The Contractual Interpretation Rule - Contra Proferentem : It's Relevance in Modern Law

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Introduction

The relentless and unabated onward march of Covid- 19 across the jurisdictions world over, has successfully weighed down with nameless pain the economies of all Nations, high and mighty or small and insignificant.

If the fortunes of powerful corporates appear to crumble under its merciless attack, the woes of less fortunate are even worse off. The Corona Tsunami, has forced the Corporates not only speed up their cope up strategies for their Business Continuity arrangements and completion of their annual corporate targets but has also galvanized them to restrategise their future business commitments and plans against the backdrop of a very grim and recession bound economies world over. As an offshoot of this, companies may be bracing up for litigation arising out of broken performances or failed commercial obligations under various contracts through which they have allocated and distributed expected business risks. Commercial Contracts ranging from infrastructure projects, lending arrangements, insurance, custodial services, supply of goods and services, maintenance etc., will go through the process of examination for remedial action in case of non-performance. Similarly, a whole range of international contracts may also

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be under the sway of this universal scourge and as such, there would be doubtless careful scrutiny of the commercial contracts for the purpose of enforceability by lawyers in all the jurisdictions. In all these exercises, there would definitely crop up issues of how the contracts were worded and whether the parties have consented to the terms the way they were worded in those contracts. Generally, the commercial contracts that are drawn between the parties are purely guided by the considerations of business sense, mutual rights and obligations and the practices of the specific area of business activities etc., The parties to the contracts in their own interests take care to set out in very clear terms their rights and obligations so that the possibility of the same being challenged later on is avoided. So long as the main pillars of an ideal contract, *viz.*, competency to contract, consensus ad idem (free consent of the parties), lawful consideration, lawful object and not declared as void, are laid up on the foundation of a free contractual relationship, there may not any scope for dispute. However, structuring a perfect contract, giving rise to rights and obligations leave alone commercial contracts where financial stakes are involved, is as tortuous and tedious through negotiations as the expensive process of its enforcebility in the event of a dispute. When a dispute arises in a contract, the Courts resort to the process of interpretation of the contents of the contracts and try to fill up the gaps.

Contract Interpretation

In the doctrinal legal literature, the common intention of the parties is considered the 'natural'or straightforward starting point of contract interpretation.This is mainly due to the fact that the implicit or often explicit contract theories behind the rules of western legal systems (bargain theory, will theory , party autonomy) are reflected in contract

interpretation[1]. In many western jurisdictions there are clear prescriptions in the Civil Code/Statutes governing the rules of interpretation of contracts to be applied by the Court. While it is true that generally the freedom to contract as a principle in law, is untrammelled by restrictive irritants of any compulsive factors, such contracts are also not totally free from limitations. For instance, such limitations could assume the forms of insufficient considerations or unconscionable terms imposed by one of the parties, or even statutory restrictions or prescriptions on the operation of the contract etc.[2], Ultimately, the ambit of freedom to contract is determined by the levels of limitation found in each contract and how the Courts undertake the process of "gap filling" through tools of interpretation.

"There are many substantive rules which are not supposed to enforce the parties' intentions, actual or hypothetical, rather they set limits to freedom of contract. Similarly, while contract interpretation has the parties' bargain at least as its ultimate goal, in some cases the purpose of contract interpretation is not to find and give effect to the intentions of the parties but to achieve other goals[3]."

It is interesting to note that in most of the cases the focus of the starting point of interpretative rules are the intentions of the parties to a

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[1] Policy considerations in contract interpretation: the contra proferentem rule from a comparative Law and economics perspective, Peter Cserne, Univeristy of Hull, From the Selected works of Peter Cserne, October 2009.
Besides national legal systems (Art.1156 French Civil Code, ss133, 157 German BGB; Art1362 Italian Codice Civile; Art.18 SwissLaw of Obligations; ss1425 Quebec Civil Code; 2-202 UCC;
Restatement(second) of contracts etc., various international agreements and "soft"legal instruments contain rules on contract interpretation (CISG Art8; UNIDROIT Principles Art4; Ch.5.101 Principles of European Contract Law).

[2] Freedom Contract Richard Craswell, University of Chicago Law School, Coase-Sandor Working Paper Series in Law and Economics, 1995, pp 1-2.

