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CONTRA PROFERENTEM: AN IN-DEPTH ANALYSIS OF IT'S HISTORICAL EVOLUTION, PRINCIPLES, AND IMPACT ON INDIAN CONTRACT LAW

AUTHORED BY - GULNAR ARORA

INTRODUCTION

Contract drafting is a prevalent activity, and the issue of interpretation inevitably arises. The interpretation of contracts is a requisite aspect in the realm of law. Typically, "commercial contracts between parties are guided by business considerations, mutual rights and obligations, and industry practices. The involved parties strive to clearly outline their rights and obligations to prevent potential challenges in the future."[1] Competency to Contract, mutual consent, lawful consideration, legal object, and absence of void declarations are all essential elements of a valid contract.[2] These elements establish the foundation for a free contractual relationship, reducing the likelihood of disputes.

When drafting a contract, the person creating it i.e., the drafter "must consider both statutory regulations that may apply and address the specific needs of the situation."[3] This involves describing the "transaction, rights, representations, warranties, covenants, and more in detail for each party."[4] To prevent ambiguity, drafters can incorporate interpretation guidelines into the contract. They need extensive knowledge of legal precedents, statutory regulations, and traditional drafting techniques. However, crafting an ideal contract, especially in commercial scenarios with significant financial implications, is a complex and challenging process. Even more, enforcing such contracts in case of disputes can be an expensive and intricate legal procedure. When disputes arise, courts resort to interpreting contract contents to address gaps.

[1] Dr. O.N. Ravi, *The Contractual Interpretation Rule- Contra Proferentem: It's Relevance in Modern Law,* 2, CMR Uni. J. Cont. Leg. Aff., 112, 113 (2022).
[2] Section 10, The Indian Contract Act, 1872.
[3] Aparaijita Haripriya Mannava, *The Legal Validity of Self-Prescribed Rules of Interpretation and Construction of Contracts*, 5 Int. J. Law Man. & Hum., 859, 859-860 (2022).
[4] *Id.* at 859.

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CONTRACT INTERPRETATION

Interpreting contracts commonly begins with understanding the shared intent of the parties. When interpreting a contract, the initial consideration is whether the provision is ambiguous. Ambiguity occurs when it can reasonably be understood in more than one way.[5] "Some courts take an objective stance, evaluating whether the provision is reasonably open to multiple interpretations when read by someone in the parties' position. Additionally, certain courts consider a reading of the provision by an individual familiar with the customs, practices, and terminology commonly understood in a specific trade or business."[6] However, there's a potential exception to this. If the plain meaning of a word allows only one reasonable interpretation, that interpretation takes precedence. It emphasizes that the contract should be examined in the context of the circumstances under which it was made.

Furthermore, when faced with two interpretations, the court typically avoids adopting an interpretation that leads to an absurd result. It's crucial to note that a provision is not automatically deemed ambiguous just because the parties disagree on its construction or propose alternative interpretations. This nuanced approach aims to ensure a more precise understanding of contractual terms and intentions.[7] In determining whether a provision is ambiguous, the court must examine the entire provision as a cohesive unit. The interpretation should avoid rendering any provision or term meaningless, emphasizing the need for harmonization and contextual reading of terms. Contracts executed simultaneously and with a shared purpose should be construed and interpreted together. This comprehensive approach ensures coherence and meaningful interpretation of contractual provisions.

"There are many substantive rules which are not supposed to enforce the parties' intentions, actual or hypothetical, rather they set limits to freedom of contract. Similarly, while contract interpretation has the parties' bargain at least as its ultimate goal, in some cases the purpose of contract interpretation is not to find and give effect to the intentions of the parties but to achieve other goals."[8]

[5] Vincet R. Martorana & Michael K. Zitelli, *A Guide to Contract Interpretation*, Reed Smith LLP, 1, 5 (2013).
[6] HEIN KOTZ, Contract Law TRANSLATED BY GILL MERTENS & TONY WEIR, CH.6 (Oxford, 2017).
[7] *Id* at 05.
[8] Peter Cserne, *Policy Considerations in Contract Interpretation: The Contra Proferentem Rule from A Comparative Law and Economics Perspective*, 5 Uni. Hull, 1, 114 (2007).

