

Electronic Consumer Protection from Unfair Contract Terms: A Study in Light of Algerian E-Commerce Law

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Abstract :

The rapid expansion of electronic commerce has given rise to various legal and practical challenges. Among them, consumer protection in the digital environment has emerged as a particularly significant concern, especially regarding unfair contractual terms imposed by traders on consumers, who are generally considered the weaker party in the contractual relationship.

In seeking appropriate legal solutions, reliance must be placed on electronic commerce legislation as the primary legal framework governing such transactions. This study concludes that Algerian electronic commerce law does not expressly address unfair contractual terms through specific statutory provisions. Nevertheless, a careful examination of its provisions reveals several mechanisms for consumer protection.

The first mechanism consists of treating all consumer contracts as contracts of adhesion. The second involves imposing a set of obligations on electronic suppliers. These include the duty to provide consumers with a clear and legible commercial offer, the obligation to include specific mandatory contractual clauses under penalty of nullity and possible liability for damages, the requirement to provide consumers with a copy of the contract, and the recognition of the consumer's right of withdrawal after the conclusion of the contract.

Another protective mechanism is found in the law's reference to the provisions governing unfair commercial practices. In this regard, the legislature has established a list of unfair terms whose inclusion in contracts is prohibited and has prescribed sanctions for violations of these rules.

However, despite the existence of these protective mechanisms, their effectiveness remains limited in addressing the practices of electronic suppliers. This is due to the distinctive nature of electronic contracting on the one hand and the inadequacy of the sanctions provided under commercial practices legislation on the other.

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Introduction:

The phenomenon of unfair terms in consumer contracts has become a global issue affecting jurisdictions worldwide. This development is largely a consequence of the widespread adoption of market-oriented economic systems. In their pursuit of maximizing profits within the shortest possible time, professionals and businesses increasingly rely on standardized contracts drafted unilaterally in advance. These contracts are often formulated in language that is difficult for consumers to understand. As a result, consumers are usually left with no meaningful opportunity to negotiate the contractual terms and merely sign the contract, creating a significant imbalance between the parties' bargaining positions.¹

In response, legislators have sought to combat such practices by introducing legal safeguards designed to protect the weaker party in the contractual relationship. These safeguards apply regardless of the nature of the relationship, whether it arises from civil or commercial contracts or involves the supply of goods or services.

The rapid advancement of technology and the revolution in information and communication technologies have fundamentally transformed the contracting process. Contracts are now frequently concluded through the Internet and various electronic communication platforms rather than through traditional means. This transformation has generated new forms of conduct that may adversely affect consumers and has further increased the imbalance between contracting parties, particularly with regard to the imposition of unfair contractual terms.

These developments have prompted scholars and policymakers to call for stronger consumer protection and the establishment of legal mechanisms capable of effectively addressing such practices. In Algeria, the first legislative framework governing electronic commerce² was enacted in 2018 through Law No. 18-05. This legislation devotes considerable attention to protecting the interests of electronic consumers. Nevertheless, the issue of unfair contractual terms remains open to examination, raising the following question: To what extent does Algerian electronic commerce law contribute to protecting consumers against unfair contractual terms?

To address this question, the present study is divided into two main sections. The first examines the regulation of electronic consumer contracts under Law No. 18-05. The second analyzes the law's reference to the provisions governing unfair commercial practices and assesses the

effectiveness of those provisions in the context of electronic consumer contracts. The study adopts an analytical approach.

The first topic:

The Regulation of Electronic Consumer Contracts under the Electronic Commerce Law as a Preventive Mechanism

A close examination of the provisions of the Electronic Commerce Law reveals that it neither expressly regulates unfair contractual terms nor directly refers to them. This suggests that the legislature intended to leave their regulation to the general legal framework.

Nevertheless, the law appears to establish a set of preventive mechanisms aimed at reducing the risk of consumers being subjected to such terms. These mechanisms operate through two principal avenues. First, the law defines the concept of the electronic consumer contract and effectively treats it as a contract of adhesion. Second, it imposes specific requirements governing the formation of electronic contracts. In addition, the law provides sanctions for violations of these provisions.

