MISUNDERSTANDINGS BETWEEN CONTRACTING PARTIES: DEVELOPING AN OPTIMALLY SIMPLE LEGAL DOCTRINE *

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ABSTRACT

Under Belgian law misunderstandings between contracting parties as to the agreed terms are dealt with through five doctrinal headings: mistake preventing the contract, the doctrine of legitimate expectation, the transformation of rights, the interpretation of contracts, and tacit acceptance.

In this article, we propose a new, simple, accurate and unifying doctrine: ‘the least cost avoider of misunderstandings’ doctrine. This doctrine is inspired on law and economics research of Calabresi (1970), Posner (1977), Van den Bergh (1987) and De Geest (1994). We elaborate this doctrine and show that it explains Belgian law in a simpler and more accurate way than the competing set of 5 doctrines.

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1. Introduction

Ideally, a contract is based on the ‘meeting of minds’ of both parties. Two parties are fully informed on the content of the contract and have exactly the same object and clauses in mind. Unfortunately, in practice, this process of communication often runs into difficulties. Various types of misunderstanding may arise. One of the parties may believe that the contract was concluded, whereas the other party assumes to have made an offer without commitment. One party thinks that he or she sold object A, whereas the other party believes that he or she had bought object B. One party believes that the contract contains a liability exemption, whereas the other party is unaware of this. One of them had no intention of transferring an entitlement, whereas the other party considers that this was indeed the case.

Under Belgian law misunderstandings are dealt with through various doctrinal headings: mistake preventing the contract, the doctrine of legitimate expectation, the transformation of rights, the interpretation of contracts, and the rules on tacit acceptance.

In this article, we propose a new, simple, accurate and unifying doctrine: ‘the least cost avoider of misunderstandings’ doctrine. This doctrine is inspired on law and economics research by Calabresi (1970), Posner (1977), Van den Bergh (1991) and De Geest (1994). We elaborate this doctrine and show that it explains Belgian law in a simpler and more accurate way than the competing set of 5 doctrines.

2. Methodological Remarks

The type of research questions we address in this paper differs substantially from mainstream law and economics articles. Our purpose is to initiate one of the first attempts towards a new ‘research program’ (in a 'Lakatosian' definition). It also differs from traditional doctrinal analysis or mainstream contemporary comparative law. Hence there is a danger that our analysis will by misunderstood by law and economics scholars as well as comparative lawyers. Therefore, we must address a couple of methodological questions first.

We do not purport to to develop a proposal to change the law (‘de lege ferenda’). Rather, we attempt to describe existing law (‘de lege lata’), while at the same time using new concepts and formulations to describe this existing law.

A legal doctrine is a scientific theory on the law. It is a coherent set of concepts and rules that describes legal reality. A legal doctrine is the equivalent of a law in natural sciences, like Newton’s law of falling bodies. Such a law compresses hundreds of observations into one formula. A legal doctrine contains hundreds of cases and legislative articles into a set of rules that is as simple and clear as possible. A legal doctrine can be judged from two perspectives. (a) The content: are the rules desirable i.e. efficient? (b) The quality of the formulation: are the rules described in a simpler and more precise way than competing doctrines? To date, law and economics scholarship has focused solely on the first perspective. The second is left to traditional doctrinists.

Some comparative lawyers' aspiration is to select the doctrines that are superior from a technical point of view. This is especially the case for those groups of comparatists that try to draft new European (civil) codes. The Lando commission's proposal for a new contract law code is a well-known example (Lando and Beale, 1995). But a weak point in the approach of these scholars is their lack of methodology with respect to finding and choosing doctrines. In a sense
they have no methodology: they select on the basis of intuition and - sometimes - compromise (trying to please lawyers of all legal families).

In this paper, we hope to demonstrate that searching the optimal formulation is also a task for law & economics scholarship. One reason is that, since legal doctrines ultimately serve to save legal information costs, their merits should as well be weighed in terms of savings in legal information costs. Another reason is that ultimately legislators and courts balance advantages and disadvantages of rules. A theory that focuses on describing these advantages and disadvantages has better chances to be a good description of the legal reality.

In our research we have investigated Belgian case law for situations where a misunderstanding arose between the contracting parties. Such research was challenging for a number of reasons. The notion of ‘misunderstanding’ is not a legal concept as such. Cases which involve misunderstandings between parties are classified by judges and scholars under various headings. Also, third parties might find it difficult to recognize misunderstandings between parties as such. For instance, a judge may find that evidence ascertains that parties have agreed to a certain clause. But it may prove very hard for the judge to figure out what in reality has been decided in the minds of both parties.

The reading of each of the cases proved to be laborious. We restricted ourselves to those cases (about 300) that resembled a high degree of plausibility of concerning a genuine misunderstanding. It must be noted that, in practice, a misunderstanding may not be captured by the court under the heading of a misunderstanding. Sometimes a court will find that both parties agreed on the terms of the agreement while, in fact, they did not. Such a statement rests then on fiction. Of course, from our side there is a danger of hineininterpretierung. But that is a danger of all legal scholarship that tries to reinterpret case law.

A good scientific theory is as simple and accurate as possible. As argued in the next section, traditional Belgian doctrines are relatively complex and imprecise. Our task in sections 4 and 5 will be simple: try to find a new doctrine that attains simplicity while accurately describing Belgian law.

3. Belgian Law: 5 Separate Doctrines on Misunderstandings

When parties are in the course of agreeing on the terms of a contract, misunderstanding can arise in many ways. Current Belgian law needs 5 doctrines to solve all forms of misunderstanding in contracts. We will briefly summarize the 5 traditional doctrines and then explain how one doctrine can perform the same task.

