Interpretation of Terms and Conditions of Insurance[1]

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1 This essay is a shortened and updated version of Radetzki, *Tolkning av försäkringsvillkor*, Stockholm, 2014.

1 Introduction

Insurance contracts are a common occurrence, they are complicated and of great financial importance. It is not then surprising that there are a great number of disputes between insurers and the insured. Superficially, these disputes are very often about whether the insured is entitled to compensation, and if so, what amount. However, a closer analysis of these disputes indicates that, at a deeper level, the differences in opinion between the parties concern the meaning of one or more provisions of the insurance contract. These disputes may thus be said to be about interpretation of the terms and conditions of insurance. The large number of disputes of this kind means that questions concerning the interpretation of terms and conditions must be said to be among the most important issues in the law of insurance contracts.

This paper aims at clarifying the factors that, according to Swedish law, have an impact on the interpretation of terms and conditions of insurance and the mutual relationship between these factors.

The Swedish Insurance Contracts Act (FAL) does not contain any rules about the interpretation of terms and conditions of insurance. Neither does the legislation on contracts in general provide any guidance in this regard.[2] Consequently, the preparatory work of the legislation also leaves the reader without any proper guidance. In addition, questions regarding the interpretation of terms and conditions of insurance has never been made subject to profound analysis in the legal doctrine. On the other hand, there is a large number of decisions from the Supreme Court relating to this important issue. However, the Supreme Court has made statements at a more principled level on the approach to interpretation of terms and conditions of insurance in only a few of these cases. These decisions are dealt with in section 2.1. Other decisions are casuistic in so far as that the Supreme Court has taken a position on the issue of interpretation in each particular case and then stated which factor or factors have been important for the result of the interpretation. These decisions are dealt with in section 2.2.

Overall, this abundant case law provides a good picture of the various factors that may be influential in the interpretation of terms and conditions of insurance. However, it cannot be excluded that other factors might also be regarded as relevant in this context, even though these have not yet found expression in the case law of the Supreme Court. Section 3 contains an examination of whether there is reason to include any such additional factors in the interpretation of terms and conditions of insurance.

The next question concerns the mutual relationship of the relevant factors. This question is dealt with in section 4 after which there is a summary of the presentation in section 5 in the form of a schematic model for interpretation of terms and conditions of insurance.

2 This is true, however, with one exception, namely section 10 of the Consumer Contract Terms Act, which stipulates the so called contra proferentem rule. *See* section 2.2.6.

2 Factors of Interpretation in the Case Law of the Supreme Court

2.1 General Statements

In NJA 2001 p. 750, the Supreme Court made an announcement of principle concerning relevant factors in the interpretation of terms and conditions of insurance. The statement is worded as follows:

"In the interpretation of a condition of insurance, …consideration must be given, in addition to the wording, to the intention of the clause, the type of insurance and category of client, to traditions as regards wording, the legal mode of expression, current case law, etc. Consideration must also be given to what is objectively a sensible and reasonable regulation. Only if it is not possible to achieve any result from such consideration, is there reason to fall back on other, more general principles of interpretation, such as the contra proferentem rule."

In a later decision, NJA 2006 p. 53, the Supreme Court has, with reference to the judgment of 2001, more or less repeated this statement, although excluding the section on what is objectively a sensible and reasonable regulation. It was hardly the case, however, that the Supreme Court intended to distance itself from the interpretation factor thus excluded. This is confirmed by NJA 2013 p. 253 where the Supreme Court, with reference to both NJA 2001 p. 750 and NJA 2006 p. 53, made a statement which, with the exception of a few insignificant differences in language use, corresponds to the statement in the 2001 judgment.[3]

It is thus stated in the above-mentioned decisions that interpretation of terms and conditions of insurance may take place taking into consideration a number of stated factors. However, the importance of these statements appears to be relatively limited. In the majority of the Supreme Court's decisions concerning the interpretation of terms and conditions of insurance after 2001, there are no references to the statement quoted. One reason for this may be that it does not appear to have been the intention of the Supreme Court in the 2001 decision to make an exhaustive list of the relevant factors for the interpretation of terms and conditions of insurance.[4] Furthermore, the statements do not seem to be the result of an independent analysis by the Supreme Court. They are instead based to a very great extent on a statement made by Jan Hellner over 50 years ago.[5]

3 *See* also NJA 2017 p. 237, with reference to NJA 2001 p. 750, NJA 2006 p. 53 as well as NJA 2013 p. 253.

4 This follows if not otherwise from the initial list being followed by "etc." (and so on).

5 *See* Hellner, *Försäkringsrätt*, 2 ed, Stockholm, 1965, p. 72 f. Consequently, there are comparative references to this statement in NJA 2001 p. 750 and NJA 2006 p. 53 (although not in NJA 2013 p. 253 and NJA 2017 p. 237 which, however, contain references to the two decisions mentioned above).

2.2 The Supreme Court's Casuistic Case Law

As has been described in section 1, there is thus abundant case law of a casuistic nature concerning interpretation of terms and conditions of insurance. A large number of cases are referred to in sections 2.2.1 – 2.2.6 arranged according to the different factors that have actually had an impact in the interpretation of the respective case.[6]

2.2.1 Wording

A number of cases indicate that terms and conditions of insurance are to be interpreted taking into account the wording of the provisions in dispute.[7]

The following decisions show that the wording of a provision in dispute is not infrequently interpreted in accordance with general use of language.[8]

NJA 1987 p. 835 concerned the meaning of a provisions in the terms and conditions of a liability insurance for businesses that made an exemption for loss arising "due to incorrect undertakings on the suitability of the product delivered for a particular purpose". The insured had delivered fish meal to a customer to be used as fodder for mink, although without making any explicit undertaking on the suitability of the fish meal for this intention. The fish meal injured the minks. The insured was considered to be liable for the loss and claimed compensation from the insurance. The claim was rejected by the insurer with reference to the fact that the fish meal sold to be used as mink fodder should be equated with an explicit undertaking on its suitability for this purpose. The court of appeal, whose judgment was upheld by the Supreme Court, took as its starting point the wording of the condition which "interpreted according to common use of language" was considered to provide "scant support" for the insurer's allegation that sale of the fish meal alone was to be equated with an undertaking on its suitability for this purpose. The exemption provision in question was thus inapplicable with the consequence that the insured's request for compensation could be assented to.

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6 Cases in which a number of factors have had an effect are thus referred to under several headings.

7 The following presentation only covers cases where the wording constituted the crucial or at any rate predominant interpretation factor. Beside this, there are, of course, cases where the wording affected the interpretation of terms and conditions but only in the capacity of one among a number of interpretation factors (for example, NJA 1996 p. 727 and NJA 2004 p. 534 and cases where the wording only had limited importance for interpretation but where the Supreme Court explicitly stated that wording did not provide clear guidance (for example, NJA 2012 p. 3, NJA 2010 p. 227, NJA 2001 p. 750 and NJA 1988 p. 408).

8 Beside the decisions referred to below, reference may be made to NJA 1939 p. 286, NJA 1975 p. 733, NJA 1980 p. 145, NJA 2006 p. 53, NJA 2009 p. 877 and NJA 2017 p. 237. Cf NJA 2009 p. 408 where the Supreme Court, even if it is not explicitly stated, seems to have adopted the point of view that the wording of the provisions in question could not be considered as providing support for the insurer having any obligation of the kind alleged by the insured.

NJA 1989 p. 346 concerned the meaning of a provision in the terms and conditions of burglary insurance for businesses according to which the insurance applied for theft through "a break-in where someone unlawfully broke into premises using force or a skeleton key". The insured requested compensation for a theft carried out by use of so-called fake keys, i.e. keys that had been copied without authorisation from the original keys which had been deposited for some time at a security firm. The claim was rejected with reference to it not being considered that there had been an insured event according to the provision referred to. The Supreme Court noted that the term skeleton key in common language use could not be considered to cover fake keys. Furthermore, the court pronounced that the terms and conditions appeared to be consistent as the insurance only covered loss where force or a skeleton key had been used while losses where a breach of trust could be suspected were not covered. In these circumstances, there was according to the Supreme Court no reason to interpret the provision in question "in any other way than in accordance with its wording" with the consequence that the insured could not base entitlement to compensation for the loss incurred "immediately on the terms and conditions of the insurance".

NJA 1997 p. 832 concerned the meaning of a provision which stipulated that a machine insurance applied for physical damage which had "occurred" during the period of the insurance. The question at issue in the case concerned whether the insured could be considered to be entitled to compensation for physical damage which was shown by the machine ceasing to function during the period of the insurance but which had actually occurred previously (after which the machine, despite the damage, continued to work for a period). The Supreme Court referred to the wording of the provision in question and noted that the insured could not be considered to be entitled to compensation from the insurance.

NJA 1941 p. 683 concerned the meaning of a provision in the terms and conditions of an accident insurance which stipulated that "*frostbite* ….is not considered to be an accident". After the insured had been taken by surprise by a violent snow storm and thus incurred frostbite, the insured requested compensation from the insurance. The Supreme Court dismissed the claim with reference to frostbite "not being considered as an accident" according to the terms and conditions of the insurance.

A number of decisions show that expressions which have a particular legal meaning have often been interpreted accordingly.[9]

NJA 1996 p. 68 concerned the meaning of a provision in the terms and conditions of liability insurance for businesses that stated that the insurance covered liability for damages for "injury to persons and damage to property". After the insured had incurred liability to damages, a dispute arose as to whether the damage in the sense of the terms and conditions of insurance was damage to property. This term was not defined in the terms and conditions of insurance. In this situation, the Supreme Court opted to give the term damage to property the

9 Alongside the decisions referred to below, reference may be made to NJA 2009 p. 355, NJA 2008 p. 668, NJA 2001 p. 255, NJA 2000 p. 225 and NJA 1994 p. 566. Cf NJA 1976 p. 24 concerning the meaning in a particular respect of a beneficiary appointment.

same meaning as in the application of the Tort Liability Act. Accordingly, the reduced performance of a manufactured capsule, in conflict with the interpretation of the insurer, was considered to constitute damage to property and was covered by the insurance.

NJA 1986 p. 659 concerned the meaning of the expression "theft or other misappropriation" in the terms and conditions of an insurance for a motorcycle. Two men had absconded with the insured motorcycle during a test run. The insured's claim for compensation from the insurance was rejected by the insurer with reference to the insured, in connection with the test run, having voluntarily relinquished possession of the motorcycle so that the occurrence could not be regarded as theft or other misappropriation in the sense of the terms and conditions of insurance. The Supreme Court noted that it was not contested in the case that the insured together with the two men had agreed on a special route for the test run and decided that the insured during the test run would follow the motorcycle in a car and that, if they were separated, the men would stop and wait for the insured. In these circumstances, it was considered that the insured had retained possession of the motorcycle until the two men absconded with it. The occurrence could therefore be considered to constitute an unlawful misappropriation that was covered by the policy with the effect that the insured's claim for compensation could be consented to.[10]

However, it may happen that the legal use of language is not approved, with the effect that the interpretation will be determined by common language use.

