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THE EFFECTS OF UNFAIR TERMS ON THE BINDING FORCE PRINCIPLE OF CONTRACTS*

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Abstract:

Regulations regarding the unfair terms in the contracts signed by a consumer and a professional are mainly, but not entirely, found in the consumer protection law. Therefore, consumer protection law is becoming a very diverse field of law, comprising many normative acts which often offer contradictory solutions. The most important of them is Law no. 193/2000 regarding the unfair terms in the contracts signed between consumers and professionals, which transposes Directive 93/13/EEC.

According to the Romanian law and doctrine in the field of consumer protection, the most important elements for a term to be considered abusive are the lack of direct contractual negotiation between the professional and the consumer, the lack of contractual balance and the total ignorance of the obligation of good faith.

Keywords: *unfair terms, contractual negotiation, contractual equilibrium, good faith.*

1. The application field of the unfair contract terms theory

The unfair terms issue has finally found its path through Romanian positive law, mainly in the consumer protection contracts; therefore, in the contractual relation between a professional and a consumer, we shall apply the special regulations governing consumer protection, which are quite substantial but also contradictory, having as result a high number of different normative acts.

The main acts regulating consumer protection in Romania are Law no. 296/2004 regarding the Consumer Code [1], Governmental Ordinance

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[1] Law no. 296/2004 approving a Consumer Code, published in the Official Journal no. 296 of 28 June 2004, republished in the Official Journal no. 224 of 24 March 2008, with modifications and additions. The existence of this act is intensely criticized in the legal literature, considering it contains

no. 21/1992 regarding consumer protection[2] and Law no. 193/2000 regarding the unfair terms in the contracts signed between professionals and consumers[3], which transposed the Unfair Contract Terms Directive 93/13/EEC of 5 April 1993[4]. This Directive represents the most important measure in order to approximate the laws, regulations and administrative provisions of the EU Member States regarding unfair terms in contracts concluded between a seller or supplier and a consumer, being transposed by every member state of the European Union, even if there have been some deficiencies, sanctioned by the jurisprudence of the European Court of Justice[5].

On the other hand, provisions on unfair terms can be found in other European directives on consumer protection[6], which makes it very difficult to have a complete and unitary knowledge on the field.

The premise of adopting a specific legislation on consumer protection was that the consumers found themselves in a triple state of inferiority in relation to the professional: *a technical inferiority*, because the professionals knows much better

identical provisions with other acts, such as in article 78-81, where it resumes provisions found in Law no. 193/2000 related to the definition of abusive clauses, the significance of negotiation or contractual transparency. See also, L. Pop, I.-F. Popa, S.I. Vidu, *Tratat elementar de drept civil. Obligaţiile,* Ed. Universul Juridic, Bucureşti, 2012, p. 161.

[2] Republished in the Official Journal no. 208 of 28 March 2007, with modifications and additions.

[3] Published in the Official Journal no. 560 of 10 November 2000 and republished in the Official Journal no. 305 of 18 April 2008, with modifications and additions.

[4] In this field of law, there are also indirectly applicable other acts, such as: Law no. 190/1999 regarding mortgage credit for real estate investments, published in the Official Journal no. 611 of 14 December 1999; Law no. 289/2004 regarding the legal regime of credit consumer contracts for individuals, presently repealed; Law no. 363/2007 regarding the fight against unfair commercial practice in the relation with consumers and the harmonization of national regulations with the European legislation on consumer protection, published in the Official Journal no. 899/28.12.2007; Governmental Ordinance no. 85/2004 regarding the protection of consumers in distance financial contracts, republished in the Official Journal no. 365 of 13 May 2008; Governmental Emergency Ordinance no. 50/2010 regarding credit contracts for consumers, published in the Official Journal no. 389 of 11 June 2012; Governmental Emergency Ordinance no. 107/1999 regarding commercialization of tourism services, republished in the Official Journal no. 448 of 16 June 2008; Governmental Ordinance no. 130/2000 regarding consumer protection when signing distance contracts, presently repealed; Law no. 449/2003 on selling contracts, republished in the Official Journal no. 347 of 6 May 2008 etc.