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"Rule of Contra Proferentem" is one such rule of interpretation. This principle is encapsulated in the Latin maxim *"verba cartarum fortius accipiuntur contra proferentem*" which emphasizes constructing words against those who employ them. The rule of Contra Proferentem means "the clause or language or words in a contract would be interpreted against the party which authored or introduced it."[9] The primary aim of the rule against the drafter is straightforward and well-known: it deters ambiguity.[10] Originating in the 17th century in the case of "*Manchester College v Trafford (1679)*, Lord Coke popularized it with his statement: It is a maxim in law, that every man's grant shall be taken by construction of law most forcibly against him."[11]

HISTORICAL DEVELOPMENT OF CONTRA PROFERENTEM RULE

Within the Roman Legal system, numerous principles of interpretation are embedded in their civil codes. One guideline suggests that terms should be understood in the context of the entire contract, while another emphasizes interpreting contracts to uphold all terms rather than nullifying some of them.[12] These principles originate from Roman law, compiled in Justinian's Digest and extensively discussed in the late Middle Ages and the early modern era. The foundation of Roman legal thought during this period was significantly influenced by Greek philosophy, particularly dialectics and rhetoric.[13]

In legal systems, "Art. 1162 of the French Civil Code, 1804 embodies the *Contra Stipulatorem* rule, tracing its origin to the Roman jurist Celsus."[14] This rule, found in various legal systems globally, including common law jurisdictions and Romanistic legal families, dictates that in case of ambiguity, a contract term should be interpreted against the drafter introducing it in a dispute. Used for consumer protection, especially in standard form contracts, it is recognized in numerous legal instruments regulating consumer contracts.[15]

[9] O.N. Ravi, *supra* note 1, at 115.
[10] David Horton, Flipping the Script: Contra Proferentem and Standard Form Contracts, 80, Uni. Col. Law Rev., 432, 473 (2009).
[11] SIR KIM LEWISON, The Interpretation of Contracts, 360 (South Asian Reprint 2016).
[12] Chapter 4, UNIDROIT Principles, 2016.
[13] See Article 1157 & 1158 of The French Code Civil, 1804; Article 1284 & 1286 of The Spanish Codigo Civil, 2016; Article 1367-1369 of The Italian Codice Civil, 1942; Article 4.4 & 4.5 of The UNIDROIT Principles.
[14] Peter, *supra* note 8, at 8.
[15] Characteristically, the rule was included in all the European codifications until the end of the 19th century, but not in general contract law rules. These countries have codified the contra proferentem rule for standard form of contracts only. Later, mainly in accord with the European directive, every non-negotiated consumer contracts became subject to the rule too.

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As per a contemporary American analyst, "this rule is not actually one of interpretation, because its application does not assist in determining the meaning that the two parties gave to the words, or even the meaning that a reasonable person would have assigned to the language used. It is chiefly a rule of policy, generally favoring the underdog."[16] In case of doubt, "an agreement shall be interpreted against the one who has stipulated, and in favor of the one who has contracted the obligation."[17]

"Later on, during classical Roman legal times, some less formal contracts, like sales contracts (emptio-venditio) and various contracts involving labor, services, leases, and rentals (locatio-conductio), emerged. These contracts often included essential terms, accompanied by additional agreements specifying extra provisions, usually formulated by the vendor. The interpretative presumption *"contra venditorem/locatorem"*, found in a few Digest rules, worked against the drafter of ambiguous pacta. Roman jurists Papinianus and Paulus justified this presumption, stating that the vendor could have spoken more clearly."[18] Yet, these were disjointed concepts discovered in the Digest, lacking any indication of practical implementation during those times.[19] During the Middle Ages, amidst significant shifts in contract law doctrine and theory, the two principles, *"ambiguitas contra stipulatorem"* and *"ambiguitas contra venditorem/locatorem"*, underwent generalization and acquired the common name: *"ambiguitas contra proferentem",* which translates to "when in doubt, against the drafter." Nevertheless, "the idea of "*contra proferentem"* was introduced as a component of the general rule of interpretation. This was aimed at addressing ambiguous language in deeds and contracts. The individual drafting the document typically safeguarded their own interests, often neglecting or overlooking the concerns of the other party involved."[20] Throughout these historical periods, the rule served as a final recourse.