First requirement: The Classification of the Electronic Consumer Contract as a Contract of Adhesion

It is well established that unfair terms are closely associated with contracts of adhesion and that consumer protection becomes particularly necessary in contractual relationships characterized by an imbalance of bargaining power, where one party occupies a dominant position over the other. This consideration highlights the adhesive nature of such contracts. Accordingly, consumer contracts are generally regarded as contracts of adhesion, although this characterization remains the subject of debate in legal scholarship.

First section: The Concept of the Electronic Consumer Contract

Given that the present study is conducted within the framework of Algerian electronic commerce legislation, any definition of the electronic consumer contract must be derived from the relevant statutory provisions. An examination of the law reveals that the Algerian legislature has established a comprehensive list of definitions in Article 6, which sets out a number of key terms essential for the interpretation and understanding of the subsequent provisions. This approach seeks to eliminate ambiguity and uncertainty for both judges responsible for applying the law and individuals subject to its provisions.

In this context, Article 6(1) defines electronic commerce as an activity carried out by an electronic supplier that consists of offering and ensuring the provision of products to an electronic consumer through electronic communication technologies.

This definition indicates that the scope of the legislation is limited to transactions conducted between suppliers and consumers. It excludes transactions that take place exclusively between suppliers.

Furthermore, Article 6(2), (3), and (4) define the electronic contract, the electronic consumer, and the electronic supplier, respectively. With regard to the electronic contract, the legislature identifies its essential elements through its parties, namely the electronic supplier on one side and the electronic consumer on the other, as well as through the means of contracting, namely electronic communication technology. The law also treats this contract as equivalent to the contract regulated under the Commercial Practices Act, even though that Act primarily governs traditional commercial transactions between contracting parties.

Reference to the Commercial Practices Act reveals, that Article 3(4) defines a contract as any agreement or arrangement aimed at the sale of goods or the provision of services, drafted in advance by one of the contracting parties and accepted by the other party on an adhesion basis, such that the latter is unable to introduce any substantive modification thereto.

Accordingly, an electronic consumer contract may be defined as a contract concluded between two parties: an electronic supplier who offers pre-formulated products or services and an electronic consumer who accepts those terms through electronic means of communication.

Second section: Juristic Debate on the Classification of Electronic Consumer Contracts as Adhesion Contracts

No universally accepted and comprehensive definition of a contract of adhesion exists. Consequently, legal scholars have differed in formulating a precise definition. Generally, a contract of adhesion may be defined as a contract whose terms and conditions are predetermined, wholly or partially, by one party and are not open to negotiation.³

Legal scholarship has extensively examined whether electronic consumer contracts should be classified as contracts of adhesion. Divergent views have emerged, giving rise to two principal positions.

According to the first view, the consumer is the weaker party in such contractual relationships. In the interest of fairness and contractual justice, electronic consumer contracts should therefore be regarded as contracts of adhesion, particularly given the practical difficulty, and often the impossibility, of negotiating their terms. Since these contracts are typically characterized by the consumer's inability to discuss or modify contractual provisions, they fall within the conceptual framework of contracts of adhesion.⁴

The second view rejects the proposition that all electronic contracts should automatically be considered contracts of adhesion. Its proponents argue that some online contracts may involve genuine negotiation of contractual terms, for example through email correspondence between the parties. Moreover, consumers generally retain the freedom to choose among competing suppliers. If dissatisfied with a particular offer, they may simply seek an alternative. In such circumstances, the essential element of adhesion is absent.

Nevertheless, supporters of this position acknowledge that some electronic contracts do exhibit the characteristics of contracts of adhesion. Accordingly, each contract should be assessed on the basis of whether the elements of adhesion are present in the particular case.⁵

In light of this doctrinal divergence, the Algerian legislature has expressly resolved the issue by classifying the electronic consumer contract as a contract of adhesion through an explicit statutory provision. From our perspective, this approach is justified because it affords broader protection to consumers in view of the risks and vulnerabilities inherent in electronic commerce.

