

THE LEGAL REGIME OF UNFAIR CLAUSES IN COMPARATIVE LAW

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Abstract

The concept of unfair clauses has legitimately held the headlines in recent European case law and its relevance is due to the innovative case law solutions and due to the increasing volume of legal contractual relationships which may be considered as being under the legal regime of abusive clauses. The purpose of this article is to analyse unfair clauses in countries with a long history in consumer law, by comparing the manner in which these clauses are stipulated and what each state deems to be unfair. Also, the author's study is aimed to outline the legal solutions identified by the foreign legislator in comparison with the ones established by the Romanian legislator with respect to unfair consumer clauses.

This study is also directed towards emphasizing the necessity of amending the current legal framework regulating abusive clauses, since current technological developments are susceptible of creating situations where the consumer is unlikely to be guarded from a legal point of view. For example, even though contracts concluded online are highly frequent nowadays, consumer protection is still directed towards more classic contracts and is unable to provide for relevant liability in cases when the consumer is subject to intelligent agents acting in cyber space. In particular, the usual lists of clauses deemed as abusive does not reflect and are not exactly applicable to cases when the consumer orders a product or a service through online platforms and therefore, the legal framework must be amended in accordance with common cases usually encountered in today's modern reality.

Keywords: *unfair clauses, unfair contract terms, standard contract terms, good faith, contractual balance, consumer protection rules.*

1. Introduction

All parties enter a contract, when trying to perform an activity, regardless if the activity is focused on selling or procuring assets, obtaining financing for the establishment of a business or insuring their existing business. Contracting parties may be both professionals or individuals. If the parties to the same contract are one professional and one individual, there is a significant protection which the individual should be aware of, since, based on consistent legal provisions, in most cases the individual is deemed to be a consumer.

Under European Union laws¹, the consumer is defined as any natural person who, in contracts covered by this Directive, is acting for purposes which are outside his trade, business or profession, whereas the seller or supplier² means any natural or legal person who, in certain contracts, is acting for purposes relating to his trade, business or profession, whether publicly owned or privately owned. For the purpose of this analysis, we shall refer to such a seller or supplier as a "professional".

The importance of establishing adequate and balanced contractual relationships in cases when a consumer enters a contract where the contracting party is a professional has been emphasized both by European Parliament and by member states officials

whose purpose was to create a coherent and convergent legal framework for the protection of consumers.

The creation of this legal framework is fully justified and was embraced by consumers who requested the application of such framework in their own agreements. For example, large law offices have sustained that there is a growing tendency in recent years for borrowers in Spain to file claims alleging that certain provisions included in their mortgage loans are abusive or unfair². In Romania, this tendency has also been increased in cases where consumers who benefited from credits in CHF reacted promptly by filling claims financial institutions for the annulment of potentially abusive clauses. This tendency was exacerbated most likely by the huge increase of CHF exchange rate³ and the tendency of Romanian courts is to determine that most clauses related to the manner of establishing interest rates and certain commissions are abusive and therefore, should be annulled.

2. Legal framework regarding abusive clauses and unfair terms in the European Union

The necessity to ensure proper guidelines at the level of the European Union was considered given that it is the responsibility of the European Union to supervise and ensure that contracts concluded with consumers do not contain unfair terms. Also, Member

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¹ <http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A31993L0013>

² <http://www.allenoverly.com/publications/en-gb/european-finance-litigation-review/southern-europe/Pages/Increasing-litigation-in-Spain-regarding-abusive-clauses-in-mortgage-loans.aspx>

³ <https://www.economist.com/blogs/economist-explains/2015/01/economist-explains-13>

States took into consideration the creation of a tool aimed to facilitate the establishment of the internal market and to safeguard the citizen in his role as consumer when acquiring goods and services under contracts which are governed by the laws of Member States other than his own.

Based on these premises of protecting European citizens from the risks of unfair terms practiced by other contracting countries, Member States adopted Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts (hereinafter "Directive no. 93/13/EEC").

Directive no. 93/13/EEC focuses on the notion of "good faith" to prevent imbalances in the rights and obligations of consumers on the one hand and sellers and suppliers on the other hand.

Under EU law, standard contract terms used by traders have to be fair. Based on Directive no. 93/13/EEC, a contractual term which has not been individually negotiated shall be regarded as unfair if, contrary to the requirement of good faith, it causes a significant imbalance in the parties' rights and obligations arising under the contract, to the detriment of the consumer.

Since Directive no. 93/13/EEC was aimed to create a legal environment safeguarding consumer, it has produced a large influence regarding fundamental notions and principles of contract law in the traditional domestic legal systems of the Member States⁴.