NJA 1966 p. 313 concerned the meaning of the term "driver" in the terms and conditions of a so-called driver protection insurance, i.e. an accident insurance which is taken out as a complement to the earlier motor third party liability insurance. During motorcycle driving lessons, the insured had collided with a car in front and been killed. The estate's claim for compensation from the insurance was rejected by the insurer with reference to the insured at the time of the accident, in accordance with the regulatory framework then applicable for driving lessons, was not regarded as the driver of the motorcycle. Instead, the driver was considered to be the insured's mother who at the time in question supervised the driving lesson from a car which was 100-150 metres behind the motorcycle. According to the majority at the Supreme Court, it must, despite the content of the said regulatory framework, "be considered as excluded that the voluntarily taken out accident insurance, the terms and conditions of which did not include any provision as to what was meant by the term driver, should not cover injury which, during a driving lesson, hits the person who actually drove and was travelling alone on the motorcycle but only cover his mother, who was travelling in a car 100 to 150 metres behind the motorcycle."

Finally, reference is made to a decision which shows that not only legal use of language but also other specialised use of language is relevant in the interpretation of terms and conditions of insurance.

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10 In the similar case NJA 1995 p. 392, the Supreme Court arrived at the same result despite the insured in this case not following the motorcycle on a test run. However, it had been agreed in this case that the test run would take place on a stretch of around 300 metres, which could be supervised from the place where the insured was and that the test run would only last for five to ten minutes.

NJA 1978 p. 628 concerned the meaning of a provision in the terms and conditions of a forest insurance according to which compensation for technical reduction in value due to a storm would be limited to the equivalent of 25 % of the root value of "the damaged stock". According to the insurer, the quoted term is considered to apply only to the damaged trees. According to the insured, the damaged stock consisted instead of all damaged and undamaged trees within the area damaged by the storm. The Supreme Court's starting point was the wording of the limitation rule in question. Taking into consideration the investigation carried out in the case on the specialised use of language, the term "the damaged stock" according to the court, "could hardly be given any other meaning than that it meant all trees – both damaged and undamaged – within an area determined in accordance with one or another basis, where the damage had occurred". The insured's claim for compensation could therefore be consented to.

2.2.2 Systematics and other contents of the contract

A number of cases show that the systematics and other contents of the contract are an important factor for the interpretation of terms and conditions of insurance. At times, it may even be the case that the meaning of a term depends directly on the other contents of the terms and conditions.

NJA 2013 p. 253[11] concerned the meaning of a provision in the terms and conditions of a legal expenses insurance according to which the insured loses entitlement to compensation from the insurance if the insured does not make a claim to the insurance company within a year from having "become aware of his claim". The crucial issue in this case concerned the time at which the insured had a claim on the insurance company. After having noted that the intention of the disputed provision could be assumed to be "to avoid the issue of the payment obligation of the insurer being uncertain for an excessively long period"[12], the Supreme Court noted that the general formulation of the terms and conditions "must be given different meanings depending on the type of insurance concerned". The court noted that the entitlement to compensation from the insurance policy in question according to the current terms and conditions assumes that the insured has used an attorney to deal with a dispute. When this happens, a claim for compensation from the insurance thus arises. The insured should therefore be considered as having a claim on the insurer, as well as having become aware of his claim, at the time when the attorney in question in the case was instructed. In this circumstance, the stipulated one-year period of respite had elapsed, with the consequence that there could not be considered to be any entitlement to compensation from the insurance.

11 The principal statement on interpretation of the terms and conditions of insurance which the Supreme Court made in this case with reference to NJA 2001 p. 750 and NJA 2006 p. 53 is not taken up in the context under consideration here but in section 2.1.

12 *See* section 2.2.3.

Even when the disputed formulation is not in this way directly dependent on the other contents of the terms and conditions, it is clear in certain cases that the wording has been regarded in the light of the context in which it appears.[13]

NJA 2007 p. 17 concerned the meaning of a provision in the terms and conditions of a machine insurance for businesses with the following wording: "Compensation is provided for sudden and unforeseen physical damage to the insured property". The dispute concerned whether damage to a milling and drilling machine could be considered as unforeseen. The Supreme Court established that the meaning of the term in question must be determined taking into consideration that it was an all-risk insurance which entailed that the insurer had not specified in detail the risks covered by the insurance. According to the court, the expression unforeseen damage then "could not be given the literal meaning that no one had actually foreseen the damage". Instead the condition "must be understood as meaning that the damage in some reasonable sense was not possible to foresee" whereupon not only the circumstances at time of entry into the contract but also "circumstances that became known during the period of insurance could be taken into consideration". The exact meaning of "the damage in some reasonable sense not being possible to foresee" was therefore established subsequently with the aid of, in the first place, industry practice.[14]

NJA 1988 p. 408 concerned the meaning of a provision that exempted from the coverage of a home insurance theft-prone property left in a car by the insured. Theft-prone and bulky musical equipment had been left in a car for 15-20 minutes while the insured had helped a friend to carry equipment from the car to his home. During this time, the car was broken into and the musical equipment stolen. The insured's claim for compensation from the insurance was rejected by the insurer with reference to the insured having gone so far away from the car that he no longer had immediate supervision of the car and the equipment stored there and that the insured must be considered as having left property in the sense referred to in the provision in question. The Supreme Court noted that the terms and conditions of the insurance in question under clause C.1.8 stipulated that compensation in the event of theft and damage can be paid for property which the insured takes with him from his home and which he has then kept in, inter alia, a car, if the perpetrator has used force to break in. Furthermore, it is stipulated that the property is not considered to be taken with (the insured) if the insured has prior to departure from home or on return there *left it in the car for a longer period than that normally used for immediate loading or unloading.* In

13 Beside the case referred to, reference may be made to NJA 1989 p. 346 where the fact that the terms and conditions of insurance in the respect in question appeared to be consistent appears to have contributed to the Supreme Court deciding to interpret the provision in dispute in accordance with its wording. *See* also NJA 1992 p. 414. This decision is difficult to interpret. The Supreme Court appears, however, to have held the view that each of the two provisions that were subject to dispute, viewed per se, could be considered clear. Together, the two provisions entailed, however, a regulation which was considered to be contradictory and therefore less reasonable, which contributed to their being interpreted in contravention with their wording. Reference may also be made to NJA 2004 p. 534 where the Supreme Court as one of several reasons for the interpretation result referred to the "systematics of the contract".

14 *See* also section 2.2.4.

the exemption provision in the current case C.1.81, it is finally stipulated that compensation is not paid for, inter alia, theft-prone property which the insured has *left in, inter alia, a car*. In C.1.81 the expression "left" is thus used without the special determination accompanying this term in C.1.8. In the light of this, the Supreme Court stated that the term left "in its context" could not be considered to be "unambiguous".[15] The detailed meaning of the term in question was subsequently established taking into account reasonability aspects and the contra proferentem rule.[16]

There are also cases where the extent of the premium actually charged for the insurance in question was referred to as a factor in interpreting the terms and conditions.[17] In such cases as well, the other content of the contract may be said to be an interpretation factor.

NJA 1947 p. 400 concerned the meaning of a special condition of insurance in a liability insurance for a margarine factory. According to the condition in dispute, the insurance also covered "the insured's lawful liability for damage, incurred to the insured's customer's goods on use of the defective or incorrect good (margarine) supplied by the insured, provided that the insured is able to prove that he was not aware of the deficiency or incorrectness … ". The dispute concerned whether the provision quoted could be considered to mean that the insurance covered damage for which the insured had strict liability or whether the provision, like the rest of the insurance policy, only covered damage for which the insured had incurred liability through negligence. The judgment[18] entailed that compensation from the insurance would only be paid for damage incurred through negligence. In support of this, beside the wording of the insurance contract, in particular the circumstance was invoked that the insurer had not charged any additional premium due to the particular condition in question.

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15 *See*, however, Svensson, *Tolkning och bristande finhet, Avtalslagen 90 år*, Stockholm, 2005, p. 466 where the author instead starts from "that it was the practical problems entailed by the insurance company's interpretation that provided the basis for the court's assertion that the condition could not be regarded as being unambiguous in its context".

16 *See* also sections 2.2.5 and 2.2.6.

17 In addition to the decisions referred to below, reference may be made to NJA 2010 p. 227. In this case, the insurer in support of his interpretation alternative stated the need to be able to calculate a premium corresponding to the risk actually assumed by the insurer. The Supreme Court noted, however, that the insured "had paid the correct premium in relation to the risk" so that the argument in question did not have any crucial importance for the interpretation. In a more general perspective, the statement quoted must be said to indicate that the extent of the premium actually charged may constitute a factor of importance for interpretation of the terms and conditions. *See* also NJA 1980 p. 145 where the Supreme Court, in accordance with the statements in Bengtsson, *Försäkringsteknik och civilrätt*, Stockholm, 1998, p. 92, seems to have attached importance in the actuarial reasoning presented by the insurer, even though this has not been explicitly stated.

18 The judgment that is referred to is the judgment of the Court of Appeal. The Supreme Court did not grant leave to appeal. As, despite this, the case was reported upon in NJA, there is a lot to indicate that at least the central parts of the reasoning of the Court of Appeal were accepted by the Supreme Court (see Bengtsson, *Försäkringsteknik och civilrätt*, Stockholm, 1998, p. 89).

NJA 1971 p. 502 concerned the content of the term "insured premises" in the terms and conditions of a company insurance which covered break-ins at the said premises. According to the insurer, the term "insured premises" referred to the building in which the insured property was kept or at any rate the lower floor of the building. The insured considered, however, that the insured premises consisted of some separate rooms on the lower floor, from which the insured property had been stolen. At the time of the theft, the building was not locked. The space in which the property had been kept was, however, locked. If the insurer's view of what constituted the insured premises was correct, no break-in had taken place at these premises while the opposite was the case if the insured's point of view was accepted. The Supreme Court noted that the insurance policy drawn up between the parties did not state what the insured premises consisted of but that in the insured's application for insurance, it was stated that the insured premises consisted of a dwelling house. In addition, the Supreme Court noted that the question of determination of the concept insured premises was very important for the amount of risk assumed by the insurer. In the light of this, the disputed term was interpreted in accordance with the insurer's view with the effect that the insured's claim for compensation from the insurance was rejected.