[5] For example, cause C-70/03, judgment of the Court (First Chamber) of 9 September 2004. *Commission of the European Communities v Kingdom of Spain;* Cause C-372/99 judgement of the Court (Fifth Chamber) of 24 January 2002, *Commission of the European Communities v Italian Republic etc.*

[6] For example: Council Directive 90/314/EEC of 13 June 1990 on package travel, package holidays and package tours; Directive 97/7/EC of the European Parliament and of the Council of 20 May 1997 on the protection of consumers in respect of distance contracts etc. Nevertheless, a general consumer rights directive was finally adopted in 2011: Directive 2011/83/EU of the European Parliament and of the Council of 25 October 2011 on consumer rights, amending Council Directive 93/13/EEC and Directive 1999/44/EC of the European Parliament and of the Council and repealing Council Directive 85/577/EEC and Directive 97/7/EC of the European Parliament and of the Council.

than the consumers the products and services they commercialize; *an economical inferiority*, considering the professionals have a greater economic force as opposed to the consumers; *a legal inferiority*, considering the consumers don't have any real possibility to negotiate, being forced to adhere at all the proposals coming from professionals[7].

In order to compensate this state of inferiority, the legislator had foreseen that any contract signed between a professional and a consumer in order to sell goods or to offer services, where all or certain terms offered to the consumer are in writ, the terms must always be drafted in plain, intelligible language. Where there is doubt regarding the meaning of a term, the interpretation most favorable to the consumer shall prevail[8]. Therefore, through these legal provisions, the legislator enforced an obligation of *contractual transparency,* in direct connection with the publicity and information exigencies, specific to consumer law, assuming a guarantee of the consumer's right to have a complete understanding of the contractual provisions which he acknowledges[9].

It must be also mentioned that applying the specific legislation of consumer protection outside consummation relations, considering the mandatory rules, is strictly forbidden. Therefore, the law imposes certain limitations in using these special techniques in order to eliminate unfair terms, as they are strictly related to consumers as natural persons. Accordingly, no matter how significant the imbalance between two professionals is, the consumer protection legislation is inapplicable to the legal relation between them.

2. The conditions for a contractual term to be considered unfair

Law no. 193/2000 regarding the unfair terms in the contracts signed between professionals and consumers establishes in article 1 paragraph 3, the general obligation incumbent to a professional not to stipulate unfair terms in the contracts he signs with consumers[10]. In case of infringement, same act states, at article 13, that the court, in case of establishing a term as unfair, compels the professional to modify all adhesion contracts not fully executed yet and also to eliminate all unfair terms in prewritten contracts, destined to be used in their professional activity.

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[7] Gh. Stancu, *Particularităţile raporturilor contractuale, în cadrul dreptului consumului*, in "Dreptul", no. 2/2009, p. 28.

[8] Article 1, paragraph 1 and 2 of Law no. 193/2000 regarding the unfair terms in the contracts signed between professionals and consumers, republished. The same provisions can be found in article 75 and 77 of Law no. 296/2004 regarding a Consumer Code.

[9] See also L. Pop, I.-F. Popa, S.I. Vidu, *Tratat elementar de drept civil. Obligaţiile, op. cit,* p. 164-166. The authors consider that breaching this specific obligation has three main effects: it will generate a *contra proferentem* interpretation, meaning against the professional who proposed it to the consumer; the lack of transparency is an important circumstance in the global evaluation of a term as being unfair; the lack of transparency of the terms defining the *main object of the contract*, meaning the *relation between quality and price*, will have as consequence the elimination of their "immunity" to control, as unfair terms.

[10] This interdiction figures as well in article 78 of Law no. 296/2004 regarding a Consumer Code.

Considering the evaluation criteria of a term as unfair, article 4 paragraph 5 of Law no. 193/2000 establishes that the unfair nature of a contractual term is evaluated in relation with the nature of products and services, object of the contract at the time of its conclusion, with all the factors determining the conclusion of the contract, as well as with any other contractual clauses or even contracts associated to it. Evaluating the unfair nature of a term is not associated with defining the main object of the contract, nor with the quality to satisfy price and payment requests, on one hand, neither with the products and services offered in exchange, on the other hand, if these terms are drafted in plain, intelligible language.