[3] Policy considerations in contract interpretation: the contra proferentem rule from a comparative Law and economics perspective, Peter Cserne, Univeristy of Hull, From the Selected works of Peter Cserne, October 2009.

contract whereas some interpretations focus on what is least favourable to the drafter of the contracts.

One such rule of interpretation is the rule of *Contra Proferentem*. The clause or language or words in a contract would be interpreted against the party which authored or introduced it. The Latin maxim '*verba cartarum fortius accipiuntur contra proferentem'* means words must be construed against those who use them. Initially applied in the 17th century in the matter of *Manchester College v Trafford (1679*), Lord Coke popularized it with his statement: It is a maxim in law, that every man's grant shall be taken by construction of law most forcibly against him.[4]

Historical Development of Contra Proferentem Rule

The concept of *'Contra Proferentem'* as understood in the present context appeared to have been accorded a lesser or subordinate significance in Roman law and it was introduced as a general rule of interpretation by the Glossators of later period. It appears that the scattered utterances of some of the Roman Jurists, later on became the source (*fons*) or origin (*origo*) rule of law. One source of principle of law is "contra proferentem". For instance, Celsus, an eminent Roman jurist, articulated a formulation that in case of ambiguity, it should be interpreted against the stipulator. It was he who structured the wording that formed the subject matter of the "stipulation" and any ambiguity in that should be attributed to him as he could have always expressed it in more clear terms indicating what he wanted the party to do or promise under the "stipulation". The concept of ambiguous language being held against the stipulator also extended to contracts of sale or lease as in the case of contract of sale, the terms are always drawn up by a seller and in the case of lease agreements, the terms are drafted by a lessor. However, as mentioned earlier these were fragmented pieces of concepts found in

[4] The Interpretation of Contracts, by Sir Kim Lewison, A Lord Justice of Appeal, fifth edition, South Asian Edition South Asian Reprint 2016, Construction Contra Proferentem,133-footnote,Co.Litt 36a.In Co.Litt183a Lord Coke, p 360.

the Digest with no evidence to suggest they found practical applications in those days[5].

In classical Roman Law, according to Pomponius, a Roman jurist, ambiguity rule was only a subordinate rule as the concept of '*Id quod actum est*' was broad enough to advert to both the 'will' of the parties to the contract as also the objectives and features of the contract. Accordingly, jurists used the flexibility of this rule to interpret the contract from objective as well as subjective viewpoints and only when this concept failed, did they resort to the ambiguity rule. Hence, subsidiary rule like "*ambiguitas contra stipulatorem*" did not have a major role to play in the classical Roman laws.[6]

However, the glossators of medieval period introduced this concept of "contra proferentem" as part of rule of interpretation in general to resolve ambiguous language found in deeds and contracts. The person who drafted the document always took care of his interests and did not reflect or took into account the interests of the other party. Interestingly, in most of the cases, it was the creditor who benefited from the special terms that were introduced in the deeds and there was a need to protect the interests of debtor and the only way it could be done was through the use of "contra Proferentem'

Even in modern times, there were unfair terms in Standard contracts and the drafter of such standard terms had always had his interests more than that of the ultimate customer or buyer and the drafters' expressions or stipulations always prevailed in such contracts. The weak bargaining or economic conditions of an ultimate customer did

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[5] The Law of Obligations, Roman Foundations of the Civilian Tradition, Dr. REINHARD ZIMMERMANN,Juta & Co, Ltd, WETTON,CAPE TOWN, JOHANNESBURG First edition 1990, Reprinted 1992, 4. Rules of Interpretations: the contra proferentem rule, pp 639-640.

[6] The Law of Obligations, Roman Foundations of the Civilian Tradition, Dr. Reinhard Zimmermann, Juta & Co, Ltd, Wetton, Cape Town, Johannesburg, First edition 1990, Reprinted 1992, 4. Rules of Interpretations: the contra proferentem rule, p 640.

not enable her to do sophisticated negotiations which could result in fair deal to both the parties. This always resulted in one sided uniform standard contracts seriously prejudicing the interests of one party. As the Codes of laws of the land did not and could not cover all these scenarios, the Courts had to heavily rely on this rule of interpretation.

It was Lord Sir Edward Coke, former Chief Justice in the King's Bench, England, who in the sixteenth century introduced the concept of "Contra Proferentem" in English common law system. He was followed by Francis Bacon, who propounded the concept as an interpretative tool to unravel the mysteries of obscurity and ambiguities in deeds. It was also used which portion of conflicting expressions used in a document would be treated as valid in law.