Second Requirement: Imposition of Specific Conditions on Electronic Contracts

Article 10 of the Electronic Commerce Law stipulates that transactions conducted through electronic communication must comply with two mandatory mechanisms: first, the provision of a pre-contractual commercial offer; and second, the formation of an authenticated electronic contract approved by the electronic consumer, together with the legal obligations arising therefrom.

First section: The Prior Commercial Offer in Electronic Contracting

The electronic supplier is required to provide the electronic consumer with a commercial offer. Some scholars regard this obligation as a pre-contractual duty to inform, while others consider it a form of negotiation agreement. Nevertheless, the Algerian legislature has neither clarified the legal nature of this obligation nor provided a specific definition of it.⁶

It may be defined as “a legal obligation that precedes the conclusion of an electronic contract, whereby the electronic supplier must provide the electronic consumer with all information, data, and details relating to the goods or services that form the subject matter of the commercial transaction conducted through the Internet and that are subsequently acknowledged and accepted by the electronic consumer.”⁷

Article 11 of the same law specifies the content of the commercial offer by setting out the information that must be disclosed.

An examination of these required disclosures reveals that they relate not only to the product or service itself but also to the procedures governing the formation and performance of the contract, as well as to pricing matters. These are the matters of greatest concern to consumers and are capable of directly affecting their interests. Based on this information, the consumer decides whether to enter into a contractual relationship with the supplier.

The provision also appears to establish a preventive mechanism for consumer protection. By reviewing the commercial offer, the consumer may identify indications of potential abuse or unfair conduct by the electronic supplier.

For this reason, the law requires the commercial offer to be presented in a visible, legible, and comprehensible manner. These requirements enable the electronic consumer to assess the content of the offer clearly and detect the possible presence of unfair contractual terms.

However, the law does not require the commercial offer to be drafted in a language understood by the consumer. Nor does it impose an obligation to provide the offer in the country's official language together with one or more additional languages.

Second section: Conditions and Obligations Governing the Conclusion of Electronic Contracts

Article 13 of the Algerian Electronic Commerce Law requires electronic contracts to be concluded in written form and to contain a number of essential elements, most notably the detailed characteristics of the product, the terms and procedures governing delivery and payment, the conditions for contract termination, and the competent authority responsible for resolving any disputes that may arise.

Although these elements are listed by way of illustration rather than limitation, the supplier is nevertheless required to include all information expressly prescribed by law. Accordingly, the supplier is not free to omit any of these mandatory elements, even when additional information is provided, as implied by the wording of the provision.

Furthermore, Article 19 of the same law imposes an additional obligation on the electronic supplier, namely the duty to provide the consumer with a copy of the contract. This obligation applies regardless of whether the consumer expressly requests such a copy.

The legislature's objective in requiring these contractual elements is to ensure that the contract serves as an effective means of proof in the event of a dispute. It also facilitates the identification and assessment of potentially unfair terms, thereby promoting greater transparency in

contractual dealings.

In addition, Article 18 of the Algerian Electronic Commerce Law provides that the electronic supplier bears a presumed responsibility to perform contractual obligations in good faith once the contract has been concluded. This requirement is, in itself, an important preventive mechanism against consumer exploitation. The principle of good faith entails an obligation not to harm the other contracting party and requires honesty, fairness, and consistency in contractual performance. It also precludes practices such as unilaterally altering contractual terms, imposing additional obligations after the conclusion of the contract, or engaging in other conduct that may disadvantage the consumer.

The law also implicitly recognizes the consumer's right of withdrawal through Articles 22 and 23. This right may be regarded as an additional preventive safeguard.

The right of withdrawal may be defined as a statutory right granted to consumers in recognition of their weaker position in the contractual relationship. It allows them to rescind the contract without the consent of the electronic supplier, provided that a legitimate justification is presented.⁸

The significance of this mechanism lies in its ability to protect consumers against hasty or impulsive contracting decisions, particularly where such decisions are influenced by advertising campaigns, promotional practices, or the increasing complexity of products offered in the digital marketplace.⁹

The withdrawal period therefore affords consumers a valuable opportunity to examine the contractual terms more carefully and identify any potentially unfair provisions. At the same time, it places pressure on electronic suppliers to adopt fair and balanced contractual terms, thereby contributing to a more equitable contractual environment.