According with article 6 and 7 of Law no. 193/2000, the unfair terms in a contract found either personally or through an entity entitled by law in this regard, shall not produce any legal consequences on the consumer. In this situation, the contract will continue only if still possible and only if the consumer agrees. If the contract can no longer produce any effects, after eliminating the unfair terms, the consumer is entitled to ask for annulment and damages, if and when applicable.

Moreover, according with articles 13-14 of the same Law no. 193/2000, the harmed consumers can ask the court to intervene in contract and, if the court establishes the existence of unfair terms, it can force the professional to modify all adhesion contracts still in force, as well as to eliminate unfair terms in prewritten contracts, destined to be used in their professional activity.

After January the 1st 2007, all Romanian Courts are compelled to directly apply the European Union Law, according with the interpretation given by the European Court of Justice, which established that the national judge is entitled to appreciate by default if a contractual term is unfair or not, when deciding on the admissibility of a request[11]. In this view, The European Court of Justice considered the objective established in article 6 of Directive 93/13/EEC, according to which *Member States shall lay down that unfair terms used in a contract concluded with a consumer by a seller or supplier shall, as provided for under their national law, not be binding on the consumer and that the contract shall continue to bind the parties upon those terms if it is capable of continuing in existence without the unfair terms,* could not be reached if the consumers would have to plead themselves the unfair nature of these terms. The protection system established by the directive starts from the idea that the lack of balance between the consumer and the professional can be rectified only by a positive, independent intervention. Therefore, article 7 paragraph 1 of the directive establishes that *Member States shall ensure that, in the interests of consumers and of competitors, adequate and effective means exist to prevent the continued use of unfair terms*

[11] See also, ECJ, Judgment of the Court of 27 June 2000, Océano Grupo Editorial SA v Roció Murciano Quintero (C-240/98) and Salvat Editores SA v José M. Sánchez Alcón Prades (C-241/98), José Luis Copano Badillo (C-242/98), Mohammed Berroane (C-243/98) and Emilio Viñas Feliú (C-244/98).

in contracts concluded with consumers by sellers or suppliers. These means shall include the right of consumer protection associations to introduce court actions, in order to establish if a contractual prewritten term is unfair and, if necessary, to forbid them, even if they were not effectively used in specific contracts. The court's right to determine, by default, if a clause is abusive or not, should be considered as an adequate measure, both for reaching the result aimed by article 6 of the directive to prevent the individual consumer of being bound by a certain clause, and for fulfilling the objective of article 7 of the same act, considering the court itself makes such an analysis, which might have a dissuasive effect, being able to prevent introducing unfair terms in the contracts signed by professionals and consumers.

Practically speaking, we have to establish the concrete way in which the consumer can oppose to the professional its personal observation or the observation made by the authorities, regarding one or more contractual terms considered unfair, given that the professional has at their disposal contractual or legal means to ignore this observation or even to determine the consumer to renounce pleading a term as being unfair or to make him restart executing the term considered as unfair[12].

According with article 4 paragraph 1 of Law no. 193/2000, article 79 of Law no. 296/2004 regarding a Consumer Code and article 2 paragraph 16 of Governmental Ordinance no. 21/1992 on the consumer protection, a contractual term which was not directly negotiated with the consumer, will be considered as unfair if, by itself or together with other contractual provisions creates, against the consumer and against the requirements of good faith, a significant imbalance between the rights and obligations of the parties.

Starting from this definition, the legal literature considers as main conditions for a term to be considered as unfair: *the lack of direct contractual negotiation* between the professional and the consumer, *the creation of a significant contractual imbalance* against the consumer, *the infringement of the good faith obligation.* Besides these implicit legal requests, some authors observed two additional criteria of evaluating

