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CONTRACT INTERPRETATION CONTRA PROFERENTEM ACCORDING TO THE CROATIAN OBLIGATIONS ACT

The aim of contract interpretation according to the Croatian Obligations Act is to ascertain and give effect to the common intent of the parties. This general principle informs contract interpretation in all circumstances, including the proper application of the contra proferentem maxim under Article 320(1) of the Croatian Obligations Act. The contra proferentem rule is a corollary of both the principle of good faith and the principle of party autonomy: when interpreting contractual language, one should resist possible attempts by the drafter to abuse his position so as to write the contract in a way which does not reflect the actual agreement of the parties. Nonetheless, the contra proferentem rule of Article 320(1) of the Obligations Act applies only when the following requirements are met: (a) the contractual term at issue is unclear, (b) the contract was prepared and proposed by one party and (c) the contract was made on the basis of a pre-printed form or otherwise involves the possibility of the drafter abusing his position to advance his own interests when drafting the contracts.

Key words: *contract interpretation, interpretation contra proferentem, Croatian Obligations Act*

INTRODUCTION

In most developed legal systems, the aim of contractual interpretation is to ascertain the common intent of the parties regarding the meaning of their contract. In order to assist the interpreter in achieving this purpose, many jurisdictions, particularly those belonging to the civil law family, codify in their laws certa-

in general canons of contractual interpretation. Under the approach prevailing in comparative law, these canons are not an end in and of themselves. They are merely interpretative tools that are applicable only insofar as they can assist courts or tribunals in ascertaining the common intent of the parties.

The purpose of this paper is to discuss one of such canons of interpretation, namely interpretation *contra proferentem*, according to the Croatian Obligations Act.¹ At the outset, the paper will identify and explain the general principles of contract interpretation in Croatian law under Article 319 of the Croatian Obligations Act, as they are necessary to understand and properly apply Article 320(1) which deals with the *contra proferentem* doctrine. It will then address the meaning and purpose of Article 320(1) and take stock of its application in court practice.

The Croatian Obligations Act is largely based on the Yugoslav Obligations Act, which was adopted in 1978. While important amendments have been made in the Croatian Obligations Act, especially in the field of torts, its provisions are in many respects the same or substantially the same as those of the 1978 Obligations Act. Case law and scholarly writings developed under that Act may therefore be consulted when interpreting the Croatian Obligations Act.

This paper does not discuss the principles of contract interpretation under other statutes, such as the Consumer Protection Act,² which have precedence over the Obligations Act.

GENERAL RULES OF CONTRACTUAL INTERPRETATION

Article 319(1) of the Obligations Act: the “Clear Wording” Rule

According to Article 319(1) of the Obligations Act, “*contractual terms shall be applied as they read.*” This provision codifies the maxim according to which, where the language of a contractual term is clear, the term is not to be subject to interpretation (“*in claris non fit interpretatio*”).³

¹ *Narodne novine* Nos 35/2005, 41/2008, 125/2011, 78/2015, 29/2018.

² *Narodne novine* Nos 41/2014, 110/2015, 14/2019.

³ Slobodan Perović, Dragoljub Stojanović, *Komentar Zakona o obligacionim odnosima*, Kulturni centar, Gornji Milanovac, Pravni fakultet, Kragujevac, 1980, vol. I, p. 354; Vilim Gorenc, *Komentar Zakona o obveznim odnosima*, RRIF, Zagreb, 2014, p. 509; Borislav T. Blagojević, Vrleta Krulj, *Komentar Zakona o obligacionim odnosima*, Vol. I, Savremena administracija, Beograd, 1983, pp. 313–314; Stojan Cigoj, *Komentar obligacijskih razmerij*, Vol. I, Uradni list, Ljubljana, 1984, p. 345.