Third Requirement: Sanctions for Non-Compliance with These Requirements

The Algerian legislature, within the framework of the Electronic Commerce Act, did not merely establish the conditions governing commercial offers and electronic contracts, together with the obligations arising from them. It also provided civil remedies for non-compliance with these provisions. In particular, it granted the electronic consumer the right to seek annulment of the contract and claim compensation for any damage resulting from such violations.

In addition, the legislature imposed criminal sanctions for breaches of Article 11 referred to above. These sanctions consist of a monetary fine

ranging from DZD 50,000 to DZD 500,000. They may also include the suspension of access to all electronic payment platforms for a period not exceeding six months as an additional penalty. This is expressly provided for in Article 39 of the same law.¹⁰

It should be noted that this penalty is a relatively novel sanction specifically designed for the electronic commerce environment. It involves the temporary prohibition of the electronic supplier from accessing electronic payment platforms. In practice, this makes it impossible to complete commercial transactions during the period of suspension.

Collectively, these mechanisms are preventive in nature and are intended to protect the electronic consumer from unfair contractual terms. However, where a contract has already been concluded and contains an unfair term, preventive measures alone are not sufficient. In such cases, remedial or ex post mechanisms become necessary to protect the consumer against abusive conduct by the supplier. These mechanisms will be examined in the following section.

The second topic:

Reference to the Provisions of the Commercial Practices Law Concerning the Control of Unfair Terms and Their Effectiveness

Remedial mechanisms complement preventive measures in consumer protection. Since the issue of unfair contractual terms does not fundamentally differ between traditional and electronic transactions, the Algerian legislature has referred to the general rules governing the control of such terms in contracts. The purpose is to preserve the contractual balance between the parties and protect the weaker party in the contractual relationship. Through an examination of these provisions, this study also seeks to assess their effectiveness in the context of electronic consumer contracts.

First Requirement: Reference to the Provisions of the Commercial Practices Law Concerning the Control of Unfair Terms

Although Law No. 18-05 does not expressly regulate unfair terms or provide specific mechanisms for addressing them, Article 35¹¹ appears to refer matters relating to unfair contractual terms to the provisions of amended and supplemented Law No. 04-02.

To clarify this legislative approach, it is first necessary to define the concept of an unfair term under the Commercial Practices Law. This will be followed by an examination of the mechanisms established by that law to combat such terms.

First section: The Concept of an Unfair Term under Law No. 04-02

Law No. 04-02 regulates unfair contractual terms through Articles 29

and 30, as well as Executive Decree No. 06-306.¹²

Article 3(5) of Law No. 04-02 defines an unfair term as “any clause or condition, whether considered independently or in conjunction with one or more other clauses or conditions, that creates a manifest imbalance between the rights and obligations of the parties to the contract.”

Legal doctrine has also defined unfair terms as contractual provisions imposed on the consumer by a professional trader through the abusive use of economic power in order to obtain an excessive and unjust advantage. Such terms are usually drafted in advance by the party with greater economic influence and confer a disproportionate benefit at the expense of the other contracting party.¹³

This definition indicates that, for a contractual provision to be characterized as unfair, several conditions must be satisfied:

- The contract must concern the sale of goods or the provision of services, a condition that is equally applicable to electronic consumer contracts.
- The contract must be in writing. This requirement is also fulfilled in electronic contracting, as the supplier is obligated to prepare and transmit the contract to the consumer.
- One of the contracting parties must be a consumer and the other an economic operator, a condition likewise present in electronic consumer contracts.
- The clause in question must result in a manifest imbalance between the rights and obligations of the contracting parties.¹⁴ With respect to this requirement, it is noteworthy that the Algerian legislator has adopted imbalance as the sole criterion for determining unfairness. Such imbalance may be material, relating for example to the price of goods or services, or non-material, concerning matters such as delivery arrangements, product specifications, and other contractual conditions.¹⁵

Article 29 of the same law identifies a number of clauses that are considered unfair and prohibits their inclusion in contracts. In addition, Article 30 refers the matter to implementing regulations concerning the prohibition of certain unfair terms, namely Executive Decree No. 06-306, which sets out a list of such clauses.