In the last-mentioned case, it was not explicitly stated that the premium actually paid was a determining factor. The Supreme Court's statement on the importance of the interpretation question for the size of the risk assumed by the insurer must, however, be said to indicate that the parties' respective alternative interpretations were regarded in the light of the premium actually paid, in which connection the insurer's interpretation alternative was considered to be most compatible.[19]

To the extent that the relationship between premium and risk affects the interpretation of terms and conditions in the way that took place in NJA 1947 p. 400 and NJA 1971 p. 502, the interpretation may be said to be based on actuarial considerations.

2.2.3 The intention of the contract and the disputed contract provision

There is one case law decision, according to which the overall intention of the insurance contract can affect the interpretation of terms and conditions.

NJA 2001 p. 255 concerned whether the fact that there was found to be liability to damages in a default judgment should be considered as meaning that the insured in the sense of the terms and conditions of the insurance had admitted liability with the effect of excluding compensation from the insurance. The Supreme Court noted that the wording of the provision in question did not contain any explicit declaration that a default judgment would entail exclusion of liability for the insurance company. Furthermore, it was the insurer who had drafted the terms and conditions of insurance and it should have been explicitly stated if the intention had been to exclude liability for damages based on a default judgment. And, according to the court, this was particularly the case when the

19 *See* Bengtsson, *Försäkringsteknik och civilrätt*, Stockholm, 1998, p. 90 f and Hellner, Tolkning av standardavtal, Jussens Venner, 1994, p. 271.

liability insurance in question was mandatory and intended to protect a third party. In the light of this, the court considered that there was no reason to deviate from the wording of the provision.

Considerably more decisions show that the intention of the disputed contract provision is an influential factor in interpreting terms and conditions.[20]

NJA 2013 p. 253[21] concerned the meaning of a provision in the terms and conditions of a legal expenses insurance which provided that the insured loses the right to compensation from the insurance if he does not make a claim to the insurance company within a year of his "having become aware of his claim". The Supreme Court drew the conclusion that the one-year period of respite had expired. This was based on the wording of the disputed provision being regarded in the light of the other terms and conditions of insurance.[22] However, it is also stated in the reasoning in support of the judgment that the intention of the disputed provision could be assumed to be "to avoid the issue of the payment obligation of the insurer being uncertain for an excessively long period".

NJA 1992 p. 428 concerned the meaning of a provision in the terms and conditions of insurance for children and young people, the insured amount of which was being secured in value gradually by being linked to the base amount under the National Insurance Act. The disputed provision had the following wording: "Payment from the insurance is based on the insured amount… applicable at the time when right to compensation occurs. In the event of ongoing payment of care allowance, it is considered that such right is initiated anew on every occasion of payment." It was not disputed in the case that the insured had the right to a monthly care allowance from the insurance from 1978 to 1985. As the notification of claim was received in 1986, the insurer paid compensation on one occasion for the whole period. Compensation had been calculated month for month based on the different insured amounts as current from time to time during the period in question. The insured claimed, however, that the compensation for the whole period should be paid on the basis of the insured amount that was current at the actual time of payment in 1986. According to the Supreme Court,

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20 Beside the decisions presented, reference may be made to NJA 2010 p. 227 and NJA 2017 p. 237. Cf NJA 2006 p. 53, which, inter alia, concerns the meaning of damage arising through a "sudden" occurrence, where the Supreme Court stated that a "reason for the criterion of suddenness should be to distinguish accidents from such events which have such a long-drawn out course of time that the person suffering damage should reasonably react and interrupt the course of event to counteract the damage". However, it is not evident to what extent this intention had an effect on the interpretation or not. Cf NJA 1996 p. 727 where the Supreme Court did not state explicitly that the intention of the disputed contractual provision was taken into account in the interpretation of the terms and conditions. The reference to a "natural interpretation" may, however, be considered to indicate that the court, beside the wording of the contractual provision in question, also took into account its intention. Cf also NJA 1944 p. 21. Even if it is not stated explicitly, it may be considered plausible that the outcome in the latter case as well was to a great extent affected by the deemed intention of the contractual provision in dispute.

21 The statement in principle concerning interpretation of the terms and conditions of insurance that the Supreme Court made in this case with reference to NJA 2001 p. 750 and NJA 2006 p. 53 is not drawn attention to in the current context but in section 2.1.

22 *See* section 2.2.2.

it was evident that the provision on the right to compensation in the event of ongoing payment of care allowance is considered to be initiated afresh on every occasion of payment aimed at providing the insured with the increase in the allowance which was called for by it not being paid as one-off compensation but in separate payments over a longer period of time. The court moreover stated that while the provision must be considered to be applicable also in cases where payment of the care allowance does not take place as ongoing payments but in retrospect although "not to a greater extent than that the insured is placed in the same situation as if ongoing payments had been made". In the view of the Supreme Court, the provision in question could not therefore be considered to support the insured's claim for additional compensation from the insurance.

NJA 2012 p. 3 concerned the meaning of an exemption provision in the terms and conditions of a liability insurance for businesses with the following wording: "The insurance does not cover occupational injury. However, the insurance does cover injury that occurs in Sweden, excluding the compensation paid by occupational injury or social insurance, other current insurance or form of compensation or as an occupational benefit." The question in dispute was whether this exemption should be regarded as being applicable to every occupational injury (as the insurer claimed) or only occupational injuries that affect employees of the insured (as the insured claimed). The Supreme Court interpreted the provision in question taking into account its intention. The court noted that the exemption for occupational injury, which appears in numerous standard contracts for business insurance, is connected with the introduction of TFA (occupational injury insurance scheme) and the Occupational Injury Act which entailed "that the employer essentially did not need to insure against obligation to pay compensation for occupational injuries" with the effect that there was "no reason for insurance contracts to include such cover". These circumstances are considered "to argue for the exemption clause being intended for such occupational injuries that the insured's employees are affected by." In the light of this and with reference to reasonability aspects[23] and that the standard contract in question was provided by the insurer[24], the exemption provision in question should, according to the Supreme Court, be considered to mean that only occupational injuries that affect employees of the insured were exempted from the insurance cover.

2.2.4 Voluntary law and industry practice

The following case shows clearly the importance that voluntary legal rules may have in the interpretation of terms and conditions of insurance.[25]

23 *See* section 2.2.5.

24 *See* section 2.2.6.

25 Beside the case referred to below, reference may be made to NJA 1992 p. 414 where the disputed provision was interpreted in accordance with the voluntary rule in section 54 of the previous Insurance Contracts Act. Cf also NJA 1963 p. 683. The question of interpretation in this case concerned whether a provision in the terms and conditions of an agricultural insurance policy could be considered to set aside the voluntary rule in section 19, first

NJA 2013 p. 253[26] concerned the meaning of the term "became aware of his claim" in a contractual provision of the kind which, under Chapter 8, section 20, second paragraph, of the Insurance Contracts Act, can be provided for in terms and conditions of business insurance. The Supreme Court noted the lack of guideline decisions on the more exact meaning of the term "became aware of his claim" in the said legal rule. If such decisions had existed, they would, as far as can be judged, have been very important for interpretation of the current provision.

Some additional decisions also indicate that current insurance industry practice is given considerable importance in the interpretation of terms and conditions of insurance.[27]

NJA 2007 p. 17 concerned the meaning of a provision in the terms and conditions of a machine insurance for businesses with the following wording: "Compensation is paid for sudden and unforeseen damage to the insured property". The dispute concerned whether damage to a milling and drilling machine could be considered as unforeseen. The machine was constructed to be able to operate at various heights. To be able to adjust the height, the six-tonne heavy working unit connected with a couple of steel cables which in turn were connected to counterweights which also weighed six tonnes. The 22-millimetre thick cables consisted of 265 wires with six strands each with seven wires, ran over two pulleys placed at a height of six metres. The cables dated from 1995. In 1999, one of the cables broke, which led to the machine being damaged. The investigation in the case revealed that the cable break was caused by wear and tear. The main cause was given as so-called bending fatigue. It further emerged that the fatigue of the cables must have been visible by individual wire breaks starting to appear and that individual broken wires in particularly exposed parts of the cables must have been visible for a longer period before the cables

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paragraph of the previous Insurance Contracts Act. In the light of the contra proferentem rule, the court concluded that the question should be answered in the negative meaning that the said provision in the previous Insurance Contracts Act could be applied (see section 2.2.6). However, this would none the less mean that the outcome of the case could be justified by the provision in question being interpreted under strong influence of the voluntary rule in section 19, first paragraph, of the previous Insurance Contracts Act. Cf also NJA 2006 p. 367 where the meaning of the term "reasonable and necessary litigation expenses" was interpreted taking into account certain (admittedly mandatory but not directly applicable in the case considered here) provisions of the Code of Judicial Procedure.

26 The statement in principle concerning interpretation of the terms and conditions of insurance which the Supreme Court made in this case with reference to NJA 2001 p. 750 and NJA 2006 p. 53 is not dealt with here but in section 2.1.

27 Beside the decisions presented here, reference may be made to NJA 2012 p. 3 where the Supreme Court initially noted that there was no fixed industrial practice on the issue of the meaning of the contract provision in question and first subsequently interpreted the provision with reference to the intention of the disputed contractual provision, reasonability aspects and the contra proferentem rule (see sections 2.2.3, 2.2.5 and 2.2.6). This also provides support for industry practice being an influential factor in the interpretation of terms and conditions of insurance. The importance of practice in the insurance industry is also clearly indicated in NJA 1996 p. 400 and NJA 2000 p. 48, even though the latter two decisions concerned a supplement to rather than interpretation of the terms and conditions of insurance in question.

snapped. According to the Supreme Court, the requirement that the damage was unforeseen, taking into consideration its appearance in the terms and conditions of an all-risk insurance, "is to be understood so that the damage to some reasonable extent was not possible to foresee" in which connection not only the circumstances at the time of entry into the contract but also "circumstances that became known during the period of insurance must be able to be taken into account". Furthermore, the court noted that the Swedish Insurers Association in an opinion had stated that the question of the extent to which damage is to be considered as unforeseen or not in the usual way of regarding the matter in the insurance industry is to be determined on the basis of whether supervisory staff, an operating engineer or another specially experienced person would consider that damage could be foreseen. This assessment criterion was accepted by the Supreme Court which in view of the current damage situation made the following statement: "For responsible supervisory staff carrying out the requisite checks, it must … have been possible to detect the wire breaks for a longer period of time prior to the accident. During this period, it had also been possible for the supervisory staff to anticipate the damage." The damage to the machine could not therefore be considered as being unforeseen in the sense of the current terms and conditions with the consequence that the insured's claim for compensation from the insurance was rejected.