While Article 319(1) of the Obligations Act does not expressly state that it applies only to clear terms, it emerges from the published decisions of Croatian courts that this is indeed how the provision is to be understood.⁴

Croatian courts view Article 319(1) of the Obligations Act as a corollary of the fundamental principle of party autonomy, codified in Article 2 of the Obligations Act: to interpret a contract contrary to its clear wording would be to substitute the parties' common intent with that of the interpreter.⁵

The "clear wording rule" of Article 319(1) of the Obligations Act has its counterparts in many developed legal systems. Among civil law jurisdictions in which such a rule applies, as a canon or maxim of interpretation, are for example, France and Germany.

The French *Cour de cassation* has developed a doctrine known as *clauses claires et précises*, according to which when written terms of a contract are "clear and precise" there is an irrebutable presumption that they reflect the intention of the parties.⁶ As of 2016, when the Code Civil underwent a major reform, this doctrine has received legislative approval in France.⁷

Similarly, German courts have long applied the "unambiguity rule" (*Eindeutigkeitsregel*) according to which unambiguous terms are to be applied as they

⁴ Supreme Court, Judgment No. Rev 698/2006-02, 26 July 2006; High Commercial Court, Judgment No. Pž 2531/05-4, 9 May 2007; High Commercial Court, Judgment No. Pž-2610/04-5, 28 August 2007; High Commercial Court, Judgment No. Pž-3825/05-3, 18 June 2008; High Commercial Court, Judgment No. Pž 4765/07-3, 5 September 2008; Supreme Court, Judgment No. Rev 1369/2007-2, 1 April 2009; Supreme Court, Judgment No. Rev 1422/2009-2, 18 May 2011; Supreme Court, Judgment No. Rev x 515/2011-2, 29 November 2011; Supreme Court, Judgment No. Revt 165/2011-2, 22 May 2012; Supreme Court, Judgment No. Rev x 179/2009-2, 24 October 2012; Supreme Court, Judgment No. Revt 47/2012-2, 9 April 2013; Supreme Court, Judgment No. Revt 133/2009-2, 26 June 2013; Supreme Court, Judgment No. Revt 107/2012-2, 18 September 2013; Supreme Court, Judgment No. Revt 89/2009-2, 10 October 2013; Supreme Court, Judgment No. Rev x 806/2013-2, 21 May 2014; Supreme Court, Judgment No. Revr 985/2012-2, 3 September 2014.

⁵ "Kada su riječi pisane isprave jasne, ne može se dokazivati da je volja sastavljača bila drukčija, jer se tumačenje jasnih ugovornih odredbi protivi pojmu i smislu tumačenja. Time bi bilo povriđeno osnovno načelo slobodnog uređivanja obveznih odnosa." High Commercial Court, Judgment No. Pž 2531/05-4, 9 May 2007; High Commercial Court, Judgment No. Pž 3825/05-3, 18 June 2008; High Commercial Court, Judgment No. Pž 4765/07-3, 5 September 2008. See Gorenc, op. cit., p. 509.

⁶ The leading decision in this respect was the judgement of the Cour de Cassation in *Veuve Foucauld et Coulombe c. Pringault* of 15 April 1872. Cass. civ., 15 avr. 1872, DP 1872, 1, cited per *Droit & Patrimoine*, No 247, May 2015, p. 38.

⁷ Article 1192 of Code Civil: "On ne peut interpréter les clauses claires et précises à peine de dénaturation." *Ordonnance n° 2016-131 du 10 février 2016 portant réforme du droit des contrats, du régime général et de la preuve des obligations*.

read. According to the prevailing opinion, the rule is still applied by the German Supreme Court (*Bundesgerichtshof*) as well as the lower German courts.⁸

Article 319(2) of the Obligations Act: Ascertaining Common Intent

a) *General.* – Article 319(2) of the Obligations Act, like Article 319(1), reflects the fundamental principle of contractual interpretation of Croatian law: contracts are to be interpreted according to the common intent of the parties. According to Article 319(2), “[w]hen interpreting controversial terms one is not to adhere to the literal meaning of the expressions used but rather to search for the common intention of the parties and understand the terms in a manner which complies with the principles of the law of obligations established by this Act.”

