujuan dinyatakan suatu hal untuk menjelaskan perikatan, hal itu tidak dianggap mengurangi atau membatasi kekuatan persetujuan itu menurut hukum dalam hal-hal yang tidak disebut dalam persetujuan.

Article 1342. If the wording of an agreement is clear, one shall not deviate from it by way of interpretation. (ICC. 855)

Article 1343. If the wording of an agreement is open to several interpretations, one shall ascertain the intent of the parties involved rather than be bound by the literal sense of the words. (ICC. 886, 1257, 1473, 1855; Civ. 1156)

Article 1344. In the event that a promise is ambiguous, one shall interpret it in the sense that allows for the promise to be enforceable, rather than in the sense in which it would be entirely unenforceable. (ICC. 887)

Article 1345. Wording which is open to two kinds of interpretation shall be interpreted in the sense which corresponds most with the nature of the agreement. (ICC. 887)

Article 1346. If the wording is ambiguous, it shall be interpreted in a manner which is customary in the country or in the location where the agreement was entered into. (AB. 15)

Article 1347. Customary stipulations shall be deemed to be implied in the agreement, notwithstanding that these have not been expressed therein. (ICC. 1339, 1492)

Article 1348. All promises provided in an agreement shall be interpreted having regard to their relationship to one another; each shall be interpreted having regard to its relationship to the whole agreement. (Civ. 1161)

Article 1349. In the event of doubt, the agreement shall be interpreted against the party requesting for the agreement to be made and in favour of the party who has bound himself thereto. (ICC. 1273, 1473, 1509, 1865, 1879)

Article 1350. Regardless of the generality of the wording of an agreement, it shall cover the matters regarding which the parties clearly intend to enter into the agreement. (Bw. 1854)

Article 1351. If a party has specified something in an agreement for the purpose of clarifying the contract, then he shall not be considered to have restricted and limited the force of the agreement by law in matters not provided for therein.

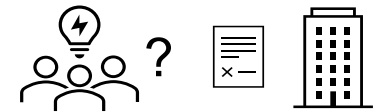
2. Contractual interpretation: Thai CCC

2.1 Contractual interpretation in accordance with the true intentions

Section 171. In the interpretation of a declaration of intent, the real intent must be sought rather than the literal meaning of the words or expressions.

- The true intention shall always prevail even when it is in conflict with the written agreement
- Example: Supreme Court Judgment No. 11107/2555

The Court ruled that the true nature of a contract should be determined by the parties' intentions and actual terms, not just its name.



Section 368. Contracts shall be interpreted as required by good faith, taking customary practice into consideration.

- Example: Supreme Court Judgment No. 1375/2505

“Although it did not state in the freight booking that the jute must be packed tightly, but in the customs of freight forwarding overseas, the consignor shall machine pack the jute that would be delivered tightly.”

Supreme Court Judgment No. 2210/2526

“The true intention of the parties could be seen from such agreement. If the provision in the agreement is clear, there is no requirement to interpret the intention of the parties outside such agreement.”



2. Contractual interpretation: Thai CCC

2.2 Filling the gaps with the statutory rules

- Section 10 – 14 of the CCC

Section 10. When any of the terms in a document may be interpreted in two meanings, the meaning which gives some effect shall be preferred over the other which does not.

Section 11. In case of doubt, the interpretation shall be in favour of the party who incurs the obligation.

Section 12. In the case where an amount of money or quantity is expressed in a document both in characters and in figures, if there is inconsistency between them and the real intent cannot be ascertained, the expression in characters shall be governed.

Section 13. If an amount of money or quantity is expressed in characters or in figures more than once in a document, but there is inconsistency in them and the real intent cannot be ascertained, the lowest amount of money or quantity shall be governed.

Section 14. In the case where a document is made in several languages, whether in a single document or several documents, including the Thai language, if the contents in such several languages are different and the parties' intent as to which language is to prevail cannot be ascertained, the Thai language shall prevail.

3. Pre-contract Negotiations

Common law position

Pre-contractual negotiations are part of the surrounding circumstances that are used to design, and hence interpret, the apparent (objectively determined) meaning of an agreement, unless the document is intended to be seen by third parties not privy to the negotiations.

Under common law, as you know, various rules prohibit the admission of evidence of pre-contractual negotiations.

The "*Factual matrix*" therefore is limited and excludes pre-contractual negotiations from evidence – other than in exceptional circumstances.

