CONTRA PROFERENTEM: A NECESSARY EVIL

SUKRITI JHA & SAARA MEHTA

ABSTRACT

If there arises any ambiguity in a contract, a number of methods may be used to resolve it; in some cases, what is looked at is which party was in a better position to interpret the contract terms, and liability for lack of clarity is pinned on this party. This is termed as the Contra Proferentem rule and has been adopted in many jurisdictions. This article analyses the position accorded to this rule by tribunals and courts, and how readily it is employed in status quo. It is argued that this rule is “functionally an information-forcing default rule” and must be used as a device to incentivize clear contract drafting; at the same time, its potential repercussions must not be ignored. Further, the authors have shed light on how Indian courts have employed and treated this doctrine, while drawing a contrast between the Indian perspective and a global one.

I. DEALING WITH AMBIGUITY IN A CONTRACT

A modern Western tribunal treats the contravention of contract terms by a five-step approach: first, satisfaction of contract terms; second, if the terms were satisfied; the tribunal ascertains presence of genuine consent; third, interpretation of contract terms; fourth, if the agreement does not tackle the focal point giving rise to the dispute or it has a ‘gap’, then the tribunal applies a default rule; and fifth, if a term is violated, expressly or impliedly, the tribunal awards a remedy.

1 Students, National Law Institute University, Bhopal, India.
2 ERIC POSNER (WITH MATTHEW ADLER), NEW FOUNDATIONS OF COST-BENEFIT ANALYSIS 565 (Harvard, 2006).
Although attributed a theoretical distinction, gap filling and interpretation of contracts are interconnected in practice. Gap filling is a matter of judicial interpretation and courts in various jurisdictions use a variety of tools for the same. Judges either use methods of constructive interpretation (using general legal principles) or the implication of terms (involving default rules prescribed by a statute). Under constructive interpretation, in jurisdictions like Germany, Austria and Switzerland, the judges interpret the contract in pursuance of its complete purpose, business practice and good faith. French tribunals, on the other hand, resolve gaps in the contract by relying on the common intention of the contracting parties.

The different reasons as to why a contract is uncertain or deficient vindicate the different methods used to interpret contracts. In certain cases, the ambiguous language is determined to suit what the parties would have agreed to had they actually discussed the term. This approach is termed as a majoritarian approach, or also designated as the ‘market-mimicking’ approach. In other cases, the unclear contractual term is interpreted against the party who drafted it. This approach assumes the nature of a penalty and is termed as an ‘information-forcing’ default rule.

One of the hazards of the court operating as a “cheap contract drafter”, that is, supplying contract terms to lower the parties’ transaction costs and essentially redeeming the contract, is that the parties lack motivation to draft

---

4 HEIN KOTX & ALEX FLESSNER, EUROPEAN CONTRACT LAW Ch. 7 (Vol I Clarendon Press 1997).
5 Id.
6 Supra, note 2.
7 RICHARD CRASSWELL, FOUNDATIONS OF CONTRACT LAW 15 (Foundation Press, 2000).
a sound contract themselves. Consequently, there should be certain judicial instruments that check the courts’ involvement in contract interpretation and entice parties to decrease the risks arising out of a carelessly drafted contract.

In many cases, it is possible to pinpoint one party, which is in a better position to elucidate the vague terms in a contract. This situation may arise when agreements are drawn out between parties who have contracted with each other previously. In such cases, imposing liability on the party who was in a better position to interpret the contract - possibly because it was involved in the drafting of contract terms - seems like a better option. The risk of courts erroneously interpreting contracts or supplying terms is definitely a compelling one. It would be suitable to let the parties be liable for contract interpretation as against the court that was a distant party throughout the transaction.

The Contra Proferentem rule comes to the rescue of courts in such situations. Succinctly, the Rule states, “Ambiguities in the language of a written contract should be construed against the drafter of the unclear term.” It is distinct from other maxims of contract interpretation, with commentators going as far as saying that it is not a rule of interpretation but a rule of policy that “favors the underdog.” This it because it does not aid in establishing the meaning that two parties gave to the contractual terms. It is recognised by and codified in common law countries (UK, USA, Canada,

9 PHILIPPE FOCHARD & BERTHOLD GOLDMAN, FOCHARD, GAILLARD, GOLDMAN ON INTERNATIONAL COMMERCIAL ARBITRATION 827 (Kluwer Law International 1999).
India), several Romanistic jurisdictions (those in Latin America, France and Belgium) and in the Austrian Civil Code as well.

