9. Pitfalls of English as a Contract Language

9.3 English contracts under common law

9.3.3. English canons of construction

Noscitur a sociis
Nonetheless, a term is to be seen in its contextual setting. General words may be restricted by surrounding words.

Contra proferentem
There is a common law rule of construction that ambiguous and unclear words should be construed against the party who chose them. This rule exists in German law only where standard terms are involved.

Commercial or purposive interpretation

Under English canons of construction, the purpose of the contract and its commercial intention cannot be taken into account. This is significantly different from the position under German law where the purpose is of such importance that it can be given greater weight than the actual text of the contract.

However, the commercial or purposive interpretation has now been introduced in England. In Mannai Investments Co Ltd v. Eagle Star Life Assurance Co Ltd [1997] AC 749 the House of Lords, by a majority of three (among them Lords Steyn
and Hoffmann, both of whom come from South Africa\textsuperscript{54}, overturned the rule that evidence about the factual circumstances in which a notice had been served should, generally speaking, be ignored. Instead the court held that the purpose of the wording should be considered (commercial interpretation).

The case concerned a 'break clause'\textsuperscript{55} in a lease which permitted the tenant to terminate that lease on 13 January 1995. The tenant served a break notice on the landlord. Unfortunately for the tenant, that notice stated that: \textit{Pursuant to Clause 7(13) of the lease we as tenant hereby give notice to you to determine the lease on 12 January 1995.}

The notice was clear and unambiguous. The semantic and syntactical analysis left no doubt. If applied rigidly and formalistically, the notice would have failed. However, knowledge of the background against which the notice was given clearly showed that the wrong date had been inserted. The House of Lords found that the break clause had only one purpose: to inform the landlord that the tenant wished to determine the lease in accordance with its terms. The House of Lords ruled in favour of the tenant and overruled precedents established over centuries.

\section*{9.4 English contracts under civil law}

\subsection*{9.4.2 Legal terms of art}

\textit{Common law terms}

\textit{Force majeure} is a clause which causes great confusion under German law. Its effects are well settled under English law: it will excuse performance where events outside the control of a party make performance impossible. Such a clause makes sense under English law where - generally speaking - contractual liability is strict and not dependent on fault of a party (Triebel et al. 1995: 76). Under the fault regime of German law,\textsuperscript{63} however, such a clause is meaningless and may be distorting: fault often requires more than just an event outside the control of a party; a \textit{force majeure} clause may jeopardize the fault principle.

\textsuperscript{47} \textit{It is known from its associates.}

\textsuperscript{52} To negate this rule of construction, parties often agree on the following clause: \textit{Each party has participated in negotiating and drafting this contract. Any ambiguity is to be construed as if the parties had drafted this contract jointly, as opposed to being construed against a party for drafting one or more provisions of this contract.}

\textsuperscript{53} Under German law, the purposive interpretation goes back to Rudolf von Jehring (1877).

\textsuperscript{54} The legal system in South Africa has elements of both Romano-Dutch law (civil law) and English law (common law). This may well have affected their Lordships' approach.

\textsuperscript{55} 'The Tenant may by serving not less than six months notice in writing on the landlord or its solicitors such notice to expire on the third anniversary of the term commencement date determine this Lease and upon expiry of such notice this Lease shall cease and determine and have no further effect...'.

\textsuperscript{63} Sect. 276 German Civil Code (\textit{Bürgerliches Gesetzbuch}).
Referring Principles:

- IV.5.1 - Intentions of the parties
- IV.5.4 - Interpretation against the party that supplied the term
- IV.5.2 - Context-oriented interpretation
- VI.3 - Force majeure