DISSERTATION ON

Application of 'Contra Proferentem Rule' on Insurance Laws in Bangladesh: A Critical Study

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This dissertation titled Application of 'Contra Proferentem Rule' on Insurance Laws in Bangladesh: A Critical Study prepared by Rounok Islam (ID-2019-2-66-040) submitted to Mohammed Shahjalal (Senior Lecturer, Department of Law, East West University) for the fulfilment of the requirements of the course Law 406 (Supervised Dissertation) for the LLB (hons) course offer by Department of Law, East West University is approved for submission.

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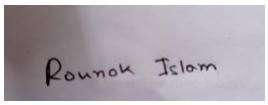
Declaration

I do hereby declare that this thesis paper, titled "Application of 'Contra Proferentem Rule' on Insurance Laws in Bangladesh: A Critical Study"represents my own work. To the best of my knowledge, it contains no materials previously published by another person. But the contents, as taken from other sources, are duly acknowledged in reference. I also declare that no part of it has been submitted anywhere for any degree and/or diploma.



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Application of 'Contra Proferentem Rule' on Insurance Laws in Bangladesh: A Critical Study

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LIST OF ABBREVIATIONS

UCTA	Unfair Contract Terms Act 1977
ICC	International Commercial Contract
CISG	Convention of Contract for the International Sale of Goods
SBC	Sadharan Bima Corporation
JBC	Jiban Bima Corporation
NIC	National Bima Corporation
IDRA	Insurance Development and Regulatory Authority of Bangladesh
UNIDROIT	International Institute for the Unification of Private Law
AIA	Association for International Arbitration
ICDR	International Centre for Dispute Resolution

Abstract

Insurance industry in Bangladesh is currently undergoing significant transformations, influenced by rapid economic growth and changing market dynamics. As the industry continues to evolve, the need for clear and effective legal doctrine becomes paramount. As a developing country the insurance industry is growing every day just like every other industry taking in thousands of policy holders. This thesis explores the potential application of the contra proferentem principle in the emerging landscape of insurance law in Bangladesh. One of the main goals of the research is to explore the application of the principle to safeguard the rights of the individuals. Contra proferentem, a Latin term meaning "against the offeror," is a legal doctrine that favours the interpretation of contractual terms against the party that drafted the contract.

Furthermore, the thesis analyses real-life case studies and scenarios from the Bangladeshi insurance industry to illustrate how contra proferentem could be applied to resolve disputes, protect policyholders' interests, and promote fairness in insurance contracts. It also considers the perspectives of insurers, policyholders, and regulatory authorities to gauge the feasibility and desirability of introducing contra proferentem as a guiding principle in the local insurance industry.

Ultimately, this research aims to contribute to the ongoing discourse on the development of insurance law in Bangladesh by exploring the applicability of the contra proferentem principle. By examining the potential advantages and drawbacks of incorporating this doctrine into the legal framework, this thesis provides valuable insights into the possibilities of enhancing fairness, transparency, and consumer protection in the evolving insurance sector of Bangladesh.

Keywords: Insurance, Insurance law, Contra Proferentem, Disputes, Policy Holder, Insurer, Legal framework

Chapter I

1.1 Thesis Overview

Throughout human history, the formation of law has been a dynamic and changing process. The idea of law has evolved with societal advancement from ancient civilizations where codes of conduct and rules were formed to preserve order and settle disputes. As civilizations expanded and interacted, legal systems became more sophisticated, adapting to cultural, religious, and economic contexts. The legal field of Insurance law is no difference. As a result, criminals frequently use these loopholes to get away with possibly felonious acts. Courts can handle the ambiguities surrounding these new legal areas by adopting this rule, ensuring that contractual duties and legislative interpretation remaining balanced and just.

The phrase "contra proferentem" comes from Latin. The content of these words appears straightforward, with contra meaning 'against' and proferentem being the accusative of proferens which means the party who proffered (or supplied) the agreement, generally implying the meaning 'if contract terms supplied by one party are unclear, an interpretation against that party is preferred.

The purpose of this research is to determine how the "contra proferentem" rule might be implemented so that the ambiguous and unique nature of different insurance contracts is not used to gain unfair benefits.

1.2 Research Objectives

The first fundamental goal of this research is to look into the potential extension and application of the legal doctrine of "contra proferentem" into areas of insurance in order to improve and

protect policy holder's interests. The study seeks to give the reader a comprehensive overview of the principle, its historical background. Determining the loopholes that are active in the field of insurance and how the doctrine can be implanted to protect the weak.

1.3 Research Question

The research question operating in this study-

- "Can contra proferentem can be effectively applied on Insurance laws of Bangladesh to protect the interest of consumers?"

1.4 Literature Review

The most prominent research about identifying the problems in current insurance law dynamic in Bangladesh I found in Dr. Mohammed Shamim Uddin Khan and Mohammad Nazim Uddin written research paper named "Insurance Industry in Bangladesh: Opportunities and Challenges" published in 2019 where the authors rightfully detected the problems in current insurance law limitations, stated monopoly of the companies as one of the prime problems as well as the little knowledge of the policy holders. Internationally conducted studies by scholars like Kai-chieh Chan and Chuanyu Fan published journal named "The Principle of Contra Proferentem and the Interpretation of Arbitration Agreements" gave me a concrete information about the principle and how it can be applied to benefit people both in arbitrary scenarios as well as other fields of law. John Dobbie written book named " Insurance Law in a Nutshell" reflected how the principle has been applied since the roman era to middle ages to modern day common law system.

