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UNDERSTANDING *CONTRA PROFERENTEM* IN VIETNAM – A MERELY IMPRACTICABLE RULE

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Contra proferentem, an originally Romanistic rule, has been codified in many different legal systems, both common and civil ones, as the protector of the weak. The rule varies in form from one jurisdiction to another. For most jurisdictions, the rule has long been categorised as one of the maxims of interpretation, but this presumption has been considerably resisted by many legal scholars and practitioners. Irrespective of which, if one relies on the quest to simply find a tiebreaker for an ambiguous term, one would view that *contra proferentem* is indeed an interpretive rule. In Vietnam, given how the rule is constructed, the debate on its nature could even be more problematic. Generally, the rule in Vietnam stipulates that in the event the drafter [of a contract] inserts any terms unfavourable for the other party, such term must then be interpreted in the manner that favours the latter. This construction sets aside the element of ambiguity, meaning that the rule in Vietnam is not purported to construe an ambiguous term. Rather, it offers the weaker party a means of last resort to shift the meaning of the contract to its favour regardless of how explicit such language was. This is the reason why *contra proferentem* in Vietnam becomes the potential intruder of sanctity of contract[1].

This article shall review *contra proferentem* in Vietnam with a view to shedding light on its nature. It goes further to identify the key difference between the rule in Vietnam and its counterparts in certain notable jurisdictions in the efforts to denote the concept of *contra proferentem* under the laws of Vietnam. In short, this article shall seek to analyse, to the extent of limited knowledge and research of the author, the following questions:

1. Should contra proferentem be grouped into the rules of interpretation?
2. How to denote the concept of *contra proferentem* under the laws of Vietnam?

Contra proferentem as a global concept – A rule of contract interpretation, or isn't it?

Though formulated as a contractual interpretation principle[2], *contra proferentem* is not similar to its peers. While all first five rules attempt to seek the true meaning of the contractual

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1 Tony Foster and Bui Thanh Tien, *Corporate Acquisitions and Mergers in Vietnam* (Wolters Kluwer 2020 4th Edition) 110

2 To note that contra proferentem as an interpretive rule is not a unique feature of the Vietnamese legislations. This approach is also found in, *inter alia*, the French Civil Code (*See* French Civil Code, art. 1162)

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language[3], either via seeking the mutual intentions of the contractual parties or the contractual purposes, *contra proferentem* does not seem to serve the same objectives. It is widely agreed that *contra proferentem* was originally rationalised as a policy tool, by which it offers protection to the party in a weaker bargaining position. With that in mind, the application of *contra proferentem* is not purported to find out both the plain meaning of terms and the underlying will of the contractual parties, but it aims at an interpretive approach in favour of the party being forcibly less involved in contractual construction[4]. Considering a contract contains an unclear term which has been put forward by one party. Through seeking the underlying will of the contractual parties it found that both of them understand (or are supposed to understand) it in the same way but no objection was raised during the negotiation or execution of such contract. How would such term be interpreted?

If the common intention of the parties is to be upheld[5], one term would be interpreted in the manner that it aligns with their underlying will even if such interpretation is less favourable for the one at a disadvantage in the contracting process. Nonetheless, if *contra proferentem* to take place, the interpretation could be overturned. Therefore, the author opines that making *contra proferentem* a method of construing contract may run at odds with the other interpretative rules.

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3 The other five rules are provided under art. 404.1 to 404.5 of the 2015 Civil Code (Vietnam), which are read as below:

"1. Where a contract contains terms and conditions which are unclear, the interpretation of such terms and conditions shall be based not only on the wording of contract but also on the mutual intentions of the parties which are expressed before and at the time of preparation and performance of the contract.
2. Where a contract contains term or wording which may be interpreted in different ways, such term or wording shall be interpreted in the way most appropriate to the purpose and nature of the contract.
3. Where a contract contains a term or wording difficult to understand, such term or wording shall be interpreted in accordance with the customary practice of the place where the contract was entered into.
4. The terms of a contract must be interpreted in relation to each other so that the meanings of the terms conform with the entire content of the contract.
5. Where there is a conflict between the mutual intentions of the parties and the wording used in the contract, the mutual intentions of the parties shall be used in order to interpret the contract."

4 Joanna McCunn, "The contra proferentem rule: Contract law's great survivor" (2019) 39 Oxford Journal of Legal Studies 483, 38 *(peer review version).*

5 Generally, it can be found in many jurisdictions an interpretive rule providing that common intention trumps literal meaning in construing an agreement (*See* Peter Cserne, "Policy considerations in contract interpretation: the contra proferentem rule from a comparative law and economics perspective" (2007) 5 Hungarian Associations for Law & Economics, 5). Though not explicit as that under the French Civil Code or German Civil Code, such rule is also incorporated into the Civil Code 2015 (Vietnam) (*See* 2015 Civil Code (Vietnam), art. 404.1).