The language of Article 319(2) corresponds almost literally to the relevant provisions of major civil law codifications.⁹

For example, §914 of the Austrian Civil Code (ABGB) provides as follows:

*“When interpreting contracts one is not to adhere to the literal meaning of the expressions used but rather to search for the intention of the parties and understand the contract in a manner which complies with fair business practice.”*¹⁰

The German Civil Code provides in § 133:

*“When interpreting a declaration of intent one is to search for the true intention and not to adhere to the literal meaning of the expression.”*¹¹

⁸ BGH NJW 1984, 289, 290 (“Voraussetzung für die Auslegung einer Willenserklärung ist deren Auslegungsfähigkeit. Bei absoluter Eindeutigkeit ist für eine Auslegung kein Raum”. (Krüger=Nieland-Zöller, in: RGRK, 12. Aufl., § 133 Rdnr. 5 m. w. Nachw. aus der Rspr. des BGH).) [“It is a requirement of any interpretation of a contract that the contract is apt for interpretation. In case of absolute clarity of a contract, there is no room for interpretation (...)”], BGH NJW 1996, 2648, 2650 (“Auslegung setzt erst ein, wenn der Wortlaut einer Erklärung zu Zweifeln überhaupt Anlaß gibt.”) [“Interpretation can only begin when the wording of a contract raises any doubts about its meaning.”], BGH NJW 2005, 2225, 2227 (“Die Prüfung ergibt, dass die vom Ber Ger. angenommene Eindeutigkeit nicht besteht, so dass die Erklärungen der Parteien vom RevGer. selbst auszulegen sind.”) [“It is the assessment [of the Supreme Court] that the Court of First Instance was wrong in assuming clarity of the contract, so the Court of First Instance will have to interpret the contract.”]. That the clear wording rule is, according to the prevailing opinion, still applicable in Germany is confirmed in the academic commentary. See, e.g., Palandt/Heinrichs/Ellenberger (75th ed.), § 133, para 6.

⁹ See e.g. § 914 Austrian ABGB; §§ 133, 157 German BGB; Art. 18 Swiss OR; Article 1156 French *Code Civil*; Art. 1362 Italian *Codice civile*, Provisions of Civil Codes on Contract Interpretation.

¹⁰ § 914 Austrian Civil Code (ABGB): “Bei Auslegung von Verträgen ist nicht an dem buchstäblichen Sinne des Ausdrucks zu haften, sondern die Absicht der Parteien zu erforschen und der Vertrag so zu verstehen, wie es der Übung des redlichen Verkehrs entspricht”.

¹¹ § 133 German Civil Code (BGB): “Bei der Auslegung einer Willenserklärung ist der wirkliche Wille zu erforschen und nicht an dem buchstäblichen Sinne des Ausdrucks zu haften.”

and in § 157:

*“Contracts are to be interpreted in accordance with the requirements of good faith and in line with commercial usage”.*¹²

Article 319(2) of the Obligations Act differs from major codifications only in that it states that it applies to “*controversial terms*”, and in that it refers to “*principles of the law of obligations established by this Act*”, not to good faith or usages.

As it will be discussed below, these differences were not intended to create any distinctly Croatian (or, formerly, Yugoslav) solutions to the problems of contract interpretation. Rather, the principles of contract interpretation under Croatian law are the same as those prevailing in major civil law jurisdictions.¹³

b) *Scope of Application of Article 319(2).* – Article 319(2) of the Obligations Act applies, according to its letter, only to “*controversial*” terms. The Croatian Supreme Court has explained through its published decisions, that this expression is to be interpreted as meaning “*unclear*” terms.¹⁴ For example, in a decision of 10 October 2013, the Supreme Court found that “*the contract does not contain any unclear clauses that need to be interpreted in accordance with [Article 99, para. 2] of the Croatian Obligations Act*” and applied Article 319(1) to the effect that the contract is to be applied as it reads even though the parties disagreed over its meaning.¹⁵ Therefore, a mere controversy between the parties regarding the meaning of a term does not render Article 319(1) of the Obligations Act inapplicable.