However, later on William Blackstone came out with a combination of the rule of earlier times with what was practiced during his time. He believed that the concept would effectively deter the parties from acting unfairly and it would ensure that the parties to the contract do not indulge in deceitful practice of couching ambiguous and indeterminate expressions with an intent to exploit later.

Theories of Intention and Expression

Contractual interpretations arise only when a gap arises between what parties intended and what they have put down in writing. There are two different ways of assessing such gaps. The first one is focused in determining the intention of the parties to the contract. This approach recognized that the obligations of the parties arose from the intention or free will of the parties.

The other approach is centered on the premise that the importance should be given to the external expression or what others actually say and not on the intent of the parties. The ancient Roman law also witnessed oscillation between these two types of interpretation. Externalities such as utterances of specific words or following specific procedures were

required to create legal obligations between the parties and not the intention of the parties. Later on, it was under the influence of Greek Philosophy and Christianity, that the influence of intention or will of the parties was counted for creation of legal obligations or rights. The expressions of *'voluntas'* (intention) prevailed over the '*verba*'(utterances)[7]. Until the late 19th century, the Subjective Theory of Interpretation had occupied the centre stage in the discourses of legal literature, though no specific evidence is available to what extent this subjective theory was in practice. However, while going through the European legal literature, one cannot escape the overriding influence of the subjective theory over its Codes, some of which are still part of them. The French Civil Code set the tone to be followed by other European jurisdictions. For instance, in the French Code the intention of the parties must be ascertained in a contract[8], *i.e.* "*one must in agreements seek what the common intention of the contracting party was, rather than pay literal meaning of the terms*." The German Civil Code also stipulates that the real intention of the party is necessary to find out instead of sticking to the literal meaning[9]. *i.e.* In interpreting an expression of intention "*it is necessary to ascertain the true intention rather than adhering to the literal meaning of the declaration*". Though the language used *supra* in both French and German Codes, appear to indicate that the respective Codes are adhering to the "Subjective Theory" , the same is not the case as this "intention approach" is sobered down by separate provisions set out in both the Codes with "objective approach as well". For instance, the French Code contains provisions to interpret contracts based on good faith, usage and customs[10], in terms of Art.1135,

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[7]Contract Law, Second edition, Hein Kotz, translated by Gill Mertens & Tony Weir,2017, Chapter 6, Interpretation of contracts, B. Intention and Expression: the two theories

[8] Article 1156, French Civil Code

[9] BGB ss. 133

[10] Art.1134 of the French Civil Code stipulates that they should be performed with good faith.

"Agreements are binding not only what is expressed therein, but also as to all the consequences which equity, usage or statute give to the obligations according to its nature". Art.1160 states, *"Terms which are customary in nature shall be supplemented even if they are not expressed therein"*. Similarly, the German Code also contains interpretative rules of good faith and customs and usages.[11]

Interestingly, another European jurisdiction, the Austrian Civil Code combines the theories of subjectivity and objectivity by stipulating that instead of sticking to literal meaning of the words, intention of the parties should be ascertained along with the decent business practices[12]. Nonetheless, the parties can always express and attach special meaning to the words, instead of common meaning and can demonstrate that always it is their intention rather than expression used in the document that gives rise to contractual obligations. In such cases, the rule *"falsa demonstratio non nocet"* comes into play. In any case, Common Law also recognizes that if parties can demonstrate continuity of meeting of minds (*consensus ad idem*), the written expressions of the contract are trumped by such intention. This can be accomplished through rectification of contract or acceptance of mistake by the other party in drafting from what was intended[13].

Generally, disputes arise only when the parties to the contract attach different meanings to the same words set out in the contract and in such cases it may not be worthwhile to be guided by the intention of the parties. In such cases, the test would be what meaning is given to those words by a 'reasonable person' who is placed in that position in the context of all relevant circumstances to which he could been made aware of. The 'reasonable person' test has been amply reflected in the UN

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[11] BGB ss. 157

[12] ABGB ss. 914

[13] Contract Law, Second edition,Hein Kotz, translated by Gill Mertens & Tony Weir,2017, Chapter 6, Interpretation of contracts, B. Intention and Expression: the two theories

Convention on Contracts for International Sale of Goods[14]. English Common Law also recognizes the principle of "*interpretation is the ascertainment of the meaning which the document would convey to a reasonable person having all the background knowledge which would reasonably have been available to the parties in the situation in which they were at the time of the contract"*[15].