(a) (Excusable) mistake preventing the contract.

One party believes he has purchased a tract of land (A) while, in the same transaction, the other party is convinced to have sold a different tract of land (B). In one recent case\(^1\) the buyers saw a parcel of building land, with a notice board on it, indicating ‘land for sale’. They bought the land in a public sale, but later noticed that it was another lot and not the one with the board on. The court decided this mistake was excusable, and declared that no sale had taken place.

Mistake like this does not always lead to a nullified contract. The mistake should be ‘excusable’. That criterion allows the court to decide who was responsible for the

misunderstanding and to sanction the responsible party by not giving that party what he or she wants.

(b) The doctrine of legitimate expectation
One party signs a contract without having read the contract before signing it. He is convinced that clause A is included but did not verify this. The other party is convinced that, instead of clause A, clause B has been agreed upon, as specified in the contract. So there is a misunderstanding as to what clause has been agreed upon. Courts will in such cases normally decide that clause B is the valid one. The first party only has to blame himself: he should have read the contract. Although the starting point of Belgian contract law is the theory of will, and that will is absent for the first party, courts will declare the contract valid on the doctrine of legitimate expectations: parties may reasonably expect that what is signed reflects the will of the one who signs.

Now suppose a contract has been signed by both parties, but there is an error in the wording. The seller wanted to sell a watch for 290 Euro, but erroneously wrote 250 Euro in the contract. Or the seller wanted to sell a truck for 250,000 Euro, but erroneously wrote 250 Euro. In the first case (a small error) courts will declare the contract valid. Though there was no >meeting of minds= for 250 Euro (the seller had another price in mind), courts will argue that the buyer had a legitimate expectation that the price mentioned in the contract and signed by the seller reflected the seller=s will. In the second case (a big error) courts will declare that no valid contract has been concluded, because there was no meeting of minds and because the error was so manifest that the buyer had no legitimate reason to believe that there was no error involved (Van Gerven, 301-307; Kruithof, 1991).

(c) The doctrine of tacit acceptance
The owner of a parking wants to be exempted from liability for car theft, so he places a large board at the entrance of the parking lot exempting him from liability. However, a consumer did not notice or read the board and believes that the parking contract includes no exemption clauses. Between both parties there is a misunderstanding as to what has been agreed upon. Belgian law will solve these cases under the doctrine of tacit acceptance, especially acceptance of standard term clauses. The basic idea is that offers can be accepted in more implicit ways. Case law has elaborated specific conditions. Boards with exemption clauses have to be large enough to be noticed without special effort, and the text should be clear enough to be easily read and understood. If a board was too small, courts will presume it has not been accepted by the consumer. If a board is large and clear enough, and the consumer did not react, the courts will presume that the consumer accepted the terms (Kruithof et al., 1994, p. 273-274).

(d) Rules on the interpretation of contracts
Sometimes one party interprets a clause as A, while another party reads B in it. This different interpretation creates a misunderstanding as to what has been agreed upon. These misunderstandings are solved under the heading of rules on the ‘interpretation of contracts’. One such rule is that contracts have to be construed against the party that drafted it, like the insurance company (art. 1162 C.C. states that contracts have to be construed against the party that benefited from the clause, but there is a tendency in Belgian case law to read this sentenced as >construed against the drafter=. Kruithof et al., 1994, p. 452).
(e) The doctrine of the transformation of rights (‘rechtsverwerking’)
This doctrine solves misunderstandings at a later stage of the contract, for example whether a
modification or prolongation has been approved.
In one case 2 the contract with a building contractor stated that the consumer had to pay the
architect’s fee directly to the architect and not to the builder. The consumer paid the fee instead to
the builder. The architect knew this, but did not react, and consequently made the consumer
believe that he agreed with this change. Later, the architect sued the consumer, but lost the case,
on the basis of the doctrine of the >transformation of rights=: the architect had lost his right to
require direct payment by his behaving in a contradicting way.
The Belgian supreme court (court of cassation) has later denounced the doctrine of the
transformation of rights.3 Some writers have (in our opinion correctly) argued that the doctrine
still holds under Belgian law, in that several legislative rules and cases are an application of it. 4

4. A Proposal for One Unifying “Least Cost Avoider”-Doctrine
Current Belgian law needs 5 doctrines to solve all forms of misunderstanding in contracts. Now
we would like to propose one unifying doctrine that covers all these aspects. The basic rule of this
decision is very simple: whenever a misunderstanding occurs, the court should sanction the party
that could have avoided the misunderstanding at least costs.
The new unifying doctrine departs from the idea that a misunderstanding is a regrettable
event. The legal system can reduce the number of misunderstandings by giving correct incentives
to the parties who are in the best position to avoid them. In all these kinds of cases, courts have to
ask a simple question: which party was in the best position to avoid this misunderstanding? That
party has to be sanctioned, by not giving it what it wanted, by nullifying the contract (clause) that
party wanted or by declaring a contract (clause) valid that the party did not want. When both
parties could have prevented the misunderstanding at equal costs both are sanctioned, in the sense
that neither party’s version gets accredited. For instance, when the misunderstanding involves a
supplemental clause, parties are subordinated to the general default rules. If, in such a case, the
misunderstanding solely concerns the essence of the contract, then the whole contract will be
assumed not to have been created.
The courts therefore need to weigh various interests. It is to the advantage and in the
interest of both parties to minimise the expenses which they incur in the course of communication,
as well as the cost of vigilance. The courts will need to assess which interest is the most
substantial, and more particularly which interest carries the highest cost.
The notion that a sanction must be imposed on the party who could have prevented the
misunderstanding in the least expensive manner is essentially an application of the “least cost