The rationale behind the rule was that he who caused a misunderstanding by furnishing an unclear term could have avoided it by being clearer about it. Historically, the rule has been one used as a last resort. The judicial consensus is that this rule is applied only when all usual methods of interpretation have been exhausted; it is a subsidiary rule of interpretation.

The long-standing maxim *verba chartarum fortius accipiuntur contra proferentem* has been used in contract interpretation, law relating to evidence, and deeds as well. In Britain, the doctrine has been predominantly applied to contract clauses, which attempt to constrain or eliminate liability, but there is a clear dichotomy in the treatment of limitation versus exclusion clauses, the latter being construed more vigorously. In the USA, disclaimer as well as limitation clauses in commercial contracts are subject to restrictions in the shape of *Contra Proferentem*. The general rule is that the drafter should bear in mind public policy considerations, inconsistencies in drafting, good faith, restrictive interpretation and informed consent. The *Contra Proferentem* features in American cases as well as in the Uniform Commercial Code and the Restatement (Second) of Contracts.

---

12 As most clearly explained in a 1619 treatise by Antonius Faber, the rule had to be conceived as a subsidiary or tiebreaker rule, i.e. it can only be applied when neither party can prove what they agreed upon.
13 First Travel Corp. v. Iran, 9 IRAN-U.S. C.T.R 371.
16 Supra, note 2.
For the rule to be applicable, it must be ascertained or be capable of being ascertained as to which party drafted the contract. This loses significance and application when the parties enter into negotiations before formulating the contract. In such cases it cannot be established as to which party is at a lower bargaining power (the rule applies only when there is a difference in the bargaining positions of parties) or which party unilaterally dictated the ambiguous term in question (since the contract is a result of mutual consultations between the parties). This rule has been classically applied to standard forms of contract in Anglo-American, Scandinavian and Romanistic law amongst others.

In Germany, before the codification of this rule in 1977, the courts interpreted standard form contracts by applying the Roman axiom (a primitive variation of the doctrine itself) stating that the drafter should have expressed himself clearly in the contract. The ambiguity was resolved against the party who was responsible for including it in the contract.

In the French and Belgian legal systems, Contra Proferentem is applied to standard forms of contract as a rule made by judges. Standard clauses are interpreted against the drafter when he exploits them for his own account. Presently, there are statutory provisions that dictate Contra Proferentem interpretation of any standard form contract in Austria, Germany, Italy and Spain and many other nations.

---

19 Cserne, Supra note 2.
20 Id.
22 Austria: ABGB §915, Italy: Codice Civile Art. 1370, Spain: Codigo civil Art.1288, Germany: BGB §305c II.
In its entirety, the *Contra Proferentem* rule has had a diverse application from the Middle Ages to commercial contracts in the 21st century. The principle manifests itself as\(^{23}\):

- A general rule in contract law;
- Against the drafter in a vague standard form contract; and
- A benefit to the customer.

In recent statutes and codes, legislators have been successful in merging all three presumptions of the rule. For example: Article 6.193 Section 4 of the Lithuanian Civil Code provides: "In the event of doubt concerning contractual conditions, these shall be interpreted against the contracting party that proposed such conditions, and in favour of the party that accepted them. In all cases, the conditions of a contract must be interpreted in favour of consumers or a party who concludes a contract by way of adherence."

**II. CONTRA PROFERENTEM AS A DEFAULT RULE**

The *Contra Proferentem* rule has various rationales as provided by jurists and yet is considered a rule of the last resort because it is not, strictly, a rule of interpretation\(^{24}\). In consumer contracts, it is said to be “protecting the weak”\(^{25}\), i.e. when parties were not at an equal footing in framing the contract terms. The ambiguity in the contract term drafted or otherwise supplied by a party may deceive the other party, and therefore it is

\(^{23}\) Cserne, *Supra*, note 2.