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Another factor, being unique to Vietnam, which pushes the rule even farther from an interpretative maxim is that it does not take into account the element of ambiguity[6]. In that sense, the rule does not assist in interpretation but becomes the tool to undermine the bargaining power of the stronger and promote the interest of the weaker.

Contra proferentem in Vietnam – Genuine _contra proferentem_ or a defective variant*?*

Article 404.6 of the 2015 Civil Code reads: "Where the drafter [of the contract] incorporated into the contract any content being unfavourable for the other party, such contract shall be construed in a manner that favours the latter".

Accordingly, in considering whether *contra proferentem* would be applicable, one must present that the term of contract, drafted by one party, is (or appears to be) unfavourable for the other. The rule is far from clarity. How would a clause that bears the literal meaning to be unfavourable for one party can be interpreted by Court or arbitral tribunal, in any way, to the contrary? Such contradiction has potentially be the obstacle that keeps the dispute resolution bodies away from the employment of this rule in judicial practice. On such regard, the Vietnamese variant diverges greatly from the original *contra proferentem* in which the rule may only be triggered if there exists doubts or ambiguities in interpreting a contractual term put forward by a party[7]. Interestingly but also inconsistently, while the 2015 Civil Code (Vietnam) discards ambiguity from its contributing elements, the 2010 Law on Customers' Protection (Vietnam) brings back the same in its own built-in version of *contra proferentem*[8]. There

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6 *See more* in the below analysis of the second question.

7 *See more:* French Civil Code, art. 1162; German Civil Code (BGB), art. 305(c); For common law countries, *see* McCunn (n 4).

Art. 1162 of the French Civil Code reads as below:

"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."

Article 305(c) of the German Civil Code reads as below:

"(1) Provisions in standard business terms which in the circumstances, in particular with regard to the outward appearance of the contract, are so unusual that the party to the contract with the user need not expect to encounter them, do not form a part of the contract.
(2) Any doubts in interpretation of standard business terms are resolved against the user."

8 Art. 15 of Law No. 59/2010/QH12 dated 17 November 2010 (hereinafter referred to as **2010 Law on Customers' Protection (Vietnam)**) reads as below:

"In case of different interpretation of the contract, the competent organisations and individuals shall resolve the dispute in consideration of consumer's interests."

To note that this article only attempts to analyse contra proferentem as set out under the 2015 Civil Code (Vietnam) and leave the one as prescribed in the 2010 Law on Customers' Protection (Vietnam) out of its scope.

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appear different paths set course by the regulators in Vietnam and this seems to be more of an accident than an intention.

The manner to which *contra proferentem* is structured under the 2015 Civil Code (Vietnam) presents even a bigger problem – that is the substantial interference with the sanctity of contract (or freedom of contract). To clarify, *contra proferentem* was originally constructed to prevent the more powerful party from compelling the weaker to execute a doubtful term which can be beneficial for the former but detrimental to the latter. However, the rule is only justified so long as there is ambiguity. In other words, ambiguity is one of the key elements that gives rise to *contra proferentem*. In the absence of ambiguity, the rule is an outright violation of the freedom of contract. If one party fully understands the challenges it may face with when accepting such clause, on what reasonable grounds could the laws step in to overrule it? There is no one right answer to this tricky question.

Of course, sanctity of contract, like many other legal rules, has its own exceptions. These exceptions are grounded on the basis that irrespective of how desirable it is for a contract to be entirely enforced, once it becomes onerous and unfair for one party, equity [by way of interference] should be prioritised[9]. That said, any rule with too many or too broad exceptions would eventually undermine the principal and ultimately lead to arbitrary results. The quest is to draw a line between a significantly broad exception and a reasonably acceptable one. To do that, one ought to take into account a great number of factors associated with the case in question including but not limited to the bargaining power of both parties, the expected level of their professionalism and the involvement of both parties during the contractual construction. Had any of the foregoing criteria not being met, it would be imprudent to employ *contra proferentem* version as set out in the 2015 Civil Code (Vietnam). Even if in the case that a standard form contract is provided by one party which offers no room for negotiation for the other, and the bargaining power of the drafter is relatively higher, *contra proferentem* should still not be applicable if the unfavourable party is also professional entity that are reasonably expected to fully understand the terms it had contracted to and entry into contract with the drafter is not an absolute only choice. In this case, the rule of sanctity of contract should remain intact. In that sense, it seems that only some consumer contracts would likely meet all these criteria and if the proposed school of thoughts is employed by the actual Court or other dispute resolution bodies in Vietnam, this would bring the practical scope of application of *contra proferentem* in Vietnam closer to the modern tendency of many of the common law jurisdictions[10].