paragraph entitled >rechtsverwerking= (transformation of rights).
trouw op de kontraktuele schuldvorderingen, Brussel, Story-Scientia.
avoider” concept developed by Calabresi (1970). The underlying idea is that the notion of fault is a comparative, rather than absolute notion. In the event of an undesirable occurrence, the courts would not assess the behaviour of the parties involved in the light of absolute rules, but make a comparison as to which of the parties could have prevented the occurrence at the lowest cost. Posner (1986, 88-90, also in the 1977 edition at 71-73) briefly applied this idea to communication problem cases and suggested that these case should be solved by looking at what party could have avoided the misunderstanding at least costs. Cooter and Ulen (1988, 257-258), Van den Bergh (1991, 31-33) and De Geest (1994, 196-200) made similar (brief) analyses.

Let us analyze the former 5 cases (described in section 3) in these terms.

In the case under (a) the misunderstanding as to what lot of land was sold, was created by the seller who placed the board ‘land for sale’ on the wrong lot of land. Most people would have believed that the board referred to the land on which it was placed, so the seller should have clearly indicated that it was another land. A misunderstanding that is created by the fact that someone expected a different clause than the one in the contract he had signed and not read (case under (b)), can in most situations be avoided by simply reading the contract before signing it. If a misunderstanding is due to an error in the wording of the contract, there were two possible solutions: the drafter could have been more careful, and the reader could have checked whether there was no error, by simply asking the drafter. If errors are small, it would be a waste to require readers to always double-check, since minor price reductions are common in a free market. If the difference between the normal price and the announced price is extreme (like a truck that is set for sale at a price of 250 Euro), than buyers should ask confirmation - which after all does not require too much effort from the buyer. Misunderstandings caused by not reading an exemption clause on a board (c), can be avoided in two ways: the drafter can use bigger boards and the reader can check more carefully whether there are no announcements to be discovered. Noticing a small board would require too much effort from the reader. In that case it would be cheaper to buy a bigger one. But if the board is big and clear enough, the least cost avoider of the misunderstanding is the reader, by being a bit more observant when he enters a place. If unclear clauses are the source of the misunderstanding as to what has been agreed (c), the least cost avoider is the drafter of the contract, who should have done a better job. Finally, in the case under (e), the misunderstanding was caused by the fact that the consumer performed in a different, but equally demanding way (paying via the contractor instead of directly to the architect costs as much money) and by the fact that the architect who did not accept this change, did not react to it. The least cost avoider of the misunderstanding was the architect, who simply should have objected.

5. Technical Elaboration of the New “Least Cost Avoider”-Doctrine

Let us know pay some more attention to the technical elaboration of the doctrine.

Two types of distinction can be drawn. Misunderstandings may be classified according to their subject-matter and according to their actual cause. With respect to the subject-matter causes of misunderstandings, one could sum up the following categories: misunderstandings as to the subject-matter and nature of the contract; misunderstandings as to which clauses apply; misunderstandings as to the precise scope of a clause; misunderstandings as to the person seeking to contract; misunderstandings as to whether or not an offer had to be made; misunderstandings as to the period during which the offer is valid; misunderstandings as to the intention to accept, whether express or implicit; misunderstandings as to whether the contract is to be extended or
renewed; misunderstandings as to whether there was the intention to waive a right; misunderstandings as to whether powers of attorney were given (apparent powers of attorney).

The traditional set of doctrines makes a further subset of rules on the distinction between the objects of the misunderstanding (like the subject matter, the nature of the contract, which clauses apply, how they are to be interpreted, etc.). However, since the legal system has to compare the relative prevention costs of both parties, it looks much more fruitful to focus on the actual causes of misunderstandings.

5.1. Misunderstandings resulting from a failure to notice or read signs.

Often clauses are publicized through signs or notices. For instance, at the entrance of a private parking lot one often finds a sign posted to notify that the owner is not liable for any damage to the vehicles on the premises'. When compared to the signing of a written document this type of communication offers an opportunity for transaction costs savings. It may also prove to be more efficient, when more people read signs than they read the fine print of a contractual clause. Nevertheless, when such a sign is ignored, a dispute on the content of the contract may ensue. Party A, who drafted the contract, assumes that that clause X is approved by party B, who in fact never noticed the sign and, instead, assumes that the default rule applies. The question radiates: who is best placed to prevent this type of mistake?

When it involves clearly visible signs with bright print, the customer may generally be thought of as the party who could have prevented the misunderstanding at the lowest cost. All that would be required of him is to be a little more vigilant. When, however, a sign is placed unconventionally or when it contains very small print, the aggregate costs to customers to search for the sign or to closely examine it might outweigh the relatively small effort required of him to post a bigger sign or to mount the sign on a more prominent or noticeable location. The optimal rule could be formulated as follows:

Rule 1: A party who proposes a supplemental, non-default rule through a sign or notice must assure that it is posted in such manner that attracts attention or in large font so that the other party is not necessitated to take additional efforts to notice and read the sign. If, in such a case, the reader does not voice any reservations as to the content of the clause, he is to be regarded as having accepted the clause in tacit manner.