While the reasonable person test seeks to impart clarity to the unclear terms of a contract, there are rules of interpretation representing legal value judgment which seeks to accord the best possible meaning in conformity with that value judgment[16]. The Civil Code stipulates that in the event of a doubt in contract negotiated individually between the parties, it should always be construed against the creditor and in favor of a debtor[17] and a contract of sale should be construed against the seller and in favor a buyer[18]. This was on account of the general presumption that the seller or creditor was always in a position of advantage and the buyer or debtor was always an underdog and more often than not, the contracts are drafted by the sellers or creditors and they could have drafted it better by distributing the risks fairly among the parties to the contract. The risks arising out of the ambiguities in the contract could have been avoided by the drafter of the contract and accordingly he should bear the cost of ambiguities.

Application of the Concept of *Contra Proferentem*

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[14] Art. 8(1) & 8(2) of UN Convention on Contracts for International Sale of Goods

[15] Lord Hoffmann's speech in Investors Compensation Scheme v. West Bromwich Building Society, (1998) 1. W. L. R. 896.

[16] Contract Law, Second Edition, Hein Kotz, translated by Gill Mertens & Tony Weir,2017, Chapter 6, Interpretation of contracts, C. Objective Interpretation

[17] Art. 1190 of Civil Code

[18] Art. 1602(2) of Civil Code

Invocation of this concept arises when there is an ambiguity in a term of contract contributed by a drafter of such a clause[19]. In other words, the '*Contra Proferentem*' principle itself will come into play only when it is absolutely clear that a party has drafted an ambiguous term in a contract or he has played major role in drafting that.[20]

A literal translation of the principle is "the words of documents are to be taken strongly against the one who 'puts forward'. This could mean:

1. The person who prepared the document as a whole;
2. The person who prepared the particular clause;
3. The person for whose benefit the clause operates[21]

This ambiguity has led to the principle having been formulated in many different ways over the years, and as a result the formulations are not always entirely cohesive"[22].

The following are the various ways how this concept of "puts forward" could operate:

1. A person, who has been entrusted with the task or responsibility of drafting the terms alleged to have been ambiguous, will be the person against whom it will be construed even if the other person had a hand in the drafting. "Whoever holds the pen creates the ambiguity and must live with the consequences"[23]

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[19] Contract Law, Second edition,Hein Kotz, translated by Gill Mertens & Tony Weir,2017, Chapter 6, Interpretation of contracts, D.Maxims of Interpretation.

[20] Ibid.

[21] The Interpretation of Contracts, Fifth Edition by Sir Kim Lewison, A Lord Justice of Appeal, South Asian edition Reprint 2016), 8. Construction Contra Proferentem 7.08-(b), p. 362.

[22] The Interpretation of Contracts, fifth edition by Sir Kim Lewison, A Lord Justice of Appeal, South Asian edition Reprint 2016),8. Construction Contra Proferentem 7.08-(b), page 362

[23] Justice Binnie, Co-operators Life Insurance Co. v. Gibbens

2. This rule is often used in insurance contracts. *In Houghton v.Trafalgar Insurance Co Ltd.*, it was held that in case of ambiguity in the policy, it will be read in favor of assured as the clause was supplied by the Insurer.
3. Where there is difficulty in identifying the 'proferens' or where the parties to the contract are equally identified to be 'proferentes', this concept may not apply. Similarly, if the contractual terms are decided on the standardized form formulated by any industry body and the same is adopted by the parties, this concept will not be applied[24].
4. Upon objective analysis of the document whoever is taken as a person who put forward, that person would be 'proferens'. All deeds should be interpreted against the grantor[25].
5. In case of grant with an exception embedded therein, the exception will be construed to benefit the grantor and accordingly the grant will be read in favor of the grantee[26].
6. Wherever there is a doubt in any term of the contract and if such term is likely to benefit or in favor of a party to the contract, it should be read against him[27].
7. This maxim may not be of much help or any use in case of mutually negotiated commercial transactions[28].
8. *Contra Proferentem* principle will be used only when there is a real ambiguity in a document. It should not be used for creation of any ambiguity where there was none[29].