It should be noted that this list is not exhaustive but merely illustrative. This is evident from the legislator’s use of the expression “in particular,” which reflects an intention to broaden consumer protection and leave room for judicial discretion in determining whether contractual terms not expressly mentioned in the legislation should nevertheless be regarded as unfair.¹⁶

Examples of unfair terms identified in the decree include clauses that allow the supplier to unilaterally amend or terminate the contract, impose unjustified additional obligations on the consumer, or assign to the consumer responsibilities that properly fall within the supplier's contractual obligations.¹⁷

A violation of Article 29 of the aforementioned law is punishable by a financial penalty ranging from fifty thousand Algerian dinars to five million Algerian dinars.

Second section: Mechanisms for Combating Unfair Contract Terms

Article 38 of the aforementioned Law No. 04-02 provides that where a contract contains an unfair term, the electronic supplier is subject to a financial penalty ranging from DZD 50,000 to DZD 5,000,000. However, the law provides only for criminal sanctions and makes no reference to civil remedies.

In this regard, recourse may be had to the Civil Code as the general legal framework governing contractual relationships. Article 110 stipulates that where a contract is one of adhesion and contains an unfair term, the court may either modify the contract or exempt the weaker party from performing the relevant obligation. This provision also applies to electronic consumer contracts.

To prevent such practices, Executive Decree No. 06-306 established a specialized body known as the Unfair Terms Committee. Pursuant to Article 7 of the Decree, the Committee is entrusted with examining contracts in order to identify unfair terms and submit recommendations to the competent supervisory authorities for appropriate follow-up and enforcement measures.

Second requirement: The Effectiveness of the Commercial Practices Law in Combating Unfair Terms in Electronic Contracts

The regulation of unfair contractual terms under the Commercial Practices Law raises numerous legal and practical challenges that cannot be exhaustively addressed within the scope of this paper. These challenges become even more pronounced in the context of electronic contracting due to the distinctive nature and specific characteristics of this mode of contracting. Several scholars have highlighted these difficulties, among which the most significant are the following:

*– **The Specific Nature of Electronic Contracting and Its Incompatibility with the List-Based Approach to Unfair Terms:** The transnational nature of electronic contracting introduces unique challenges for consumer protection against unfair contractual terms. However, Law No. 18-05 adopts a limited approach by restricting the*

scope of protection both territorially and substantively. This is evident from Articles 2 and 3 of the Law.¹⁸ Article 2 provides that the law applies where one of the contracting parties is Algerian, resides in Algeria, is subject to Algerian law, or where the subject matter of the contract or its performance is connected to Algerian territory.

Moreover, the adoption of a predefined list of unfair contractual terms under Executive Decree No. 06-306 may conflict with the legal frameworks of other jurisdictions, which may not classify the same terms as unfair. The legal consequences of unfair terms also vary considerably from one legal system to another. Effective consumer protection in the digital marketplace therefore requires either greater harmonization of legal rules at the international level or, at a minimum, a more flexible approach to the identification and assessment of unfair contractual terms.¹⁹

– ***The Ineffectiveness of Criminal Sanctions:*** The Algerian legislature has limited the sanction for violations of the rules governing unfair commercial practices to the imposition of financial penalties.²⁰ However, the amount of these fines remains relatively low compared with the scale of operations and revenues generated by electronic suppliers. Consequently, the economic benefits derived from incorporating unfair terms into consumer contracts often outweigh the potential costs of regulatory enforcement.²¹

As a result, these sanctions do not provide a sufficient deterrent, particularly for businesses operating in the online environment. More effective and proportionate sanctions should therefore be introduced to reflect the specific characteristics of electronic commerce. Such measures could include the temporary suspension of access to electronic payment platforms or other operational restrictions capable of exerting meaningful pressure on non-compliant suppliers.