Is such an optimal rule pertained by the Belgian courts? Belgium’s highest court, the Court of Cassation, never formulated any specific rules on the size and visibility of posted signs. Cass, Arr. 6544, 29 May 1988 concerned a self-service laundry shop which put up the following sign: ‘The store declines all liability for theft, damages or other losses, be it physical or material, caused by accidents, defective machinery, faulty treatment, etc. Any assistance or advice by employees or management shall be accepted on the sole responsibility of the customer’. A client suffers damages and turns to the manager of the laundrette. The lower court decides that for the clause, which deviated from default provisions, to be enforced, all parties are required to have explicitly agreed on the terms of the provision. The Court of Cassation overruled this decision. Instead, it
holds that a party may explicitly enter into a clause that exonerates liability, but may also tacitly express its consent. Although the tacit acceptance of signs is recognized, the court does not develop any specific criteria to determine when customers are bound by liability exemptions.

Other case law maintains the principle that the sign must be readable and visible. However, on the matter of size and location nothing is specified.\(^6\)

An old case concerns a sign posted in laundrette which reads “the store declines all responsibility for stolen goods during transportation or in the store”. A client’s 18 kilo load of laundry disappears during transportation. The court in \textit{Rb. Namen 21 January 1986}\(^7\) states that the sign must be of such a nature that the customers are compelled to read the sign, which was not established in the case above.

\textit{Rb._____} \(^8\), concerns a sign that exempted liability for accidents involving a shopping cart on a warehouse parking lot. The court held that the contractual clause is valid only when it is evidenced that clients, in any event, are notified of the clause before entering the parking lot.

The risk of misunderstandings due to unnoticed information on bulletins decreases substantially when a signed document refers to the posted information. In such a case it is not required for the drafter to take additional measures to notify the contracting party of the existence of the clause.

\textit{Exception: When a signed document refers to information communicated through notices, it is sufficient that the other party can find the information upon request.}

A specific application can be found in Belgian banking regulation which requires all banks to post their interest rates in their offices. This applies under the condition that this method of notification is asserted in the general terms (‘reglement der verrichtingen’ of the bank, of which every client receives a copy upon opening an account. The legitimacy of such arrangement was approved by the court in \textit{Kortrijk 11 October 1994}. In the original contract a bank refers to the posted interest rates that apply for account that go into debt. The court sentences a client to pay the interests, as posted on the sign, against which he never opposed.

\textit{5.2. Misunderstandings resulting from a failure to read the contract before signing it.}

Misunderstandings often result from the simple fact that that a party did not take the effort to read the contract or its (standard) clauses before signing the document. This \textit{signing without reading} phenomenon is a frequent factor in modern economies. As a consequence, the opinions between parties may differ on what was actually agreed to in the contract.


\(^7\) \textit{Rb Namen 21 januari 1986, R.R.D., 1986, 420 (5)}.

\(^8\) ___________________________________
Rule 2: *The party who signs a document without reading it, is responsible for misunderstandings, when the content would not correspond with his expectations.*

In most occasions the misunderstanding could have been avoided at lower cost by the reader. (FN) By sanctioning the party for not reading the document, the rule provides an *ex-ante* incentive to read. The following examples may illustrate how such a rule is in fact applied by Belgian courts.

The owner of real estate delegates a broker to sell his property and with that purpose, he blindly signs a standard term contract with the broker (in good faith). When the owner decides not to sell the house after all, he receives an invoice of 3% of the price of sale, as stipulated in the standard contract. The owner refuses to pay the transaction fee and maintains that he was not aware of such unilaterally imposed clause. The court does not follow this reasoning and holds that it rests upon seller to read the contract before signing it. Seller’s autograph beneath the contract is an essential part of the contract with which the seller ‘familiarizes’ himself with the contract.

The owner of farmland want to sell their property, including *half* of the land that belongs to it. The buyer and notary assume that the complete property estate is for sale. The seller’s suit to dismiss the contract, on the grounds of mistake preventing the contract (1109 C.C.) is denied by the court on the argument that the seller, who manages a taxicab company, should possess the necessary expertise to notice upon the writing of the contract that the totality of the real property interest is being sold.

Indeed, one may assume that when real property is sold, it concerns the totality of the property, because it is common to sell real property in its entirety. When the sellers hold the intention to sell only a fraction of the property, they are supposed to report this and emphasise the aberration. Also, they could have prevented this by carefully reading the acts of sale, drafted by the notary.

An insurance policy for material damage to motor vehicles covers damage incurred on the territory of Belgium, Luxemburg and Western-Germany. A highway accident occurs between Hannover and West-Berlin, on the territory of Eastern Germany. The policy holder argues that in order to reach Western-Berlin he is obligated to cross the territory of Eastern Germany. The court waives this argument. Instead, it holds that the customer should have explicitly bargained coverage for Eastern Germany if he desired such. This case originated from the fact that the insured party had not carefully studied the contract.

During construction works for the Belgian railway company, NMBS, a fire takes place. The contractual agreement between the contractor and the railway company states that the contractor will be exclusively held liable for all damages that may emerge from constructions until completion of the work. The railway company escapes all liability, except the damage that arose from severe fault by the railway company itself.

On this general rule a number of exceptions must be made:

Exception 2.1: *Signed clauses are not to be considered as accepted when the drafter made efforts to augment the signing-without-reading problem.*

The drafter can take steps to discourage the other party to read the contract. One example of such measures is the printing of standard clauses in soft-yellow ink. This increases the likelihood of a misunderstanding. Yellow ink is more expensive than black, other things being equal, its may thus be thought of as an additional effort to aggravate the problem. In order to preserve an optimal incentive structure such actions need to be penalized.
Exception 2.2: The drafter (or offeror) of the contract stands in an agency or trust relation with the party that he signs for, in other words, the drafter was paid (direct or indirect) to read the contract.