\(^{24}\) ARTHUR LINTON CORBIN & JOSEPH PERRILO, CORBIN ON CONTRACTS 51 (Vol 3, 1960).

imperative to have the device of Contra Proferentem ready. Since the party that drafts the contract has both real and apparent power over the language used in the contract, this rationale can be used to hold him responsible for the resulting ambiguity in the contract. The party drafting the terms of the contract should not leave it with gaps deliberately, with the intent of misusing ambiguities created by such gaps later.\(^{26}\)

The rule is not only applicable in cases of disproportionate bargaining power, although superficially it may seem so. Contra Proferentem is more a tool for correcting the distorted communication of information between the parties\(^{27}\) and essentially upholding the sanctity of the contract. The rule is also included in the UNIDROIT Principles, 2010\(^{28}\) and is alluded to in the CISG in Article 8, which relates to contract interpretation. These rules are designed for commercial contracts entered into between parties from different countries, which are usually parties at an equal footing.

A disparity in bargaining power between companies at an international level seems unlikely because contracts are thoroughly negotiated and discussed before they are finally entered into. If perceived as a default measure, the rule can plug in the deficiency in the contract by incorporating a rule which is adverse to the drafter of the ambiguous term. The drafter of the careless term will then be compelled by law to: firstly, ensure meticulous drafting of the contract and secondly, divulge to the other party or the court as to why the term was drafted and what the party planned to gain from it. This guarantees a transparent procedure for contract framing.

This essay seeks to establish that Contra Proferentem is not only a rule of


\(^{27}\) Cserne, Supra note 2.

\(^{28}\) UNIDROIT Principles 2010, art. 6.4.
policy but also a legal apparatus, which safeguards the drafting of a contract. It checks careless drafting and precludes the drafter from misleading the other party, which is seemingly at a lower bargaining power. It is “functionally equivalent to an information-forcing (penalty) rule29” but whether it can be used as a default rule needs to be proved. Apart from creating an incentive for the drafter to frame the rights and obligations properly, the rule will function as an interpretative device for the judiciary30.

The Contra Proferentem Rule must not be confused with the rules for information disclosure. The rules for disclosure of information relate to parties’ conduct or quality of goods, not with the semantics of the contract per se31. Contra Proferentem will ultimately result in a precise and clear contract and will economically benefit the parties by reducing costs of obscurity and re-drafting.

III. PROBLEMS ASSOCIATED WITH CONTRA PROFERENTEM AS A DEFAULT RULE

Achieving clarity in contractual language and then holding a particular party responsible for it is not as straightforward as it seems. Since contracts are drafted by man, they will always have possibilities of error and unclear language since absolute lucidity in language cannot be delineated. Holding the drafter “strictly liable for ambiguities32” would amount to a travesty of justice.

30 ERIC POSNER (WITH MATTHEW ADLER), NEW FOUNDATIONS OF COST-BENEFIT ANALYSIS 565 (Harvard, 2006).
32 Id.
Interpretation resulting from the *Contra Proferentem* rule would not necessarily be in favour of the non-drafting party; it can be in favour of third parties as well. *Contra Proferentem* cannot be applied as a straightjacket formula because contractual interpretation might have certain grey areas.

Standard form contracts, which are predominant in industry and trade, contain homogenous language, which is understood in a particular way by the parties involved. Parties outside the industry and trade sector may perceive these terms as unclear. In such situations, using *Contra Proferentem* against the drafter would be unfair because the court will then read the terms against the industry. This decision however, will disrupt the normal working of the industry and will not encourage the firm to make a clear contract. Adhering to standardized terms is easier and more convenient whereas individual deviance is expensive\(^{33}\). Standard forms of contract are, therefore, not receptive to the *Contra Proferentem* doctrine.

Insurance contracts also, in particular, do not adhere to the rule of *Contra Proferentem* because they are more dependent on judicial outcomes\(^{34}\) concerning risks covered by the insurance contract. The language of insurance contracts is not easily changed even after the court has applied *Contra Proferentem*.