c) *Establishing Common Intent.* – In general terms, the primary aim of interpretation under Article 319(2) of the Obligations Act is to establish the *subjective* common intent of the parties. Since in practice, however, subjective intent (a “meeting of the minds”) hardly ever can be established with certainty, the analysis usually relies on an *objective* test – that is, what a reasonable person knowing the relevant circumstances in which the contract was concluded would have under-

¹² § 157 German Civil Code (BGB): “*Verträge sind so auszulegen, wie Treu und Glauben mit Rücksicht auf die Verkehrssitte es erfordern.*”

¹³ The only systematic commentary specifically on the Croatian law of obligations explains that the rules of contract interpretation under Article 319 of the Croatian Obligations Act are the same as those applicable in major civil law codifications such as the Austrian, German, Swiss and Italian ones, Gorenc, op. cit., p. 510.

¹⁴ Supreme Court, Judgment No. II Rev 152/1994-2, 22 November 1994; Supreme Court, Judgment No. Rev 1076/1999-2, 3 July 2002; Supreme Court, Judgment No. Revr 80/2006-2, 9 January 2008; Supreme Court, Judgment No. Revt 89/2009-2, 10 October 2013; Supreme Court, Judgment No. Revt 192/2011-2, 8 January 2014. Compare to: Supreme Court, Judgment No. Rev 2429/1994-2, 27 July 1994.

¹⁵ Supreme Court, Judgment No. Revt 89/2009-2, 10 October 2013.

stood the agreement of the parties to be. When applying the objective test, the goal is to establish *actual intent*, albeit by objective means, and not to explore the hypothetical intent of the parties.¹⁶

In ascertaining what a reasonable person would have understood the common intent of the parties to be, the interpreter will rely, as a starting point, on any written contract terms and analyse their language and their place in the context of the entire contract. When Article 319(2) of the Obligations Act instructs the interpreter “not to adhere to the literal meaning of the expressions used” and to search for the common intent of the parties, it does not require the interpreter to disregard the text of the contract. Indeed, the text usually remains the best evidence of the common intent of the parties. The clearer the text, the easier it is for the interpreter to ascertain the common intent.¹⁷

Where doing so is necessary to understand the meaning of the terms, the interpreter will consider such text and context in light of extrinsic considerations (such as the purpose and nature of the transaction, the circumstances in which the contract was concluded, the negotiations leading to the contract, the subsequent conduct of the parties, the prior dealings between them, commercial usages, etc.).

As part of the search for common intent, Article 319(2) of the Obligations Act requires the interpreter to “*understand the terms in a manner which complies with the principles of the law of obligations established by this Act.*” Under this provision, when there are several possible meanings of a contractual term, the interpreter is to opt for one that is consistent with the principles of the law of obligations rather than one that is not. For example, if due to a typing error the buyer’s offer indicates a price ten times higher than one which had been actually negotiated, it would be contrary to the principle of good faith (Article 4 of the Obligations Act) for the seller to rely on the erroneous language and claim the higher price. An understanding consistent with the principle of good faith is that the price was the one referred to in the negotiations (as demonstrated through contemporaneous documentation or other evidence).

¹⁶ Hypothetical intent of the parties may be relevant in the process of interpretation only as part of gap-filling. When the parties have not contemplated a certain issue when negotiating the contract, courts may inquire what terms the parties would have reasonably agreed upon under the circumstances had they contemplated that issue. Given that gap-filling is not of concern in the present case, the search for hypothetical intent is not discussed further in this paper.