"In the sixteenth century, Lord Sir Edward Coke, a former Chief Justice in the King's Bench, England, introduced the concept of "Contra Proferentem" in the English common law system. Francis Bacon further developed this concept as an interpretative tool to clarify obscurities and ambiguities in deeds, determining which conflicting expressions in a document would be legally valid. Subsequently, William Blackstone combined earlier rules with contemporary practices, aiming to discourage unfair conduct by parties and prevent deceptive practices involving

[16] Peter, *supra* note 8, at 7-8.
[17] Article 1162, The French Civil Code, 1804.
[18] Peter, *supra* note 8, at 8.
[19] Dr. REINHARD ZIMMERMANN, The Law of Obligations, Roman Foundations of the Civilian Tradition, 639-640 (Juta & Co. Ltd, 1992).
[20] O.N. Ravi, *supra* note 1, at 116.

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ambiguous and indeterminate expressions in contracts."[21]

APPLICATION OF THE RULE CONTRA PROFERENTEM

David Ibbetson notes that "the common law has a tendency to shed outdated rules but struggles to abandon entire doctrines or bodies of ideas."[22] The contra proferentem rule is a prime example of this phenomenon, representing a relic from an older era of contracting. Despite numerous reconceptualization in contractual interpretation and the nature of contracts, the essence of the rule persists into the twenty-first century. This concept comes into play when a term in a contract is unclear, and it's introduced by the drafter of that specific clause. In simpler terms, "the *Contra Proferentem* principle is applied only when it's evident that a party has either drafted a confusing term in a contract or has significantly contributed to its drafting."[23]

"The literal translation of the principle is the words of documents are to be taken strongly against the one who puts forward. This could 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."[24]

Different ways in which the rule of *"Contra Proferentem"* could function:

1. "Whoever holds the pen creates the ambiguity and must live with the consequences."[25] The person who drafts the contract is responsible for any ambiguity that arises in the contract's terms. The responsibility for interpreting and addressing ambiguities in the contract falls upon the drafter.
2. This principle is frequently applied in Insurance Contracts. In "*Houghton v.Trafalgar Insurance Co Ltd*.[26], it was held that in case of ambiguity in the policy, it will be read in favor of assured as the clause was supplied by the Insurer."
3. "This concept may not be applicable when it is challenging to determine the party presenting the terms or when both parties are equally identified as presenters. Similarly,

[21] O.N. Ravi, *supra* note 1, at 117.
[22] Jonna McCunn, The Contra Proferentem Rule: Contract Law's Great Survivor, 39(3), Oxf. J. Leg. Stud., 483, 505 (2019).
[23] Hein, *supra* note 6, at CH.6.
[24] Sir Kim, *supra* note 10, at 362.
[25] Justice Binnie, Co-operators Life Insurance Co. v. Gibbens, (2009) 3 SCR 605.
[26] Houghton v. Trafalgar Insurance Co. Ltd., (1954) 1 QB 247.

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if the contractual terms are based on a standardized form developed by an industry body and adopted by the parties, this concept will not be invoked."[27]

4. "After objectively examining the document, the individual identified as presenting or putting forward the terms would be considered the 'proferens.' In all instances, interpretations of deeds should be construed against the grantor."[28]
5. In the case of "*Savil Brothers Ltd. v. Betheel*[29], the Court observed that in case of grant with an exception embedded therein, the exception will be construed to benefit the grantor and accordingly the grant will be read in favor of the grantee."
6. "Wherever there is a doubt in any term of the contract and if such term is likely to benefit or in favor of a party to the contract, it should be read against him. This was observed in the case of *Burton v. English*."[30]
7. As observed in "*CDV Software Entertainment AG v. Gamecock Media Euroe Ltd*[31], this maxim may not be of much help or any use in case of mutually negotiated commercial transactions."
8. "Contra Proferentem principle will be used only when there is a real ambiguity in a document. It should not be used for creation of any ambiguity where there was none."[32]