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[24] Terson Ltd v. Stevenage Development Corporation (1963).

[25] Johnson v.Edgware & Railway Co. (1866).

[26] Savil Brothers Ltd v Bethell (1902).

[27] Burton v.English, (1883).

[28] CDV Software Entertainment AG v.Gamecock Media Europe Ltd, J.Gloster)

[29] Cornish v.Accident Insurance Co(1889), Tektrol Ltd. v. International Insurance co. of Hanover Ltd.

Contra Proferentem Rule may manifest into two types of construction. In the first type, language used in a contract may be held against a party attempting to place reliance on such construction with intent to get out of her basic liability or any common law duty that was cast upon her independent of the contract. In the second type, in the event of any ambiguous wording or language found in the contract, the same will be held against the person who proposes such wording or language in the contract. In reality, both the cases are likely to be attracted to an exclusion of liability clause in a contract through which a party to the contract may relieve herself of her duty to perform her obligations under the contract. In either of the cases, it will be seen whether the language gives rise to ambiguity or more than one construction is possible from the language. However, there is a basic difference in the approach of construction of wording between these two types. While in the second case, upon careful construction of the contract, it will be used only as a rule of last resort, if the wording throws up clouds of doubt or is visited with ambiguity, in the first type, it will be allowed to be enforced if the language is structured in an unambiguous way in an "exclusion clause". Generally, the first one applies only in the case of exemption clauses whereas the second type applies when ambiguous language is set out either in an exclusion clause or on any clause where the party relying on it has proposed the same[30].

However, according to some scholars, exclusion clauses are narrowly interpreted and are treated as a separate rule of interpretation[31]. As such they are to be treated differently from the concept of '*contra*

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30 Teitel The Law of Contract, Chapter 7, Exemption Clauses and Unfair Terms,1(b)Construction(i)contra Proferentem, pp 7-15

31 The Contra Proferentem Rule :Contract Law's Great Survivor, Joanna McCunn, Oxford Journal of Legal Studies, vol.39, No.3(2019), pp.483-506, published Advance Access, February 27, 2019, (Carter,Yoell v.Bland Welch (n.10) 134)

proferentem'. The interpretations regarding the 'exclusion clauses' arise even when they are couched in unambiguous terms and they are treated as a separate rule. However, they are inextricably woven with each other on account of a shared history[32]. In cases of exclusion clauses, if they are unambiguously worded, they will not be treated as a *contra proferentem*.

Though *contra proferentem* as a rule of interpretation is being used by the Courts over centuries, it was not without criticisms. For instance, in 1877 in *Taylor v.Corporation of St. Helens*, Jessel M.R. doubted whether the maxim had any force in view of the rules of construction settled by the House of Lords in *Grey v.Pearson*, called as "Golden Rule"[33].

Generally insurance contracts, which are all drafted by the insurance companies, contain standard clauses in which the ultimate consumers or insured do not have any say. Invariably such contracts are entered into by them without any kind of pre-contract negotiation[34]. Lord St. Leonades stated that *"such contracts should be so framed, that he who runs can read[35]*. It was felt that standard clauses in the contracts were so one sided and couched against the consumers with a lot of unfair clauses. In 1975, the Law Commission U.K., observed that there was a profusion of unfair clauses against the consumers not only in insurance contracts but also in other commercial contracts. This resulted in passing

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[32] Ibid.

[33] The Interpretation of Contracts, by Sir Kim Lewison, A Lord Justice of Appeal, fifth edition, South Asian Edition South Asian Reprint 2016, 8. Construction Contra Proferentem, p 361.

[34] Routledge v.Burrell (1789).

[35] Andersan v. Fitzgerald.

of Unfair Contract Terms Act, 1977 which enabled the courts to examine the reasonableness of such contracts[36].

