



THE ROLE OF CIVIL COURTS IN PROTECTING CONSUMERS AGAINST UNFAIR TERMS

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Abstract:

The imposition of unfair terms in consumer contracts has grown significantly with the expansion and diversification of commercial practices. Some economic operators insert non-negotiable clauses that prejudice consumers' interests and create a significant contractual imbalance. This paper examines the need for legal protection against such clauses, which represent a prominent form of commercial fraud. It focuses specifically on the role of civil courts in confronting unfair terms and restoring contractual balance, thereby safeguarding consumers as the weaker party in consumer-contract relationships within Algerian consumer law and civil-law doctrine more broadly.

Keywords: consumer contract; economic operator; consumer; unfair terms; civil courts.

Introduction:

The phenomenon of unfair terms in consumer contracts is a global phenomenon that has affected legal systems across the world. It has emerged as a consequence of the adoption of the market-economy model and the proliferation and diversification of commercial practices between two categories of contracting parties: economic operators, whose primary concern is often the pursuit of their own commercial interests, and consumers, whose objective is to satisfy their needs for various goods and services. Consumers, however, generally lack the legal and technical expertise required to understand all the terms contained in consumer contracts prepared in advance by economic operators.

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Within this asymmetrical context, certain professionals or economic operators have exploited the consumer's vulnerable position by inserting, within contractual documents, terms that prejudice the consumer's interests. Such terms are described as unfair because they create a manifest imbalance between the rights and obligations of the contracting parties. They may also be regarded as one of the most significant forms of commercial fraud to which consumers may be exposed.

It has therefore become necessary to ensure legal protection for consumers against this form of contractual unfairness, particularly because the consumer is the weaker party in the contractual relationship. On this basis, the present study raises the following research question: What is meant by unfair terms in consumer contracts, and to what extent are civil courts effective in confronting such terms in order to protect consumers?

The answer to this question requires, first, defining the concept of unfair terms and, second, examining the role of civil courts in addressing them, with a view to ensuring effective legal protection for consumers as the weaker party in consumer-contract relationships.

1- The Concept of Unfair Terms in Consumer Contracts

A consumer contract concluded between a consumer, on the one hand, and an economic operator, on the other, may be characterised as unfair where it contains unfair terms or clauses through which the economic operator exploits the consumer's cognitive, economic, legal and technical vulnerability. Such exploitation results in a disruption of the contractual balance between the parties.

The Algerian legislature introduced a specific legal regime governing unfair terms through Law No. 04-02, which lays down the rules applicable to commercial practices. Through this legislation, the legislature sought to define the content and scope of such terms in greater detail, with the aim of ensuring effective consumer protection, in line with the approach adopted in several comparative legal systems. Determining the concept of unfair terms therefore requires, first, examining their legal definition and, second, identifying the criteria according to which terms contained in consumer contracts may be characterised as unfair.

1.1- The Legal Definition of Unfair Terms

Among the most significant European legal systems to have defined unfair terms is French law. The French legislature defined them in Article L.132-1 of the French Consumer Code, as amended by Law No. 95-96 of 1995, as terms contained in contracts concluded between professionals and non-professionals or consumers whose object or effect is to create a significant imbalance between the rights and obligations of the contracting parties (Bouaroudj & Boudliou, 2021, p. 525). Unlike the French approach, the German legislature had gone further at an earlier stage by enacting, on 9 December 1976, the Act on Standard Contract Terms (Bouhental, 2021, p. 831). Article 1 of that Act defined unfair terms as terms drafted for use in a number of contracts and imposed by one contracting party upon the other at the time of conclusion of the contract. Such terms may be set out separately from the contract or incorporated into its provisions, irrespective of their subject matter or the form in which they appear (Aidi, 2018, p. 31 ff.).

It may be observed that the German definition is broader, as it extends to all contracts of adhesion. By contrast, the French definition is confined to unfair terms in consumer contracts. This differs from the position of many Arab legislations which, although among the earlier legal systems to address unfair terms, have often failed to establish a precise definition capable of removing ambiguity and resolving interpretative disagreement concerning their legal nature.