Several contracts include clauses so as not to apply the contra proferentem rule. The Anti-Contra Proferentem doctrine in sales-purchase contracts, for instance, specifically prohibits the use of *Contra Proferentem* and states “no weight will be placed on the party, which drafted the agreement\(^ {35} \)”. The Construction of Agreement clause in service contracts also prohibits

\(^{33}\) Cserne, *Supra* note 2.
\(^{34}\) Id.
ambiguities from being resolved against the drafting party\textsuperscript{36}. Loan contracts, bankruptcy agreements, merger agreements as well as joint venture contracts include clauses to exclude the applicability of \textit{Contra Proferentem}\textsuperscript{37}.

\section*{IV. The Indian Perspective}

The \textit{Contra Proferentem} doctrine, as applied in India, can trace its roots to English Common Law jurisprudence. Courts have, if contract terms are drafted in a manner excluding or limiting a party's liability, used the doctrine of \textit{Contra Proferentem} and constructed the terms against the party who is benefiting from such exclusion clauses, a practice evident since the 20\textsuperscript{th} century.\textsuperscript{38}

Defining how the doctrine applies in India, the Apex Court has stated in a recent decision that “The Common Law rule of construction ‘\textit{verba chartarum fortius accipiuntur contra proferentem}’ means that ambiguity in the wording of the policy is to be resolved against the party who prepared it.”\textsuperscript{39} In the same decision, the court also relied on MacGillivray’s \textit{Insurance Law}, wherein he has stated that it is only when the court has exhausted ordinary means of interpretation that this doctrine must be relied upon; one must not use the rule to create the ambiguity and actually find the ambiguity

\textsuperscript{36} TRANS-LEX LAW RESEARCH, 926000, (Nov 1, 2017 09:30am), https://www.translex.org/926000.


\textsuperscript{38} Andrews v. Singer (1934) 1 KB 17 (England); Wallis, Son and Wells v. Pratt (1910) 2 KB 1003 (England).

\textsuperscript{39} M/s. Industrial Promotion & Investment Corporation of Orissa Ltd. vs. New India Assurance Company Ltd. & Anr., 2016 SCC ONLINE SC 842.
before employing this rule. The court also went on to refer to Colinvaux’s *Law of Insurance*, which provides that “turn of the scale ought to be given against the speaker, because he has not clearly and fully expressed himself. Nothing is easier than for the insurers than to express themselves in plain terms.”

In India, the *Contra Proferentem* rule has been applied extensively in the field of insurance contracts. The Supreme Court has held that contracts of insurance are no different from ordinary contracts, barring the fact that in a contract of insurance, there is a requirement of *uberima fides*, i.e., good faith on the part of the insured. For this reason, the contract is highly likely to be interpreted *contra proferentes*, i.e., against the company, in case there arises any ambiguity or doubt. The judgment goes on to say that it is not the duty of the Court to make a new contract, even if that seems reasonable; the court must only interpret those words that have been used by the parties. Even if the insured party has had an opportunity to go through the entire text of the contract, any ambiguity in the contract of insurance must be construed against the insurer. The same court in another case distinguished between standard policy and regular contracts, holding that only in the case of the former could the rule of *Contra Proferentem* be used in contract interpretation.

In a case wherein there was a question regarding interpretation of provisions of the Voluntary Retirement Scheme of 2000 of the appellant bank, it was held that given the fact that it was the bank which had drafted the scheme, under which it was provided that “the optees of voluntary retirement under

---

40 *Id.*
41 *Id.*
43 *Id.*
45 United India Insurance Co. Ltd. v. Orient Treasures (P) Ltd., 2016 SCC ONLINE SC 32.
that Scheme will be eligible to pension under the Pension Regulation, 1995”, it would be the bank which would bear responsibility for any ambiguity arising in the scheme’s interpretation. In another case, the Apex Court stated that in the light of the whole policy, the contract was to be interpreted in the favour of the insured party; the court used the Contra Proferentem rule impliedly, simply by stating that any ambiguity in the words of the document shall be construed against the person who prepared the document.