The "*Contra Proferentem"* Rule can take two forms of interpretation:

1. In the first, contractual language may work against a party seeking to evade basic liability or common law duties imposed independently of the contract.
2. In the second type, if there's unclear language in the contract, it will be held against the party proposing that language.[33]

Both scenarios often come into play concerning exclusion of liability clauses, allowing a party to escape contractual obligations. "Such clauses, known as exemption, exception, exculpatory, or limiting clauses, are introduced by either party in a contract to anticipate and address potential hindrances or failures in performance."[34] "The primary goal is to accommodate consequences

[27] Terson Ltd. v. Stevenage Development Corporation, (1963) EWCA Civ J1023-3.
[28] Johnson v. Edgware & Railway Co., 55 E.R. 982.
[29] Savil Brothers Ltd. v. Bethell, (1902) 2 Ch 253.
[30] Burton v. English, ECLI:EU:C:1982:58.
[31] CDV Software Entertainment AG v. Gamecock Media Europe Ltd., (2009) EWHC 2965 (Ch).
[32] Cornish v. Accident Insurance Co., Civil Action No. 3:06CV-344-DW.
[33] O.N. Ravi, *supra* note 1, at 123.
[34] J.W CARTER, Carter's Breach of Contract, 48 (Hart Publishing, 2018).

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arising from non-performance, partial performance, or negligent performance of the contract."[35] However, there's a fundamental distinction in how the wording is approached between the two types. In the second case, it serves as a last resort rule when ambiguity arises, while in the first type, it may be enforced if the language in an "exclusion clause" is unambiguous. The first type typically applies to exemption clauses, while the second type is relevant when unclear language is proposed by the party relying on it.[36]

Nevertheless, as per certain academics, exclusion clauses undergo a restricted interpretation and are regarded as an independent principle of interpretation.[37] Interpretations of "exclusion clauses" can arise even when clearly expressed, and they are considered as a distinct rule. However, their connection is undeniable due to a shared history. In instances where exclusion clauses are clearly worded, they will not be subject to the rule of *contra proferentem.*

APPLICATION OF THE RULE CONTRA PROFERENTEM IN INDIA

In the context of Indian laws, there are minimal statutory provisions guiding contract interpretation, primarily emphasizing reasonableness and discouraging exploitation, particularly when there is an imbalance in bargaining power between parties, leading to potential ambiguity in contract interpretation rules.

"The Indian Contract Act, 1872, outlines principles related to enforceability, void contracts, acceptance, consent, fraud, and breaches. However, it lacks specific provisions or guidance on contract drafting and interpretation."[38] Many people view Indian contract laws as outdated, with statutes scattered across different legislations, diminishing the Act's overall clarity. In addition to the Indian Contract Act, 1872 other relevant laws governing contracts in India include the Sale of Goods Act, 1930, and the Indian Evidence Act, 1872. "The Indian Evidence act strictly condemns ambiguous writing in a contract, urges the drafter to use clear and unambiguous phrasing of the terms, and requires a party disputing any terms of a contract, that are drafted using plain and unambiguous language, to substantiate its claim that the phrasing of such terms is

[35] MP Ram Mohan & Anmol Jain, *Exclusion Clauses Under the Indian Contract Law: A Need to Account for Unreasonableness*,13 NUJS L. Rev., 1, 2 (2020).
[36] EDWIN PEEL, Treital on the Law of Contract, 7-15 (Sweet & Maxwell,2020).
[37] Jonna, *supra* note 21, at 492.
[38] Aparajita, supra note 3, at 860.

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actually meant to have a more liberal or vaguer meaning."[39]

"Additionally, under Section 91 of the Indian Evidence Act, a document stands as proof on its own, and no alternative secondary evidence is permissible. Section 92 prohibits the admission of oral evidence when the terms of a contract are established through a document."[40] However, exceptions apply if evidence invalidating the document is presented, or in cases of separate oral agreements, customary practices related to the contract, or facts illustrating the language's manner.