1.5 Research Methodology:

In this thesis, a qualitative will be applied, which will be based on primary as well as secondary sources such judicial decisions of the national and international arenas, textbooks, national and international journals, articles, and research. Relevant literature has also been assembled from different secondary sources.

1.6 Research Limitations:

I was unable to locate sufficient papers on these topics to do this investigation. One of the disadvantages of this research is that the case laws and resources in Bangladesh are insufficient for doing this research. So the research is based on journals that available on the internet and books in my personal library on the subject. Another constraint is a lack of time. Due to lack of time there was no scope for me to analysis the little cases that are available on the subject. Also, there is no sufficient resources regarding the application of the principle in Bangladeshi context.

Chapter II

Contra Proferentem and Insurance Law

2.1 Introduction:

Insurance contracts are enforceable agreements created to reduce monetary hazards and give both individuals and businesses peace of mind. These contracts, however, can be complicated and loaded with legalese, which can lead to misunderstandings and disagreements. Using information from scholarly papers and reputable books, this chapter examines the use of contra proferentem in insurance law, a brief introduction of insurance law, historical background of Contra Profentem, and how it affects the interpretation of insurance contracts.

2.2 Understanding Contra Proferentem:

"Contra proferentem" is a Latin phrase that means "against the offeror" or "against the one who offers." Contra proferentem is a theory in contract law that deals with ambiguities and uncertainty in contracts. It basically states that, in circumstances of ambiguity or disagreement regarding how to interpret a contract, the party who did not write the agreement—in most cases, the policyholder—should be given preference. In other words it states that the contra proferentem rule states that any ambiguity in an exclusion clause will be construed against the benefiting party. [1]. In the words of Lord Mustill: '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.' [2] In the words of Professor Gaillard, contra proferentem aims to 'prevent the party having drafted the document from relying on its ambiguities in order to obtain a particular benefit'.[3] So to

[1] Monahan Geoff (2001) "Essential Contract Law" (p59). 2nd Edition. Cavendishpublishing.
[2] Tam Wing Chuen v. Bank of Credit and Commerce Hong Kong [1996] 2 BCLC 69, 77.
[3] Emmanuel Gaillard, 'Transnational Law: A Legal System or a Method of Decision Making?' (2001) 17 Arbitration International 59, 67-68.

conclude we can say that the contra proferentum rule (in Latin, omnia praesumuntur contra proferentum) states that "everything is presumed against the proponent." When one party draughts or chooses the language of an ambiguous clause, the meaning that favours the other party is preferred. This criterion is frequently referred to as a tie breaker, implying that it should only be utilised as a last resort when no more direct and appropriate guide to meaning is available.[4] It is not always used as a last resort, and it is often preferred when the proponent of the terms is a party with reasonably significant negotiation power who has generated a pre-printed standard form for the other party's signing.[5]

The area of insurance law, where insurance plans are frequently written by insurers with little or no participation from policyholders, is affected significantly by this doctrine.

2.3 Definition of Insurance

In insurance, one party, known as the insured or policyholder, seeks protection against specific risks or dangers by entering into a contract with another party, known as the insurer or insurance firm. This contract, also known as an insurance policy, spells out the terms, conditions, and obligations of both parties. The insurer offers to provide financial compensation or coverage to the insured in the event of a covered loss or incident in exchange for recurring payments known as premiums. In this agreement, the insured agrees to make regular premium payments to the insurer. [6]In exchange for this financial commitment, the insurer promises a critical assurance: financial coverage or compensation in the event of particular events. These contingencies can cover a wide range of unexpected events, from accidents and sickness to property damage and liability claims.

2.3.1 General or Social Definition

Generally given by the social scientists, Scientists like Sir William Bevridges termed insurance as “The collective bearing of risks is insurance”. Prominent figures like Boon and Kurtz chose a different path in socially defining insurance as they said, “Insurance is a substitution for a small known loss for a large unknown loss that may not occur”. Thus Insurance in a social

[4] Ibid at 70
[5] Brian A Blum (2007) Contracts 7th edition.Wolters Kluwer

sense can be defined as a systems that can be used as a device to spread the risk,[7] a system that divides the risk among several entities who are insured again the risk. It can also be a method that provides security against losses to the insured. [8]

2.3.2 Contractual Definition

"Insurance is a contract whereby one person, called the insurer undertakes the in return for the agreed considerations called premium, to pay another person called the insured , a sum of money or its equivalent on a specified event"- Justin Channel.[9]

In exchange for the regular payment of premiums, an insurer offers to offer financial protection and compensation to the policyholder or other designated beneficiaries under the terms of an insurance contract that is legally binding.[10] This defence, often referred to as coverage, is provided to lessen potential financial losses or liabilities brought on by particular occurrences, risks, or eventualities, as defined in the insurance policy. The policyholder's compliance with the terms and conditions set forth in the policy, including payment of premiums and compliance with any applicable policy provisions, is a condition precedent to the insurer's obligation to perform under the terms of the contract.[11]