In NJA 1998 p. 448[28] a nuclear reactor had been insured against stoppage arising "through" compensable property damage. Damage of this kind entailed a shorter interruption in operations after which the damaged property was repaired. The reactor then resumed operation. During the subsequent investigation, it was noted that the design of the property in question did not comply with current security requirements even in undamaged condition. To comply with the said requirements, the property had to be redesigned. This work led to another two stoppages in operation. The insured's claim for compensation for this was rejected by the insurer with reference to these two stoppages not being associated with property damage in such a way as was required by the terms and conditions for compensation to be paid from the insurance. The Supreme Court noted that the parties, in the negotiations that had preceded the insurance contract in question, had not discussed the requirement of association in question. Neither could it be considered that any particular meaning was intended in the text of the contract in this respect. As both parties at the time of entry into the contract were represented by persons with relevant experience and expert knowledge in this context, it was considered to be nearest at hand to determine the issue of association in dispute in the light of the general business interruption insurance principles as expressed in most generally applied standard terms and conditions referred to in the case. A consistent feature of these terms and conditions was considered to be that the insured's right to compensation is limited to losses arising from stoppage time required to restore the damaged property to the same state as prior to the damage. The current stoppages in the

28 It should be pointed out that the Supreme Court's decision in this case just as well can be said to be based on a supplement to the contract (cf NJA 1999 p. 629). Regardless of this, the case must, however, be said to illustrate well the influence that industry practice may have when the meaning of the insurance contract in a specific respect is to be established.

case had been used to make such improvements in the insured property that aimed at greater security than that which actually existed when the damage occurred and which were restored already during the first stoppage. The latter two stoppages could in this light not be considered to be associated in such a way with the property damage that the insurer was liable to pay compensation.

NJA 1945 p. 504 concerned the content of a supplement to a war insurance contract according to which, inter alia, "damage, loss or cost which … is caused by … transport not being able to take place or be completed within a reasonable period of time, when the impediment has arisen by the action of a power engaged in war". The insured requested with reference to this provision compensation for loss of interest that had arisen due to a delay caused by the act of a power engaged in war. According to the majority of the Supreme Court, the wording quoted could certainly allow for the insurance to cover the loss of interest in question. Despite this, however, the insured's claim for compensation was rejected with reference to the civil marine insurance not in principle covering such risks, that this basic approach was also maintained in war insurance, that the insurance of the risk in question could thus be considered to require that it was specifically stated and that this had not been the case.

2.2.5 Reasonability aspects

A number of cases indicate with varying clarity that reasonability aspects are an influential factor over interpretation of terms and conditions of insurance.[29]

NJA 2001 p. 750[30] concerned the meaning of a provision in the terms and conditions of a legal expenses insurance for businesses with the following wording: "In every dispute, the excess is 20 % of the base amount plus 20 % of the excess costs." According to the attorney entitled to compensation, the term "excess costs" was to be considered as referring to the difference between the base amount and the amount claimed. According to the insurer, the said term should instead be considered as referring to the difference between the basic excess of 20 % of the base amount and the amount claimed. The Supreme Court stated that both interpretations were compatible with the wording of the cited provision. Furthermore, the court noted that the insurer's interpretation alternative meant that the excess would be 100 % up to costs of just over SEK 7 000, after which it would be 20 % up to the insurance's ceiling amount. In the

29 Beside the decisions referred to below, reference may be made to NJA 1992 p. 414 where the Supreme Court stated that the two provisions which were subject to dispute together entailed a contradictory arrangement that could not be considered as being reasonable, which contributed to their being interpreted in breach of the wording. *See* also NJA 1980 p. 145 where the Supreme Court considered wether regard to reasonableness entailed that there were reasons to deviate from the literal meaning of certain reimbursement provisions in the grounds of a life insurance contract. The court's conclusion was, however, that no such reasons could be considered to exist. Cf NJA 1922 p. 202 and NJA 1929 p. 573. Even if it is not explicitly stated, there is a lot to indicate that reasonability aspects have been very important for the Supreme Court's decisions in both these cases.

30 The statement in principle concerning interpretation of the terms and conditions of insurance made by the Supreme Court in this case is not dealt with in this context but in section 2.1.

opinion of the court, this appeared to be a reasonable arrangement. The interpretation alternative of the attorney entitled to compensation would mean that the excess would be 100 % up to costs of just over SEK 7 000, and thereafter 0 % up to around SEK 36 000, and finally 20 % of the excess amount. In the view of the court, such an arrangement appeared less reasonable. Therefore, and in the absence of other decisive factors, the interpretation suggested by the insurer was preferred by the court.

NJA 2012 p. 3 concerned the meaning of an exemption in the terms and conditions of a business liability insurance with the following wording: "The insurance does not cover occupational injury. However, the insurance does cover injury occurring in Sweden, excluding the compensation paid through occupational injury or social insurance, other valid insurance or forms of compensation or occupational benefits." The insured had sold fire protection products to a manufacturing company in the United States. A fire had subsequently broken out at the manufacturing company, in which two employees of this company had been injured when they fought the fire during working hours. A case concerning product liability was instituted against the insured in the United States. The case was withdrawn but the proceedings entailed costs for the insured who therefore requested compensation from its liability insurance. The claim was rejected by the insurer with reference to the injuries incurred being occupational injuries and thus exempted from the insurance cover. The issue in dispute concerned whether the exemption for occupational injury should apply to every occupational injury (as the insurer alleged) or only occupational injuries incurred by employees at the insured (as alleged by the insured). The Supreme Court stated that the wording could not exclude either of the interpretations asserted by the parties but chose the interpretation asserted by the insured, entailing that only occupational injuries that affected the employee at the insured would be exempted from the insurance cover. In support of this, it was stated, in addition to the intention of the occupational injury exemption in question[31] and that this exemption constituted part of a standard contract provided by the insurer,[32] that it could not be considered as a "natural and reasonable interpretation of the terms and conditions of insurance" that the protection of the insured should be limited as soon as the injury can be classified as an occupational injury as a "not inconsiderable part of liability for product damage is associated with workplaces where the products are used. In these cases, it is almost only employees who are affected by injuries. If such injuries to employees at purchasers of the products were not covered by a liability insurance, the insured's cover against obligation to compensate would be greatly limited." If the insurance were to exclude all injuries which can be classified as occupational injuries, it would also lead to "an unpredictable and fragmented insurance cover" where the coverage of the insurance "may depend on random factors".

NJA 1988 p. 408 concerned the content of a provision which exempted from the coverage of a home insurance policy theft-prone property which the insured

31 *See* section 2.2.3.

32 *See* section 2.2.6

had "left" in a car. Theft-prone and bulky musical equipment had been left in a car for 15-20 minutes while the insured assisted a friend to carry equipment from the car to his home. During this time, the car was broken into whereupon the insured's musical equipment was stolen. The insured's claim for compensation from the insurance was rejected by the insurer with reference to the insured having gone so far away from the car that he no longer had immediate supervision of it and the property kept there and that the insured therefore must be considered to have left the property in the sense referred to in the disputed provision. After having stated that the term left "in its context" could not be considered to be unambiguous[33], the Supreme Court stated that if the term in question were given the content alleged by the insurance company, this would mean "a far-reaching limitation of insurance cover for many frequently occurring situations". Taking this into account, and also the fact that the disputed provision had been drafted by the insurer,[34] the Supreme Court held that the insured could not be considered to have left the property in question in the sense referred to in the terms and conditions of insurance.

There is no explicit reference to reasonability aspects in the 1988 judgment. The statement on "a far-reaching limitation of insurance cover" indicates, however, that the interpretation of the insurer, in the view of the Supreme Court, could lead to a less reasonable result.[35]

2.2.6 The contra proferentem rule

The contra proferentem rule means that an unclear contract provision is interpreted to the detriment of the party responsible for the drafting of the provison. The following cases may with varying clarity be said to indicate that this rule is a factor of some importance for the interpretation of terms and conditions of insurance.

NJA 1963 p. 683 concerned a provision in the terms and conditions of an agricultural insurance which, in close association to the voluntary rule in section 18 of the former Insurance Contracts Act, stipulated that compensation would not be paid to an insured when the insured had deliberately or through gross negligence caused the loss. After the insured had deliberately set fire to the insured property, but then in such a mental state as to exclude responsibility for crime, the question arose of whether the stipulated contract provision would be considered as exhaustively regulating the liability of the insurer in case where the insured had caused the loss or whether there was scope for application of the voluntary rule in section 19, first paragraph, of the previous Insurance Contracts Act, aimed at situations of the kind in question entailing an exemption from the rule stipulated in section 18 on release from liability. According to the Supreme Court, reasons worthy of note could be asserted in favour of both parties' positions. As the insurer had unilaterally drawn up the terms and conditions of

33 *See* section 2.2.2.

34 *See* section 2.2.6.

35 *See* Ingvarsson, *Tolkning av försäkringsavtal*, Juridisk tidskrift, 2012/13, p. 431.

insurance, it was, however, considered closer at hand that the insurer had to bear responsibility for the lack of clarity. The provision in question could thus not be considered to prevent application of section 19, first paragraph, of the previous Insurance Contracts Act, and consequently the insured was considered to be entitled to compensation.

NJA 1951 p. 765 concerned the meaning of an exemption in the terms and conditions of a business liability insurance according to which the insurance did not cover "claims based on contracts or special undertakings extending beyond the normal provisions on damages". The insured was liable to damages for damage which it had caused to a counterparty by negligence in performing a task and claimed with reference to this compensation from the insurance in question. The claim for compensation was rejected by the insurer with reference to the cited exemption. The Supreme Court granted the insured's claim with reference to the said provision "not – or at any rate not with sufficient clarity – being able to indicate that the company enjoyed release from liability for losses of the kind in question in this case".

NJA 2012 p. 3 concerned the meaning of an exemption in the terms and conditions of a business liability insurance with the following wording: "The insurance does not cover occupational injury. However, the insurance applies for injury incurred in Sweden, excluding the compensation that is paid through occupational injury or social insurance, other valid insurance or form of compensation or as an occupational benefit." The matter in dispute concerned whether this exemption should be considered to cover every occupational injury (as asserted by the insurer) or only occupational injuries that affect the employee at the insured (as asserted by the insured). The Supreme Court noted that both the intention of the provision in question and reasonability aspects could be considered to provide support for the latter interpretation alternative.[36] In the same direction, the court stated that the provision in question constituted part of a standard contract provided by the insurer and that the insurer must have been aware that the exemption was understood in different ways by different insurance companies in the Swedish market. Furthermore, the court stated that it would have been possible for the insurer to "word the clause in such a way that it was clear the exemption referred to all injuries occurred by the employee at a workplace, regardless of whether the injury took place at the insurer or some other employer". In the light of this background, the Supreme Court considered that the exemption should be interpreted in the way asserted by the insured, entailing that only occupational injuries affecting employees at the insured were exempted from coverage.

