

## ***Contra Proferentem***

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This is a Latin phrase meaning “against the one bringing forth”. When a term is included in a contract at the insistence of one party, any ambiguity in that term must be interpreted against the interests of the party who insisted upon its inclusion. This will only apply if the term is included unilaterally by one party and will not apply if the term was subject to negotiations by both parties.

This rule also applies to *contracts of adhesion*; for example, the standard contracts of insurance companies and residential leases. In these cases, the parties involved in the contract have unequal bargaining positions and to mitigate this imbalance, any uncertainty is ruled in favor of the party upon whom the contract was forced.

### **Aside**

Some common law jurisdictions have codified this concept. For example, included in 1872 into the California Civil Code was §1654, which says that “[i]n cases of uncertainty...the language of a contract should be interpreted most strongly against the party who caused the uncertainty to exist.”

### **Aside**

A discussion on *contra proferentem* was included in the decision of *Oxonica Energy Ltd v. Neuftec Ltd.* where the justices wrote:

In *Tam Wing Chuen v. Bank of Credit and Commerce Hong Kong Ltd* [1996], P.C. Lord Mustill said that the basis of the *contra proferentem* principle is that the person who puts forward the wording of a proposed agreement may be assumed to have looked after his own interests, so that if words leave room for doubt about whether he is intended to have a particular benefit there is reason to suppose that he is not.

The trouble is that the maxim is itself ambiguous. Who is the person who “puts forward” the wording? (He is sometimes called the *proferens*.) In ‘The Interpretation of Contracts’, 4th edition, page 261, Sir Kim Lewison says

It might 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.

There are yet other possibilities, because we are concerned, not with the meaning of a Latin maxim, but with the way the common law has applied it. To illustrate this, a bewildering array of authorities was collected by Campbell J in *North v. Marina* [2003]. Amongst other cases, Campbell J identified at least two where the maxim was held to have no application, because the document was the result of a joint drafting effort. Other cases deny that one can identify the culpable draftsman by recourse to extrinsic evidence, because that would be to break the rule that the history of the negotiations may not be examined.

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