This is particularly the case with insurance agents. They are paid by their clients to provide advise and guidance in technical matters that the client knows little about. Several cases can be found in support of such exception to the rule, as formulated above.

A party signs an insurance contract with an insurance agent for protection against liability for any damage that may be caused by his pet animal. Not until two days later does the insurance agent deliver the document to the offices of the insurance company. In the meanwhile an accident involving the pet animal occurs and the question emerges whether the insurance company should cover the damages. The contract contains a clause which determines that the contract ‘goes into effect at midnight, on the date marked on the postal stamp’ (i.e. before the accident) or ‘as soon as the insurance company receives a copy of the signed insurance contract’ (i.e. after the accident occurred). The court does not maintain the second rule. Instead it asserts that the insurance company has created a legitimate expectation of a relationship of trust.

Exception 2.3: When a contract revision or renewal contains significant modifications, which are not directly communicated, but rather, are implemented into the contract covertly, these changes are to be regarded as not accepted by the other party, regardless of the fact that this party has signed the contract.

Explicitly reporting a change in the contract to the other party may be less costly than to demand from those who sign a contract extension or renewal to investigate the whole contract in search of eloquently hidden changes. Ceteris paribus, this also holds for the case where a particular clause has been omitted from a previous contract version. The latter situation surfaced in Vred. Dinant, 21 June, 1974.

5.3. Misunderstandings resulting from differing interpretations of the contractual clauses.

Rule 3: A party with an idiosyncratic definition of a word or concept, who neglects to explicitly communicate this to the other party, is to be held responsible for resulting misunderstandings.

The party with erratic or differing language sense may be regarded as the least cost avoider of misunderstandings that ensue from that particular idiosyncratic sense of language. Certainly, it is more expensive to require a contracting party with a standard sense of language to check every document and inquire whether the author of the document did indeed use the conventional denotation. The most constructive way to prevent such ‘confusion of tongues’ is to record conventional or official definitions in legal and other dictionaries.

Three glass manufacturers commence negotiations with an American supplier of natrium carbonate. The objective it to substitute their current (Belgian) supplier, or at the least, to diversify supply. After a first set of negotiations the US-based supplier and all three manufacturers agree to sign a letter of intent which includes the following formula: ‘This letter of intent will form the basis for a more complete contract to be finalised in the coming weeks. We are in basic agreement with the concept outlined in this (...) telex.’ Two weeks later the supplier sends the manufacturers a complete contract which they don’t sign. In the meanwhile, be it through increased leverage, they close a new contract with their old Belgian supplier. To what extent are the three suppliers to be held bound to the letter of intend? The court in Brussel 14 June 1994
inquires whether the parties intentions were clearly expressed. Also, the question pertains to the common meaning of a letter of intent. The party that attaches unconventional meaning to the concept is to be held responsible for the misunderstanding that originate from it.

**Rule 4:** The party that attaches a meaning to a text, other than that of the average third party (like a judge) is responsible for the misunderstanding, so that one has to express themselves in a way that the third party gets the correct impression on what has been agreed.

**Rule 5:** The drafter of a contract needs to formulate his proposal in a understandable and unambiguous manner. In order to provide the drafter with an incentive to do such, obscurities and contradictions are resolved to the detriment of the drafter.

Would the other party, which had no part in drafting the contract, not be equally placed to secure that the text is improved on a technical level? Generally not: in most cases the drafter, as a commercial agent, is in a better position to formulate the contract: he is more specialized and will be able to maximize of economies of scale (see, Posner, 1995) by employing standard contracts in his large-number transactions

Article 1162 of the Belgian civil code (C.C.) holds that in case of ambiguity the respective clause is to be interpreted against the conditioner.

This is not entirely the same as the rule proposed above. In case of article 1162 C.C. the conditioner will be sanctioned, not the beneficiary drafter. In some cases this will create the perverse effect that one may profit from the fact that he did a poor job in his formulation of the contract. For instance, when the drafter implements an unclarity in the terms of a clause, which is in favour of the other party, 1162 C.C. mandates that the clause is to explained against the latter. The question is then, do courts actually apply 1162 C.C. as such? No such court ruling were found in the examined case law between 1947 and 1995. In most cases the drafter is indeed classified as the conditioner of the clauses. In each instance, the clauses are explained against the drafter, i.e. conditioner.

The general contractual conditions of a dealer, as found on the reverse of the invoice, are in Dutch and French. Both versions contain serious contradictions. The court in *Kh. Brussels 11 February, 1981* applies 1162 C.C. such that its considers them as not to be written, since they are bargained for by the drafter. Our thesis applies *a fortiori* to this case: only the dealer would have been able to prevent the misunderstanding.

A person, who owns a Ford Anglia vehicle, purchases an insurance policy titled ‘Insurance of Occupants of Motor Vehicles’. The policy excludes accidents with race or sports cars (‘race cars or cars of the sportsmanlike sort’) which involve dangerous or reckless conduct. The insurance form’s classifications with regard to car type, licence number, cylinder, etc. are left blank. During the insurance period the policy holder purchases a Porsche 365. On a ride with the new Porsche, he and his daughter are involved in a deadly accident. The court in *Liège, 6 March 1973*, commands the insurance company to cover damages. An insurance clause which excludes race and sports cars from recovery but does not provide a classification of ‘race or sports car’

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9 Belgium has three language communities. Many regulations prescribe disclaimers to be in both Dutch and French, the two main languages.
produces an uncertainty. This is further aggravated by not requiring recordation of brand or car type on the policy form. Explanation against the beneficiary is justified from a least cost avoider perspective.

