UNITED STATES BANKRUPTCY COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

In re: CELSIUS NETWORK LLC, *et al.*,[1] Debtors.	Chapter 11 Case No. 22-10964 (MG) Jointly Administered
CELSIUS NETWORK LIMITED, Plaintiff, v. STAKEHOUND SA, Defendant.	Adversary Proceeding No. 23-01138 (MG) **DECLARATION OF FELIX DASSER IN SUPPORT OF MOTION FOR TEMPORARY RESTRAINING ORDER AND PRELIMINARY INJUNCTION**

I, Felix Dasser, pursuant to 28 U.S.C. § 1746, hereby declare as follows:

1. I am a partner and the former head of the Litigation/Arbitration practice at Homburger, one of the largest Swiss law firms. Homburger advises companies and entrepreneurs on all aspects of commercial law. The firm's arbitration team has extensive experience representing clients in the field of internal commercial and investment arbitration.

2. I obtained my LL.M. at Harvard Law School in 1990 and became an Adjunct Professor of Law ("*habil. Titularprofessor*") at the University of Zurich in 2005. I have practiced

[1] The Debtors in these chapter 11 cases (the "Chapter 11 Cases"), along with the last four digits of each Debtor's federal tax identification number, are: Celsius Network LLC (2148); Celsius KeyFi LLC (4414); Celsius Lending LLC (8417); Celsius Mining LLC (1387); Celsius Network, Inc. (1219); Celsius Network Limited (8554); Celsius Networks Lending LLC (3390); and Celsius US Holding LLC (7956). The Debtors' service address in these Chapter 11 Cases is 121 River Street, PH05, Hoboken, New Jersey (07030).

law for more than thirty years, and during that period, I have acted as counsel and arbitrator (including as sole arbitrator, co-arbitrator, and chairman) in more than 60 international commercial arbitration cases. I am also the President of ASA, the Swiss Arbitration Association. A true and correct copy of my Curriculum Vitae setting out of my professional qualifications and relevant experiences is attached to this declaration as Exhibit A.

3. I have been asked by Akin Gump Strauss Hauer & Feld LLP ("Akin"), acting for Celsius Network Limited ("Celsius"), to provide an expert declaration on Swiss law in connection with Celsius' Motion for a Temporary Restraining Order and Preliminary Injunction. Specifically, Akin has asked me to provide my expert opinion on: (i) how Swiss courts interpret contracts in connection with commercial disputes, and (ii) remedies for breach of contract under Swiss law.

A. Contract Interpretation under Swiss Law

4. Pursuant to Art. 18(1) of the Swiss Code of Obligations ("CO"), in order to determine the content of a contract, a Swiss court would first inquire about the existence of a real common intent of the parties ("meeting of the minds"), i.e. the question of what the parties actually wanted.[2] This is a subjective test; the parties' intent is determined based on their actual subjective intent. If and to the extent that such an actual common intent of the parties can be proven and no specified form is required for the conclusion of a contract, such a subjective interpretation takes precedence over any oral statement or even any written instrument.

5. Art. 18(1) CO on the interpretation of contracts reads as follows:[3] "When assessing the form and terms of a contract, the true and common intention of the parties must be ascertained

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[2] Decisions of the Federal Tribunal [the Swiss Supreme Court] (**DFT**) 138 (2012) III 659, c. 4.2.1 p. 666; NICOLAS KUONEN, Swiss Law of Contracts, Geneva 2022, N 133; PETER GAUCH/WALTER R. SCHLUEP/JÖRG SCHMID/SUSAN EMMENEGGER, Schweizerisches Obligationenrecht Allgemeiner Teil, 11th edition, Zurich 2020, N 1200.

[3] Unofficial translation by the Swiss Federal Office for Justice, available at <https://www.fedlex.admin.ch/eli/cc/27/317_321_377/en>.

without dwelling on any inexact expressions or designations they may have used either in error or by way of disguising the true nature of the agreement."

6. In the event that no true and common intent of the parties can be established, a Swiss court would carry out an objective interpretation by applying the principle of trust (so-called "*principe de la confiance*" / "*Vertrauensprinzip*"). Adopting the perspective of a fair and reasonable party, the court would consider how such a person could and had to understand the use of the words to be interpreted and the conduct of the parties in good faith.[4]

7. Applying the principle of trust for an objective contract interpretation, a Swiss court would rely on different means of interpretation, in particular:[5]

- In general, the objective interpretation of a contract always starts with its wording. As a rule, a written declaration can be taken at face value. Furthermore, special technical terminology must be taken into account among specialists.
- As supplementary means of interpretation, particularly if the wording is not clear, the following factual circumstances may be taken into account:
    - the conduct of the parties prior to the conclusion of the contract. In practice, the negotiation history is crucial: contract drafts, e-mails, conversations leading up to the execution of the contract, etc.;
    - the purpose of the contract and the interests of the parties;
    - place, time, and other circumstances surrounding the conclusion of the contract;
    - prior custom and usage between the parties.