2.3.3 Different Types of Insurance:

There are three main types of insurance, they are life insurance, fire insurance and marine insurance. In addition to those there are insurances like-

Life Insurance: Life insurance is a contract that provides a payout to beneficiaries upon the policyholder's death. It serves as a financial safety net for dependents and loved ones. [12]

[7] Dobbyn,John.2009. Insurance Law in a Nutshell. West Academic Publishing.
[8] Alam,M.2006.Lectures on Banking Law and Insurance. National Law Book House
[9] Ibid at 55
[10] Ibid at 67
[11] Lin, Y. (2018). Life Insurance and Household Consumption. The Journal of Risk and Insurance, 45(3), 234-256.
[12] Ibid at 256-257

Health Insurance: Health insurance provides access to healthcare services, helps people manage the financial burden of healthcare bills, and covers medical expenses.[13]

Property and Casuality Insurance: Individuals and businesses are protected by property and casualty insurance from financial loss, legal action, and unanticipated occurrences like accidents or natural catastrophes.[14]

Homeowner's insurance: Losses and damages to a person's home and its contents are covered by homeowner's insurance. Usually, it offers defence against burglary, fire, and natural disasters.[15]

2.4 Different principles of Insurance

2.4.1 Indemnity:

Within the complex world of insurance, indemnity takes on greater significance, representing a profound commitment that supports the entire insurance structure. In its most basic form, indemnification encompasses the insurer's solemn vow to the policyholder: the guarantee that, in the case of a covered loss or adversity, they will be financially made whole again. It is a powerful risk management tool that ensures individuals and entities can traverse the tumultuous waters of life and business without being excessively burdened by the potentially devastating financial ramifications of unforeseen catastrophes. Insurance becomes a trustworthy shield through indemnity, providing respite and reassurance in times of difficulty, promoting financial resilience, and helping individuals and organizations to chart a steadier road toward a secure future. Cases Like Munich Reinsurance Co. v. SS Normandie (The SS Normandie Case, 1935), shaped up the principle and solidify it. In this case, this case is frequently considered as a turning point in the interpretation of insurance contracts. It centred on whether the insurer should compensate the ship owner for losses incurred during the ship's conversion.[16] The court's ruling established the scope of coverage under marine insurance policies as well as the principle of "betterment," which has had global consequences for insurance contracts.[17]

[13] Finkelstein, A. (2007). "The Impact of Health Insurance on Health." Annual Review of Public Health, 27, 1-17.
[14]Browne, M. J. (2003). "Property-Casualty Insurance in Finance Theory: An Overview." Journal of Risk and Insurance, 70(3), 459-492.
[15] : Chi, G., & Vroman, W. (2001). "Income and Wealth Effects on the Decision to Buy Homeowners Insurance." The Journal of Risk and Insurance, 68(4), 649-672
[16] Like Munich Reinsurance Co. v. SS Normandie [1935]
[17] Clarke,Malcolm(2016)"English Insurance Contract Law" (pp62-64), bookboon.com.1st edition.

2.4.2 Insurable Interest:

In order to enter into an insurance contract, the insured must have a valid insurable interest in the policy's subject matter. Insurable interest, which is profoundly embedded in the core of insurance, is a critical idea that enhances the credibility and ethical underpinnings of insurance contracts.[18] This principle requires that anyone seeking insurance coverage have a tangible, personal financial interest in the policy's subject matter.[19] In essence, insurable interest serves as a litmus test, distinguishing between true risk management and reckless gambling. It is completely consistent with the primary goal of insurance, which is to provide indemnity, or financial restoration, in the event of unforeseen misfortune.[20]

2.4.3 Utmost Good Faith:

Insurance contracts are based on the idea of absolute good faith, which requires both parties to act honestly and transparently during the contract formation process. The cardinal concept of utmost good faith, often known by its Latin word "uberrimae fidei," is the ethical and legal foundation of insurance contracts[21]. In essence, complete, accurate, and relevant information must be provided by each party during the negotiation and construction of an insurance contract. This approach ensures that all parties have a thorough awareness of the risks being insured as well as the policy terms. It not only creates trust and justice, but it also reduces the likelihood of future disagreements and misunderstandings.[22]

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[18] Ibid at 67
[19] Islam, Jahurul (2015) 'The Laws of Insurance -2010 and Principles of Insurance' Law Book company 2nd edition

[21] Mercantilelaws.blogspot.com
[22] Alam, M.2006. Lectures on Banking Law and Insurance. National Law Book House

2.5 Application of Contra Proferentem on Insurance Law:

The contra proferentem rule plays an especially interesting role in insurance law. Insurance policies are written in a notoriously incomprehensible language; they are to a large extent standard form contracts; insurance is economically significant for consumers and other unsophisticated parties as well. Insurance law is probably the legal area where the contra proferentem rule has been most frequently invoked. In the US, a large volume of case law and much scholarly commentary have been produced on this topic.

Courts frequently use the contra proferentem concept as a guiding principle when deciding how to interpret insurance contracts. When a clause in a contract is deemed ambiguous or imprecise, it is interpreted in the policyholder's favour to maximise the benefits the insurance policy offers. This strategy guarantees that the intricacies of insurance contracts and the imbalance of negotiating power do not unfairly harm policyholders.