NJA 1988 p. 408 concerned the meaning of a contract provision which exempted theft-prone property "left" by the insured in a car from the coverage of home insurance. Theft-prone and bulky musical equipment had been left in a car for 15-20 minutes while the insured had assisted a friend to carry his equipment from the car to his house. During that time, the car was broken into and the insured's musical equipment stolen. The insured's claim for compensation from the insurance was rejected by the insurer with reference to

36 *See* sections 2.2.3 and 2.2.5.

the insured being so far away from the car that he must be considered to have left the equipment in the sense intended in the disputed provision. After having stated that the term left "in its context" could not be considered to be unambiguous[37] and that the interpretation alleged by the insurer would entail a far-reaching limitation of insurance cover for numerous frequently occurring situations,[38] the Supreme Court pronounced as follows: "In particular, bearing in mind that this is a consumer insurance policy, it must be considered in the stated circumstances to be incumbent on the company, if its intention was to make a general exception from insurance cover of theft-prone property left in a car without immediate supervision, to explicitly state this in the terms and conditions of insurance." Taking into consideration what has thus been stated, the exemption provision in question could not be considered to apply with the effect that the insured's claim for compensation was consented to.

3 Additional Interpretation Factors

The case law of the Supreme Court thus provides explicit support for at any rate the following factors having an influence in the interpretation of terms and conditions of insurance:

- The wording
- The systematics and other contents of the contract
- The intention of the contract and the disputed contract provision
- Voluntary law and industry practice
- Reasonability aspects
- The contra proferentem rule

However, it cannot be excluded that other factors could also be considered relevant in this context, even if this has not found expression in the Supreme Court's case law.

3.1 The Common Will of the Parties

In the interpretation of contracts in general, the common will of the parties is an important factor.[39] In case law on the interpretation of terms and conditions of insurance, there is, however, as shown in section 2.2, no decision which clearly shows that the common will of the parties has been decisive for the interpretation of the Supreme Court. Neither is the common will of the parties among the interpretation factors listed in NJA 2001 p. 750.[40]

37 *See* section 2.2.2.

38 *See* section 2.2.5.

39 *See* Adlercreutz & Gorton, A*vtalsrätt II*, 6th edition, Lund, 2010, p. 57 f; Bernitz, *Standardavtalsrätt*, 8th edition, Stockholm, 2013, p. 83 and Lehrberg, *Avtalstolkning*, 6th edition, Uppsala, 2014, p. 47 f.

40 *See* section 2.1.

However, it is hardly correct to draw from this the conclusion that the common will of the parties is not at all or only to a particularly limited extent permitted to influence the interpretation of terms and conditions of insurance. Both the circumstance that a contract is actually an expression of the parties' common will at the time of entry into the contract[41] as well as the principle of the binding effect of contracts[42] argue in favour of the common will of the parties being regarded as important in the interpretation of every type of contract. In this circumstance, there cannot be any doubt that the common will of the parties must be regarded as an important factor also in the interpretation of terms and conditions of insurance.

The noted lack of cases where interpretation of the terms and conditions of insurance has been decided on the basis of the common will of the parties could instead probably be explained by the insurance terms and conditions in most cases being standardised and unilaterally drawn up by the insurer. In these circumstances, the difficulties of indicating a common will of the parties with regard to a detail which has subsequently been the object of a dispute are evident with the consequence that the common will of the parties only seldom comes to the fore in the interpretation of terms and conditions of insurance.[43]

Correspondingly, the above-mentioned fact that the common will of the parties is not mentioned among the interpretation factors in NJA 2001 p. 750 could probably be explained by the fact that the intention of the Supreme Court's statement in principle in this case, as far as can be judged, was limited to presenting the interpretation factors relevant in situations in which the insurance terms and conditions are standardised and unilaterally drawn up by the insurer, and in which no common will of the parties therefore can be determined.

Some support for the common will of the parties being an influential factor in the interpretation of terms and conditions of insurance is otherwise given in NJA 2012 p. 3 where the Supreme Court, before it interpretated the contract on the basis of the intention of the contract provision in dispute, reasonability aspects and the contra proferentem rule, stated that it was evident that there "had not been any common intention of the parties in the matter of how [the disputed] exemption shall be understood". If it had been possible to demonstrate a common will of the parties, it would, as far as can be judged, have been taken into consideration in the assessment.[44] The fact that the common will of the

41 With regard to this basic circumstance, reference may be made to, for example, Lehrberg, *Avtalsrättens grundelement*, 2nd edition, Uppsala, 2006, p. 37 and Taxell, *Avtalsrätt. Bakgrund – sammanfattning – utblick*, Stockholm, 1997, p. 47. Cf Adlercreutz, Gorton & Lindell-Frantz, *Avtalsrätt I*, 14th edition, Lund, 2016, p 25 ff.

42 With regard to this basic principle, reference may be made, for example, to Adlercreutz, Gorton & Lindell-Frantz, *Avtalsrätt 1*, 14th edition, Lund, 2016, p. 27, Ramberg & Ramberg, *Allmän avtalsrätt*, 10th edition, Stockholm, 2016, p. 29 and Taxell, *Avtalsrätt. Bakgrund – sammanfattning – utblick*, Stockholm, 1997, p. 39 f.

43 *See* Radetzki, *Orsak och skada*, Stockholm, 1998, p. 60 f. Also Johansson, *Varuförsäkringsrätt*, Stockholm, 2004, p. 103.

44 *See* also the Supreme Court's similar statements in NJA 2000 p. 225 and NJA 1998 p. 448. Cf also NJA 1933 p. 163 where the common will of the parties was possibly what was of crucial importance for the Supreme Court's interpretation of terms and conditions. The

parties is a factor in the interpretation of terms and conditions of insurance has also been indicated in the insurance law doctrine.[45]

Overall, it may thus be stated that the common will of the parties, as far as can be judged, has the same importance in the interpretation of terms and conditions of insurance as in the interpretation of terms and conditions in other contracts, allowing that the practical importance of this interpretation factor in the interpretation of terms and conditions of insurance, as is probably the case in the interpretation of every unilaterally drawn up standard contract, is limited due to it only being possible to establish the common will of the parties in exceptional cases.

The common will of the parties is, however, not wholly without practical importance in the interpretation of terms and conditions of insurance. In particular not, in the interpretation of terms and conditions of business insurance. Such terms and conditions are usually standardised and unilaterally drawn up by the insurer. However, there is not infrequently some room for negotiation, to the extent that the parties are able to reach contract on replacing one or the other of the standardised contractual clauses for a standardised or individually worded special condition. When this type of agreement has been entered into by the parties, it naturally increases the possibilities for establishing a common will of the parties with the effect that this may be of major importance in interpretation,[46] allowing that this circumstance has still not made an impression in the case law of the Supreme Court.

3.2 The Dolus Rule

The dolus rule is an important factor in the interpretation of contracts in general. This rule aims at situations where contracts come about despite the parties misunderstanding one another in some respect with the effect that the wills of the parties do not fully coincide. To avoid this, it is naturally important that the party, which during contract negotiations realises that the counterparty has in some respect understood the contract differently, draws the counterparty's attention to this. In the event of failure to do this, the dolus rules means that the

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decision is, however, difficult to interpret and cannot therefore be used as the basis for any completely certain conclusions.

45 *See*, in particular, Dufwa, *Försäkringsrätt*, Stockholm, 1995, p. 12 and Radetzki, Orsak och skada, Stockholm, 1998, p. 60 f, but also Bengtsson, *Försäkringsavtalsrätt*, 3rd edition, Stockholm, 2015, p. 51; Hult, *Föreläsningar över försäkringsavtalslagen*, Stockholm, 1936, p. 30 and Johansson, *Varuförsäkringsrätt*, Stockholm, 2004, p. 100.

46 *See* Wallin & Pärssinen, *Högsta domstolen om tolkning av standardvillkor i entreprenad-avtal*, Svensk juristtidning, 2013, p. 816: "In the normal case, it is only when the parties have chosen to change or contract to remove certain provisions in a standard contract that guidance can be obtained on the intention of the parties." Cf Bengtsson, *Försäkringsrätt. Några huvudlinjer*, 9th edition, Stockholm, 2015, p. 40.

failing party is bound in accordance with the counterparty's understanding. The failing (dolose) party thus bears the risk of the misunderstanding.[47]

In case law on the interpretation of terms and conditions of insurance in accordance with what has emerged in section 2, however there is no single decision that clearly indicates that the question of interpretation has been decided with the support of the dolus rule. Neither is the dolus rule mentioned among the listed interpretation factors in NJA 2001 p. 750.[48]

It is, however, hardly correct to draw the conclusion that this interpretation factor is not at all or only to a particularly limited extent allowed to affect the interpretation of terms and conditions of insurance. The foremost reason for this is that the rule must be considered as being based on good reasons, more exactly that the failing (dolose) party has acted in a blameworthy way and cannot therefore be considered worthy of protection.[49]

In insurance contexts as well a dolose counterpart in the respect now under consideration must, of course, be considered to have acted in a blameworthy way and thus lack a position worthy of protection. In this circumstance, the conclusion is close at hand that the dolus rule is also important for the interpretation of terms and conditions of insurance.

The fact that the dolus rule is not mentioned as an interpretation factor in NJA 2001 p. 750 cannot be permitted to change this position, as the intention of the Supreme Court's statement in this case, as mentioned in the previous section, is as far as can be judged limited to presenting the interpretation factors relevant in situations in which the insurance terms and conditions are standardised and unilaterally drawn up by the insurer, meaning that the conditions for applying the dolus rule are typically not met.

Some support for that the dolus rule constitutes a factor of influence in the interpretation of terms and conditions of insurance is moreover provided by NJA 1978 p. 628. In this case, the Supreme Court interpreted a provision in a forest insurance contract in accordance with its wording. In the reasoning in support of the judgment, it could not be considered proven that the insured, before the terms and conditions of insurance had been agreed to, knew about the insurer's position on the meaning of the provision in question. The statement gives an indication that the Supreme Court had, in the event of it being possible to prove such knowledge, been prepared to apply the dolus rule.[50]

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47 *See* Lehrberg, *Avtalstolkning*, 6th edition, Uppsala, 2014, p. 58. *See* also Ramberg, *Avtalstolkningsmetode*r, Festskrift till Gösta Wallin, Stockholm, 2002, p. 500 and Ramberg & Ramberg, *Allmän avtalsrätt*, 10th edition, Stockholm, 2016, p. 174.