8. The objective interpretation of a contract in application of the principle of good

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[4] DFT 138 (2012) III 659, c. 4.2.1 p. 666; GAUCH/SCHLUEP/SCHMID/EMMENEGGER (fn. 1), N 1201; KUONEN (fn. 1), N 136.

[5] GAUCH/SCHLUEP/SCHMID/EMMENEGGER (fn. 1), N 1205 ff.; KUONEN (fn. 1), N 134 f. and 137; DFT 133 (2007) III 61, consid. 2.2.1; DFT 131 (2005) III 606, c. 4.2; DFT 128 (2002) III 265, consid. 3a p. 267; cf. also DFT 132 (2006) III 460, consid. 4.3.

faith is carried out in accordance with certain rules by Swiss courts, in particular:[6]

- Interpretation must be made "ex tunc", i.e. the time at which the contract was entered into by the parties is decisive; later behavior of the parties is not relevant (it may, however, be relevant for determining a common intent of the parties under the subjective test);

- As a starting point for the interpretation, the wording of the contract is of central importance, but a purely grammatical interpretation is not permitted;

- Interpretation must consider the contract as a whole, i.e. a systematic and teleological interpretation must also be taken into account;

- Interpretation in accordance with the (default) legal rules must be preferred: if doubts arise, preference should be given to the meaning which corresponds to the (default) legal rules rather than to the meaning which departs from them;

- The principle of interpretation "*in favorem negotii*": the legal principle that a court should not interfere with the internal affairs of a business unless there is a compelling reason to do so);

- In some circumstances, in particular for general terms and conditions, the principle of interpretation "*in dubio contra stipulatorem*": the legal principle that where there is doubt or ambiguity about the meaning of the contract, the words of the contract will be construed against the drafter of the contract.

9. By way of additional authority, a true and correct copy of an excerpt from a respected primer on Swiss Contract law by Nicolas Kuonen is attached hereto as Exhibit A.

B. <u>Remedies for Breach of Contract under Swiss Law</u>

10. According to the general rule of Art. 102(1) CO, where an obligation is due, the debtor is in default as soon as he receives a formal reminder from the creditor. For bilateral contracts and subject to contrary agreement by the parties, Art. 107(1) CO provides that where the debtor is in default, the creditor is entitled to set an appropriate time limit for subsequent performance or to ask the court to set such time limit. Pursuant to Art. 107(2) CO, if performance

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[6] GAUCH/SCHLUEP/SCHMID/EMMENEGGER (fn. 1), N 1222 ff.; KUONEN (fn. 1), N 138 ff.; DFT 131 (2005) III 606, c. 4.2; DFT 127 (2001) III 444, consid. 1b; Judgment of the Federal Tribunal 4A_627/2012, 4A_629/2012 of 9 April 2013, consid. 8.5.

has not been rendered by the end of that time limit, the creditor has the following three options: (1) he may compel performance of the primary obligation in addition to suing for damages in connection with the delay or, provided he makes an immediate declaration to this effect, (2) he may instead forego subsequent performance, thereby waive the right to the primary obligation and claim secondary obligations by either (i) claiming damages for non-performance (lost profits under the agreement, so-called "positive interest") or (ii) withdrawing from the contract altogether. Art. 107 CO reads as follows:

> [1] Where the obligor under a bilateral contract is in default, the obligee is entitled to set an appropriate time limit for subsequent performance or to ask the court to set such time limit.
>
> [2] If performance has not been rendered by the end of that time limit, the obligee may compel performance in addition to suing for damages in connection with the delay or, provided he makes an immediate declaration to this effect, he may instead forego subsequent performance and either claim damages for non-performance or withdraw from the contract altogether.[7]

11. Thus, the primary remedy in case of breach of contract is specific performance, but the creditor has the option to choose damages as secondary obligations of the debtor.

I hereby solemnly declare that the foregoing is true and correct.

Executed on August 23 2023

FELIX DASSER

Official certification see reverse side

[7] Unofficial translation by the Swiss Federal Office for Justice, available at <https://www.fedlex.admin.ch/eli/cc/27/317_321_377/en>.

Official Certification

Seen for authentication of the reverse side signature of

Mr. **Prof. Dr. iur. Felix DASSER**, born 3rd May 1958, Swiss citizen of Thalwil und Herrliberg, according to his information residing at Rietliweg 80, 8704 Herrliberg, personally known to us.