Apart from established contract interpretation principles, Indian courts, influenced by Common law traditions, have incorporated the "*Contra Proferentem"* principle in various cases. Notably, this principle has found application in the context of "insurance contracts". "Due to the insured party's obligation under the doctrine of "*Uberremi Fidei"* (utmost good faith), the *Contra Proferentem* principle is invoked against insurance companies when ambiguities arise in their policy contracts."[41]

JUDICIAL INTERPRETATION OF THE RULE CONTRA PROFERENTEM BY INDIAN COURTS

As per Halsbury's Laws of England[42], *"the principle of contra proferentem only becomes operative where the words are truly ambiguous; it is a rule for resolving ambiguity and it cannot be invoked with a view to creating a doubt. Therefore, where the words used are free from ambiguity in the sense that, fairly and reasonably construed, they admit of only one meaning, the rule has no application."*

The court highlighted this fact in "*United India Insurance Co. Ltd v. M/S. Orient Treasures Pvt. Ltd.*[43] and accordingly held that there was no ambiguity in the words expressed in the clauses under dispute and the language carried only one meaning set out in clear terms, the maxim was found not useful to decide the case. It was also observed by the court "that when the words of a statute are plain or unambiguous, the Courts are bound to give effect to the meaning irrespective of the consequences."

[39] Section 91 through Section 97, Indian Evidence Act, 1872.
[40] Abhishek Akshantaka, *Analyzing the Jurisdictional Arbitrage Potency of Indian Contract Law: With the Distinct Application of the Parol Evidence Rule of Contract Interpretation*, 8, Asian Law Public Policy Rev., 137, 142-143 (2023).
[41] O.N. Ravi, *supra* note 1, at 129.
[42] Halbury's Laws of England (5th ed, 2016) 60, para 105.
[43] United India Insurance Co. Ltd. v. M/S. Orient Treasures Pvt. Ltd., 2016 (3) SCC 49.

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Similarly, in "*M/s. I.P. & Investment Corpn. v. New India Assuance Co Ltd*.,[44] it was held that in order to permit a claim under the policy a forcible and violent entry would be required as sine qua non. However, the language was very clearly set out in the insurance policy and admits of no ambiguity and hence the question of invocation of the maxim does not arise in the case. This rule cannot be used to find ambiguity or vagueness where it does not exist. The words have to be read as it is without addition or subtraction."

However, the Supreme Court observed in the case of "*Rashtriya Ispat Nigam Ltd. v. Dewan Chand Ram Saran*[45] that this principle will not apply and not to be invoked in commercially negotiated contract between two parties."

The Court in "*General Assurance Society Ltd. v. Chandmull Jain and Anr*.[46], *and United Insurance Co. Ltd. v. M/S. Pushpalaya* Printers[47] observed that the Contracts of insurance being special standard contracts requiring commitment of uberrima fides (good faith) on the part of the insured. Hence, whenever there is an ambiguity in the contract, it was ruled against the insurance company using the maxim of *contra proferentem.* Wherever the facts fitted in this structure, the Supreme Court has applied the maxim to those cases."

Applying the principle of "*contra proferentem"*, Delhi High Court in "*Namrata Singh & Ors. V. Director General Civil Aviation*[48], allowed the pilots to be eligible for the insurance cover on account of the clear single language arrived at after reading the entire document and concluded that the expression passengers included the pilots as well."

"In *Bank of India v. K. Mohandas & Ors*[49]. Supreme Court observed that the true construction of a contract must depend upon the import of the words used and not upon what the parties choose to say afterwards. Nor does subsequent conduct of the parties in the performance of the contract affect the true effect of the clear and unambiguous words used in the contract. The Court held that the banks which framed the policy for Voluntary Retirement Scheme should take the responsibility for any laxity in drafting leading to ambiguity in the expression of the terms of the contract of retirement. Such ambiguity should justifiably be held in favor of the optees of the scheme applying the rule of contra proferentem."