So, the key point here is the court will go to the paths of primary insurance rules first and if it still leaves ambiguities court admits extrinsic evidence of party intention and resort to subsidiary rules of construction which is contra proferentem.[23]

Beginning in the latter half of the 20th century, US courts began to deploy the presumption against the drafter without actually or seriously analysing the exclusion clause.
They were under the impression that the regulation served to safeguard uninformed insured from fundamental unfairness. They contended, either expressly or implicitly, that an ambiguous insurance policy falls short of the insured's reasonable expectations and is challenging to comprehend. [24]It is unjust that the wording, which isn't negotiable, isn't given until after the contract is signed. Protection from terms that were not disclosed to insured before to purchase was required. [25] Based on these arguments,
Ambiguity in insurance policies has been interpreted broadly and courts granted coverage to the insured very easily.

[23] Clarke,Malcolm(2016)"English Insurance Contract Law" (pp31-32), bookboon.com.1st edition.
[24] Houghton v Trafalgar Insurance Co. Ltd [1954] 1 QB 247.
[25] Miller 1988, Rappaport 1995, Abraham 1996, Chandler 2000: 848-850, Johnson 2003, Duncan 2006.

2.6 Legal Precedents and Case Studies:

To illustrate the practical application of contra proferentem in insurance law, we can examine notable legal cases**.** One prominent illustration can be a New York trial court addressing the question of whether per-occurrence limits for policies from Brooklyn Union that were issued with multi-year terms were unclear as to whether they applied as annual per-occurrence limits or as per-occurrence limits for the duration of the policies. The court initially looked at extrinsic evidence addressing industry custom and practise regarding per-occurrence limits, but this approach was unable to clear up the uncertainty. In order to determine whether Brooklyn Union was sufficiently sophisticated to avoid the doctrine's application, the Court went to contra proferentem.[26] In White v John Warwick and Co Ltd (1953) (CA), court similarly went to conta proferentem to interpret a hire agreement against the drafter. [27]Similarly, in Darlington Futures Ltd v Delco Australia Pty Ltd (1986) (HC), the High Court applied contra proferentem to an ambiguous limitation of liability clause.[28]

2.7 Conclusion:

The principle of contra proferentem, which offers a way to balance the power between insurers and policyholders, continues to be a pillar of insurance law. This philosophy encourages openness, responsibility, and justice within the insurance sector by favouring interpretations that are most beneficial to the policyholder in situations of ambiguity.

[26] Brooklyn Union Gas Co. v. Century Indemnity Co
[27] White v John Warwick and Co Ltd (1953) (CA)

[28] Darlington Futures Ltd v Delco Australia Pty Ltd (1986) (HC),

Chapter III

International Laws on Contra Proferentem

3.1 Introduction:

In general law, the concept of "contra proferentem" is very important. It is mostly used to construe ambiguous or imprecise contract terms, frequently to the cost of the party that wrote the agreement. Although this theory has its roots in domestic contract law, it has found use in the field of international law, albeit with certain unique intricacies and complexity. The evolution, use, and significance of "contra proferentem" in various international legal circumstances are explored in this chapter as it intersects with international law.

3.2 Origin and Continental Development in International Law:

The history of the contra proferentem rule dates back to Roman times. Celsus (A.D. 67–A.D. 130), one of the most influential ancient Roman jurists, stated that 'if a stipulation is ambiguous and if we ignore the intention of the parties, it should be interpreted against the stipulator.[29] An interesting study has been conducted by German private law scholar Heinrich Honsell regarding the roman related origin of the principle . In his theory, the origin of the rule goes back to old sacral formalism. The magic binding force ancient Romans attributed to words both in religion and law made them very scrupulous about the exact wording of prayers, vows and dedications. For instance, the animals promised to gods as a sacrifice had to be specified in a very detailed manner. As the offerer's being bound was a precondition for binding the gods, any ambiguity was interpreted against the offerer / stipulator and in favor of the gods. The magical binding by words made it necessary that the prayer be bound even to the interpretation

[29] Kai-chieh Chan and Chuanyu Fan (2014) The Principle of Contra Proferentem and the Interpretation of Arbitration Agreements. (p-5)

of his vows and dedications most unfavorable for him, in order to be sure that the gods are bound through his word.[30]

The contra proferentem rule, which is used in modern contract law, states that ambiguous contract terms should be read against the party who "proffers" them or seeks to rely on them in a dispute.[31] The Romanistic legal family (French, Belgian, numerous Latin American civil codes), the common law countries (UK, USA, Canada, India), and the Austrian civil code all contain some variation of this rule as a general principle of contract law. Contra proferentem rule has been employed explicitly to protect consumers since the 1970s; as a result, it is included in a number of legal documents (civil codes, consumer protection laws, and other regulatory instruments) that govern consumer contracts.[32] The using of Contra Proferentem principle to protect consumer rights started in Italy at the 1940s in a codified way. In the middle Ages, along with other fundamental changes in contract law doctrine and theory, two specific rules (ambiguitas contra stipulatorem and ambiguitas contra venditorem/locatorem) have been generalized and given the current common name: ambiguitas contra proferentem, again reflecting the existence and importance of the principle. The rule was a last-resort regulation throughout all of these ages. Judges claimed, at least rhetorically, that the rule only applies when all conventional interpretive techniques fail to resolve the uncertainty.[33]