¹⁷ Claus-Wilhelm Canaris, Hans Christoph Grigoleit, “Interpretation of Contracts” in: Hartkamp et al. (eds), *Towards a European Civil Code* (2011), p. 596; Stefan Vogenauer, “Interpretation of Contracts: Concluding Comparative Observations”, in: A. Burrows, E. Peel (eds.), *Contract Terms* (2007), Oxford Legal Studies Research Paper No. 7/2007, p. 11.

It is important to note that under Article 319(2) of the Obligations Act, the principles of the law of obligations do not govern the legal relationship of the parties as such. They are used only as a yardstick in establishing common intent. This follows in particular from the phrase contained in Article 319(2) “to *understand the terms* in a manner which is in accordance with” those principles. Article 319(2) of the Obligations Act does not allow the interpreter to substitute the terms actually agreed between the parties with the interpreter’s own understanding of what terms would best fulfil the principles of the law of obligations or what terms would be fair under the circumstances. Doing so would be inconsistent with the nature of the process of contract interpretation and contrary of the principle of party autonomy.

Article 319(2) of the Obligations Act refers to the principles of the law of obligations established by the Obligations Act as a whole. It does not require that the parties’ declarations in each case be measured against each individual principle of the law of obligations codified in the Obligations Act. Such a mechanical approach would defeat the purpose of Article 319(2) of the Obligations Act. The interpreter should first inquire what possible meanings the parties, as a matter of fact, could have reasonably attached to a term and then, if any of the meanings is incompatible with the principles of the law of obligations, establish that the parties likely did not intend the contractual term to have that meaning.

ARTICLE 320(1) OF THE OBLIGATIONS ACT: INTERPRETATION AGAINST THE DRAFTER

According to Article 320(1) of the Obligations Act, “[w]here a contract is concluded on the basis of a pre-printed content, or where a contract was otherwise prepared and proposed by one contracting party, any unclear term shall be interpreted in favour of the other contracting party”.

The provision codifies the maxim that ambiguities are interpreted against the drafter, that is, the maxim *contra proferentem*. The provision is a corollary of the principle of good faith: a party should not be able to abuse its position as the drafter by concealing into the contractual language a term to which the other party reasonably had no opportunity to object. The *contra proferentem* rule is also a function of the principle of party autonomy; when interpreting contractual language, one should resist possible attempts by the drafter to use his position to write the contract in a way which does not reflect the actual agreement of the parties. The rule therefore does not contradict the principle of interpretation according to common intent, but is, like other canons of interpretation, an instrument of its implementation.

When applying the *contra proferentem* rule, one should take into account that, as a matter of policy, contract law should not discourage parties from recording their agreements in writing. If, as a matter of principle, contracts were to be interpreted against their drafters, nobody would agree to draft contracts. By the same token, if the non-drafting party could always benefit from an interpretation of the contract in its favour, parties would have no incentive to participate and co-operate in contract drafting. The *contra proferentem* rule, therefore, should not be applied beyond its purpose. It should rather be applied to prevent parties who, due to their bargaining power or dominant position, control the drafting of the contract, from using ambiguous expressions in order to achieve their own interests.

For those reasons, the application of Article 320(1) of the Obligations Act is subject to significant limitations which are explained below.

Scope of Application of Article 320(1)

The first limitation is that, according to its express language, Article 320(1) of the Obligations Act applies only to “unclear terms”. Published jurisprudence of Croatian courts indicates that courts have consistently refused to apply Article 320(1) of the Obligations Act to clear contractual clauses.¹⁸

As explained in the context of Article 319(2), no party can unilaterally choose, by merely raising an issue with the meaning of a term, which provisions of substantive law govern contract interpretation. If that were allowed, Article 320 of the Obligations Act, which according to its title applies only in “Specific Cases”, would be applicable whenever there is a dispute between the parties over the meaning of a term. It would, in other words, apply in all contract interpretation cases. An exception would thus become a general rule.