As regards Algerian law, the Civil Code does not provide a specific definition of unfair terms. It confines itself to setting out mechanisms for protecting the weaker party against such terms. However, the legislature did define unfair terms in Article 3, paragraph 5, of Law No. 04-02 of 23 June 2004 (Algerian Republic, 2004), which lays down the rules applicable to commercial practices. According to that provision, an unfair term is “any clause or condition, whether taken alone or together with one or more other clauses, which is liable to create a manifest imbalance between the rights and obligations of the parties to the contract.” On the basis of this provision, any agreement containing a non-negotiable term that is capable of disturbing the contractual balance may be characterised as unfair.



It is apparent from this definition that, although the Algerian legislature adopted the criterion of contractual balance, as did the French legislature, it also followed the broader orientation of German law in its conception of unfair terms. The definition is framed in general terms and is therefore capable of applying to all contracts, not merely consumer contracts. In doing so, Algerian law extends protection to any contract containing unfair terms that may create a manifest imbalance between the rights and obligations of the contracting parties.

1.2- Criteria for Determining the Unfair Nature of Terms Included in Consumer Contracts

In determining unfair terms, the Algerian legislature adopted the listing method, by establishing lists comprising a number of the most significant terms that acquire the character of unfairness by operation of law. The first list was set out under Law No. 04-02, while the second was introduced by Executive Decree No. 06-306, which defines the essential elements of contracts concluded between economic operators and consumers, as well as the terms deemed to be unfair (Algerian Republic, 2006).

1.2.1- Reliance on the List System under Law No. 04-02

Pursuant to Article 29 of Law No. 04-02, as amended and supplemented, which lays down the rules applicable to commercial practices, terms and conditions contained in contracts concluded between consumers and sellers are deemed unfair, in particular where they grant the latter the following rights or advantages:

- 1- To obtain rights and/or advantages that are not matched by equivalent rights or advantages recognised in favour of the consumer.
- 2- To impose immediate and final obligations on the consumer, while the seller remains bound only by conditions that he may fulfil whenever he wishes.
- 3- To retain the right to modify the essential elements of the contract, or the characteristics of the product delivered or service provided, without the consumer's consent.
- 4- To reserve the exclusive right to interpret one or more contractual terms, or the exclusive right to determine whether the commercial transaction complies with the contractual conditions.

5- To require the consumer to perform his obligations without assuming corresponding obligations himself.

6- To deny the consumer the right to terminate the contract where the seller fails to perform one or more obligations incumbent upon him.

7- To reserve the unilateral right to alter the time limits for delivery of a product or performance of a service.

8- To threaten the consumer with termination of the contractual relationship merely because the consumer refuses to submit to new and unequal commercial conditions.

1.2.2- Reliance on the List System under Executive Decree No. 06-306

Pursuant to Article 5 of Executive Decree No. 06-306, as amended and supplemented, which defines the essential elements of contracts concluded between economic operators and consumers, as well as the terms deemed to be unfair, contractual terms are considered unfair where the economic operator does any of the following:

- Reduces the essential elements of contracts referred to in Articles 2 and 3 of Executive Decree No. 06-306, which defines the essential elements of contracts concluded between economic operators and consumers and the terms deemed to be unfair.
- Reserves the right to modify or terminate the contract unilaterally, without compensation to the consumer.
- Prevents the consumer, in cases of force majeure, from terminating the contract except upon payment of compensation.
- Unilaterally excludes his liability, without compensating the consumer, in cases of total or partial non-performance or defective performance of his obligations.
- Stipulates, in the event of a dispute with the consumer, that the latter waives any means of recourse against him.
- Imposes terms of which the consumer had no knowledge before the conclusion of the contract.
- Retains sums paid by the consumer where the latter refuses to perform the contract or terminates it, without granting the consumer a corresponding right to compensation where the



economic operator himself abandons performance or terminates the contract.