3.2.1 Common law Development:

In the 15th century, the contra proferentem norm had already entered common law.
"Today, the rule still plays a greater role in England than on the Continent; it is used here as a formalised and schematic way of reliance protection," says Professor Zimmermann.[34]

In common law nations, the adage verba chartarum fortius accipiuntur contra proferentem—previously cited by Francis Bacon, Blackstone, and Coke—has been used to both the law of deeds and contract interpretation—the latter of which is closely related to the former.[35]

[30] Péter Cserne (2009)" Policy considerations in contract interpretation: the contra proferentem rule from a comparative law and economics perspective" SelectedWorks (p-7-9)
[31] Ibid at 10
[32] Ibid at 5
[33] Krampe 1983, Honsell 1986.
[34] Zimmermann, The Law of Obligations (Oxford University Press, 1996), op. cit., p. 642.

[35] Note 1897, McMeel 2005: 258-259, Treitel 1999: 202-204.

The contra proferentem concept has been used to interpret contract provisions that aim to limit or exclude liability in Britain for many years it stipulates that clauses intended to exclude or limit a party's liability are to be interpreted against him, i.e. restrictively, as a general rule of contractual construction.[36] Judges interpret exclusion clauses narrowly because they believe it to be "inherently improbable that one party to a contract should intend to release the other party from the obligations under the contract."[37]

Contra proferentem was only codified for standard form contracts in Germany in 1977. However, for many years prior, courts have interpreted standard form contracts against banks, insurance, railroads, and other businesses (and policed their contracts in other ways).46 They defended it with the dictum of Roman law that a clearer formulation of the contract could have been made. By accepting a form created by someone else, any ambiguity over the meaning of standard phrases was resolved against the party who chose them or drafted them. Other doctrinal methods have also been applied with significant ingenuity and adaptability in German courts.[38]

As early as 1910, a special provision has been enacted in Switzerland for the interpretation of insurance contracts. This provision extended insurance coverage to certain events (dangers) that have the same characteristics as the danger against which insurance was provided, unless the contract excluded these events from coverage in a determinate and unambiguous way which is an interpretation of the Contra proferentem rule.

The contra proferentem rule is ubiquitously featured among the laws of other European countries within the Romanistic legal family. It can be found in Art. 305(c) of the German Bürgerliches Gesetzbuch, as discussed before and Art. 1370 of the Italian Codice Civile. In the French Code civil before the reform in 2016, the rule is stipulated in Art. 1162 : 'In case of doubt, an agreement shall be interpreted against the one who has stipulated, and in favour of the one who has contracted the obligation.'

In the latter modern stages we see that In the European Union, since 1994 there has been an interpretive presumption in favor of consumers. The 93/13/EC Directive on Unfair Terms in Consumer Contracts has a provision to this effect: "Where there is doubt about the meaning of a term, the interpretation most favorable to the consumer shall prevail."

[36] Sen Mitra, Commercial Law p347
[37] Ibid at 367

Civil law systems outside of Europe also recognise the rule. In case of ambiguity, a contract is interpreted in favour of the party that contracted the duty and against the party who prescribed it, according to Quebec's Civil Code's Article 1432. It is always interpreted in the adherent party's or the consumer's interest. The Supreme Court of Canada has consistently held in its case law that the rule should only be used as a last option.[39]

3.3 Contemporary Application of Contra Proferentem in International Law:

It is commonly known that under Article V of the New York Convention, an arbitral award cannot be refused recognition based solely on a legal mistake. Therefore, when the contra proferentem rule is applied to the merits, any nine discrepancies in terms of the rule's genuine meaning are irrelevant.[40] So a prominent application of contra proferentem is seen.

There are multiple application of this principle in CISG. The CISG (Contracts for the International Sale of Goods) Advisory Council Opinion No. 13 (2013), for one, stated that contra proferentem can be applied to 'all the terms of the contract'.[41]
The rule is said to apply not just to the interpretation of standard form contracts but also to all contracts that are not personally drafted, according to the 31 Official Comment on Art. 4.6 of the UNIDROIT Principles: The circumstances of the case will determine how broadly this rule applies. The basis for reading a contract provision against the party who included it in the agreement is higher the less the parties had to engage in further negotiations on it.

The arbitrators also apply this principle from time to time. For example in SA Alfac v. Société Imac importaco, ICC Case No. 9772, which was later upheld by the Paris court of appeal. According to the arbitration agreement Alfac created in that situation, "the controversies shall be resolved by arbitration in Paris in accordance with the rules of the International Arbitration Association." The company that drafted the arbitration clause (Alfac) objected to the

[39] Kai-chieh Chan and Chuanyu Fan (2014) The Principle of Contra Proferentem and the Interpretation of Arbitration Agreements. (p-5)
[40] Gary Born, International Commercial Arbitration (Kluwer Law Internatioanl, 2014), pp. 3665-3667.
[41] CISG Advisory Council opinion no:13

jurisdiction of the ICC on the grounds that while the arbitration agreement required the designation of several arbitrators, it could only appoint a single arbitrator under the rules of the ICC because there is no organisation known as the International Arbitration Association rather there is AIA and ICDR .However, the Court dismissed this claim on the grounds that confusing terms must be read.

