KEY POINTS

- Practitioners have questioned whether there is still a place for the *contra proferentem* rule in the construction of modern complex banking and finance contracts.
- In order to justify their resort to a *contra proferentem* construction, courts have had to read an ambiguity into a clause by the process of strained construction.
- Commercial contracts often contain language which on a true construction constitutes a deliberate allocation of risks and liabilities such that the language is not ambiguous.

Feature

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The *contra proferentem* rule in financial litigation

"*Contra proferentem*" is shorthand for the Latin maxim *verba cartarum fortius accipiuntur contra proferentem* (literally "the words of documents are to be taken strongly against the one who puts forward"). This principle has a long history, dating from Roman times.[1]

Under English law, the "*contra proferentem*" principle is used to describe two related rules of contractual construction[2] that: (i) in case of doubt, a contractual provision is construed against the party which drafted it or put it forward for inclusion in the contract;[3] and (ii) ambiguities in exclusion or limitation clauses are resolved against the party seeking to rely on the clause to diminish or exclude its liability. This article focuses on the position regarding exclusion, limitation or indemnity clauses, which are common in complex financial contracts.

Historically, and especially in the context of consumer contracts, the courts approached exclusion clauses with hostility. They adopted strained constructions to find ambiguity, which would then allow them to construe exclusions or limitations *contra proferentem*, so as to preclude a party from excluding or limiting their liability beyond a level which the court deemed "fair". The classic statement in *Canada Steamship Lines Ltd v The King* [1952] AC 192 that: 'If there is no express reference to negligence, the court must consider whether the words used are wide enough, in their ordinary meaning, to cover negligence on the part of the servants of the proferens' was often relied upon to argue that if a clause did not on its face refer to negligence it was, at the least, ambiguous whether such liability was excluded; that such a clause should be construed *contra proferentem*; and that the result was that liability for negligence was not excluded. This approach was rejected in cases following the Unfair Contract Terms Act 1977 (UCTA), which gave the courts powers to deal with certain types of unreasonable exclusion clauses.

INTERACTION WITH OTHER PRINCIPLES

Unfortunately the words *contra proferentem* are sometimes used in a loose fashion and/or to refer to separate principles of law. For example, the *contra proferentem* principle is sometimes conflated with the rule that clear words are required before a party is taken to have abandoned one or more remedies which would otherwise be available for a breach of contract.[4]

It should also be noted that there are some specific rules of construction (similar to *contra proferentem*) governing certain types of clause common in financial transactions. For example, there is a line of cases suggesting that an express exclusion of liability for "consequential loss" does not exclude liability for any loss which arises directly and naturally in the ordinary course of events from the breach.[5] This cuts down the scope of the exclusion significantly from what the natural meaning of the words might have suggested.

Contractual construction

The Supreme Court in recent years has decided a number of cases concerning the proper approach to contractual construction. Most recently, in *Arnold v Britton*[6] and *Wood v Capita*[7] the court has emphasised that the starting point is always the natural meaning of the words used by the parties. That language is to be construed in the context of the contract as a whole against the admissible factual matrix, and with the commercial implications of each rival construction being tested. Contractual construction is a unitary exercise, with the various elements being balanced.

The interaction between these ordinary principles of contractual interpretation and the *contra proferentem* principle is an important issue, but unfortunately the cases and commentators do not speak with one voice in this regard.[8] Given that the starting point is meant to be the words used by the parties, and that the context of the contract and commercial implications of each rival construction are already factored in when determining the true construction of a clause, it might be thought that the rule about construing a clause "*contra proferentem*" are rarely, if at all, going to be determinative. All linguistically plausible and commercially sensible constructions of the words used should have already been considered at the first stage.

The *contra proferentem* principle only applies where the wording in question is still ambiguous, even after this approach has been followed. It is not appropriate to use the principle itself to create or magnify an ambiguity. The first task is always to construe the clause applying the principles set out in *Arnold* and *Wood*, even if this task is not straightforward.

COMMERCIAL CASES PRIOR TO *TABERNA*

Use of the *contra proferentem* rule to police the scope of an exclusion clause makes most sense in cases where one set of terms has been imposed wholesale by party A on a much weaker party B, and those terms include wide-ranging exclusions of A's liability. In a commercial case, however, contracts are often negotiated between two sophisticated parties, rather than being presented and accepted on a "take it or leave it" basis. Moreover,

commercial contracts often contain language which on a true construction constitutes a deliberate allocation of risks and liabilities, including the use of exclusion clauses or mutual indemnities. In many cases parties may have adjusted their remuneration or insurance arrangements on the basis of that agreed allocation. The approach of strained constructions in order to resort to application of the "*contra proferentem*" rule where the language is not itself ambiguous threatens the freedom to contract in this manner.