[12] In the Romanian legal doctrine it is considered that such means at the disposal of the professional lender, who introduced them in the adhesion contract in order to ensure him against risks of nonperformance of the contract, have an intimidating effect against the consumer, who can no longer fully realize his right, as guaranteed by article 6 of Law no. 193/2000. For example, if in a bank credit contract there is an unfair term related to credit costs calculation (interest and poundage), by considering this term as having no legal effect, the consumer, on the basis of article 6 of Law no. 193/2000, might refuse to pay the credit, or he might pay only a share of the amount considered by him as justified. Nevertheless, the contract, considered as enforceable according to banking legislation, establishes many ways in which the debtor can be sanctioned for non-executing a specific obligation. For example, not paying a credit cost might lead to penalties, by declaring an early maturity of the credit. By such a clause, a contract with successive execution is transformed, by the single will of the bank, in a contract with imediat execution. For more information, see also Gh. Piperea, *Teoria clauzelor abuzive. Relaţia cu ordinea publică şi abuzul de drept,* http://www.piperea.ro/articol/despre-clauzele-abuzive-din-contractele-de-credit-bancar/.

a clause as being abusive or not, meaning the terms considered as abusive, listed in the annex of Law no. 193/2000 and the other relevant circumstances, established by article 4 point 5 of the same act.

2.1. The lack of direct contractual negotiation between the professional and the consumer

According with article 4 paragraphs 2 and 3, first thesis, of Law no. 193/2000, "a contractual term shall always be regarded as not individually negotiated where it has been drafted in advance and the consumer has therefore not been able to influence the substance of the term, particularly in the context of a pre-formulated standard contract or general sale conditions used by the seller or supplier on the market. The fact that certain aspects of a term or one specific term have been individually negotiated shall not exclude the application of this article to the rest of a contract if an overall assessment of the contract indicates that it is nevertheless a pre-formulated standard contract, established as such by the professional". Therefore, the law establishes the criterion of the inability by a consumer to influence the content of a contractual term, criterion of identification for contractual abuse[13]. Thus, for this kind of contracts, we might speak of a *presumption of economic power abuse*, presumption which can be overthrown by the professional if proving an effective contractual negotiation[14], meaning a real possibility from both parties to commonly establish the content of the contract and not just simple, informal discussions on certain contractual clauses[15]. In this view, according to article 4 paragraph 3, second thesis, of Law no. 193/2000, „if a professional claims that a standard term has been individually negotiated, the burden of proof in this respect shall be incumbent on him".

According to article 4 paragraph 6 of Law no. 193/2000, the assessment of the unfair nature of the terms shall relate neither to the definition of the main subject matter of the contract nor to the adequacy of the price and remuneration, on the one hand, as against the services or goods supplies in exchange, on the other, in so far as these terms are in plain intelligible language. Starting from these provisions, the doctrine extracted four main consequences, respectively: the burden of proof if a standard term has been individually negotiated is incumbent to the professional; a negotiated term shall not make object of the unfairness control, even if eventually the term is proved to be unfair; if certain clauses were negotiated, the unfairness

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[13] L. Pop, I.-F. Popa, S.I. Vidu, *Tratat elementar de drept civil. Obligațiile, op. cit,* p. 163-164.

[14] F. Prip, *Aprecierea caracterului abuziv al clauzelor contractelor de consum, în Consumerismul contractual. Repere pentru o teorie generală a contractelor de consum,* coordonator P. Vasilescu, Ed. Sfera Juridică, Cluj-Napoca, 2006, p. 129.

[15] Gh. Piperea, *Teoria clauzelor abuzive. Relația cu ordinea publică și abuzul de drept,* http://www.piperea.ro/articol/despre-clauzele-abuzive-din-contractele-de-credit-bancar/, op.cit.

control extends over other non-negotiated contractual terms; the terms defining the main object of the contract are excluded from the unfairness control[16].

2.2. The significant contractual imbalance against the consumer

As we have already shown, the second main condition for a term to be considered as unfair is represented by the creation of a significant contractual imbalance affecting the consumer. Because the "significant imbalance" notion is not clearly defined by Law no. 193/2000, the legal literature is home to many controversies on the criteria to determine such an imbalance, as well as on its characteristics. Therefore, in determining the imbalance as being significant, it is stated that it should be taken into account either a simple *mathematic rapport*, or the criterion of an *economic imbalance* or even the criterion of a *legal imbalance*, considered as the true legal criteria in determining a term as abusive or not[17].