- Determines the amount of compensation payable by the consumer in the event of non-performance of his obligations, without providing, in return, for compensation payable by the economic operator where he fails to perform his own obligations.
- Imposes unjustified additional obligations on the consumer.
- Reserves the right to compel the consumer to reimburse costs and fees incurred for the compulsory enforcement of the contract, without granting the consumer the same right.
- Exempts himself from obligations arising from the exercise of his activities.
- Places upon the consumer the burden of obligations that fall within the economic operator's own responsibility.

A simple comparison between the two lists shows that the second list, contained in Executive Decree No. 06-306, is broader than the list established by the legislature under Law No. 04-02. This reflects the considerable importance attached by the legislature to preserving the most basic consumer rights and protecting consumers against all forms of commercial fraud, particularly those relating to unfair terms (Knouza & Zita, 2021, p. 65).

In order to ensure that economic operators comply with and give effect to the list system expressly adopted by the Algerian legislature, a sanction was accordingly established. Sanctions constitute the safeguard of any legal system: they preserve its existence and ensure its continuity and effectiveness, whether they are civil or criminal in nature. For this reason, most legal systems that have addressed the issue of unfair terms have provided for a range of sanctions. While German and French legislation provide for civil and commercial sanctions, the Algerian legislature has confined itself to a criminal sanction under Article 38 of Law No. 04-02 (Mezghiche & Ben Dif, 2017, p. 112). This sanction consists of imposing a financial fine on any economic operator who includes unfair terms in contracts concluded with consumers. The fine is set at fifty thousand Algerian dinars and may reach five million Algerian dinars. The Algerian

legislature has classified such conduct as an unfair commercial practice and an abusive contractual practice.

2- The Role of Civil Courts in Confronting Unfair Terms

The Algerian legislature did not expressly provide for a direct sanction applicable to unfair terms when it regulated them under Law No. 04-02, which lays down the rules applicable to commercial practices. Nor did Law No. 09-03 on consumer protection and the suppression of fraud contain any provision expressly addressing the nullity of unfair terms (Algerian Republic, 2009).

Instead, the legislature opted to establish a form of complementarity between special rules and the general rules of civil law. This was achieved by extending the legal characterisation of contracts of adhesion to consumer contracts, thereby enabling consumers to benefit from the protection afforded by the Civil Code to the adhering party. This protection is principally embodied in Article 110 of the Algerian Civil Code, under which the judge is granted broad authority to deal with unfair terms, including the power to set them aside (Algerian Republic, 1975). In addition, consumers may also rely on Articles 184 and 185 of the Civil Code where the matter specifically concerns unfair penalty clauses.

2.1- Judicial Control of Unfair Terms through the Rules Governing Contracts of Adhesion

Pursuant to Article 110 of the Algerian Civil Code, the Algerian legislature has placed a powerful instrument in the hands of the judge (Algerian Republic, 1975, Article 110). This instrument consists in the possibility of imposing the appropriate legal consequence on an unfair term, either by modifying it or by relieving the adhering party from it, in accordance with the judge's discretionary authority (Ben Hamla, 2015, p. 98). In exercising this authority, the judge is bound only by the requirements of justice. Such a mechanism is capable of providing direct protection to the consumer in accordance with his or her specific interest.

However, the judge's discretionary authority, and the treatment of the consumer contract as a contract of adhesion, cannot be effectively implemented without passing through a number of technical and legal operations (Boucharb, 2012, p. 150).



2.1.1- The Judge's Approach to the Consumer Contract

In order to impose the appropriate civil sanction, and after verifying the legal nature of the contract by reference to its parties and the manner in which it was drafted, the judge must undertake the following steps:

1- Interpretation of the Terms Contained in the Contract

Interpretation refers to the technical operation by which the judge clarifies the meaning of the contract where a dispute arises between the contracting parties concerning one or more contractual terms and the matter is brought before the court.

The Algerian legislature regulated the rules of interpretation applicable to civil judges in Articles 111 and 112 of the Algerian Civil Code. These rules cover three situations, in each of which the judge's approach differs.