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9 Gertrude Block, “Semantics and the sanctity of contracts” (1981) 38 Et Cetera 290, 291. This can be seen in many aspects of contract law, i.e. for legal resort, force majeure or hardship mechanism; for contract interpretation, *contra proferentem* rule which will be discussed in this article.

10 It is argued that the main preserves for *contra proferentem* are to deal with consumer contract and exclusion clauses rather than any kind of contract in practice. The common law Court also tends to look towards such path (*See more:* Joanna McCunn, “The contra proferentem rule:

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Of all three criteria indicated in the above paragraph, questions are often raised as to determine the specific degree of parties' contribution during contractual negotiation and construction. Put different, how "drafter" under the 2015 Civil Code (Vietnam) should be interpreted? A layman would simply think that drafter is the one responsible for drafting and inserting any clause into the contract. However, the concept may be much more complicated than it appears. In fact, as with any other connotation of this rule under the 2015 Civil Code (Vietnam), no legislative guidelines, whether formal or informal, can be found. The 2015 Civil Code (Vietnam) identifies the *proferen* as the person drafting the contract. This approach might be clearer than that of some common law jurisdictions whereby they employ the concept of "party putting forward [the term]" which then leads to different understandings[11]. Drafter means the one drafting and proposing the incorporation of one clause into the contract. But not any clause drafted and proposed by a party would be considered a subject of this rule. Modern legal scholars believe that when the deal is negotiated between the parties, it does not matter who drafts and proposes the term and accordingly, *contra proferentem* is inapplicable under these circumstances[12]. All in all, the drafter of contract should be identified as those drafting, proposing, and insisting on the incorporation of such term into the agreement without allowing room for negotiation on the rearrangement, modification or removal of the same and the contract as a whole in a substantial manner. In modern commercial world, the application of *contra proferentem* would need to be restricted since this nebulous rule can easily breed arbitrary decisions. Indeed, its application may only be justified for consumer contract which is formulated as contract of adhesion. However, one may contend that the outreach of *contra proferentem* under the 2015 Civil Code (Vietnam) could be over any types of contract let alone the standard ones, for two reasons, namely (i) the rule is not followed by any limitation or restriction at least to the extent of its plain language and (ii) if the rule is only applicable to consumer contract then it should not have been made as a clause under the 2015 Civil Code (Vietnam) since the 2010 Law on Customers' Protection (Vietnam) has already had its own version of *contra proferentem*[13].

Contract law's great survivor" (2019) 39 Oxford Journal of Legal Studies 483, 38 *(peer review version)*)

11 English court throughout the history have come up with many approaches to identify the *proferen*. They include (but not limited to) (i) deeming the one that benefits from the clause in question as *proferen*; (ii) party relying on the clause in Court will be the *proferen*; (iii) *proferen* is the party drafting the clause. However, none of these are considered as an entirely justified approach (*See more*: Joanna McCunn, "The contra proferentem rule: Contract law's great survivor" (2019) 39 Oxford Journal of Legal Studies 483, 38 *(peer review version)* 39 – 43).

12 Peter Cserne, "Policy considerations in contract interpretation: the contra proferentem rule from a comparative law and economics perspective" (2007) 5 Hungarian Associations for Law & Economics, 9; *See more:* Joanna McCunn, "The contra proferentem rule: Contract law's great survivor" (2019) 39 Oxford Journal of Legal Studies 483, 38 *(peer review version)* 43.

13 *See* note 8.

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The expecting level of professionalism is also a criterion that deserves attention. This criterion requires the examination on the ability of the weaker party in question. When doing business in a commercial world, a professional is an entity (or sometimes even individuals) that has full capability or is supposed to have full capability to understand different aspects and terms of the contract that they are engaging to make informed decision. If one professional party agrees to enter into a term being disadvantageous for itself, it means that they have made careful considerations in exchange for other interests that they may be able to enjoy. Hence, the Court or any dispute resolution bodies ought not to interfere with the same. However, it is not an easy task to determine the level of professionalism of each party.

Another question that would be interesting to delve into is how precisely the Court would deal with a term being subject to *contra proferentem* rule. The question is of great importance in case the meaning of the term in question is explicit, but the Court takes the view that it needs to be "interpreted" differently. Would the term be set aside by the Court and replaced by the will of the judges? This is not likely since the rule is structured only as an interpretive rule assisting the Court in construing the term rather than a basis for deactivating the same. Changing a term from an unfavourable one to a favourable one for any party in the manner that it still lies within the boundaries of interpretative rules – this mission for the Court, in the author's opinion, is simply impossible.

To note that the above analysis under this sub-section does not represent any Court's opinions or case practice in Vietnam. These purely are made on the author's own judgement and opinion in light of the laws and case practice in other jurisdictions, both common and civil law. Therefore, the Court's interpretation of *contra proferentem* in Vietnam remains a mystery. With how *contra proferentem* is structured in Vietnam, it would be unpredictable for any case to be grounded on such rule.

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