It is therefore unsurprising that there have been many judicial statements over the years casting real doubt on the role of the *contra proferentum* rule in commercial cases. It has more than once been described as being a rule of "last resort"[9] and has been said to be 'of uncertain application and little utility in the context of commercially negotiated agreements'.[10]

Such pronouncements have not, however, prevented application of the principle in some commercial cases. One recent example of the principle being applied in a commercial context (specifically a share purchase agreement) is *Nobahar-Cookson & Anor v Hut Group Ltd*.[11] Briggs LJ held that the principle remains of utility in the context of exclusion clauses, even in commercial cases. However, His Lordship also confirmed that:

> 'This approach to exclusion clauses is not now regarded as a presumption, still less as a special rule justifying the giving of a strained meaning to a provision merely because it is an exclusion clause. Commercial parties are entitled to allocate between them the risks of something going wrong in their contractual relationship in any way they choose. Nor is it simply to be mechanistically applied wherever an ambiguity is identified in an exclusion clause. The court must still use all its tools of linguistic, contextual, purposive and common-sense analysis to discern what the clause really means…'[12]

An ambiguity in the meaning of a clause 'may have to be resolved by a preference for the narrower construction, if linguistic, contextual and purposive analysis do not disclose an answer to the question with sufficient clarity'.[13] This formulation accords with Lord Neuberger MR's previous statement that, '"rules" of interpretation such as *contra proferentem* are rarely decisive as to the meaning of any provisions of a commercial contract. The words used, commercial sense, and the documentary and factual context are, and should be, normally enough to determine the meaning of a contractual provision.'[14] The other two judges sitting with Briggs LJ agreed with the result, but stated that they placed greater emphasis on the "commerciality" of the various constructions put forward. This suggests that they were less convinced of the utility of the *contra proferentem* principle.

The application of this principle of construction to complex commercial contracts was revisited in two subsequent Court of Appeal cases, which both confirmed that the court will not use the principle to cut down even broad exclusions of liability if the wording is clear.

In *Transocean Drilling UK Ltd v Providence Resources Plc*,[15] the Court of Appeal held that the meaning of the clause in question (an exclusion of defined consequential losses in a drilling rig hire agreement) was clear, and that there was therefore no room for the application of *contra proferentem*. The judge had incorrectly started with the *contra proferentem* principle, rather than construing the clause in context first, and had in effect altered the parties' bargain. Moore-Bick LJ was keen to stress that commercial parties are entitled to agree to give up contractual rights. His Lordship also thought that *contra proferentem* had no role to play in typical "knock for knock" type arrangements negotiated between parties of equal bargaining power, whereby sophisticated schemes of mutual indemnities are provided in respect of loss arising from certain causes, even if the party seeking an indemnity is at fault. Such clauses favoured both parties equally and therefore should not be construed narrowly.[16]

Similarly, in *Persimmon Homes Ltd v Ove Arup*[17] the Court of Appeal, referring to *Transocean*, held that the meaning of the exclusion clause in issue was clear and that therefore the *contra proferentem* rule was not applicable. In Jackson LJ's view: 'exemption clauses are part of the contractual apparatus for distributing risk. There is no need to approach such clauses with horror or with a mindset determined to cut them down.'[18]

TABERNA EUROPE V ROSKILDE

The application of the *contra proferentem* rule in the context of complex international financial transactions was recently considered by the Court of Appeal in *Taberna Europe CDO Plc v Selskabet* of 1 September 2008 A/S (formerly Roskilde Bank A/S) (In Bankruptcy) [2017] QB 663. The claimant (Taberna) had entered into a secondary market purchase from Deutsche Bank of certain subordinate loan notes originally issued by Roskilde. It claimed that it had done so in reliance on certain representations contained in an investor presentation document, which was published on Roskilde's website. These representations were said to have been false, and Taberna claimed damages under s 2(1) of the Misrepresentation Act 1967.