The signature was acknowledged before us by an authorized third party.

This legalization refers only to the authentication of the signature and not to the contents or validity of the document.

Zürich, 23rd August 2023
BK no. 2806
Fee CHF 20.00

NOTARIAT UNTERSTRASS-ZÜRICH Kt. Zürich

NOTARIAT UNTERSTRASS-ZÜRICH

Fiorenza Graf, certifying officer

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B. Capulong

Exhibit A

SWISSLEX
User ID: giovanni.dazio@homburger.ch, 09.08.2023 08:09:24

Titel	**Swiss Law of Contracts** **General Principles**
Buchautoren	**Nicolas Kuonen**
Jahr	**2022**
Seiten	**39-54**
ISBN	**978-3-7255-8734-6**
Verlag	**Schulthess Editions romandes**

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§ 5 Determination of the content of the contract

129 The validity of a contract whose essential elements have been agreed upon by the parties, is subject to compliance with certain legal requirements, some of which relating to the content of the contract. It is therefore necessary to determine the content and terms of the contract as to assess their compatibility with the relevant legal requirements. Likewise, where the parties no longer agree on the contractual terms – be they essential or not – at the moment of performance, it is necessary to determine the content of the contract. Such determination is referred to as interpretation and operates within certain rules (I.). Furthermore, and as discussed above (N 114 et seq.), it is not necessary for the parties to agree on all the contractual terms to enter into a contract. Possible gaps, which will be identified by means of interpretation, shall be filled by the judge. Gap-filling obeys certain rules (II.).

I. Contract interpretation

130 Interpretation, which can be defined as the art of determining the meaning of words or conducts, is an important part of the communication process. Interpretation is extremely simple if, for instance, the words used are “clear” – which also results from interpretation. Conversely, it gets more complicated if the words are ambiguous, e.g., they contradict themselves or are inconsistent in relation with other circumstances. Each and every contract, regardless of its form, requires interpretation.

131 A dispute over the interpretation of a contract occurs when the parties do not agree over the meaning of contractual terms. Such a quarrel does not concern the intent of the parties to enter into a contract, but rather the contract’s content. Neither party disputes the contract itself, but there is a disagreement on the meaning of its terms. This does not mean, however, that these two types of disputes cannot arise simultaneously; an error of declaration made by one party, which, in itself, may render a contract void (Art. 23 CO), can lead to a potential disagreement over the content of the contract.

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132 There are two methods of interpretation: subjective interpretation (A.) and objective or normative interpretation (B.).

A. Subjective interpretation

1. Principle

133 In contractual matters, subjective interpretation is the primary focus of interpretation: it aims at determining the real intent of the parties (Art. 18(1) CO). It is about giving the contract the meaning, and consequently the content, the parties actually wanted. Since intent is an internal element to each party, it must be ascertained on the basis of external factual evidence. Subjective interpretation is therefore facts-based and is akin to a “reconstruction” or “discovery” of the common intent of the parties.

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2. Means of interpretation

134 The first means of interpretation lies in the terms and words used by the parties. Even if the law prohibits any fictitious use of terms by prescribing that there is no need to dwell on any inaccurate expressions or designations that the parties may have used (Art. 18(1) CO), the terms of the contract remain the starting point for interpretation. To determine the meaning of the terms one must, in principle, refer to the general and current meaning prevailing at the place and time of the conclusion of the contract, unless the parties use technical terms – in which case their technical meaning prevails. Even if the meaning of the expressions and designation used is “clear”, one must still assess the contractual terms in light of the circumstances as to ensure that their meaning corresponds to the true and common intent of the parties. Put differently, the terms used by the parties prevail as long as other means of interpretation do not reveal a different intent.

135 Beyond the terms of the contract, all the factual circumstances surrounding its conclusion may – and even must – be taken into account when ascertaining the will of the parties. This might include:

–The course of the negotiations and the exchanges that may have taken place between the parties in this context. The parties may, however, outright exclude them from the picture by adding a specific clause in the contract (so called “four-corners clause”, “entire agreement clause” or “merger clause”).

–The behavior of the parties before or after the conclusion of the contract.

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B. Objective interpretation

1. Principle

136 Objective or normative interpretation is a subsidiary method of interpretation: it is only resorted to when it is impossible to establish the true and common intent of the parties. Objective interpretation consists in determining the intent of the parties by applying the principle of trust. In other words, it is a matter of determining, from an objective point of view, the meaning, and, consequently, the content of the contract by adopting the perspective of a reasonable person of the same kind as the parties. Objective interpretation makes it possible to attribute to a party’s statements and conduct an objective meaning even if this latter does not correspond to her personal or subjective intent. Objective interpretation is a matter of law, which is understandable since it does not consist in establishing what the parties actually and truly wanted. It rather consists in framing a common normative intent by applying legal principles. Objective interpretation thus amounts to an operation of construction of the intent of the parties.