On the other hand, the significant imbalance might be subjective or objective[18]. Therefore, speaking of an economic imbalance, even though considered as having an objective character[19], in quantifying the balance between the rights and obligations of the parties, all circumstances related to the signing of a contract should be considered, either objective or subjective[20], being appreciated as such *in concreto* by the judge, in report to an ideal balance.

The Romanian High Court of Cassation and Justice has stated that in order to observe the unfairness of a contractual term, it should be established an objective analysis of a clause, meaning to create a significant imbalance between the rights and obligations of the parties, against the consumer and subjectively it should lack the obligation of good faith[21].

2.3. The infringement of the obligation of good faith

Another essential condition for a contractual term to be considered as unfair consists in the infringement of the obligation of good faith. As shown in the legal literature, the solution adopted by Directive 93/13/EEC on the requirement of

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[16] L. Pop, I.-F. Popa, S.I. Vidu, *Tratat elementar de drept civil. Obligațiile, op. cit.,* p. 164.

[17] *Idem,* p. 166.

[18] I. Fl. Popa, *Reprimarea clauzelor abuzive*, în Pandectele Române nr. 2/2004, p. 208-209.

[19] Gh. Piperea, *Teoria clauzelor abuzive. Relația cu ordinea publică și abuzul de drept,* http://www.piperea.ro/articol/despre-clauzele-abuzive-din-contractele-de-credit-bancar/, *op. cit.*

[20] See also, E. Poillot, *Droit européen de la consommation et uniformisation du droit des contrats*, foreword by P. de Vareilles-Sommieres, LGDJ, Paris, 2006, nr. 2006, nr. 273 şi urm., p. 138 şi urm.

[21] I.C.C.J., Second Civil Section, Decision no. 833/23.02.2008. On the other hand, in another judgement, the High Court stated the opposite: "the terms alleged by the plaintiff cannot be considered as unfair, because from an objective point of view there is no significant imbalance between the rights and obligations of the parties, against the consumer, but this imbalance might be created against the insurer, if cancelling these terms as unfair, considering that, from a subjective point of view, he didn't act in bad faith. On the contrary, the insurer claims its own negligence in non-observing a fully admitted jurisprudential rule, adjoined to the law by equity and custom". See I.C.C.J., Second Civil Section, Civil Decision no. 3440/01.11.2007.

good faith is taken from German law, especially from the Law on general business conditions from 9th December 1976[22], being crystalized on the idea of an "autonomous" interpretation of the good faith concept, identified and applied according to the law and not according with the perspective given by each national legal systems[23]. Thus, in the preamble of Directive 93/13/EEC it is stated that the assessment, according to the general criteria chosen, of the unfair character of terms, in particular in sale or supply activities of a public nature providing collective services which take account of solidarity among users, must be supplemented by a means of making an overall evaluation of the different interests involved. This constitutes the requirement of good faith. Moreover, in making an assessment of good faith, particular regard shall be had to the strength of the bargaining positions of the parties, whether the consumer had an inducement to agree to the term and whether the goods or services were sold or supplied to the special order of the consumer. The requirement of good faith may be satisfied by the seller or supplier where he deals fairly and equitably with the other party, whose legitimate interests he has to take into account. Therefore, the simple stipulation of unfair terms in the consummation contracts might be associated with the idea of bad faith, which can be qualified, at its turn, as an illicit cause[24], sanctioned with absolute nullity[25].

2.4. The "black list" criteria of abusive clauses

Besides the three criteria established in the unfair terms definition from article 4 paragraph 1 of Law no. 193/2000, the legal literature[26] identifies a fourth one, given that the law provedis a guiding non-exhaustive list, found in the annex, which exemplifies the terms which might considered as unfair[27]. It should be also mentioned that by simply enclosing a contractual term in the list from the annex to

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[22] See also, B. Jaluzot, *La bonne foi dans les contrats. Étude comparative de droit français, allemand et japonais,* Dalloz, Paris 2001, p. 41, as cited by L. Pop, I.-F. Popa, S.I. Vidu, *Tratat elementar de drept civil. Obligațiile, op. cit,* p. 167.