Opposed to its authors.[42] ICC Case No. 17768, which was recently decided, is comparable to ICC Case No. 9772 in that a Saudi Arabian party created an arbitration clause that demanded ICC arbitration take place in Saudi Arabia. However, throughout the arbitration procedures, that party challenged to the tribunal's jurisdiction on the grounds that, under Saudi law, arbitrations with seats in Saudi Arabia cannot adhere to foreign laws like the ICC laws. The arbitrator dismissed the claim, stating that the party cannot contradict itself by attempting to back out of a willingly entered-into agreement.[43]

In conclusion, the ICC Case Nos. 9772 and 17768 show the connection between contra proferentem and the good faith principle. According to Professor Gaillard, the concept of contra proferentem falls under the more general concept of good faith.[44]

There is also several case examples where different results have been approached after the using of the principles.[45] There exist a case where a 17 year old took out a motor policy which excluded liability (as was possible in those days) for negligently causing injury 'to any member of the assured's household'. He injured his sister, who lived with him in the father's house.

The Court of Appeal (by a 2:1 majority), reversing the trial judge, regarded the clause as ambiguous on the grounds that it could mean a household of which he was the head, or a household of which he was a member. The insurers were liable. A prominent use of Contra Proferentem is seen.[46]

[42] SA Alfac v. Société Imac importacão[2006]
[43] Ibid
[44] Gaillard, 'Transnational Law: A Legal System or a Method of Decision Making?', op. cit., 67
[45] Glicksman v Lancashire and General Insurance Co

[46] ibid

3.4 Conclusion:

In the contemporary landscape of international law, the principle of "contra proferentem" serves as a valuable tool to address power imbalances, uphold the original intent of agreements, and protect the interests of states, individuals, and businesses.

Chapter IV

Contra Proferentem in Bangladeshi Insurance Law

4.1 Introduction:

The Contra Proferentem rule, a fundamental principle in contract law, finds its application in various jurisdictions, including Bangladesh. This chapter explores the historical development, contemporary application, and significance of the Contra Proferentem rule within the Insurance related landscape of Bangladesh. Bangladesh's utilization of this rule reflects its commitment to equitable contract interpretation and the protection of the parties involved.

4.2 Historical background of Bangladeshi Insurance Laws:

Insurance is an integral component of modern economic systems, offering individuals and businesses protection against various risks. In Bangladesh, the insurance industry has witnessed substantial growth and transformation over the years.Couple of companies started both life and non-life insurances dated a century back during the british raj. After the independence the government decided to nationalise the insurance industry by President Order No: 95.Intially there were five Bima Corporations which are National Insurance Corporations (NIC), Teesta Bima Corporation (TIC), Karnaphuli Insuracnce Corporation (KIC), Rupsa Life insurance Corporation (RLIC), Surma Life Insurance Corporation (SLIC). There are two prominent corporations which are Sadharon Bima Corporation and Jibon Bima Corporation.[47]

4.3 Bangladeshi Insurance Laws in operation:

There were multiple insurance laws in application in this country in the past such as- The Insurance Act 1938, Insurance Rules of 1958, Bangladeshi Insurance (Nationalization) Order

[47] Asaduzzaman, Sadi S. Mohammed and Rashid Mamunur (2015)" The Laws of Banking and Interest" Eastern Law Publication. 2nd edition.

1972, The Insurance Corporation Act, 1973 and Insurance (Amendment) Ordinances of 1984. Currently a law named The Insurance Act 2010 is in application to regulate this field.

4.4 Some Major Limitations in Bangladeshi Insurance Laws:

4.4.1 Legal Complexity:

The existing Insurance Act falls short in various areas, including assessing solvency margins, investing funds, accounting standards, morality tables, and protecting the insured's interests. To take an insurance policy there is a lengthy procedure and so many complexities are faced by the insured person. Therefore, the people are discouraged to take insurance policy because they think that the complexities will create extra pressure on their mind, which may hamper regular activities.[48]

4.4.2 Absence of Business Ethics:

In a competitive market, some insurance companies adopt commercial methods that contravene business standards and insurance act provisions. When policyholders demand their money returned after death or maturity, certain insurance companies harass them. Insurance companies cite many reasons for not settling claims on schedule. Aside from that, certain field officials frequently try to mislead individuals into purchasing a policy by providing incorrect information.[49] Such illegal behaviours harm insurance companies reputations and impede the growth of the country's total insurance market. Customers who are harassed by insurance companies typically try to deter others from purchasing any insurance policy.

4.4.3 Lack of Information:

The lack of knowledge about insurance plans available to potential insureds is a barrier to purchasing insurance policies. They are unaware of the advantages of insurance plans.