- Where the wording of the contract is clear: Where the wording of the contract is clear and its meaning can easily be ascertained by the judge, the judge may not depart from it or reinterpret it, in accordance with Article 111, paragraph 1, of the Algerian Civil Code.
- Where the wording of the contract is ambiguous: Where the wording of the contract is ambiguous, the general rule is to seek the common intention of the contracting parties. Under Article 111, paragraph 2, the legislature established objective criteria designed to assist the judge in identifying that intention. These criteria include the nature of the transaction, the requirements of good faith and trust between the contracting parties, and the usages prevailing in transactions of the same kind.
- Where doubt arises in interpreting the wording of the contract: Article 112, paragraph 1, of the Algerian Civil Code provides that where doubt arises as to the intended meaning of a particular contractual expression or set of expressions, such doubt must never operate to the detriment of the debtor, but must instead be interpreted in his favour. In consumer contracts, doubt is interpreted in favour of the consumer, since the consumer is the weaker party in the contractual relationship.

2- Distinguishing Unfair Terms from Other Contractual Terms

Once the judge has properly understood the contractual terms through interpretation, he must examine the contract in order to identify the terms alleged by the consumer to be unfair. In practice, the judge will be faced with two categories of terms under the legal regime governing unfair terms:

- Unfair terms expressly listed by the Algerian legislature under Article 29 of Law No. 04-02, which lays down the rules applicable to commercial practices, and Article 5 of Executive Decree No. 06-306, which defines the essential elements of contracts concluded between economic operators and consumers and the terms deemed to be unfair.
- New terms whose unfair character must be assessed by the judge.

The judge has no discretionary authority to determine whether a term is unfair where the term alleged by the consumer to be unfair is already listed in Article 29 of Law No. 04-02 or Article 5 of Executive Decree No. 06-306. Such terms acquire the character of unfairness by operation of law, and the consumer is not required to prove their unfair nature (Algerian Republic, 2006).

By contrast, where the term or terms alleged by the consumer to be unfair are not included in the two lists established by Law No. 04-02 and Executive Decree No. 06-306, the judge enjoys broad discretionary authority to determine, first, whether such terms are unfair and, subsequently, whether an appropriate sanction should be imposed.

With regard to new terms not included in the statutory or regulatory lists, it should be recalled that, alongside the lists of unfair terms, the Algerian legislature established a general criterion for determining the unfair character of a term. This criterion is set out in Article 3, paragraph 5, of Law No. 04-02, which lays down the rules applicable to commercial practices. It requires that the term or terms create a manifest imbalance between the rights and obligations of the professional and those of the consumer in order to be characterised as unfair. The judge must assess the effect of the term either on its own or in conjunction with other terms when determining the existence of such manifest imbalance. The judge may also rely on future unfair



terms identified by the Unfair Terms Committee (Algerian Republic, 2006, Articles 6–16).

2.1.2- The Judge's Authority to Modify or Set Aside Unfair Terms

Article 110 of the Algerian Civil Code expressly recognises the judge's authority to deal with unfair terms by modifying them or setting them aside. Accordingly, the judge possesses a direct and explicit power to intervene in contracts of adhesion in order to restore the equality that such contracts lack between their parties. This intervention may take two forms.

The first form concerns the modification of unfair terms. This means bringing such terms back to the level that would normally be required under ordinary circumstances, by reducing their burden on the consumer. For example, where a term designates a court located far from the consumer's place of residence as the competent court in the event of a dispute, and the judge finds that term to be unfair, he may modify the jurisdiction clause in a manner that primarily serves the consumer's interest. This power of modification is capable of removing the unfair character of the term and transforming it into an ordinary contractual term whose application does not cause prejudice.

The second form concerns the complete relief of the adhering party from the unfair term or terms. This constitutes a direct and clear sanction through which the judge treats the term as void, ineffective and deemed unwritten.

Through Article 110 of the Civil Code, the Algerian legislature has therefore granted the judge broad authority to impose the sanction he considers appropriate, whether by mitigation or by setting the term aside, provided that the exercise of this authority remains consistent with the requirements of justice.