– ***The Relationship Between Personal Data Violations and Unfair Contractual Terms:*** One of the most significant risks associated with electronic transactions is the potential infringement of personal data and the right to privacy. Personal information collected through digital transactions may be exploited for commercial purposes and, in some cases, used for unlawful or criminal activities.

Furthermore, some electronic suppliers require consumers to consent to the use or processing of their personal data as a condition for obtaining free goods or services or gaining access to additional benefits and privileges. Such contractual clauses place consumers in a position where they must relinquish fundamental privacy rights in exchange for economic advantages.

These conditions constitute a clear form of unfair contractual practice and should be regarded as inherently abusive because of the imbalance they create between the parties and the undue burden they impose on consumers.

– ***Ineffectiveness of Supervisory Authorities:*** *The monitoring of unfair contractual terms falls within the competence of inspection officers responsible for investigating violations of Law No. 04-02 and the Consumer Protection Act. However, these officials may lack specialized expertise in electronic commerce contracts. It is therefore advisable to provide them with specialized training in this field and to equip them with adequate technical and operational resources. This would facilitate the detection, investigation, and enforcement of violations arising from electronic contracting practices.*

Conclusion

The foregoing analysis demonstrates that, although the Electronic Commerce Act does not expressly regulate unfair terms in electronic contracts, this omission does not indicate a lack of legislative concern. Rather, the law adopts a predominantly preventive approach.

This approach is reflected in the obligations imposed on the electronic supplier before the conclusion of the contract, particularly the requirement to provide a commercial offer, the obligation to formalize the contract in writing, and the need to obtain the electronic consumer's approval. These measures facilitate proof of the transaction and enable the competent authorities to scrutinize both the commercial offer and the contractual terms. In turn, they enhance consumer awareness and reduce the likelihood of unfair contractual practices.

The law also establishes several preventive safeguards, including the consumer's right of withdrawal and the supplier's obligation to act in good faith throughout the contractual relationship.

However, a broader and more effective level of protection also requires ex post safeguards. In this regard, the Electronic Commerce Act refers to the provisions of the Commercial Practices Act, which defines unfair terms, establishes the conditions and criteria governing their prohibition, and prescribes the sanctions applicable to such practices. Enforcement is carried out through both advisory and supervisory mechanisms, notably the Unfair Terms Committee, as well as through the civil and criminal courts.

Study Findings

– *Despite the existence of these protective mechanisms, they remain insufficient to ensure effective protection of the electronic consumer,*

mainly because of the distinctive characteristics and complexities of electronic contracting.

- The Electronic Commerce Act does not contain specific provisions expressly addressing unfair terms in electronic contracts.*
- Limiting consumer protection under Algerian law through both substantive and territorial criteria raises significant conflict-of-laws issues when an electronic contract involves a foreign party.*

Study Recommendations

- Protection against unfair contractual terms should be expressly addressed within Law No. 18-05 itself, rather than relying solely on the provisions of Law No. 04-02.*
- Contractual clauses relating to the collection, processing, or use of personal data should be presumed unfair unless proven otherwise and should be subject to enhanced regulatory scrutiny.*
- The effectiveness and accessibility of consumer protection bodies, particularly the Unfair Terms Committee and consumer protection associations, should be strengthened to ensure more effective oversight and enforcement.*
- Judges and officials affiliated with the Ministry of Commerce should receive specialized training in electronic commerce contracts and digital transactions to enable them to identify and address unfair contractual terms more effectively.*
- Greater use should be made of the experiences and best practices of countries that have achieved significant progress in regulating electronic commerce, particularly with regard to mechanisms for combating unfair commercial practices.*
- Electronic suppliers should be made more aware of the legal and reputational risks associated with infringing consumer rights. They should also be encouraged to conduct their activities with transparency and integrity through conferences, training programs, and awareness campaigns. At the same time, consumers should be educated about the risks and challenges associated with electronic transactions.*

The issue of consumer protection in the digital environment, given the consumer's position as the weaker contracting party, also raises another important area of inquiry: the protection of commercial operators against abusive practices by more powerful market participants within an increasingly dynamic and complex digital ecosystem.

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