What is supposed to be direct flight between Schiphol (NL) and Beirut (Egypt), on group travel excursion to Egypt, is redirected for an intermediate landing in Brindisi. The passengers are forced to stay in Lebanon for a week. Due to unknown reasons a number of passengers are flown to the capital of Jordan, Amman. The plane crashes and ______(to be completed)

5.4. Misunderstandings resulting from different interpretations of the spoken language, the context in which the contract was made, and forms of non-verbal communication.

Rule 6: Those who interpret spoken language, factual context or non-verbal signs of communication differently than the average bystander (without clarifying how it should be interpreted), are to be held responsible for consequential misunderstandings.

This is a variant on rules 1 and 2 on the interpretation of text.

A married couple spot a piece of land that would perfectly suit their plans to build their dream house. On the site a sign is posted which announces a public sale of land, but without any further information as to the magnitude of the real estate taxes. The sign does include the following message: ‘sign on the premises’ and refers to another address. No further information indicates that the sale concerns the other address. Also, no sign was in fact placed on the land parcel at that address. After the transaction the couple realizes that the sale concerns another piece of land than that where they discover the sign. The court in Rb. Liège 10 April 1989 regards the error as permissible and holds in favour of the couple. The discussion is of special interest: the buyers neglected to examine all indications on the site, notwithstanding the deceptive location of the sign gets the upper hand and the court -correctly- penalizes the seller. A sign on a uncultivated land parcel, which announces a sale, is generally regarded as a sale of the land parcel on which the sign is situated.

An insurance agent negotiates a right of recourse into the contract with his client, for the event that coverage is required on a legal basis, other than contractual liability. The driver of the car in an accident is not the owner of the car or the policy holder. Because he is not a party to the original agreement between policy holder and the insurance company, he claims not to be indebted to any compensation to the insurance company. The misunderstanding thus concerns third party participation into a contractual agreement. The Court of Cassation in Cass. 28 November 1975 holds that by stepping behind the steering wheel of a car which is covered by the owner, the driver implicitly agrees to the applicable terms of the car insurance contract. The underlying reasoning is that an insurer can not always determine beforehand who will drive the vehicle of the policy holder, he is only able to contract with the latter. Therefore, it is requested from each individual driver to inquire whether the car’s coverage accords with his expectations.\(^\text{10}\)

\(^\text{10}\) Cite other cases____ (to be completed).
Rule 7: If someone acts in representation of or on the account of another party, he should clearly explicit this. If he does not do this, he will be personally bound by the agreement.

We cite the following examples. A German building-contractor signs a contract with a German contractor, who in turn, signs with a Belgian subcontractor. A Belgian subsidiary of the German contractor leads the negotiations, closes the agreements and provides instructions without the invoice. It neglects to specify that it works in representation of the German contractor, and refers to ‘our’ work, ‘the contract’, all the while employing its individual letterhead. When the Belgian subcontractor is declared insolvent, the curator turns to the Belgian subsidiary for collection of twelve invoices. The Belgian subsidiary argues that it is not a party to the contract. The court in ... holds that by leading negotiations, closing deals and completing transfers, without explicating the representation of another party, a binding, personal relation to the other parties to the contract is created. The misunderstanding, which is grounded in the assumption of the contractor that the Belgium subsidiary, instead of the German firm, is the main contractor, could have been prevented by ex-ante clarification of the situation by the Belgian subsidiary.

In [case] a director of a firm is condemned to payment of the price of a ______ to which he had agreed, without notifying the other party that he was representing his company. The director was best placed to prevent the misunderstanding. On the aggregate it would be more costly for every contract party to check whether he is dealing with a represented party.

An architect purchases insurance from a cooperative company which offers its members an insurance package with wide coverage: ‘1. Objective: Accidents during work or leisure, also illness; 2. Warranties: Definite disablement: to the amount of 130,00 $ for disablements between 67-100%’. After illness and a surgical operation the architect is diagnosed crippled to a 95% degree. Then, it appears that the cooperation served as intermediary of an insurance group which policies exclusively cover disability through accidents and not illness. The architect was not aware of any contractual relation between the two companies. The court in [case] holds that the legitimate expectation was evoked that the cooperation was insurer, especially since it advertised with the one-liner ‘Insurance by architect, for architect’.

Rule 8: When agreements are not put to paper and when no other type of evidence is produced, both parties are responsible for eventual misunderstandings and no legally binding contract is created.

An agreement between an accountant and a specialized computer dealer consists of the purchase of a new computer installation, a software license and a service contract. When the new installation fails to meet the requirements of the accountant a dispute arises. One of the main disagreements concerns a ‘take-back’ clause. The buyer assumes that only if he could not find an replacement buyer within a month, he was to return the installation to the dealer at a 40% compensation rate to the dealer. The dealer, who thought that the return and 40% compensation was guaranteed in the event of non-compliance of the computer system. The court considers that all arrangements constitute one consolidated contract and tackles the vagueness of the agreement between both parties. Thus, he finds all of them void, due to absence of intent. Within the framework of this contribution, agreements so ambiguous, such that both parties are equally well placed to prevent the misunderstanding, neither version is to be acknowledged.
5.5. **Misunderstandings resulting from errors in the wording of the contract.**

Rule 9: When misunderstandings result from substantive errors in the wording of the contract, the drafter is to be held liable for relatively small errors and the reader for relatively big mistakes.