48 *See* section 2.1.

49 *See*, for example, Lehrberg, *Avtalstolkning*, 6th edition, Uppsala, 2014, p. 59. Cf Adlercreutz & Gorton, *Avtalsrätt II*, 6th edition, Lund, 2010, p. 132 and Ramberg & Ramberg, *Allmän avtalsrätt*, 10th edition, Stockholm, 2016, p. 174 f.

50 *See* also NJA 1987 p. 835. Cf. NJA 1933 p. 163. This case is exceptionally difficult to interpret. It is possible that the Supreme Court, in accordance with what has been stated in the previous section, considered that it could be proven that there was a common will of the parties whereupon the interpretation was based on that. It may, however, just as well have been the case that no common will of the parties could be proven whereupon the court applied the dolus rule.

3.3 The Minimum Rule

Finally, it should be underlined in this context that interpretation of contracts in general is based at times on the so-called minimum rule, which means that unclear conditions of contract should be interpreted so as to prefer the interpretation alternative which is least burdensome for the party under obligation.[51]

In case law on the interpretation of terms and conditions of insurance, there is, however, no decision, which even indicates that the interpretation question has been determined with the support of the minimum rule.[52] This is not surprising. The minimum rule should probably be mainly intended for interpretation of one-sided obligations.[53] There are no reasons whatsoever to argue in favour of this rule being applied in the interpretation of insurance contracts with mutual obligations. And this applies perhaps with especial force when the question of interpretation, as is so often the case in insurance contexts, applies to whether the holder of an insurance policy is entitled to insurance cover or not.

4 The Mutual Relationship of the Interpretation Factors

4.1 Introduction

In accordance with what has emerged above, it may be noted that at any rate the following factors may influence the interpretation of terms and conditions of insurance:

- The common will of the parties
- The dolus rule
- The wording
- The systematics and other contents of the contract
- The intention of the contract and the disputed contract provision
- Voluntary law and industry practice
- Reasonability aspects
- The contra proferentem rule

When this is clarified, the question is brought to the fore of the mutual relationship between these interpretation factors. Can the various factors in any way be ranked to the extent that any of these can be said of superior importance,

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51 *See* Adlercreutz & Gorton, *Avtalsrätt II*, 6th edition, Lund, 2010, p. 114; Bernitz, *Standardavtalsrätt*, 8th edition, Stockholm, 2013, p. 100 and Ramberg & Ramberg, *Allmän avtalsrätt*, 10th edition, Stockholm, 2016, p. 168 f.

52 *See* section 2.

53 *See* Adlercreutz & Gorton, *Avtalsrätt II*, 6th edition, Lund, 2010, p. 114 and Bernitz, *Standardavtalsrätt*, 8th edition, Stockholm, 2013, p. 101. *See* also Ramberg & Ramberg, *Allmän avtalsrätt*, 8th edition, Stockholm, 2002, p. 501 f.

whereupon other interpretation factors are important only to the extent that assessment according to the superior factors does not lead to a clear result?

A starting point in this context consists of the common will of the parties and the dolus rule, together referred to as subjective interpretation factors, being considered to have primary importance in the interpretation of contracts in general.[54] In the light of this, there is every reason to investigate whether these two subjective interpretation factors may be said to have primary importance also in the interpretation of terms and conditions of insurance. Such an investigation is contained in section 4.2.

Other interpretation factors may be said to be of an objective nature. In the interpretation of contracts in general, it is, rather unclear how these factors relate to one another. In section 4.3, it is investigated whether this is the case in the interpretation of terms and conditions of insurance as well, or if, in this specific context, it is possible in one or another way to rank the objective interpretation factors.

In the light of such an analysis on the mutual relationship of the interpretation factors, a schematic model is presented in section 5, which at an overall level depicts the approach in the interpretation of terms and conditions of insurance.

4.2 Subjective Interpretation

4.2.1 The common will of the parties

In the interpretation of contracts in general, if one party succeeds in proving that there has been a common will of the parties in the conclusion of the contract, the contract shall be interpreted in accordance with this. And this applies regardless of what the other factors of interpretation (for example, the wording) indicates.[55] The common will of the parties thus constitutes a primary interpretation factor. The reasons for this could probably be said to be the same as the reason for the common will of the parties being at all a relevant factor for the interpretation of the contract, namely that a contract consists of the parties' coinciding declarations of will[56] and that the contract is binding.[57]

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54 *See* Adlercreutz & Gorton, *Avtalsrätt II*, 6th edition, Lund, 2010, p. 57 f and 134 and Lehrberg, *Avtalstolkning*, 6th edition, Uppsala, 2014, p.34, 45 and 57.

55 *See* Adlercreutz & Gorton, *Avtalsrätt II*, 6th edition, Lund, 2010, p. 57 f; Bernitz, *Standardavtalsrätt*, 8th edition, Stockholm, 2013, p. 83 and Lehrberg, *Avtalstolkning*, 6th edition, Uppsala, 2014, p. 34 and 45. Cf Ramberg & Ramberg, *Allmän avtalsrätt*, 10th edition, Stockholm, 2016, p. 161.

56 In the question of this basic relationship, reference may be made to, for example, Lehrberg, *Avtalsrättens grundelement*, 2nd edition, Uppsala, 2006, p. 37 and Taxell, *Avtalsrätt. Bakgrund – sammanfattning – utblick*, Stockholm, 1997, p. 47. Cf Adlercreutz, Gorton & Lindell-Frantz, *Avtalsrätt* I, 14th edition, Lund, 2016, p. 25 ff.

57 In the question of this basic principle, reference may, for example, be made to Adlercreutz, Gorton & Lindell-Frantz, *Avtalsrätt* I, 14th edition, Lund, 2016, p. 27; Ramberg & Ramberg, *Allmän avtalsrätt*, 10th edition, Stockholm, 2016, p. 29 f and Taxell, *Avtalsrätt. Bakgrund – sammanfattning – utblick*, Stockholm, 1997, p. 39 f.

An insurance contract, of course, also constitutes a result of the involved parties' coinciding declarations of will. And, of course, the basic principle of the binding effect of a contract is also valid in the context of insurance. In this circumstance, it is undoubtedly the case that the common will of the parties must be considered as being a factor of primary importance also in the interpretation of terms and conditions of insurance, entailing that if one party succeeds in proving that there has been a common will of the parties of a particular kind when the contract was entered into, the contract shall be interpreted in accordance with this even if other interpretation factors point in a different direction.[58]

NJA 2000 p. 225 provides some support for this where the Supreme Court stated that more detailed information was lacking about both contract negotiations and what had preceded these. In consequence, no evidence was available about the intention of the parties. The assessment had "*therefore* [emphasised here] to take place on the basis of the wording of the contract and general principles of tort and insurance law". The statement undeniably provides an indication that the common will of the parties would have been given precedence if it had been possible to establish it.[59]

4.2.2 The dolus rule

In the interpretation of contracts in general, the dolus rule applies regardless of what other interpretation factors (for example, the wording) indicate.[60] The reason for this could probably be said to be the same as the reason for the dolus rule at all constituting a factor of importance in interpretation of the contract,[61] namely that the failing (dolose) party has acted in a blameworthy way and cannot therefore be considered as deserving protection.[62]

In insurance contexts as well, a dolose contractual party in the respect in question must naturally be considered as acting in a blameworthy way and therefore lack a position deserving protection. In this circumstance, it is close at hand for the dolus rule to be considered to be a factor of primary importance also for the interpretation of terms and conditions of insurance, entailing that if one

58 A number of indicators in this direction can be found in the insurance law doctrine. *See* Bengtsson, *Försäkringsavtalsrätt*, 3rd edition, Stockholm, 2015, p. 51: "If the insured alleges that the contract in some respect *deviates from what is evident from the general terms and conditions of insurance* [emphasised here], he has for natural reasons the burden of proof for this". *See* also Dufwa, *Försäkringsrätt*, Stockholm, 1995, p. 12; Hult, *Föreläsningar över försäkringsavtalslagen*, Stockholm, 1936, p. 30; Johansson, *Varuförsäkringsrätt*, Stockholm, 2004, p. 103 and Radetzki, *Orsak och skada*, Stockholm, 1998, p. 60 f.

59 Cf also NJA 2012 p. 3 and NJA 1998 p. 448.

60 *See* Adlercreutz & Gorton, *Avtalsrätt II*, 6th edition, Lund, 2010, p. 134 and Lehrberg, *Avtalstolkning*, 6th edition, Uppsala, 2014, p. 34.

61 *See* section 3.2.

62 *See*, for example, Lehrberg, *Avtalstolkning*, 6th edition, Uppsala, 2014, p. 59. Cf Adlercreutz & Gorton, *Avtalsrätt II*, 6th edition, Lund, 2010, p. 132 and Ramberg & Ramberg, *Allmän avtalsrätt*, 10th edition, Stockholm, 2016, p. 174 f.

party succeeds in proving that the prerequisites for application of the rule are met, the interpretation shall be made to the disadvantage of the dolose party even in the event of other interpretation factors pointing in a different direction.

4.2.3 The mutual relationship of the subjective interpretation factors

All in all, what has now been said means that the common will of the parties and the dolus rule in the interpretation of terms and conditions of insurance are factors of primary importance for the result of the interpretation. There is no need to rank these two interpretation factors as the common will of the parties will be decisive in cases where it has been possible to establish such a will while the dolus rule is only relevant in situations where the parties' wills have in fact diverged.

4.3 *Objective Interpretation*

Objective interpretation of terms and conditions of insurance is thus relevant only in the event of subjective interpretation not being possible. None the less, objective interpretation must be applied in most cases as standardised terms and conditions of insurance can only in exceptional cases be interpreted subjectively.

Objective interpretation may be based on wording, the systematics and other contents of the contract, the intention of the contract and the disputed contract provision, voluntary law and industry practice, reasonability aspects and the contra proferentem rule. The question under consideration here concerns how these various factors relate to one another in the interpretation of terms and conditions of insurance.

Certain guidance in this respect is provided by the statement in principle regarding interpretation of terms and conditions of insurance which the Supreme Court made in NJA 2001 p. 750. After having noted that the wording of the disputed expression could be considered to allow both parties' interpretation, the court made the following statement:[63]

"In the interpretation of a condition of insurance, …consideration must be given, in addition to the wording, to the intention of the clause, the type of insurance and category of client, to traditions as regards wording, the legal mode of expression, current case law, etc. Consideration must also be given to what is objectively a sensible and reasonable regulation. Only if it is not possible to achieve any result from such consideration, is there reason to fall back on other, more general principles of interpretation, such as the contra proferentem rule."[64]

63 The statement has also been cited in section 2.1.

64 The cited statement is followed by a comparative reference to Hellner, *Försäkringsrätt*, 2nd edition, Stockholm, 1965, p. 72 f. In NJA 2006 p. 53; NJA 2013 p. 253 and NJA 2017 p. 237, the Supreme Court has practically repeated this statement. As regards the minor discrepancies which appear in a comparison between these statements, reference may be made to section 2.1.