2.2- The Judge's Authority in Relation to Unfair Penalty Clauses

A penalty clause is a contractual compensation mechanism determined by the parties through their mutual will and intended to apply to both of them where one party fails to perform his contractual obligations, thereby ensuring compensation for the damage suffered by the other party. However, in consumer contracts, the penalty clause may assume a different function, since it is the professional who controls its content when drafting the contract in a manner that serves his own interests.

The Algerian legislature addressed the principal manifestations of such control through Articles 184 and 185 of the Algerian Civil Code. Once these manifestations are proven by the consumer, whether the consumer is a creditor or a debtor, the judge is granted broad authority to confront such forms of unfair penalty clauses, either by modifying them or by relieving the consumer from them. This authority is a matter of public order, and no agreement may deprive the judge of it.

The judge's authority in relation to unfair penalty clauses takes three forms:

- the authority to reduce an unfair penalty clause;
- the authority to increase an unfair penalty clause;
- the authority to relieve the consumer from an unfair penalty clause.

2.2.1- The Judge's Authority to Reduce an Unfair Penalty Clause

Pursuant to Article 184, paragraph 2, of the Algerian Civil Code, the judge's authority to reduce an unfair penalty clause may be exercised in two situations: first, where the penalty clause is excessive; and second, where the consumer proves that he has partially performed his original obligation, in which case the agreed compensation must be reduced to a reasonable level (Biskri, 2021, p. 39).

A- Reduction of the Penalty Clause Due to Excessive Assessment

This is the most common situation in which the professional inserts such a clause into the contract, as it enables him to obtain a direct and effective financial advantage, particularly given the consumer's lack of knowledge of the applicable legal rules. Excessiveness refers to an exaggerated assessment of the penalty clause, resulting in a substantial disproportion between the damage suffered and the compensation stipulated.

Where the judge establishes the existence of such excessiveness, he must reduce the amount of the penalty clause to a level that restores reasonable proportionality between the damage resulting from the breach of the original obligation and the value of the penalty clause as a measure of compensation.



B- Reduction of the Penalty Clause Due to Partial Performance by the Consumer of the Original Obligation

A professional or economic operator may insert a contractual term providing that the amount stipulated in the penalty clause is due in all cases of breach of obligation. Such a term is clearly illogical, since it is unreasonable for the consumer to pay an amount exceeding the extent of his breach where he has partially performed his obligation, especially where the original obligation is divisible.

In such a case, the professional would derive a substantial advantage from both the partial performance already carried out by the consumer and the amount of the penalty clause. For this reason, the Algerian legislature granted the judge the authority to intervene in order to restore the penalty clause to a reasonable level. This intervention is based on legal justifications rather than purely equitable considerations, particularly the prohibition of combining two forms of compensation and the prevention of the professional's unjust enrichment at the consumer's expense.

When reducing the compensation, the judge takes into account the benefit obtained by the professional as a result of the consumer's partial performance, the damage actually suffered, and the quality and adequacy of the performance rendered. In order to benefit from the reduction of the penalty clause in this situation, the consumer must prove that he has actually performed part of his original obligation. Failing such proof, the judge's authority cannot be exercised.

2.2.2- The Judge's Authority to Increase an Unfair Penalty Clause

According to Article 185 of the Algerian Civil Code, this situation may arise where the professional seeks to create an opportunity to withdraw from the contract because, for example, he is expecting a more advantageous transaction in the future. Since the professional is the sole drafter of the contractual terms, he may deliberately reduce the amount of the penalty clause to a level that is wholly disproportionate to the damage that will be suffered by the consumer, particularly where he is certain that he will be the party failing to perform his obligation (Algerian Republic, 1975, Article 185).

For the consumer to benefit from the provisions of this article, which allow the judge to increase the amount of the penalty clause,

the consumer must be the creditor of the compensation, not the debtor. He must also prove that the professional committed fraud or gross fault.