Further on, this article shall analyze the manner in which some Member States have implemented Directive no. 93/13/EEC and how the protection exercised by the European Union has affected consumers.

3. Legal framework regarding abusive clauses and unfair terms in Romania

Directive no. 93/13/EEC has been transposed in Romania through Law no. 193/2000 regarding unfair terms in contracts concluded between professionals and consumers (hereinafter "Law no. 193/2000").

Law no. 193/2000 establishes basic principles for contracts concluded between professionals and consumers for the sale of assets or for the performance of services, which include the provision of clear contractual clauses which may be understood by any individual, without specialized knowledge.

Also, pursuant to Law no. 193/2000, any unclear clauses shall be interpreted in favour of the consumer.

Law no. 193/2000 establishes a complex mechanism for determining the abusive character of a contractual clause. As per article 4 of Law no. 193/2000, a clause which was not subject to negotiation

directly with the consumer shall be deemed as abusive if by itself or along with other contractual clauses, creates with bad-faith a significant imbalance between your rights and obligations as a consumer and the rights and obligations of professionals. Also, a clause shall be deemed as not being directly negotiated with the consumer in case it has been established without the consumer's effective possibility to influence its content.

If specific terms in a contract are unfair, they are not binding on the consumer and the professional may not rely on them.

If the unfair term is not an essential element of the contract, the rest of the contract, except for the unfair term, remains valid and must be observed by the parties.

It is relevant to observe that the notions of "good-faith" and "significant imbalance" are not defined by Law no. 193/2000. To this end, consumers may revert to the practice of the European Court of Justice, which states that a significant imbalance should not be seen only in connection to an economical quantitative difference between the total value of the contractual operation and the costs borne by the consumer. More precisely, in the Court's opinion⁵, a significant imbalance may result solely from a sufficient damage to the legal situation of the consumer, as a contractual party, manifested as a limitation of the consumer's rights or as a restriction for the exercise of such rights.

Also, in another case⁶, the Court deemed that the observance of the good-faith should be analyzed in connection to the legal situation of the consumer, by considering the mechanisms available to the consumer as per the national legislation for the termination of unfair terms usage. In the same case, the Court mentioned that the national court must verify whether the professional could have had reasonable expectations that the consumer accepts a potentially unfair clause following an individual negotiation.

National doctrine⁷ emphasizes the importance of the evaluation of the professional's behavior in general, by considering several elements, both prior and subsequent to the conclusion of the contract, for the establishment of the professional's good faith.

A point which national doctrine⁸ correctly emphasized is that some clauses inherently connected to and which define the object of the contract or establish the equivalence between the price and the product or service provided by the professional are excluded from the application of Law no. 193/2000 and implicitly, Directive no. 93/13/EEC, if they are expressed in a clear and intelligible language.

As opposed to most continental law, US laws do not comprise a definition of unfair terms and do not provide

⁴ Paolisa Nebbia, *Unfair Contract Terms in European Law. A Study in Comparative and EC Law*, Hart Publishing, 2007.

⁵ ECJ, Judgment of the Court (First Chamber), 16 January 2014, *Constructora Principado SA v José Ignacio Menéndez Álvarez*

⁶ Judgment of the Court (First Chamber), 14 March 2013,

Mohamed Aziz v Caixa d'Estalvis de Catalunya, Tarragona i Manresa (Catalunyacaixa)

⁷ Lucian Mihali Viorescu, *Clauzele abuzive in contractele de credit*, Ed. Hamangiu, p. 176.

⁸ Liviu Stanculescu, *Curs de drept civil. Contracte*, Ed. Hamangiu, 2014, p. 100.

criteria for establishing whether a clause may be deemed as unfair⁹. However, good faith is defined by US laws and this provision may be a proper start for determining whether by breaching good contractual faith, one may generate a significant imbalance to a consumer.

4. The black and grey lists of unfair terms as per Directive no. 93/13/EEC and Law no. 193/2000

Current legal framework does not only provide the conditions which a clause must meet in order to be deemed as unfair, but also exemplifies the types of clauses which may be ab initio considered as unfair.

For example, the Annex of Directive no. 93/13/EEC provides several types of indicative and non-exhaustive list of the terms which may be regarded as unfair. Some of these terms refer to requiring any consumer who fails to fulfil his obligation to pay a disproportionately high sum in compensation, irrevocably binding the consumer to terms with which he had no real opportunity of becoming acquainted before the conclusion of the contract, enabling the professional to alter the terms of the contract unilaterally without a valid reason which is specified in the contract or to alter unilaterally without a valid reason any characteristics of the product or service to be provided or even obliging the consumer to fulfil all his obligations where the professional does not perform his.