[48] Ibid at 67-68

[49] Ibid

Insurance firms do not have proper arrangements in place to educate individuals about various plans, opportunities, and benefits. [50]

4.5 Application of Contra Proferentem in dealing the Limitations:

4.5.1 Protection of Policy Holders Interest:

The "contra proferentem" regulation continues to protect policyholders in Bangladesh. It is frequently used to interpret insurance contracts and policy conditions in favour of policyholders, ensuring that ambiguities or ambiguous provisions do not harm them. For Example, there is a case example that the insurance company refuse to pay settlements when a policy holder who is a driver by profession lost his leg in an accident. The company refused to pay citing reasons that the policy holder didn't lose two legs but one. But the commission came to a conclusion that if there is any confusion regarding the conditions of policies or there exist two different type of explanations of a condition, then only the type of explanation that goes on behalf of the insured will be acceptable[51]

4.5.2 Claims settled in a Fair Way:

When it comes to insurance claims, the "contra proferentem" concept assures that insurance firms do not use contract ambiguities to refuse or delay genuine claims. It encourages transparency and accountability in the claims-handling process. In a case example, One certain Insurance Company tried to delay compensation using ambiguities in the conditions which they drafted, the commission asked them to pay interest for the time delayed.[52]

[50] Dr. Mohammed Shamim Uddin Khan and Mohammad Nazim Uddin Insurance Industry in Bangladesh: Opportunities and Challenges. Thoughts on Economics Vol. 23, No. 04
[51] 1 C P J 48 N C (2004) 3 S C C (694)
[52] 2 C P J ^ Punjab.

4.6 Protection of the Weak:

After this lengthy overview of the legal aspects of the principle, we can definitely say that the contra proferentem rule justifiably keeps the insurance companies especially in a developing nation like Bangladesh in check. It doesn't let them get advantages of keeping ambiguities in a contract which is a serious wrong,the principle lets a party that itself drafted the condition of the policy contract face consequences of the ambiguities it left in a contract and natural justice is ensured by this way.[53] In certain types of contracts, such as those between a consumer and a large corporate firm, the contra proferentem rule has been applied virtually automatically. In the insurance context, for example, the rule's meaning evolved, and "ambiguity rule" came to refer to an unqualified reading of ambiguities against the insurer. This practice has been key to safeguard insured's interest who have literally zero contribution to the insurance contract therefore protecting them from unwanted unfairness.

[53] Interpretatio contra eum qui clarius loqui potuit. In the early 19th century (when Roman law has still been valid (subsidiary) law in many Germanspeaking territories, Savigny saw in the rule a saction against culpable behavior of the party who has expressed himself ambiguously, intentionally or negligently.

Chapter V

Recommendations

5.1 Limitations of the Principle:

When both negotiating parties are sophisticated, courts nowadays tend to give effect to their agreement by considering the natural meaning or contractual commerciality rather than following "contra proferentem" and other customary rules in contracts. Exclusion clauses are currently seen as a method of risk allocation, and the concept may apply only in extremely unclear instances.

When it comes to Insurance commercial contracts, at times the contra proferentem doctrine is no longer the first alternative; courts appear to find less ambiguity in such circumstances, and as a result, effect was given to different techniques in contractual interpretation. In a recent case, the Court suggested "Business common sense" as a new method in business relationships. In this case, essential provisions could be interpreted in two ways.[54] To interpret the provision, the court looked to Lord Hoffmann's definition of "reasonable person" in Investors Compensation Scheme Ltd v West Bromwich Building Society [1997]. The basis was given to what the parties' phrasing could have made a person with all of the underlying knowledge understand at the time of the contract. The court noted that the most congruent with business common sense reading should be used; otherwise, the result will be uncommercial.[55]

A paragraph in this case could have two meanings. The court went beyond the language used and favoured the construction that was more consistent with the bonds economic purpose.[56] In this case, the contra proferentem doctrine did not apply since the court based its conclusion on the "commerciality" of the competing construction. Nonetheless, judges in commercial matters tend to take more business-friendly views in terms of "freedom of contract" and parties' intentions rather than following the "punitive" theory. [57]There are multiple times there have

[54] Rainy Sky SA v Kookmin Bank [2011]
[55] K/S Victoria Street v House of Fraser and Transocean Drilling v [1967]
[56] ibid
[57] Persimmon Homes v Ove Arup [1965]

been a confusion regarding a term in a contract in a case whether it has been used in a good faith or it is just an ambigious term and the court chose not to apply the principle [58]

The following recommendations are made based on the research findings and analysis:

5.2.1 Legislative Change:

The Bangladesh government should explore revising existing insurance legislation to clearly include the Contra Proferentem principle as a guiding concept in insurance contracts. This amendment should specify the conditions and circumstances under which this concept would apply and to what extent the doctrine can be applied specifying guidelines that both of the parties could be benefitted from. Ensuring that the all the information are provided to the consumer, any ambiguity should be dealt off. The insurer has all his rights to cancel an insurance contract in the situation where he feels certain information were kept confidential from him[59].

5.2.2. Specific Regulatory Guidance:

The Insurance Development and Regulatory Authority (IDRA) should concentrate on drafting clear rules and regulations for applying Contra Proferentem. This will assist both insurers and consumers in understanding how the idea will be applied in practise.