2. Means of interpretation

137 The means of objective interpretation are not different from those of subjective interpretation, except that the parties’ statements made or their behavior after the conclusion of the contract must be set aside. They do not play a role in establishing their normative intent.

3. Rules of interpretation

138 Since objective interpretation is a legal issue, it is carried out in accordance with certain rules. In our view, these rules do not apply as such to subjective interpretation, which is a matter of fact-finding.

139 The fundamental rule of interpretation lies in the principle of trust, as inferred from the principle of good faith (Art. 2(1) CC). Accordingly, the judge must seek the meaning of the contract that corresponds to what a reasonable person of the same kind as the parties could or should have understood in the same circumstances.

140 Interpretation must be made *ex tunc,* i.e., the judge must place herself in the position of the parties at the time of the conclusion of the contract.

141 Interpretation carried out in accordance with the (default) legal rules must be preferred. If doubts arise, one should use the meaning that corresponds to the (default) legal rules rather than the meaning that departs from them.

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142 When interpreting a contract, one must consider the contract as a whole, which implies a systematic and teleological interpretation (i.e., related to the purpose of the contract).

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143 Interpretation must, whenever possible, favor a meaning that maintains the contract *(in favorem negotii)* rather than a meaning that nullifies it in whole or in part.

144 Exceptionally, in the case of ambiguity, the interpretation that is unfavorable to the author of the contractual terms must be adopted *("in dubio contra stipulatorem").* This rule applies essentially to the interpretation of general terms and conditions (N 231 et seq.) or to non-negotiated standardized contracts (e.g., insurance contracts).

C. Relationship between subjective and objective interpretation

145 The primacy of subjective interpretation derives from the fact that the contract is ultimately of interest only to its parties and is solely based on their will. However, moving from the contractual field *stricto sensu* to other legal acts, subjective interpretation is of variable importance. For example:

–Unilateral testamentary dispositions (e.g., wills) are interpreted exclusively subjectively; there is no room for objective interpretation.

–The law, understood as the expression of the will of the legislator, is interpreted objectively: the "historical" subjective will of the legislator is only one – and often secondary – of several interpretative methods. This stems from the fact that the law is not meant to apply solely to the people responsible for drafting it, but rather to an indeterminate number of people.

–In between, the statutes of legal persons are interpreted more or less subjectively depending on whether they concern only the founders, a limited number of persons (e.g., in the case of a privately owned company) or the public (e.g., in the case of a publicly traded company).

146 In short, the more the legal act in question is meant to apply to or concern a circle of persons other than those who created it, the more subjective interpretation gives way to objective interpretation. The standard of interpretation shifts from the subjective intent of the declaring person to the understanding that the reasonable addressee has. A contract falls midway between a unilateral testamentary disposition and the statutes of a legal entity. Because a contract does not imply a single declaring party, objective interpretation may be resorted to.

147 While subjective and objective interpretation may, in theory, be clearly distinguished, such is not necessarily the case in practice. As soon as a judge is called upon to adjudicate a dispute relating to the interpretation of a contract, it is often difficult for her to completely disregard the rules of objective interpretation when seeking out the true and common intent of the parties (subjective interpretation).

II. Gap filling

A. Principle

148 The interpretation of the contract may reveal the existence of gaps. A gap exists when the contract does not provide for a specific solution on some contractually relevant matter. To remedy this problem, the judge may be called upon to supplement the contract. A gap may only be filled if it concerns an objectively and subjectively non-essential element of the contract (Art. 2(2) CO); if it does not, the contract is not binding (N 114).

B. Means of gap filling

149 Generally, gaps may – and must – be filled by application of default legal provisions. Where the contract in question is explicitly mentioned in the law ("named" contract), the relevant default rules are those provided for in the law. For other contracts, the general principles should apply (Art. 1 to 183 CO). This view is however disputed. Indeed, some scholars prefer to afford priority to the hypothetical intent of the parties (*see* below). Since default legal provisions are numerous, rare are the situations in which the judge needs to go beyond the mere application of default legal provisions:

–In cases where default rules exist, but also have a (or many) gap(s), the judge must fill the gap in the contract by filling the gap in the law, which requires her to act as a legislator *("modo legislatoris";* Art. 1(2) CC) and to derive a general and abstract rule that can be applied to an indeterminate number of situations.

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