Article 320(1) of the Obligations Act applies only to terms that are objectively unclear. As with respect to Article 319(1), the mere fact that there is a dispute between the parties over the meaning of a term does not render Article 320(1) applicable. In all the published cases on Article 320(1) of the Obligations Act which involved a clause that the courts considered to be clear, the courts refused

¹⁸ High Commercial Court, Judgment No. Pž 1370/93, 15 June 1993; Supreme Court, Judgment No. Rev 1076/1999-2, 3 July 2002; High Commercial Court, Judgment No. Pž 260/06-3, 22 October 2008; Supreme Court, Judgment No. Rev x 528/2010-2, 22 September 2010; High Commercial Court, Judgment No. Pž 4915/2008-4, 3 May 2012; Supreme Court, Judgment No. Revt 107/2012-2, 18 September 2013; Supreme Court, Judgment No. Revt 89/2009-2, 10 October 2013; Supreme Court, Judgment No. Revt 192/2011-2, 8 January 2014.

to apply the provision, even though the parties were in dispute over the meaning of the clause.¹⁹

Contract “Prepared and Proposed” by One Party

For the *contra proferentem* rule to apply, Article 320(1) of the Obligations Act expressly requires that the contract is “prepared and proposed by one contracting party.” Where all the parties participated in the drafting process, interpretation *contra proferentem* is inappropriate.²⁰ This will be the case, for example, when the parties exchanged drafts and were able to, and did, propose changes to the contract.

It occurs in practice that when a party drafts some but not all contract clauses, the other party contends that those clauses are to be interpreted against that party. To employ *contra proferentem* interpretation in such cases would be contrary to the clear language of Article 320(1) of the Obligations Act, according to which the provision applies when a party prepared and proposed the contract as a whole. When some contractual clauses written by one party and others by the other, it would be commercially untenable to interpret each clause against its own drafter. Such an approach to contract interpretation would result in discouraging parties from cooperating with each other to draft contracts. A non-drafting party who notices ambiguities in a draft contract would have no incentive to communicate them to the drafting party. Such an approach would also encourage litigation over whether a particular term of the contract was drafted by one or the other party. Thus, as clearly stated in Article 319(1) of the Obligations Act, the *contra proferentem* rule is applicable only when one of the parties “prepared and proposed” the contract as a whole.

On proper interpretation of Article 320(1), the *contra proferentem* maxim cannot apply where the contract as a whole was prepared by a person or an entity who is not party to the contract (such as e.g. in the case of FIDIC general conditions).

Application Only in Cases of Abuse

Published judicial decisions indicate that Croatian courts view Article 320(1) as applying primarily to contracts concluded on contract forms or on

¹⁹ See previous footnote.

²⁰ The Gorenc commentary expressly states that when “both parties participated in the drafting of the contractual terms”, interpretation is governed by Article 319, not by the *contra proferentem* rule of Article 320, paragraph 1 of the Croatian Obligations Act. V. Gorenc, op. cit., p. 511.

standard terms used by one of the parties.²¹ Outside that context, courts have only considered the application of the principle when the drafter was in a dominant position with respect to the other party (e.g., in employment contracts).²² Yet, even in those cases, the *contra proferentem* rule was found to be inapplicable when the contract was individually negotiated between the parties.²³

It is submitted that there is merit to such a restrictive approach to the application of the *contra proferentem* maxim. Article 320(1) expressly uses pre-printed contracts as an example of a proper use of the *contra proferentem* principle. In accordance with the *ejusdem generis* method of interpretation, and the exceptional nature of the *contra proferentem* maxim, Article 320(1) should properly apply in scenarios comparable to the use of pre-printed contracts. It would be consistent with the purpose of Article 320(1) of the Obligations Act to limit its application to such cases, because they involve the potential for an abuse by the drafter of its position vis-à-vis the other party. For that reason, the rule should apply primarily when the contract is concluded on a pre-printed form or represents a standard set of terms used by one of the parties without scope for amendment. In other words, Article 320(1) should be applied primarily to contracts of adhesion.