This list has been considered as a „grey list” by Romanian doctrine¹⁰, since the determination of the abusive character of such clauses must be performed by analysing the conditions set out in national legal framework. This point of view emerged from European practice¹¹, based on the findings of the European Court which mentioned that the Annex of Directive no. 93/13/EEC serves as a „grey list” of terms which may potentially be deemed as unfair, whereas the Annex of Law no. 193/2000 represents a „black list” of clauses which must be interpreted as unfair, without any subsequent analysis.

The Annex to Law no. 193/2000 comprises, among others, clauses which allow the professional to unilaterally amend the contractual terms, without a serious ground which must also be stipulated in the contract, clauses which oblige the consumer to observe contractual conditions which he could not effectively be aware of at the date of signing of the contract and clauses which allow the professional to exclusively interpret contractual terms.

In addition, the Annex to Law no. 193/2000 also includes clauses based on which the consumer must

may substantial amounts of money if the consumer does not observe certain obligations. These amounts of money are usually excessive in comparison with the actual damage suffered by the professional. Also, another type of abusive clauses are the ones in which the professional is entitled to claim damages from the consumer even if the professional did not execute its own obligations. Legal doctrine¹² identifies that certain clauses comprised in agreements concluded by professionals with phone companies are abusive, since these provide that the consumer must pay penalties for the non-observation of his obligation to pay the due amounts. In some cases, these penalties even exceed the main amount, therefore the lack of proportionality of the clause is more than clear.

Under Romanian law, if a clause may not be initially included in the Annex of Law no. 193/2000, the national court must analyse whether the conditions stipulated within article no. 4 of Law no. 193/2000 are cumulatively met in order to determine that said clause represents an unfair term.

5. Unfair terms in comparative law

Even prior to the adoption of Directive no. 93/13/EEC, both Member States and foreign states have been preoccupied in addressing the issue of consumer protection.

For example, foreign literature¹³ revealed that in the United Kingdom, in 1973, the Supply of Goods (Implied Terms) Act 1973 was adopted, limiting for instance the use of warranty exclusion clauses, considered unfair, particularly in consumer contracts.

In France, the Loi No 78-23 du 10 janvier 1978, Loi sur la protection et l’information du consommateur de produits et de services was the normative act which innovatively introduced the concept of abusive clause in contracts entered into between professionals and consumers. This Law provided that certain clauses may be prohibited, limited or regulated when imposed on non-professionals or consumers by the other party’s abusive use of economic power, which confers an advantage to the professionals.

In Germany, the Act against Misleading Advertising (Das Gesetz gegen den unlauteren Wettbewerb) was adopted in 1965. On December 9, 1976, Germany adopted the General Conditions of Sale Act (Das Gesetz zur Regelung des Rechts des Allgemeinen Geschäftsbedingungen), which was not limited only to consumer contracts and protected natural as well as legal persons against unfair pre-formulated (standardized) contract clauses.

⁹ Anca Ruen, *Paradoxurile juridice ale buneii-crediințe în contractele de consum. Privire comparativă între sistemul continental și sistemul american*, Revista Jurisprudentia nr. 3/2011.

¹⁰ Lucian Mihali Vioreescu, *Clauzele abuzive în contractele de credit*, Ed. Hamangiu, 2018, p. 142.

¹¹ European Court of Justice, Judgment of the Court (Ninth Chamber) of 26 February 2015, Bogdan Matei and Ioana Ofelia Matei v SC Volksbank România SA

¹² Ana-Maria Lucia Zaharia, *Clauzele abuzive în contractele încheiate de consumatori*, Revista Forumul Judecătorilor nr. 3/2009.

¹³ Union des consommateurs, *Ending abusive clauses in consumer contracts - Final Report of the Project presented to Industry Canada’s Office of Consumer Affairs*, Canada, September 2011.

Currently, the perspective on unfair terms has been treated both in common law and in continental law.

For example, in the United Kingdom, in 1977, the Unfair Contract Terms Act 1977 (hereinafter the "UCTA") was adopted. This Act incorporated SOGITA's regulation of liability limitation or exemption clauses and extended the law's scope to adhesion contracts between merchants. Once Directive no. 93/13/EEC was adopted, United Kingdom has integrated its dispositions in the Unfair Terms in Consumer Contracts Regulations (hereinafter the "UTCCR"), for the first time in 1994 and then in 1999. Currently, both normative acts are applied. As opposed to the UCTA, the UTCCR proposes a list of clauses presumed unfair and contains no list or example of clauses considered unfair.