Civil law position

Civil law systems are much more expansive when looking at pre-contractual negotiations. The logic is that most contracts are subject to detailed negotiations in which the parties set out their position and will often explain their reasoning based on the commercial background. Evidence of such discussion may sometimes be useful when seeking to interpret a contract at a later time. However, please bear in mind that this is not conclusive and it is still subject to interpretation under Thai law.

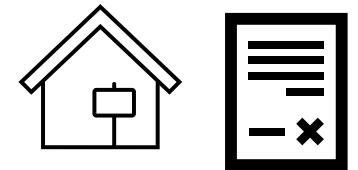
4. The Doctrine of Good Faith

Good faith in Thailand

Section 6. It shall be presumed that each person acts in **good faith**.

- Example: Supreme Court Judgment No. 9158/2539

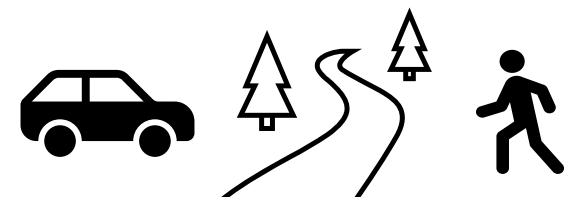
“The court viewed that the plaintiff should be benefited from Section 6 that the purchase of land was done in good faith, that is, the payment had been made and the title had been registered.”



Section 368. Contracts shall be interpreted as required by **good faith**, taking customary practice into consideration.

- Example: Supreme Court Judgment No. 478/2544

“When the true intention of the parties could not be revealed and no specific default rules are applicable, the interpretation of this term shall rest upon the principles of good faith and ordinary customs under Section 368.”



4. The Doctrine of Good Faith

Liability of bad faith for Torts

Section 421.

The exercise of a right which **will only injure another person** shall be unlawful.

- Example: Supreme Court Judgment No. 6599/2559

Company T announced that it will take the coupons valued 80 baht issued by Company B and will double the value of the coupon to be 160 baht provided that the customer shall purchase the goods in Company T's supermarket. Company T's operation is obviously to scramble for Company B's customers. The Supreme Court held that Company T's conduct was wrongful against Company B under Section 421 of the CCC.



5. Discharge of contracts under civil law systems

Keep in mind:

- Different specific remedies are available after termination
- Civil code specifies what damages apply
- Often specific performance is preferred
- Election of remedies is critical

5. Discharge of contracts under civil law systems

Further facts in our case study

Recall: the Respondents terminated the SPA on 3 June 2015. The termination was contested. The Claimants later sold their shares to a third party on 1 Feb 2018, nearly 3 years after the original Closing, for a significantly lower purchase price. They claimed the delta from the Respondents as damages for wrongful termination i.e. to seek to put itself in a position as if the contract and Closing had been performed on 1 June 2015.

Were the Claimants entitled to positive damages? And if so, to what value?

- 6.16 Accordingly, even if the Claimants are entitled to positive damages (which is denied), the valuation of the damages can only be based on the difference between the Purchase Price under the SPA and the fair market value as of the date of their election. It is not correct, as a matter of Turkish law, as the Claimants have done, to value the damages as the difference based on the Purchase Price under the SPA and the purchase price under the [REDACTED] Transaction.

5. Discharge of contracts under civil law systems

The importance of election of remedies

2.23.2 [REDACTED]: Article 112 of TCO is a general compensation provision which applies to breaches for which the law has not provided a specific provision. Where a specific provision is applicable, Article 112 does not apply. In this regard, Articles 117-125 of TCO govern the default of the obligee specifically. Those provisions apply where the default of the obligor is alleged, as in this case.⁵³ If [REDACTED]'s termination is found to be wrongful, it is Article 125 that governs the Claimants' rights.

2.20.2 [REDACTED] to become entitled to the remedies of positive damages instead of performance, or negative damages following rescission of contract, the obligee must immediately inform the obligor that he has renounced performance, and claims either positive damages or rescission for negative damages.

The problem for the Claimants is that they failed to elect to claim positive damages after the Respondent issued its Termination Notice.²¹⁴ Instead, the Claimants chose to stay silent for nearly three years following their receipt of the Termination Notice.

2.29.2 Therefore, even if the Claimants establish that [REDACTED] the purchaser in this case, was in default, Article 235 confirms that the Claimants' right is to rescind the contract and they are obliged to immediately notify CMEC of their election.