According to academic commentary, even in the context of adhesion contracts, the *contra proferentem* rule applies only as a rule of last resort, if the interpreter cannot establish the common intent by other means.²⁴ Having in mind the nature and purpose of the maxim, it is appropriate to resort to *contra proferentem* only in the cases where the ambiguous terms are inaccessible, opaque or incomprehensible to such an extent that it is appropriate to infer that the drafter reasonably could have included them in the expectation that the other party would not be able to notice them or understand their proper meaning.

²¹ High Commercial Court, Judgment No. Pž 1682/93, 23 November 1993; High Commercial Court, Judgment No. Pž 6479/05-5, 23 December 2008; Supreme Court, Judgment No. Revt 192/2011-2, 8 January 2014 (bank guarantee); High Commercial Court, Judgment No. Pž 7283/04, 14 September 2005 (insurance policy)..

²² Supreme Court, Judgment No. Revr 580/2011-2, 8 January 2013.

²³ County Court Zagreb, Judgment No. Gžr 814/2010-2, 17 December 2012; High Commercial Court, Judgment No. Pž 3825/05-3, 18 June 2008.

²⁴ S. Perović, op. cit., p. 355; V. Gorenc, op. cit., p. 511. This approach is consistent with the understanding of the *contra proferentem* maxim in the classical period of Roman law. In that period, resort to that rule was considered appropriate only if it was impossible to otherwise ascertain the common intent ("*id quod actum est*"). D. 18.1.33. Pompon 33; "[P]rimum spectari oportet, quid acti sit; si non id appareat, tunc id accipitur, quod venditori nocet: ambigua enim Oratio est." See Reinhard Zimmerman, *The Law of Obligations: Roman Foundations of the Civilian Tradition*, Juta&Co, Cape Town, 1990, p. 640.

These considerations apply with even greater force to individually negotiated contracts. Having in mind the purpose of the *contra proferentem* rule, and the requirement of abuse, scenarios where the rule can apply in the context of an individually negotiated contract are difficult to imagine. Here's an example:

A homeowner negotiates the sale of his home with a buyer who is an attorney experienced in property law. In order to save on legal costs, the homeowner, relying on the buyer's expertise and trusting that the buyer will act in good faith, agrees that the buyer prepares the text of the sales contract. Using ambiguous language and multiple cross-references within the text of the contract, the buyer inserts onerous terms which the seller, without legal advice, cannot notice and properly understand. If the seller signs the text proposed by the buyer, it is proper to find that, although the contract was not one of adhesion, the buyer abused his position as a drafter and that the ambiguous terms should be interpreted against him.

Even in exceptional scenarios, such as the above example, the *contra proferentem* rule ought not to apply to clauses over which the parties specifically negotiated. If an ambiguous clause was specifically the subject of communications between the parties during negotiations, this means that each party had a reasonable opportunity to contemplate on the meaning of the clause and was in the position to decide whether or not to agree to it. To interpret the clause in such cases against the drafter would be contrary to the principle of party autonomy and common intent.

These considerations apply with even more force with regard to contracts negotiated between commercial entities. It is submitted that the potential for the application of the *contra proferentem* to such contracts requires a nuanced approach which leaves little room for the application of the maxim. It may be possible, subject to the above requirements, to properly give effect to this rule in cases of adhesion contracts which involve a disparity in the expertise or bargaining power between the offeror and the offeree. For example, an insured commercial entity may in some cases reasonably expect to be able to invoke Article 320(1) against the insurance company which prepared the general terms of the insurance policy. On the other hand, it would be wrong to apply the *contra proferentem* rule to a set of special conditions to a construction contract prepared by the employer, given that contractors who bid on such contracts must be expected to have the expertise needed to understand and apply them. In line with the above considerations, with respect to contract terms over which commercial parties have specifically negotiated the rule ought not to be applied at all.