Both the judge at first instance (Eder J) and the Court of Appeal (the lead judgment being given by Moore-Bick LJ) recognised that by publishing the investor presentation on its website, Roskilde was actively inviting potential investors (of which Taberna was one) to make use of the information contained therein for the purpose of deciding whether to invest in its subordinated securities generally. As a result, the representations it contained were made by Roskilde to Taberna when considering whether to invest in its debt generally, including the subordinated loan notes.

There were numerous strands to Roskilde's defence. Relevantly here, it relied on a number of disclaimers published on the back page of the investor presentation. These included the disclaimer that '*no liability whatsoever* is accepted as to any errors, omissions or misstatements contained herein, …' and that 'neither the bank or any officers or employees accepts *any liability whatsoever* arising directly or indirectly from the use of this presentation for any purpose…' (emphases supplied) Roskilde argued that the effect of these

disclaimers was to exclude any liability that it might otherwise have had under s 2 (1) of the 1967 Act.

Eder J was prepared to assume that these disclaimers were exclusion clauses on which Roskilde could rely, and which satisfied the requirements of reasonableness. However, he also held that they were to be construed *contra proferentem*, and were insufficiently clear to exclude liability for damages for misrepresentation under s 2 (1) of the Misrepresentation Act 1967.

Roskilde successfully appealed this point. Moore-Bick LJ noted that while judges have historically invoked the *contra proferentem* rule as a useful means of controlling unreasonable exclusion clauses,

> '[t]he modern view, however, is to recognise that commercial parties (which these were) are entitled to make their own bargains and that the task of the court is to interpret fairly the words they have used. The *contra proferentem* rule may still be useful to resolve cases of general ambiguity, but ought not to be taken as the starting point: see, for example, *The Hut Group Ltd v Nobahar-Cookson* [2016] EWCA Civ 128 and *Transocean Drilling UK Ltd v Providence Resources plc* [2016] 2 All ER (Comm) 606. In my view [the disclaimers] are couched in language that makes it quite clear that Roskilde accepts no responsibility for the information contained in the investor presentation. There is no ambiguity of the kind that can properly be resolved by invoking the *contra proferentem* rule.' (at [23])

Nor was Taberna assisted by the suggestion in *Canada Steamship* that a clause will not be interpreted in a way that excludes negligence liability unless it specifically purports to do so, or there is no other basis of liability on which it could operate. Moore-Bick LJ noted the recognition in subsequent cases (in particular those decided since the introduction of UCTA, although he made no reference to that Act) 'that parties to commercial contracts are entitled to determine for themselves the terms on which they will do business' (at [26]).

The task of contractual construction (of which the application of the *contra proferentem* rule plays a part) is to determine what these terms are. To say that the court's task is to 'interpret fairly the words they have used' is to beg the question as to what is "fair". Moore-Bick LJ's points are perhaps not best understood as general guidance on the correct approach to contractual construction. Rather, they highlight that the courts should not use the *contra proferentem* rule as a means of re-drawing the parties' bargain to reflect the terms on which the court thinks that they "should" do business, on the basis that the result conforms to some perceived standard of "fairness".

This judgment, together with Moore-Bick LJ's earlier judgment in the *Transocean* case, has prompted some practitioners in the field to question whether there is still a place for this "rule" in the construction of modern complex banking and finance contracts. These are precisely the sorts of contracts that Moore-Bick LJ was considering when he spoke of exclusion clauses as a means by which parties allocate risk, an exercise that they should be free to do without the fear of judicial intervention.

This does not represent a change in the law. The *contra proferentem* "rule" has not been discarded from the contractual construction rule book. Rather, the case is illustrative of a further deprecation of the practice whereby the courts 'read an ambiguity into [a clause] by the process of strained construction which was deprecated by Lord Diplock [1980] AC 827, 851C in *Securicor 1* and by Lord Wilberforce in *Securicor 2* [1983] 1 W.L.R. 964, 966G'.[19] in order to justify their resort to a *contra proferentem* construction. Judges who wished to police the parties' ability to exclude their liability had to strain to find such ambiguity precisely because the "rule" has always been one of last resort.

Moore-Bick LJ gave short shrift to the notion that the relevant disclaimers of liability should be construed *contra proferentem* because he did not think that they were ambiguous. If contracts are clearly drafted, limitations and exclusions of liability should escape judicial intervention in the guise of *contra proferentem* construction. Conversely, however, a practitioner considering whether they have any prospects of successfully relying on the rule to preclude their contractual counterparty from excluding or limiting their liability may find that the first instance decision is worth considering.