In the light of this statement, the status of the contra proferentem rule in relation to other objective factors of interpretation is analysed in section 4.3.1. The question of the mutual relationship between the other objective interpretation factors is thereafter analysed in section 4.3.2.

4.3.1 The contra proferentem rule

The cited statement provides a clear decision in one respect. The Supreme Court explicitly pronounces that the contra proferentem rule is subsidiary, in so far as it is only relevant if no result can be achieved from assessment according to the other objective interpretation factors.[65]

In the light of some cases decided prior to as well as after the 2001 judgment, this statement may appear surprising.

In NJA 1988 p. 408, the Supreme Court noted initially that the wording of the disputed term in its context could not be considered to be unambiguous. The term was interpreted subsequently in the way asserted by the insured with reference to reasonability aspects, and the insurer's opportunities to give the provision in question a clearer formulation (the contra proferentem rule).

In NJA 2012 p. 3, the Supreme Court noted initially that the wording of the disputed term was unclear, and the term was subsequently interpreted in the way asserted by the insured with reference to the intention of the contractual provision, reasonability aspects and the insurer's opportunities to make the drafting of the provision clearer (the contra proferentem rule).

At first glance, the reasoning in support of the judgment in both these cases might be said to indicate that the Supreme Court, in conflict with the statement in principle in NJA 2001 p. 750, regarded the contra proferentem rule as an interpretation factor on the same level as other objective interpretation factors. However, this need not have been so. It may just as well have been the case that the Supreme Court, after having examined the unclear formulations, together with the reasonability aspects in NJA 1988 p. 408 and the intention of the disputed contractual provision and reasonability aspects in NJA 2012 p. 3, found the provisions in question so unclear that the court as a final alternative applied the contra proferentem rule, despite this reasoning not being explicitly stated in the reasoning in support of the judgment.

In this circumstance, NJA 1988 p. 408 and NJA 2012 p. 3, which in the respect now under consideration may be considered to be unclear to a great extent, in no way neutralise the Supreme Court's clear statement in NJA 2001 p. 750 that the contra proferentem rule constitutes a subsidiary rule, which is only applied in the event of the other objective interpretation factors not providing sufficient guidance. This applies not least in the light of the Supreme Court, as has been stated, repeating this statement in both NJA 2006 p. 53, NJA 2013 p. 253 and NJA 2017 p. 237.

NJA 2001 p. 750 concerned the meaning of a provision in a condition concerning business insurance. The case, however, provides no indications

65 Support for this position is also found in the insurance law doctrine, see Radetzki, *Orsak och skada*, Stockholm, 1998, p. 70 and Ramberg, *Kontraktstyper*, Stockholm, 2005, p. 219.

whatsoever that the subsidiary position of the contra proferentem rule is only aimed at such insurance. The statement in the doctrine, on which the Supreme Court's statement is to a great extent based, is not only aimed at business insurance.[66] In addition, the Supreme Court's statement in principle now referred to was repeated in NJA 2006 p. 53, which concerned interpretation of a provision in an accident insurance policy which was taken out with a private person as beneficiary.[67]

In addition to what has now been said, there are some precedents that indicate that the Supreme Court, also in the interpretation of terms and conditions of consumer insurance, appears to be inclined to primarily interpret provisions whose wording does not provide clear guidance with support of other objective factors than the contra proferentem rule, which is thus reduced to a subsidiary interpretation rule.[68]

NJA 1996 p. 727 concerned the wording of an unclearly drafted provision in a condition for legal expenses insurance taken out by a consumer. The Supreme Court did not apply the contra proferentem rule. Instead the court stated that a "natural interpretation" could be considered to argue in favour of the meaning asserted by the insurance company. As far as can be judged, the intention of the contract provision in question was taken into consideration here, alongside of the wording.

NJA 2010 p. 227 concerned the meaning of an unclearly drafted provision in a condition for car insurance entered into by a consumer. Neither in this case was the contra proferentem rule applied. Instead, the Supreme Court pronounced that the interpretation in the first place should be based on the intention of the condition in question whereby the result became that the provision in question was interpreted in the way that the insurer alleged.

4.3.2 Other objective interpretation factors

As regards the mutual relationship between other objective interpretation factors, the Supreme Court's statement of principle in NJA 2001 p. 750 may be said to indicate that the wording has a special position.[69] This is evident from that the statement, as described in section 4.3, is made only after the court has established that the wording of the disputed term allows both parties' interpretation.

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66 *See* Hellner, *Försäkringsrätt*, 2nd edition, Stockholm, 1965, p. 72 f.

67 In NJA 2013 p. 253 as well as NJA 2017 p. 237, where the statement in principle from 2001 was again repeated, it concerned, however, the meaning of a provision in a condition for business insurance.

68 Alongside the said decisions, reference may be made to NJA 1992 p. 428.

69 Such indications are also found in the insurance law doctrine. *See* Hellner, *Högsta domstolen och avtalsrätten 1920-1989, Högsta domsmakten i Sverige under 200 år. Del 2. Högsta domstolen och civilrätten*, Lund, 1990, p. 217 and Radetzki, *Orsak och skada*, Stockholm, 1998, p. 62.

The latter circumstance can in fact be said to indicate that the wording shall be given primary importance, to the extent that other interpretation factors are permitted to have an effect only in the event of the wording being unclear. In support of the wording being given such primary importance in the objective interpretation of terms and conditions of insurance, it can also be stated that the Supreme Court in a number of other cases has noted that the wording of the disputed provision must be considered clear and thereafter made the interpretation in accordance with this, apparently without taking into consideration any other objective interpretation factors.[70] In addition, there is a statement in the doctrine which may at any rate be said to indicate that wording has primary importance in the objective interpretation of terms and conditions of insurance.[71]

Strong reasons of a principled character may also be said to argue in favour of clear wording being respected. The starting point is that the disputed provision constitutes part of the parties' contract entailing that the parties have reached contract that the provision shall apply.[72] And this also applies in the case where one party may not have examined the provision at the time of entry into the contract. Very basic principles of freedom of contract and the binding effect of contracts therefore support that clear wording shall be respected. It ought, of course, be possible to deviate from these fundamental principles. Consequently, the legislator has created opportunities for so-called open control of terms and conditions of contract by introducing mandatory regulatory frameworks for certain types of contracts.[73] This regulation has also been supplemented with the general rule in section 36 of the Contracts Act which makes possible adjustment of unreasonable terms and conditions of contract. There is no such explicit legal support for making it possible in connection with interpretation of contracts to deviate from both these fundamental principles, however. Despite this, such deviations occur. It is then said to be a matter of concealed control of terms and conditions of contract.[74]

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70 *See*, for example, NJA 2009 p. 877, NJA 1987 p. 835 and NJA 1941 p. 683.

71 *See* Bengtsson, *Försäkringsavtalsrätt*, 3rd edition, Stockholm, 2015, p. 62 where the author, within the framework of a discussion on the intention of the disputed contract provision as an interpretation factor, makes the following statement: "If the intention is clear from the drafting, the terms and conditions are otherwise hardly to be considered unclear and it is then not necessary to fall back on a subtle all-sided assessment." For a considerably more sceptical attitude to interpretation based on the wording of the disputed provision, see Ingvarsson, *Tolkning av försäkringsavtal*, Juridisk tidskrift, 2012/13, p. 430 f.

72 *See* Ramberg, *Avtalstolkningsmetoder*, Festskrift till Gösta Wallin, Stockholm, 2002, p. 504.

73 Examples contained in the rules in the Insurance Contracts Act, the Consumer Sales Act, the Consumer Services Act and the Consumer Credit Act.

74 In the matter of open and concealed control of terms and conditions, of the kind in question here, general references may be made to, for example, Adlercreutz & Gorton, *Avtalsrätt II*, 6th edition, Lund, 2010, p. 107 ff; Bernitz, *Standardavtalsrätt*, 8th edition, Stockholm, 2013, p. 105 f; Grönfors & Dotevall, *Avtalslagen. En kommentar*, 4th edition, Stockholm, 2010, p. 283 ff and Lundmark, *Friskrivningsklausuler. Giltighet och räckvidd*, Uppsala, 1996, p. 96 ff. In legislative work, this question has been dealt with in the legislative history of section 36 of the Contracts Act, i.e. SOU 1974:83 p. 114 ff and p. 178 and Government Bill 1975/76:81 p. 116. In the matter of open and concealed control of terms and conditions of

Even if the disputed contractual provision as such is clearly formulated, it is accordingly not wholly certain that it will alone determine the issue of interpretation.

This is indicated by NJA 1988 p. 408. In this case, the district court considered as well as the court of appeal that the disputed term should be interpreted in accordance with common use of language. The Supreme Court regarded, however, the term in the light of certain other provisions of the contract and noted that "in its context", it could not be considered unambiguous. In this situation, the Supreme Court gave the term a meaning deviating from the common use of language with reference to reasonability aspects and the contra proferentem rule.

In this context, reference may also be made to NJA 2007 p. 17 where the fact that the insurance in question consisted of an all risks insurance led the Supreme Court to state that the disputed term should have a meaning which to a certain extent deviated from the literal meaning of the term.

In both these cases, the wording of the disputed term was set aside in the interpretation despite the wording being rather clear in a purely linguistic perspective. An important reason for this has, as far as can be judged, been that consideration has been taken not only to the linguistic form of the disputed provision as such but also to the context in which the term appeared. The wording has thus not been regarded in isolation but viewed in the light of the systematics and other contents of the contract.[75]

NJA 1988 p. 408 and NJA 2007 p. 17 may thus be said to indicate that the systematics and other contents of the contract constitute an interpretation factor at the same level as the wording. Additional support for this is provided by NJA 2004 p. 534. In this case, the Supreme Court did interpret the disputed provision in accordance with its fairly clear meaning. However, in the reasoning in support of the judgment, not only the wording but also the systematics and other contents of the contract could be considered to support the result of interpretation.[76] In addition, the Supreme Court in other contexts stated that a "contract should … be seen as an integrated whole" and that in interpretation of a contract provision, "guidance can often be obtained in other contract provisions",[77] which led to the statement in the contract law doctrine that the wording of a specific provision

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insurance, see, in particular, Wilhelmsson, *Om styrning av försäkringsvillkor*, Vammala, 1977, p. 370 ff but also Radetzki, *Orsak och skada*, Stockholm, 1998, p. 233 f and 242 f as well as Roos, *Ersättningsrätt och ersättningssystem*, Stockholm, 1990, p. 118.