CONCLUSION

The aim of contract interpretation according to the Croatian Obligations Act is to ascertain and give effect to the common intent of the parties. This general principle informs contract interpretation in all circumstances, including the proper application of the *contra proferentem* maxim under Article 320(1) of the Obligations Act.

The *contra proferentem* maximis a corollary of the principle of good faith: a party should not be able to abuse its position as the drafter by concealing into the contractual language a term to which the other party reasonably had no opportunity to object. The *contra proferentem* rule is also a function of the principle of party autonomy; when interpreting contractual language, one should resist possible attempts by the drafter to use his position to write the contract in a way which does not reflect the actual agreement of the parties. The rule therefore does not contradict the principle of interpretation according to common intent, but is, like other canons of interpretation, an instrument of its implementation.

Article 320(1) of the Obligations Act applies only when the following requirements are met: (a) the relevant contractual term is unclear, (b) the contract was prepared and proposed by one party and (c) the contract was made on the basis of a pre-printed form or otherwise involves the possibility of the drafter abusing his position to advance his own interests when drafting the contracts.

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TUMAČENJE UGOVORA CONTRA PROFERENTEM PREMA HRVATSKOM ZAKONU O OBVEZNIM ODNOSIMA

Rezime

Cilj tumačenja ugovora, prema hrvatskom Zakonu o obveznim odnosima, jeste da se utvrdi ono značenje neke ugovorne odredbe koja odgovara zajedničkoj volji ugovornih strana. Ovo opće načelo uređuje tumačenje ugovora u svim okolnostima, uključujući i onda kada se radi o pravilnoj primjeni pravila *contra proferentem* prema čl. 320(1) Zakona o obveznim odnosima, tj. pravila o tumačenju ugovora na štetu one strane koja ga je sastavila. Pravilo *contra proferentem* izvodi se, s jedne strane, iz načela savjesnosti i poštenja, a s druge, iz načela stranačke autonomije: pri tumačenju neke ugovorne odredbe, potrebno je spriječiti pokušaje sastavljača ugovora da zloupotrijebi svoj po-

ložaj tako da sastavi ugovor na način koji ne izražava stvarni sporazum ugovornih strana. Ipak, pravilo contra proferentem, iz čl. 320(1) ZOO, s obzirom na njegov tekst i svrhu, primjenjuje se samo pod sljedećim strogim pretpostavkama: (a) ugovorna odredba je nejasna, (b) ugovor je pripremila i predložila jedna ugovorna strana, i (c) ugovor je sastavljen na unaprijed tiskanom sadržaju ili na drugi način pretpostavlja mogućnost da će sastavljač zloupotrijebiti svoj položaj kako bi nametnuo svoj interes pri sastavljanju ugovora.

Ključne riječi: tumačenje ugovora, tumačenje contra proferentem, hrvatski Zakon o obveznim odnosima

Bibliography

- Blagojević Borislav T., Krulj Vrleta, *Komentar Zakona o obligacionim odnosima*, Vol. I, Savremena administracija, Beograd, 1983.
- Canaris Claus-Wilhelm, Christoph Grigoleit Hans, "Interpretation of Contracts" in: Hartkamp et al. (eds), *Towards a European Civil Code*, 2011.
- Cigoj Stojan, *Komentar obligacijskih razmerij*, Vol. I, Uradni list, Ljubljana, 1984.
- Gorenc Vilim, *Komentar Zakona o obveznim odnosima*, RRIF, Zagreb, 2014.
- Perović Slobodan, Dragoljub Stojanović, *Komentar Zakona o obligacionim odnosima*, Kulturni centar, Gornji Milanovac, Pravni fakultet, Kragujevac, 1980.
- Vogenauer Stefan, "Interpretation of Contracts: Concluding Comparative Observations", in: A. Burrows, E. Peel (eds.), *Contract Terms* (2007), Oxford Legal Studies Research Paper No. 7/2007.
- Zimmerman Reinhard, *The Law of Obligations: Roman Foundations of the Civilian Tradition*, Juta&Co, Cape Town, 1990.

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