Prior to passing of the Unfair Contract Terms Act, 1977, the Courts were, more often than not, required to resort to strained constructions of ambiguous clauses in contracts. In their zeal to protect the interests of the ultimate consumers, the courts especially in England, France and Germany had to resort to, at times, artificial constructions on ambiguous terms in the standard contracts, leading to 'discovery' of ambiguity in those terms. The process of strained construction of an ambiguous clause in contracts was deprecated by Lord Diplock[37] in Securior. However, post passing of the Unfair Contract Terms Act, 1977 the English Courts are empowered to enforce the standard contracts in a more direct way[38]. Other European jurisdictions also have also passed similar legislations enabling their Courts to directly control the standard contracts instead of resorting to indirect ways to control those ambiguous terms in contracts through artificial or strained construction of contracts. Thus, the maxim of *Contra Proferentem*, as a sword hanging over the ambiguous terms in contracts, against the party who has drafted them or seek to benefit out of them, has become part of Statutes in European jurisdictions. Currently, international rules also contain specific provision for *"contra proferentem'* as part of their rules. For instance, Principles for European Contract Law (PECL) in terms of Article 5.103 stipulates that *"where there is doubt about the meaning of a contract term not individually negotiated, an interpretation of the term against the party*

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[36] The Contra Proferentem Rule :Contract Law's Great Survivor, Joanna McCunn, Oxford Journal of Legal Studies, vol.39, No.3(2019), ,published Advance Access, February 27, 2019, pp.483-506 (Subsequently, came out with the EEC directive on Unfair terms in contracts of Adhesion.(Mccunn)(Council Directive 1993/13/EEC on unfair terms in consumer contract was implemented vide Unfair Terms in Consumer Contracts Regulations, 1994SI 1994/3159, later as Unfair Terms in Consumer Contract Regulations, 1999, SI 1999/2083 and subsequently through Consumer Rights Act, 2015.)

[37] [1980] A.C.851C

[38] (George Mitchell (Chestershall) v. Finney Lock Seeds [1983], QB 284)

who supplied it is to be preferred". UNDOIRT Principles of International Commercial Contracts (PICL) vide Article 4.6 stipulates that *"if contract terms supplied by one party are unclear, an interpretation against that party is preferred"*[39]. While PECL seems to take out of the purview of the *contra proferentem* rule all individually negotiated contracts, the PICL appears to include all contracts for application of the principle of contra proferentem, though both seek to enforce the terms against the author or supplier of the same.

Criticism of the Maxim

Going by a variety of English decisions, one would be tempted to conclude that, of late, the Courts appear to be viewing the Maxim with disdainful contempt and inherent disfavor or reluctant acceptance. The Maxim, introduced as a part Common law system way back in medieval times and followed in many cases in subsequent periods of development of civil jurisprudence, has come to stay in some form or other as part of the current civil jurisprudence of English, European and other jurisdictions world over. Yet the constant showers of copious criticisms on the relevance of the principle itself in modern times continue without any abatement.

Way back in 1877, Jessel M.R. stated that in view of the settled rules of interpretation in *Grey v. Pearson*, the maxim of Contra proferentem cannot be said to be having any force[40].

Almost all the old intellectual baggage of "legal" interpretation [of contracts] has been discarded".

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[39] https://www.jus.uio.no/lm/en/html/unidroit.international.commercial.contracts.principles.1994.commented.html Last visited on 10th October, 2020.

[40] Taylor v. Corporation of St.Helens, (1877).

Lord Hoffman[41] in the context of applicability of Contra Proferentem rule said that there would be no need for application of this rule if a *"reasonable man, is able to divine out the likely meaning of an ambiguous term used in contract, against the background of the factual matrix which is available to him.* He discarded application of this rule in a subsequent case[42] as well.

In *K/s.Victoria Street v. House of Fraser*[43], Lord Neuberger stated that in commercial contracts, maxims such as *contra proferentem*, are hardly of any use nor are they decisive to find out the meanings of the contracts. Instead the ordinary expressions used, business sense and factual and the available documents are sufficient to find out the meaning of a contractual term.

In *Multiplex Constructions v. Dunnes*[44], it was held that "*the contra proferentem rule has little applicability in current times as it used to be during the earlier times*. *It was further held that this rule has no role to play in commercial bargains where both parties have equal role to play*."

In a 2017 decision, the Court of Appeal refused the application of *contra proferentem* rule in *Persimmon Homes Limited & ors v. Ove Arup & Partners Ltd.*[45]. The Court of Appeal held that rule's applicability to exemption and indemnity clauses as it was applied by the Privy Council in *Canada Steamship v. The King*[46] would not be applicable in the Persimmon case as they were commercial parties of equal negotiable strength and they are capable of planning and structuring distribution of

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[41] Investors Compensation Scheme Ltd.,v West Bromwich Building Society [1998] 1 ALL ER 98

[42] Bank of Credit & Commerce International SA (in liquidation) v.Ali [2001] 1 All ER 961.