75 *See* also NJA 2017 p. 237. Reference may also be made to NJA 1992 p. 414. This decision is difficult to interpret. The Supreme Court, however, appears to have taken the view that each of the two provisions which was subject to dispute, viewed as such, could be considered to be clear. Together, however, the two provisions were contradictory and therefore a less reasonable regulation, which contributed to their being interpreted in conflict with their wording.

76 *See* also NJA 1989 p. 346.

77 The statement is contained in NJA 1992 p. 403. A corresponding statement is contained in NJA 1990 p. 24.

shall not be read in isolation but in the light of the systematics and other content of the contract.[78]

What has now been said cannot be considered to be especially controversial. As with the wording, the systematics and other contents of the contract contain an internally oriented interpretation factor, i.e. an interpretation factor which gives consideration to the parties' contract.[79] The fact that the disputed contractual condition is not seen in isolation but in the light of the systematics and other contents of the contract will thus in no way come into conflict with the basic principles of freedom of contract and the binding effect of contracts.

However, it would seem as if there is no absolute impediment to other objective interpretation factors also at times being able to lead to an interpretation result in conflict with what clearly emerges from the wording in the light of the systematics and other contents of the contract.

In NJA 1945 p. 504, the Supreme Court thus noted that the wording could be considered to allow that the insurance covered the loss of interest for which the insured claimed compensation. However, despite this, the claim was rejected with reference to insurance industry practice.

The 1945 decision shows that a wording, which in the light of the systematics and other contents of the contract, appears clear, can be set aside with reference to the interpretation factor voluntary law and industry practice. Even if it is not evident in the same clear way from the case law of the Supreme Court, it may be considered plausible that also the interpretation factors the intention of the contract and the disputed contract provision as well as reasonability aspects on some occasion could be conceived to have such an effect.[80]

It must be said that it is to some extent controversial that the said interpretation factors may be permitted to entail an interpretation result that

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78 *See*, in particular, Bernitz, *Standardavtalsrätt*, 8th edition, Stockholm, 2013, p. 87 and Lehrberg, Avtalstolkning, 6th edition, Uppsala, 2014, p. 113 but also Adlercreutz & Gorton, *Avtalsrätt II*, 6th edition, Lund, 2010, p. 46; Hellner, *Tolkning av standardavtal*, Jussens Venner, 1994, p. 277 and Ramberg & Ramberg, *Allmän avtalsrätt*, 10th edition, Stockholm, 2016, p. 173.

79 As regards the division in the following section between internal and external interpretation factors, a comparative reference may be made to Hellner, *Försäkringsrätt*, 2nd edition, Stockholm, 1965, p. 71 where the author, in discussion regarding the interpretation of terms and conditions of insurance, distinguishes between "*formal* points of view, i.e. those that concern the linguistic form and the context in which special provisions appear, and *material*, which refer to the appropriate regulation of insurance terms and conditions". Cf Hellner, *Tolkning av standardavtal*, Jussens Venner, 1994, p. 273.

80 An indication in this direction are the two similar cases NJA 1994 p. 566 and NJA 2001 p. 255. In these cases, the disputed contractual provision was interpreted in accordance with its clear wording. However, it is emphasised that reasons, which from as far as can be judged consist of the intention of the disputed contractual provision, could be considered to argue in the opposite direction. The latter statement must be said to indicate that *the intention of the contract and the disputed contract provision* could on some occasion lead to an interpretation in conflict with a wording which in the light of the systemicatics and other contents of the contract appears clear. Reference can also be made to NJA 1980 p. 145. In this case too, the clear wording of the disputed provision was crucial. However, the Supreme Court gave careful consideration to whether *reasonability aspects* entailed that there were reasons for an interpretation in conflict with the wording.

entails a deviation from the language content of a contractual provision, the wording of which in the light of the systematics and other contents of the contract appears to be clearly formulated. The reason for this is that both the intention of the contract and the disputed contract provision as well as voluntary law and industry practice and reasonability aspects are externally oriented interpretation factors, which take into consideration other things than those that follow from the parties' contract. To the extent that such an interpretation factor leads to an interpretation result that deviates from what clearly emerges from the internally oriented interpretation factors (the wording and the systematics and other contents of the contract) the result thus comes into conflict with the basic principles of freedom of contract and the binding effect of contracts.

In the light of this, it is not surprising that NJA 1945 p. 504 is the only decision that clearly indicates that externally oriented interpretation factors are permitted to lead to an interpretation result entailing a deviation from what clearly follows from the wording of the disputed contract provision viewed in the light of the systematics and other contents of the contract. As far as can be judged, there is thus a strong inclination on the part of the Supreme Court to respect what clearly ensues from these internally oriented interpretation factors. Deviations require from as far as can be judged that one or more externally oriented interpretation factors point strongly in a different direction.

If, however, the wording of a disputed provision, on consideration in the light of the systematics and other contents of the contract, appears unclear, the externally oriented interpretation factors may, as far as can be judged, have greater influence, whereupon the extent of the influence would seem to depend on the degree of lack of clarity, which may be considered to be attached to the provision in question.[81]

Finally, it should also be mentioned that no support in case law can be found for ranking the externally oriented interpretation factors now in question, that is the intention of the contract and the disputed contract provision, voluntary law and industry practice and reasonability aspects.

5 Interpretation of Term and Conditions of Insurance – a Model

The analysis in the previous section concerned the internal relationship between the different factors which, according to what emerged before, are influential in the interpretation of terms and conditions of insurance. Briefly, the analysis may serve as the foundation for the following conclusions.

The terms and conditions of insurance are primarily interpreted in a subjective way. Within the framework of the subjective interpretation, the common will of the parties and the dolus rule are taken into consideration. There is no need to rank both these subjective interpretation factors as the common will of the parties will be decisive in the event of it being possible to establish this common will

81 This is illustrated by, for example, NJA 2001 p. 750, where the wording did not give any guidance with the effect that reasonability aspects were crucial despite none of the parties' interpretation alternatives appearing quite unreasonable. Cf also Radetzki, *Orsak och skada*, Stockholm, 1998, p. 66.

while the dolus rule is only relevant in situations where the parties' wills actually diverge.

If such subjective interpretation does not lead to any result, an objective interpretation becomes relevant. Within this framework, consideration is given to the wording of the disputed provision, the systematics and other contents of the contract, the intention of the contract and the disputed contract provision, voluntary law and industry practice, reasonability aspects and the contra proferentem rule.

The latter rule is of a subsidiary nature and is only resorted to in the event of the other factors not providing any guidance.

Among other objective interpretation factors, the wording may be said to have a special position to the extent that it constitutes the starting point for the objective interpretation. However, the wording shall not be read in isolation but in the light of the systematics and other contents of the contract. If the wording in this connection appears as clear, basic contractual principles enjoin that the interpretation shall be made in accordance herewith. It would also seem to be very common that this is the case. However, this is not completely certain. There is namely no support for both these internally oriented interpretation factors being of primary importance in the objective interpretation, in so far as other objective interpretation factors are only relevant in the event that the wording viewed in the light of the systematics and other contents of the contract appearing unclear.

The externally oriented interpretation factors, the intention of the contract and the disputed contract provision, voluntary law and industry practice and reasonability aspects must also be taken into consideration in this phase of the interpretation, allowing that as far as can be judged, weighty reasons are required for such a factor to permit an interpretation that conflicts with clearly stated wording when regarded in the light of the systematics and other contents of the contract.

If, however, the wording of a contractual provision, in the light of the systematics and other contents of the contract, appears unclear, the externally oriented interpretation factors will, as far as can be judged, have greater influence, whereupon the extent of this influence would appear to depend on the degree of lack of clarity attached to the provision in dispute.

Finally, there is no support for ranking the externally oriented interpretation factors.

In a more compressed form, the conclusions now mentioned regarding the interpretation factors and the internal relationship between these is presented in the form of the following schematic model:

INTERPRETATION OF TERMS AND CONDITIONS OF INSURANCE

1 Subjective interpretation

- The common will of the parties
- The dolus rule

2 Objective interpretation

A (a) Internally oriented interpretation factors
- The wording
- The systematics and other contents of the contract

A (b) Externally oriented interpretation factors
- The intention of the contract and the disputed contract provision
- Voluntary law and industry practice
- Reasonability aspects

B - The contra proferentem rule

Finally, to avoid misunderstanding, it should be emphasised that case law, in conflict with what has at times been emphasised in the insurance law doctrine[82] does not give any clear indications of other than that the basic principles regarding interpretation of terms and conditions of insurance are uniform, so that the same interpretation factors exert influence and that the same mutual relationship between these factors applies, regardless of what type of insurance is involved.[83]

It is another matter that the particular characteristics of the insurance in each individual case affect the interpretation procedure at a more general level. The fact that an insurance provides coverage for a consumer thus limits the insurer's possibilities to refer successfully to such as the meaning in specialised language of a disputed term, actuarial aspects, the implicit intention behind a provision or insurance industry practice. At the same time, the insured's possibilities of successfully referring to reasonability aspects and the contra proferentem rule increase.

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82 *See* Bengtsson, *Försäkringsavtalsrätt*, 3rd edition, Stockholm, 2015, p. 56 ff where insurance for the benefit of consumers respective companies is treated separately. *See* also Bengtsson, *Försäkringsteknik och civilrätt*, Stockholm, 1998, p. 95 on marine insurance and Johansson, *Varuförsäkringsrätt*, Stockholm, 2004, p. 103 ff (in particular p. 106) regarding insurance for transported goods. Cf Bengtsson, *Försäkringsteknik och civilrätt*, Stockholm, 1998, p. 96 regarding life insurance. At a more general level, Ingvarsson, *Tolkning av försäkringsavtal*, Nordisk försäkringstidskrift, 2007, p. 138 alleges that insurance "is not a uniform phenomenon" with the effect that conclusions regarding a particular type of insurance "do not lend themselves to excessively far reaching generalisation". Cf also Bengtsson, *Försäkringsrörelselagens principer och civilrätten*, Juridisk tidskrift, 1992-93, p. 222.

83 There is, however, no completely certain confirmation for this as case law from the Supreme Court regarding interpretation of terms and conditions of certain types of insurance is wholly lacking or is so thin that it cannot be used as the basis for any certain conclusions.

The objective interpretation factors thus make possible that the particular features of the insurance in question affect the interpretation of terms and conditions. However, this fact does not in any way mean that the basic interpretation factors and their mutual relationship is in any way disturbed.