An average person should be able to detect most substantial errors, such as truly outrageous price offers. In such a case, it requires little effort to request clarification. Consider a confused professor who decides to sell his car second hand at 8000$, but mistakenly advertises 80$. The prospective shopper should realize there is a considerable probability that it concerns a mistake. A misunderstanding may be prevented relatively easily by inquiring seller whether 80$ is the correct, intended price. Relatively minor mistakes (for instance, 8,02$ instead of 8,20$) are not uncommon in everyday sales advertisements. It would be wasteful to require of customers to verify every interesting offer for accuracy. In this circumstance the least cost avoider is the seller, who should be attentive when marking prices. We cite the following examples from the case law. A notary writes an act of sale of a real property. The act of public sale specifies a surface of 280m² (? Square feet). By mistake the public act of allotment reports 380m². The court does not validate the liability suit of the buyers against the sellers and the acting notary. The judge considers the error to be a material error, due to no one in particular. The buyers are owner of the adjoining parcel and were very familiar with the purchased parcel. This case involves a big mistake. Let’s assume for a moment that it concerns an actual misunderstanding. If the buyer is in good faith, it seems fair to speculate that he was best placed to prevent the misunderstanding. Moreover, since the buyer did not notice the two different surface measurements, it seems that he had not spend the effort to read the contract.

The act of sale of a land parcel refers to a report of a land surveyor and to the boundary line. Afterwards it appears that the report contains a gross error. As a result, the buyers obtains considerably less land than anticipated. The court holds in favour of buyer and commands another demarcation of the property. Is it economically more practical to adhere to plans and demarcation poles or to the formal description of the land parcel? From our thesis follows that since both parties were equally well placed to prevent the misunderstanding, annulation of the original contract is indeed justified.

5.6. **Misunderstandings resulting from a party failing to react, or late reaction to written proposals to amend or clarify the contract (including standard terms and conditions made on subsequent invoices).**

Contract terms, included on the invoice, forwarded after the contract is closed (often after one party already performed) often leads to disputes. Nevertheless, there are 3 situations that may be classified under this heading. We distinguish three rules (rule 10, 11 and 12):

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11 See, Rule 1 of ....

12 Cassation is rejected on formal grounds, see ....
Rule 10: Forwarded/mailed contractual clauses on invoices should be read by the other party and when these conditions are not acceptable to this party, then he should communicate his disapproval. If he does not do so, he is responsible for eventual misunderstandings concerning the applicable clauses.

In [case] a municipality repeatedly calls upon the services of a particular garage. The reverse of the invoices of the garage contains a clause that provides that overdue charges are subject to a 10% interest. The fact that the municipality has continued collaboration with the garage during the years, without protesting against these provisions, provides indication of acceptance.

Parties who participate in repeated contract relations are effectively regarded as cognizant of each other’s standard conditions. The court in ... penalizes the municipality by declaring the clauses accepted. When both parties repeatedly engage in mutual business contracts, one may suspect that the debtor is familiar with the general conditions of its creditor. But does it not rest on a fiction to assume that the municipality did indeed agree to the clauses? Did the municipality’s officers closely examine the reverse of the invoice? And if so, did they agree to the terms? There is a considerable probability that [case] concerns a genuine misunderstanding. The garage manager assumes that the clauses on the invoice are accepted, while the municipality officials might not have inspected the invoice, or for that matter, agreed to them. In other words, there is no meeting of minds. The answer, then, to the question as to who is the least cost avoider is straightforward enough: the municipality. By simple notification of disagreement with the terms of the invoice’s clauses the misunderstanding could have been prevented.

Rule 11: When a party has the intention to continue contractual collaboration but fails to communicate this intention or neglects to reply to correspondence on the subject, so that the other party has reasons to doubt such intentions, he will be held liable for ensuing misunderstandings.

Two parties agree on the exploitation of a slug mountain, near a coal mine. After a while, the operators withhold payments to the owners, cease all shipments and remove all construction equipment. The owner notifies the operators that he is inclined to interpret the abandonment of the mine and the removal of all equipment, as a renouncement of the original agreement. The court in [case] held that the operators of the mine are to be regarded in approval with the content of the letter by remaining silent to it.

Rule 12: When a representative or confidential agent in correspondence incorrectly specifies the intentions of the represented party, then the latter needs to correct this. If he omits to do so, the represented party will be held liable for the eventual misunderstanding.

We refer to the following example. In an agreement before divorce on mutual basis a couple agrees that no alimony will be provided to the wife, if she were to remarry. The actual intent of the parties is to cease alimony provision when another person were to provide financial support. The lower court does not read this from the original agreement and furthermore, the couple’s legal counsellor addresses to both of them a letter in which he incorrectly noted that the soon to be ex-

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13 Exploited for exploitation of coal mine derivatives.
wife waived her rights of alimony if she were to reside on one address with her new friend.\(^{14}\) Hence, the mistake is further aggravated by the couple’s counsellor. It was up to the wife to correct the incorrect statement of her lawyer.

### 5.7. Misunderstandings resulting from a failure to react to proposals to amend a contract issued through non-verbal communication.

During the course of doing business unexpected changes may take place. Often parties will adapt their original agreement. Especially with long-term contracts it is common to make mutual concessions to strengthen co-operative ties. Law and sociology theories have emphasized the importance of sentiments of mutual solidarity in so called *relational contracts*. Similarly, game theory has shown that short term altruism may prove the best strategy for a long term self-seeker. We can formulate four rules from the analysed case law:

**Rule 13:** When one of the parties to a contract continues his deliveries (which benefit the other party) beyond the agreed period, although the other party does not desire continuance, it is up to the latter to express this desire.