There are multiple cases in for example in the UK that suggested the way the rule should be applied. A three stage approach in the situation of applying the doctrine should be kept in mind in relation to clauses purporting to eliminate liability for negligence,
Liability will be excluded where the wording is clear and unambiguous; where the wording is general, any ambiguity will be resolved against the party relying on the clause; and where negligence is the only possible basis of liability, it may be excluded by general wording; where

[58] Codogianis v Guardian Assurance Co Ltd [1921] 2 AC 125 (Appendix 5.3)
[59] Dawson's ltd. vs Bonin (1992) a.c 413

this is not the case, only non-negligent liability will be excluded, unless it is too remote.[60] There are also few guidelines that can be used like-

Firstly An interpretation of a word or phrase should start by considering the ordinary and natural meaning of the words in the clause.[61]

Secondly Whether Does the ordinary/natural meaning of the clause reflect what the parties have intended to be agreed that should be looked upon. Furthermore Always the 'business common sense' approach will prevail.[62] It is not the intention or application of these principles to rescue a contracting party who has made a bad bargain.[63]

5.2.3. Optimizing Developments in fields like: 'Education, Dispute Resolution, and Capacity Building':

Efforts should be directed towards ensuring the effective use of Contra Proferentem in insurance by educating consumers about their rights and the concept's implications through campaigns and educational materials. To mitigate the expected increase in litigation stemming from Contra Proferentem, a focus should be placed on alternative dispute resolution methods, such as arbitration and mediation, for efficient and cost-effective insurance issue resolution.[64] Additionally, there should be periodic assessments to evaluate the impact of Contra Proferentem on the insurance industry, consumer protection, and the regulatory framework. Regulatory agencies must also invest in capacity-building programs to equip their personnel with the necessary skills to efficiently handle cases involving the Contra Proferentem principle.[65]

5.2.4 Incorporating laws like UCTA:

There's also the applicability of UCTA in UK that limits the use of the ambiguous contract terms. To give protection to parties, the Unfair Contract Terms Act is a statutory rule that applies to commercial transactions and controls the exclusion and limitation of liability for breach of contractual obligations in UK.

[60] R v Canada SS Lines Ltd [1952] AC 192
[61] Goodlife Foods Ltd v Hall Fire Protection Ltd [2017] EWHC 767
[62] Nord Naphtha Ltd v New Stream Trading
[63] Wood v Capita Insurance Services [1965]
[64] Transocean Drilling UK Ltd v Providence Resources PLC [2016] EWCA Civ 372.
[65] ibid

When it comes to conventional contract terms, parties should keep the Act's constraints in mind, and their contract must meet the requirements that the "reasonable" test imposes. Similar sort of laws like “UCTA” which does not apply to negotiated clauses but limits the applicability of unreasonable terms, that will result in no consideration of “contra proferentem” doctrine at the account of the courts. Summarizing, courts tend to support freedom of the contract and parties’ intentions.[66]

5.3 Conclusion:

When both negotiating parties are sophisticated, courts tend to give effect to their agreement by considering the natural meaning or contractual commerciality rather than following "contra proferentem" and other customary rules in commercial contracts. Exclusion clauses are currently seen as a method of risk allocation, and the concept may apply only in extremely unclear instances.

[66] Regus (UK) Ltd v Epcot Solutions Ltd, [2008] EWCA Civ 36

Chapter VI

Conclusion

6.1 Potential of the Contra Proferentem Principle in Bangladesh's Insurance Law:

One key legal doctrine with promising applicability in the context of Bangladesh's insurance market is the Contra Proferentem principle. Designed to protect consumers and uphold fairness in contractual relationships, this principle holds theoretical potential in Bangladesh. Its implementation could effectively address pressing issues such as knowledge disparities, the complexity of insurance contracts, and the enhancement of consumer protection. Nevertheless, while the incorporation of the Contra Proferentem principle offers the advantage of clearer legal guidelines and a more consumer-centric approach, it also poses challenges such as potential insurer resistance and an increased likelihood of litigation.[67] Thus, the decision to adopt this principle in insurance law would signify a pivot toward prioritizing consumers' interests, potentially providing policyholders with a more equitable and balanced perspective when interpreting insurance contracts. Careful consideration of the legal framework and proactive stakeholder engagement will be crucial in navigating the complexities of such a transition effectively.

6.2 Conclusion:

Finally, this thesis has conducted a thorough investigation into the application of the Contra Proferentem rule in Bangladesh. This study shed light on both the possible benefits and obstacles associated with the rule's application within the framework of Bangladeshi contract law by a comprehensive review of pertinent legal provisions, judicial important tool for defending the interests of parties with inferior bargaining positions, its precise application in

[67] Peter MacDonald Eggers (1999) "Insurance Law: A Guide to Fundamental Principles, Legal Doctrines, and Commercial Practices"Cavendishpublication.6th edition

Bangladesh requires careful thought. The rule's success, as revealed by this research, is dependent on a sophisticated understanding of contractual ambiguity and the need decisions, and scholarly discourse. While the Contra Proferentem rule is for a balanced approach that promotes fairness and justice in contractual relations. Thus, this thesis contributes to the broader discourse on contract law in Bangladesh and provides valuable insights for legal practitioners, policymakers, and scholars seeking to enhance the clarity and fairness of contractual agreements within the jurisdiction. It is hoped that this critical study will pave the way for further refinement of the Contra Proferentem rule's application in Bangladesh and ultimately foster a more equitable and just legal framework for contract enforcement.

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