French doctrine¹⁴ states that the theory of contractual obligations is influenced by socialist ideology, which substitutes contractual equality with the protection of the weakest party, by developing consumer rights. In France, the credit agreement is currently regulated within the Consumer Code and Loi n° 95-96 du 1er février 1995 transposing Directive no. 93/13/EEC. Specialized literature¹⁵ pointed out that the so-called "Loi L.M.E." (*Loi no 2008-776 du 4 août 2008 de modernisation de l'économie*) of 2008 provided for two lists of unfair clauses depending on the features and conditions related to the terms of the: a grey and a black list of clauses. While the grey list presumes some clauses are unfair and the professional must prove the non-abusive nature of the clause, the black list comprises clauses which must be considered as abusive.

In Spain, as in other European countries, the legal framework allows consumers to address courts in view of censoring the unfair terms included in contracts concluded between consumers and professionals. Recently, there is an accentuated tendency in case law that leans towards declaring the abusiveness of many clauses standardly used by financial institutions in the mortgage market. For example, Spanish Supreme Court has ruled that rounding-up clauses are unfair since they generate a significant contractual imbalance between parties¹⁶. Once the rounding-up clause is rendered nul and void, the bank is obliged to repay the excess amounts it has collected as a result of the operation of the clause. The Court's conclusion is reasonable, considering that rounding-up clauses represent standard clauses in floating interest mortgage loans and facilities, whereby the lender is entitled to always round up an interest rate to the nearest full percentage point. Also, the Spanish Supreme Court has deemed that default interest rate clauses which specify that a default interest rate is more than three times the legal rate of interest (measured as at the date of default), it shall be declared abusive.

In the Netherlands, the fundamental premise of contract law is not contract freedom, but "reason and fairness", as per the Dutch Civil Code of 1992, in the sense that "*a contract term that conflicts with the requirements of reason and fairness is not applicable*"¹⁷. Based on this general principle, in Dutch law the notion of an adhesion contract is not acceptable. Dutch law provides a distinction between general terms, which are basically represented by all contractual clauses, except for the ones destined for the actual purpose of an agreement, including its price. Nevertheless, Directive 93/13/EEC has been integrated in the Dutch Civil Code, which contains two lists of clauses which must be or may be considered as abnormally onerous – a black list and a simple list.

3. Conclusions

By adopting Directive 93/13/CEE, a new legal framework was created, leading to an almost uniformization of the legislation regarding the protection of consumers in the European Union. Directive no. 93/13/EEC also represented the basis on which some Member States adopted a stricter policy regarding consumer rights and unfair terms in contract concluded between professionals and consumers. Its relevance is that prior to the adoption of Directive no. 93/13/EEC, professionals had the liberty to include unfair terms in their contracts, without any sanction. In present, the high tendency of consumers to address the court for the annulment of unfair clauses has emerged based on the protective legislation created by the European Union. Therefore, professionals cannot insert standard, unfair terms in their agreement and if these clauses are successfully contested, professionals may bear financial liability before consumers.

Although not all Member States have adopted black lists of clearly unfair terms, the progress made in the field of protecting consumers has been hugely appreciated. Nevertheless, this European progress should be assessed also in relation to the impact that this may have on the domestic traditions which may have been more permissive with potentially unfair clauses in the past.

Last but not least, consumer laws should also be adapted considering the increase in technology development, which leads to a higher number and type of agents offering services in online to consumers. As such, the interest of the legislator should be guided also towards the innovative nature brought by intelligent agents¹⁸, such as the legally binding nature of a web page, the neutrality of an intelligent agent etc.

¹⁴ Rémy Cabrillac, *Droit des obligations*, 3e édition, Dalloz, Paris, 1998, p.5.

¹⁵ Anna Tarasiuk-Flodrowska, *Abusive clauses in consumer and insurance contracts – Recent developments in Europe*, published in *The European insurance law review* no.1/2014, available at <http://www.erevija.org/eng/home.php>.

¹⁶ <http://www.allenoverly.com/publications/en-gb/european-finance-litigation-review/southern-europe/Pages/Increasing-litigation-in-Spain-regarding-abusive-clauses-in-mortgage-loans.aspx>

¹⁷ Art. 6:2 al. 2 *Nieuw Burgerlijk Wetboek* (NBW).

¹⁸ Silvia Feliu, *Intelligent Agents and Consumer Protection*, *International Journal of Law and Information Technology*, Vol. 9, No. 3, Oxford University Press 2001.

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