[43] K/s.Victoria Street v. House of Fraser (n.2) [68]

[44] Multiplex Constructions v.Dunnes (2017),

[45] Persimmon Homes Limited & ors v. Ove Arup & Partners Ltd., anr[2017] EWCA Civ 373.

[46] Canada Steamship v. The King [1952] AC 192

risks amongst themselves dictated by the prudent business sense. In the case of *Canada steamship*[47], the Privy Council held the exclusion clause as also the indemnity were held to be vague and ambiguous and decided in favor of the claimant. The Court of Appeal refused to apply the ratio of Canada steamship as the case pertained to a pure commercial contract between two parties with equal bargain power and *contra proferentem* was not applicable. However, the Court observed by way of *obiter dicta* that in respect of indemnity clause, the principle of *contra proferentem* may be applicable which left hope for the survival of this principle in a limited way.

In a way it can be argued that the existence *contra proferentem* rule may incentivize the sellers or writers of standard contracts to write very clearly worded and simple contractual terms so as to enable less educated or unsophisticated consumers to understand very well the contents of the contracts before they sign up. However, there is always a possibility that despite simple language in contractual terms, the parties in advantageous position may still try to resort to other clauses taking advantage of the ignorance of the simple consumers. This can be overcome through the process of transparency and fairness in the terms of the contract. The Principles for European Contracts as also Undriot Principles for International Contracts both provide for rules of clarity in language, transparency and fairness rules. Contracts that are devoid of these are open for question and enquiry by courts and authorities. Nonetheless when the terms are reduced with a greater amount of clarity, the same may reduce the chances of the other party misunderstanding the contents of the contract.[48]

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[47] Ibid.

[48] Policy Considerations in contract interpretation: the contra proferentem rule from a comparative law and economic perspective, Peter Cserne, University of Hull, from selected Works of Peter Cserne.
Available at: https://works.bepress.com/peter_cserne/28 Last Visited on 12th October, 2020

Application of the Maxim in India:

Indian courts, as they follow Common law practices, have been applying the principle of *Contra Proferentem* to cases in India. However, the Courts in India have been applying this principle to Insurance contracts which are in the nature of standard contracts. The insured are bound by the rule of *Uberremi Fidei* (utmost good faith) and hence the *contra proferentem* principle is applied against the insurance companies whenever their contracts set out in the form of policies give rise to any ambiguities. As per Halsbury's Laws of England[49], the principle of contra proferentem "*only becomes operative where the words are truly ambiguous; it is a rule for resolving ambiguity and it cannot be invoked with a view to creating a doubt. Therefore where the words used are free from ambiguity in the sense that, fairly and reasonably construed, they admit of only one meaning, the rule has no application.*"[50]

This was pointed out by the *Court, in United India Insurance Co. Ltd vs M/S. Orient Treasures Pvt. Ltd.*[51] and accordingly held that there was no ambiguity in the words expressed in the clauses under dispute and the language carried only one meaning set out in clear terms, the maxim was found not useful to decide the case. It was also observed by the court "*that when the words of a statute are plain or unambiguous, the Courts are bound to give effect to the meaning irrespective of the consequences*"

Similarly in *M/s. I.P. & Investment Corpn. Vs New India Assuance Co Ltd.*[52], it was held that "*in order to permit a claim under the policy a forcible and violent entry would be required as sine qua non. However, the language was very clearly set out in the insurance policy and admits of no ambiguity and hence the question of invocation of the maxim does*

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[49] Halbury's Laws of England, 5th edition, Vol. 60, para 105)

[50] https://expoundingthelaw.com/2017/09/03/contra-proferentem/ Last visited on 12th October 2020.

[51] Court In United India Insurance Co. Ltd v. M/S. Orient Treasures Pvt. Ltd on 13th January, 2016,

[52] S.I.P. & Investment Corpn. v. New India Assurance Co Ltd dt. 22nd August, .2016.

not arise in the case. This rule cannot be used to find ambiguity or vagueness where it does not exist. The words have to be read as it is without addition or subtraction."

However, the Supreme Court held in the case of *Rashtriya Ispat Nigam Ltd. Vs.Dewan Chand Ram Saran*[53] that this principle will not apply and not to be invoked in commercially negotiated contract between two parties.