Tacit renewal is quite common in business circles and often very useful. Silent forms of communication are cost effective: expensive negotiations are avoided and work may proceed. Endurance of co-operation often does not require redefinition of the contract terms. Of course, misunderstanding may develop. One way to prevent this, is to provide the recipient with the incentive to voice his objections.

After the termination of a brokerage-agreement, the broker endures his search for prospective buyers. The real estate property is visited and the broker continues to inform the owner through mail of the progress. The latter does not react to the correspondence. The court classified the case as contextual silence and thus, as tacit acceptance of the continuance of the brokerage agreement. Does this not rest on a fiction? Of course, it does. Although the broker could have accurately examined the original contract and inquire whether his service were requested beyond the contractually agreed period, it is correct, from a least cost avoider perspective to sanction the owner for his negligent communication.

**Rule 14:** When a promisor performs the contract in substantial manner but differently than agreed upon, the creditor needs to take steps to voice his disagreement.

A building contractor signs a building contract with a contractor, which contains the following clause: ‘the agent leaves the owner the choice of architect and the wage will be paid directly to the architect by the principal’. When the building contractor provided advance payments to the architect, he never protested. Afterwards, however, the architect claims his wage from the building contractor. The court in [case] dismisses on the grounds of transformation of rights (FN).

For the constructor payment of the wage through the contractor is intrinsically the same performance as direct payment to the architect. The misunderstanding pertains to the fact that the payment by way of the building constructor is approved by the architect. The architect could have easily prevented the misunderstanding by objecting to the advance payment.

Rule 15: When a promisee consciously continues a contract, although he had the opportunity to terminate it because of non-performance by the debtor, then the debtor may assume that the creditor doesn't want to end the contract. It is up to the creditor to communicate his intention in an unambiguous manner.

In [case] a worker agrees to an individual proposal for accident insurance on the 29th of June. The next day, the worker is involved in an accident. Is the insurance company required to compensate for the accident. More in particular, three questions arise:

(1) ???
(2) general regulation mandates that coverage runs only from the date of the first periodic payment
(3) the company terminates the contract the 16th of October (in application of art 12)

On the one hand the insurance company contends that the contract had not been concluded, on the other hand coverage is suspended in case of non-payment within the stipulated period. Moreover, the individual proposal stipulated that the contract would run from the date of signing. The court concludes that by keeping the fee for the period of the 30th of October, the company had waived the application of art. 12 of the general conditions on the agreement. The insurer of civil liability compensate the losses of parties involved in a car accident, caused by an insured. The company turns to its client to recoup the payment to the victims. The company claims that the policy holder noted a smaller than actual cylinder volume of its car on the policy agreement. If the false statement prompts the company to contract under different conditions than if it were to have the correct information, then the contract is void. The court, however, holds that the insurance company's behaviour contrast with such a conclusion. The prolongation of the contract at the same fee rate, without re-modification provides evidence to the contrary. The essence of the case is that the insurance company is sanctioned for faulty communication after identifying the irregularity.

Rule 16: When the creditor does not react immediately when the debtor performs late, the debtor should not assume that the creditor wanted to give time a period of grace. The debtor should request for clarification.

5.8. Misunderstandings resulting from delays incurred in taking court action.

Rule 17. When a debtor presumes that a delay is due to the creditor's desire waive his right of recourse, while no other facts support this thesis, the debtor must in any event explicitly verify whether the creditor has such intentions.

Rule 18. A creditor who defers to follow suit and provides the creditor with additional indications that create confusion as to his true intentions, is to be held responsible for the misunderstanding.
6. Concluding Remarks

Our analysis of Belgian cases leads us to conclude that Belgian courts have in effect applied the least cost avoider-principle, even though they have not justified their decisions using this terminology. Although the solutions are generated on the basis of a multiplicity of doctrines (mistakes preventing the contract, doctrine of legitimate expectation, the transformation of rights, rules governing standard terms and conditions, tacit acceptance), it would appear that they can all be reduced to the application of one fundamental rule.

The new, economically inspired doctrine, as proposed in this paper, is also superior from a pedagogical perspective. The central notion of ‘misunderstanding’ is something that everybody understands. The doctrine, its division and its 18 rules are much easier to explain to non-lawyers than the abstract traditional doctrines that it proposes to supplant.

What is the role of economics in this doctrine? The 18 rules as such contain no more economics than any other. But they are the result of an economic starting point: the idea that the number of misunderstandings can be reduced by holding responsible the least cost avoider of the misunderstanding. Because the doctrine focuses on the process of misunderstandings, a primary division is made in terms of the factual causes of misunderstandings. In contrast, traditional doctrinal analysis is primarily focused on the subject-matter of the misunderstandings (misunderstandings as to the subject-matter and nature of the contract, as to which clauses apply, as to the precise scope of a clause, as to the person seeking to contract; as to whether or not an offer had to be made, as to the period during which the offer is valid, ...), which is less relevant.

One of the most important roles for law and economics is to design optimally simple legal doctrines. The costs of legal information should be reduced to a minimum. Our thesis provided support for the thesis that the various legal doctrines that govern misunderstandings sustain a superficial need for diversity in doctrine.

It would be very interesting to examine on a comparative level whether our proposition is consistent with the situation in other legal regimes. On an international level, the least cost avoider doctrine would offer an opening to the various initiatives for a unified European code on contract law.

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