In a very recent case "*Sushilben Indravadan Gandhi v. The New India Assuarnace Company*[50],

[44] M/S. I.P. & Investment Corpn. V. New India Assuance Co. Ltd., Civil Appeal No. 1130 of 2007.
[45] Rashtriya Ispat Nigam Ltd. v. Dewan Chand Ram Saran, AIR 2012 SC 2829.
[46] General Assurance Society Ltd. v. Chandmull Jain and Anr., 1966 SCR (3) 500.
[47] United India Insurance Co. Ltd. v. M/S. Pushpalaya Printers, AIR 2004 SC 1700.
[48] Namrata Singh & Ors. V. Director, General Civil Aviation, AIR 2017 (NOC) 692 (DEL.).
[49] Bank of India v. K. Mohandas, & Ors., Civil Appeal No. 1942 of 2009.
[50] Sushilben Indravadan Gandhi v. The New Indian Assurance Company, (2021) 7 SCC 151.

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the Supreme Court considered the application of contra proferentem principle. It held that only in the event of vagueness or unclear expressions used in a clause, can the maxim be pressed into service. Upon examination of the clause, if the ambiguity is found, then this maxim can be made applicable. Upon reading of the entire insurance contract, if it brought about clarity, then in that case even an ambiguous clause found in the contract the principle of contra proferentem would not be applicable. Similarly, even if one meaning is given to a clause but other parts of the insurance contract are clear, it would be construed in accordance with the rest of the policy."

IMPACT ON INDIAN CONTRACT LAW: ANALYSIS

The principle of "*contra proferentem"* plays a crucial role in the interpretation of contracts in India, as highlighted by various court decisions. This rule is invoked when contract terms are genuinely ambiguous, aiming to resolve such ambiguity rather than creating doubt. Indian courts have consistently applied this principle, especially in the realm of insurance contracts, which are deemed special standard contracts demanding utmost good faith from the insured. In instances where ambiguity arises, the maxim is utilized against the party introducing the ambiguous term, often favoring the insured. However, the courts emphasize that contra proferentem is not a tool to create ambiguity but to address existing uncertainty in contractual language.

The impact of these court decisions on Indian contract law is significant. They underscore the importance of clarity in contractual language and discourage parties from exploiting ambiguities. The application of contra proferentem in insurance contracts, where fairness and good faith are paramount, reinforces the need for transparency and unambiguous terms. The rulings emphasize that if a contract is clear and unambiguous in its overall language, the maxim may not be invoked, promoting a fair and equitable interpretation of contracts in the Indian legal landscape.

Furthermore, these court decisions reflect the evolving nature of contract interpretation in India, where the courts acknowledge the need to balance contractual autonomy with fairness and protection of the weaker party. The principle of contra proferentem acts as a safeguard against potential abuses and ensures that contracts are construed in a manner consistent with the reasonable expectations of the parties involved. While the Indian Contract Act of 1872 may lack detailed provisions on contract drafting and interpretation, judicial application of principles like contra proferentem serves as a dynamic and responsive approach, adapting to the complexities of modern contractual relationships. This pragmatic stance by the Indian courts contributes to legal

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certainty and reinforces the idea that contractual obligations should be transparent, equitable, and aligned with the principles of justice and good faith.

CONCLUSION

In essence, the journey through the historical evolution and application of the *"contra proferentem"* rule in contract law provides a comprehensive understanding of its significance. Stemming from a need for clarity and fairness in contractual relationships, this principle has traversed through legal landscapes, adapting to the changing dynamics of contract interpretation. Delving into its historical development, we witness its emergence as a safeguard against ambiguity and exploitation, evolving into a rule invoked when terms are genuinely unclear.

As we explore its applications, particularly in the nuanced realm of insurance contracts, the principle emerges as a guardian of fairness, demanding utmost good faith and transparency from the parties involved. The impact on Indian contract law is substantial, as these court decisions highlight the delicate balance between contractual autonomy and the protection of the weaker party. The pragmatic application of *"contra proferentem"* in Indian courts acts as a responsive approach, filling the gaps left by statutory provisions and ensuring that contracts align with principles of justice and good faith.

The *"contra proferentem"* principle, with its roots in historical legal thought, continues to play a pivotal role in shaping the interpretation of contracts in India. It stands as a testament to the legal system's adaptability, addressing complexities in modern contractual relationships and reinforcing the core values of fairness, transparency, and justice.