



2025/09/30

CONTRA PROFERENTEM RULE: CLARITY OR CONSEQUENCES

Contra Proferentem is a Latin maxim meaning "against the party who put it forward", simply put, "against the author" in contract law.

In the complex world of contracts and their interpretation, ambiguity is a constant risk. When the wording of an agreement is unclear or capable of more than one meaning and a dispute arises in reference to that clause or phrase, it is to be interpreted against the interests of the party who drafted, proposed or inserted it into the agreement.

This rule is founded upon the principle of equity and the doctrine of *Commodum ex injuria sua nemo habere debet*: no one should profit from their own wrong.

The *contra proferentem* rule ensures prudence and fairness in contractual relationships.

The Rationale

1. **Drafting Responsibility:** The party who drafted the clause (typically the stronger party, such as a large corporation providing a standard form contract) had the opportunity to express the term clearly and unambiguously. Their failure to do so should not be allowed to benefit them at the expense of the other party (usually the weaker party, such as an individual client).
2. **Inequality of Bargaining Power:** It is a counterweight to imbalances in bargaining power, protecting the party who had little to no opportunity to negotiate the terms (the "adhering party").



In essence, the rule is a legal presumption that any ambiguity in a contract is the fault of the drafter, and therefore, the interpretation least favourable to them should prevail. The drafter bears the risk of their own lack of clarity.

Application in Contract Drafting and Litigation

It is particularly prevalent in interpreting exemption and limitation of liability clauses, insurance policies, and standard form contracts.

The application of the rule has significant implications for both those who draft contracts and those who litigate them.

1. For lawyers, business owners, and anyone responsible for drafting agreements, the *contra proferentem* rule serves as a critical warning, clarity is paramount.
 - Risk Management: Drafters must be meticulous. Ambiguous phrasing, poorly defined terms, and convoluted sentence structures create legal risk. A court will not save a drafter from their own lack of precision.
 - Standard Terms and Conditions: Businesses that use standard terms (e.g. for sales, web services, or leases) must be especially careful. These are classic examples of contracts where one party (the customer) adheres to terms they did not negotiate. Any ambiguity will almost certainly be interpreted in the customer's favour.
 - Best Practice: To avoid the rule's application, drafters should use plain language, define key terms explicitly, and have agreements reviewed by multiple parties to identify potential ambiguities before they are signed.
2. In court, once the ambiguity is confirmed to exist, the rule is invoked to break the tie, in favour of the party who did not draft the clause.

Examples:

1. In an insurance policy drafted by the insurance company, a clause might exclude coverage for "accidents involving commercial vehicles." If the policyholder has an accident while using their SUV to occasionally make deliveries, is the SUV a "commercial vehicle"? If the policy fails to clearly define the term (commercial vehicle), the ambiguity will be interpreted *contra proferentem*, against the insurer and in favour of the policyholder, potentially allowing the claim.
2. The Consumer Protection Act 68 of 2008 (CPA) reinforces this principle, it allows courts to declare contractual terms as unfair, unreasonable, or unjust, providing even stronger protection for consumers against opaque and one-sided terms in standard form agreements.



Limitations:

The rule does not apply:

- If the ambiguity can be resolved through the primary, comprehensive interpretation process.
- If both parties jointly drafted the contract or the ambiguous term (in which case, neither is the "*proferens*" – the contract initiator).
- To override the clear, unambiguous language of a contract i.e. it cannot be used to rewrite a perceived raw deal for a party.

The *contra proferentem* rule is the quality control of the legal forge, ensuring that those who create weak, flawed weapons are the ones who suffer the consequences. In the battle of contractual interpretation, ambiguity is not a clever feature, it is a fatal design flaw.



Ambiguity is a double-edged sword, one edge may seem to offer power, but the other carries the inherent risk of self-inflicted defeat. The *contra proferentem* rule ensures that the drafter of the contract is the one who will be cut by its flawed edge. The only safe contract is one drafted with precision and clarity.

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