It has been strongly stressed by the judiciary that a court’s duty extends only so far as to interpret the terms used by the parties, and not replace those with its own contract. It has been held that while engaging in interpreting the parties’ words and intentions, the court must refrain from doing anything that makes it “venture into extra liberalism that may result in rewriting the contract or substituting the terms which were not intended by the parties”. It is a settled position of law that “under the garb of construing terms incorporated in the agreement of insurance”, the court must not interfere in the contract of insurance by substituting terms capriciously; no exceptions may be made for equity. Courts have considered the presence of an ambiguity sine qua non for application of the doctrine, and have stated that the rule must not be used to create the ambiguity in any case. In a recent case involving an insurance policy dealing with burglary and house-breaking, there was a dispute about the applicability of a term in the policy according to which a claim required a “forcible entry” into the house. On these grounds, the insured company’s claim was rejected. The insure company’s complaint to the MTRP Commission was rejected and a

49 Goetz & Scott, Supra note 7.
subsequent appeal to the Supreme Court led to the order being upheld; the Apex Court observed that there being no distinction between a contract of insurance and an ordinary contract, it should be construed strictly without adding or deleting any of its terms, and that in the absence of an ambiguity, the Contra Proferentem doctrine finds no application in the present case.\(^{50}\)

Courts in India have unequivocally held that the Contra Proferentem doctrine must not be applied in the field of commercial contracts. Relying on the decision in K. Mohandas, wherein it was held that banks which drafted a voluntary retirement scheme would be liable for any ambiguity arising in it, the respondent in a case argued that since it was the petitioner who had drafted the contract, it would be interpreted against the petitioner. The Supreme Court, however, stated that seeing as the present case dealt with a commercial contract “which is a bilateral document mutually agreed upon”, there is no scope for applying Contra Proferentem, and thus the ratio in K. Mohandas would find no relevance.\(^ {51}\) A contract executed by and between parties “with open eyes” cannot attract the Contra Proferentem Rule even if an ambiguity arises; if a party does not challenge the terms of a contract during the contract’s execution or during the execution of the work, nor does it clarify its questions or doubts regarding the contract with the other party, then such a party must not be allowed to take advantage of there being an ambiguity in the contract terms. It had every opportunity to rectify such an ambiguity earlier, which it did not utilize.\(^ {52}\) In some cases, the court has gone so far as to exclude the application of Contra Proferentem in the case of insurance contracts as well. In a Supreme Court case, it was held that an insured party cannot claim in an insurance contract more than the

\( ^{50} \)M/S. Industrial Promotion & Investment Corporation of Orissa Ltd. v. New India Assurance Company Ltd. & Anr. (2017).


\( ^{52} \)M/S Oil and Natural Gas Corporation Ltd. v. M/S Interocean Shipping (India) Pvt. Ltd. (2017).
words of the contract guarantee him; the terms of the contract should be harmonized with each other and must be read as they are. In another case, it was held by the same court that an insurance contract is itself a kind or species of commercial contracts and thus its interpretation should be by itself and to its own terms.

Insofar as expounding on the general feasibility and practicality of this rule, the Supreme Court has been careful to neither extoll the virtues of nor criticize the Contra Proferentem doctrine, stating quite cautiously that “…no rule of interpretation should either be overstated or overextended. It points to the conclusion that an interpretation which would attain the object and purpose of the Act has to be given precedence over any other interpretation which may not further the cause of the statute. The development of law is particularly liberated both from literal and blinkered interpretation, though to a limited extent.”

V. Conclusion

As observed both in foreign and Indian jurisprudence, the rule of Contra Proferentem must be used sparingly and cautiously, owing to its possible repercussions. Under no circumstances should it be allowed to become the default rule of contract interpretation. However, it may be used to incentivize clear contract drafting. The basis for the rule should be the drafter, but interpreting it as a matter of policy is not advisable because of the ‘side-effects’ it can trigger. Other rules of interpretation will always have priority over the rule, and this is essential because of the inherent defects in applying it as a blanket provision. It is opined by the authors that

54 Supra note 10.
seeing as the need to use *Contra Proferentem* can arise in commercial contracts as well - as show - perhaps the Indian judiciary could rethink its position on the existing bar on applying *Contra Proferentem* in commercial contracts.