2.2.3- The Judge's Authority to Relieve the Consumer from an Unfair Penalty Clause

This situation is provided for in Article 184, paragraph 1, of the Algerian Civil Code (Algerian Republic, 1975, Article 184, para. 1). It arises where the professional requires the consumer to pay the amount stipulated in the unfair term despite the absence of any damage suffered by the professional. In such circumstances, the justification for compensation disappears, since one of the essential elements of contractual liability is lacking.

In this situation, the consumer may bring the matter before the judge in order to put an end to the prejudice caused by the economic operator or professional, by seeking complete relief from the unfair compensation. However, the consumer does not benefit from this provision merely by bringing the case before the court; he must prove that the professional has not suffered any damage.

Ultimately, although this mechanism is available to the consumer in relation to unfair penalty clauses, its implementation remains confined to the judge's discretion. It is a discretionary power, similar to the authority exercised by the judge in the field of contracts of adhesion.

Conclusion

Consumer contracts are agreements concluded between two parties: the first is the professional, and the second is the consumer. Owing to the specific nature of this category of contracts, consumer contracts have acquired a distinctive character that sets them apart from other contracts. This specificity is reflected, in particular, in the absence of contractual balance between the parties, which may lead to the inclusion of terms and conditions described as unfair and imposed by the professional or economic operator on the consumer, who remains the weaker party in the contractual relationship.

This research paper has shown that, in view of the insufficiency of the general rules to ensure adequate protection for consumers against unfair terms, the Algerian legislature reinforced them through special rules. It sought to combat such terms in consumer contracts



through the list system established under Law No. 04-02, which lays down the rules applicable to commercial practices, as amended and supplemented, as well as Executive Decree No. 06-306, which defines the essential elements of contracts concluded between economic operators and consumers and the terms deemed to be unfair, as amended and supplemented.

The presence of unfair terms in contracts of adhesion allows the judge to intervene in order to restore contractual balance, either by modifying such terms or by relieving the adhering party from them. It should be noted, however, that not every contract of adhesion necessarily contains unfair terms. Where such terms exist in a consumer contract, one of the most important mechanisms of judicial intervention to remove unfairness and contractual prejudice is the modification of the unfair term in a manner that creates a new obligation entirely different from the original contractual obligation, or its complete removal where it causes serious harm to the consumer. The Civil Code grants the judge broad authority to impose the sanction deemed appropriate, whether by mitigation or cancellation, provided that such authority is exercised in accordance with the requirements of justice.

In order to activate the Algerian legal regime governing unfair terms in a manner capable of ensuring effective protection for Algerian consumers, the following recommendations may be proposed:

- Unifying the concepts and terminology used, particularly those relating to the parties to the consumer contract and its subject matter, in order to avoid interpretation and ambiguity that may arise before the courts.
- Reorganising and simplifying the essential elements of contracts set out in Executive Decree No. 06-306, which defines the essential elements of contracts concluded between economic operators and consumers and the terms deemed to be unfair.
- Accelerating the establishment and effective activation of the Unfair Terms Committee, given the moral pressure it may exert on professionals through the recommendations it issues. Such a committee also constitutes an appropriate forum for addressing

unfair terms through direct confrontation between consumers and professionals, especially since both categories are represented within it. This would also reduce the burden placed on civil courts in this type of dispute.

- Providing for a strict and appropriate sanction where the professional breaches his obligations in a manner that harms the consumer's interests, particularly where he includes legally prohibited unfair terms in consumer contracts.
- Ensuring the specialised training of judges in the field of unfair terms, including within conciliation mechanisms, given the positive and effective role they play in protecting consumers against such terms.
- Encouraging the organisation of study days and scientific conferences to raise consumer awareness of their rights and to draw attention to the risks posed by unfair terms in consumer contracts.
- Issuing further executive decrees aimed at limiting abusive conduct by economic operators in contracts concluded with consumers, and granting civil judges broad discretionary powers enabling them to confront unfair terms in consumer contracts on the basis of specific legal provisions, rather than relying solely on the general rules contained in the Civil Code.

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