The Contracts of insurance being special standard contracts requiring commitment of *uberrima fides* (good faith) on the part of the insured. Hence, whenever there is an ambiguity in the contract, it was ruled against the insurance company using the maxim of *contra proferentem*. Wherever the facts fitted in this structure, the Supreme Court has applied the maxim to those cases[54].

Applying the principle of contra proferentem, Delhi High Court in a case[55], allowed the pilots to be eligible for the insurance cover on account of the clear single language arrived at after reading the entire document and concluded that the expression passengers included the pilots as well. In another case[56], Supreme Court observed "*that the true construction of a contract must depend upon the import of the words used and not upon what the parties choose to say afterwards. Nor does subsequent conduct of the parties in the performance of the contract affect the true effect of the clear and unambiguous words used in the contract*". In that case, the Court held that the banks which framed the policy for Voluntary Retirement Scheme should take the responsibility for any laxity in drafting leading to ambiguity in the expression of the terms of the contract of retirement. Such ambiguity should justifiably be

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[53] Rashtriya Ispat Nigam Ltd. v. Dewan Chand Ram Saran (2012)

[54] General Assurance Society Ltd. v. Chandmull Jain and Anr., and United Insurance Company Ltd. Vs. Pushpalaya Printers; of General Assurance Society Ltd. v. Chandmull Jain & Anr.).

[55] Namrata Singh & Ors. v. Director General Civil Aviation (2016)

[56] Bank of India v. K. Mohandas & ors.

held in favor of the optees of the scheme applying the rule of *contra proferentem*.

In a very recent case[57], the Supreme Court considered the application of contra proferentem principle. It held that only in the event of vagueness or unclear expressions used in a clause, can the maxim be pressed into service. Upon examination of the clause, if the ambiguity is found, then this maxim can be made applicable. Upon reading of the entire insurance contract, if it brought about clarity, then in that case even an ambiguous clause found in the contract the principle of *contra proferentem* would not be applicable. Similarly, even if one meaning is given to a clause but other parts of the insurance contract are clear, it would be construed in accordance with the rest of the policy.

Conclusions

In India, the courts have been using the rule of *Contra Proferentem* mostly in case of insurance contracts and in contracts where ambiguities are palpably cited. But what the Courts have avoided is application of the principle *of contra proferentem* in commercial contracts duly negotiated. With advancement of technology, sophistication in structuring the contracts has also increased. Increasing transparency and information sharing in most of the business transactions (whether voluntary or mandated by the authorities as investor protection measures) have also increased over a period of time. Accordingly, the knowledge levels of ultimate consumer, buyer, or investor may be taken to have improved substantially as compared to what they were a decade back. Accordingly, it can always be argued that commercial transactions structured through negotiated deals need not be brought under the protective umbrella of principles such as *contra proferentem.* Yet in a country like India, where the bargaining and economic power of the service providers, sellers of the goods and services being supreme and

[57] Sushilben Indravadan Gandhi v. The New India Assurance Company (2020)

unmatched as compared to their counter parties, most of whom invariably happen to be average customers or buyers and their lot is always at a serious disadvantage, they need to be protected at all times from the powerful parties with whom they contract. For them, the real challenge lies in negotiating complex banking, real estate, and insurance transactions. To that end, rules of construction such as *Contra Proferentem* could still found to be most useful and relevant in the Indian context. To bring about level playing field between the giants of the industry and average customers in the arena of negotiations, there is a compelling need to even contemplate legislative changes by introduction of statutory rules for application of fairness, reasonableness, clarity of language and *contra proferentem* rule, in contracts on the lines of those that are found in European and American jurisdictions as part of their legislations such as Principles of European Contract Law, Second Reinstatement and Uniform Commercial Code respectively or on the lines of those prescribed under UNIDROIT Principles of International Commercial Contracts. This will bring about certitude and uniformity in enforcement of this concept by various courts in our Federal structure. In that case, what they are indirectly enforcing through rules of construction will be enforced more formally through statutory rules. This will bring about a sea change in the way contracts are structured in the country.

Though there are raging debates in the western countries on the relevance of principle of *contra proferentem*, variously termed as left over intellectual baggage of a bygone era or outmoded concept of medieval times, it may still be found relevant in a country like India to further advance the interests of the less privileged customers or buyers of less bargaining power. To that extent, the epitaph on the principle of contra proferentem is not written, not yet.