Eder J ruled that disclaimers of 'any liability whatsoever arising directly or indirectly from the use of this provision for any purpose', and the statement that the bank accepted 'no liability whatsoever' were 'to be construed *contra proferentem* and, as such, the words used are insufficiently clear to exclude liability for damages for misrepresentation under s 2(1) of the 1967 Act' (at [120]). Yet it is hard to see how the words could have been any clearer. Indeed, they are almost textbook examples of 'words which clearly indicate an intention to exclude all liability without exception', including negligence.[20] That Eder J was nonetheless willing to reach the conclusion he did suggests that there may still be first instance judges (or arbitrators) who will be able to persuade themselves of an ambiguity that does not really exist if they are of the view that the "merits" require it. Such decisions may not survive the Court of Appeal. However, as Briggs LJ's judgment in *The Hut Group* shows, in cases where the ambiguity is genuine, and the judge is able to see the commercial logic behind both parties' rival constructions, the *contra proferentem* principle is still a useful aid to construction. ■

1 See *Oxonica Energy Ltd v Neuftec Ltd* [2008] EWHC 2127 (Pat) (Prescott QC).

2 See *Chitty on Contracts* (32nd edn 2015) at para 15-012.

3 Determining the identity of the "proferens" or "proferentes" (ie "the one who puts forward") can give rise to difficulty. Some cases identify the party who prepared the contract or a particular clause, others the party who benefits from the clause. As noted in *The Interpretation of Contracts* (Lewison ed.) at p 391, this ambiguity has led to differing formulations of the *contra proferentem* principle.

4 *Gilbert-Ash (Northern) Ltd v Modern Engineering (Bristol) Ltd* [1974] AC 689 (HL). The *Nobahar-Cookson* case cited below is an example of a court appearing to make this

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error cf per Moore-Bick LJ in *Transocean* (also cited below) at [19]–[21].

5 ie that the exclusion is only of loss recoverable under the second limb of *Hadley v. Baxendale (1854)* 9 Ex. 341; 156 ER 145. See *Croudace Construction Ltd v Cawood's Concrete Products Ltd* [1978] 2 Lloyd's Rep. 55 (CA) and following cases. Such an approach is open to the criticism that it uses the terms "consequential loss" to mean something fundamentally different from its generally understood meaning in the law of damages: see eg *McGregor on Damages* at 3-014. However, recent decisions suggest that some of these cases would not be decided in the same way today (see per Moore-Bick LJ at [15] in *Transocean*, cited below).

6 [2015] AC 1619.

7 [2017] 2 WLR 1095.

8 For instance, at para 7-015 of Treitel, *The Law of Contract* (14th edn) and at p 11 of [2017] 133 *LQR* 6, Professor Peel suggests that *contra proferentem* may have a role in the construction of an exclusion clause even if the clause is not ambiguous. That does not, it is suggested, reflect the current state of English law.

9 See eg per Mance LJ in *Sinochem International Oil (London) Co Ltd v Mobil Sales & Supply Corp* [2000] 1 Lloyd's Rep. 339 (CA) at [27].

10 per Gloster J in *CDV Software Entertainment AG v Gamecock Media Europe Ltd* [2009] EWHC 2965 at [56].

11 [2016] 1 CLC 573.

12 at [19].

13 at [21].

14 *K/S Victoria Street v House of Fraser* [2012] Ch 497 at [68].

15 [2016] 2 Lloyd's Rep. 51 (CA).

16 See [20].

17 [2017] EWCA Civ 373.

18 At [56].

19 per Lord Diplock in *George Mitchell (Chesterhall) Ltd v Finney Lock Seeds Ltd* [1983] 2 AC 803 at 814.

20 Chitty cites words such as 'no liability whatever', 'under no circumstances', 'all liability', all loss 'howsoever arising' from 'any cause whatsoever' as examples of 'words which clearly indicate an intention to exclude all liability without exception', including negligence. The basis upon which the words in *Taberna* can be distinguished from these textbook examples is not clear.

Further Reading:

- Consequential loss exclusions in financial misselling claims (2017) 5 JIBFL 277.
- Are we exceedingly reliant on common sense? (2015) 11 JIBFL 704B.
- LexisPSL: Banking & Finance Practice note: Rules of contract interpretation.