[23] L. Pop, I.-F. Popa, S.I. Vidu, *Tratat elementar de drept civil. Obligațiile, op. cit., loc. cit.*

[24] I. Fl. Popa, *Reprimarea clauzelor abuzive*, în Pandectele Române nr. 2/2004, *op. cit., loc. cit.*

[25] According with article 1238 paragraph 2 of the Civil Code: "An illicit or immoral cause is sanctioned with absolute nullity if it is commune or, on the contrary, if the other partie knew about its existence or, should have known it".

[26] L. Pop, I.-F. Popa, S.I. Vidu, *Tratat elementar de drept civil. Obligațiile, op. cit.,* p. 167.

[27] The issue related to this criterion is if, once included in the list of unfair terms, a clause should be automatically declared as unfair or not? Thus, from the point of view of transposing the directive, the majority of Member States adopted the list as an exemplificative annex and not as an imperative one (the gray letter rule), so that any term found in the annex shall be presumed as unfair, without being automatically unfair (for example, France, Great Britain, Ireland and Poland). Other states adopted an imperative list (the black letter rule), so that by simply putting a term in the list, it means the term is considered as abusive (for example, Austria, Belgium, Greece, Luxembourg). Finally, some states (Germany, Italy, Portugal and Hungary) chose mixed transposal systems, both with black lists and gray lists. See, L. Pop, I.-F. Popa, S.I. Vidu, *Tratat elementar de drept civil. Obligațiile, op. cit.,* p. 167.

the law, doesn't make it automatically unfair. The authority entitled to analyze this character is the court. Besides, according to the preamble of Directive 93/13/EEC, the list of terms in the annex is just a guidance list, their field of application being subject to expansions or restrictions, according with the applicable law of every Member State.

However, the list of unfair terms offered by Law no. 193/2000 is quite comprehensive[28], respectively:

a) Terms enabling the professional to unilaterally alter certain contractual clauses: *the right of the professional to alter unilaterally without a valid reason any characteristics of the contract*. It should be mentioned that these provisions do not oppose to: terms by which a supplier of financial services reserves the right to modify the rate of the interest payable by the consumer or owned to the consumer or the value of other taxes for financial services, without a written notice, if there is a well-founded motivation, considering the professional should inform as soon as possible the other contractual parties, which are allowed to immediately terminate the contract; terms by which the professional reserves the right to unilaterally alter the clauses of an undetermined duration contract, considering the obligation of the professional to inform the consumer in due time, by written notice, so that the consumer might be allowed to terminate the contract; the right of the professional to alter unilaterally without a valid reason any characteristics of the product or service to be provided or the delivery date of a product or the execution date of a service;

b) Terms excluding or hindering the consumer's right to take legal action or exercise any other legal remedy: excluding or hindering the professional liability of the professional in case of consumer's injury or death, as a result of an action or omission of the professional in using products or services; the right of the professional to transfer his rights and obligations under the contract, to a third party – agent, mandatory, etc., where this may serve to reduce the guarantees for the consumer, without the latter's agreement;

c) Terms imposing discretionary obligations to the consumer or restraining his rights: the obligation of the consumer to be irrevocably bound by terms upon which he had no real opportunity of becoming acquainted before the conclusion of the contract; the obligation of the consumer to fulfil all his obligations where the professional does not perform theirs; inappropriately excluding or limiting the legal rights of the consumer vis-à-vis the professional or another party in the event of total or partial non-performance or inadequate performance by the professional of any of the contractual obligations, including the option of offsetting a debt owed to the seller or supplier against any claim which the consumer may have against him; the obligation requiring the consumer to take disputes exclusively to

[28] For other classifications, see also L. Pop, I.-F. Popa, S.I. Vidu, *Tratat elementar de drept civil. Obligațiile, op. cit.,* p.168.

arbitration; the interdiction for the consumer to compensate any debts towards the professional with claims he might have against the latter;

d) Terms granting discretionary rights for the professional: the right of the professional to automatically extend a contract of fixed duration where the consumer does not indicate otherwise, when the deadline fixed for the consumer to express the intention to not extend the contract is unreasonably early; the right of the professional to determine whether the goods or services supplied are in conformity with the contract; the exclusive right of the professional to interpret any term of the contract; the right of the professional to retain sums paid by the consumer where the latter decides not to conclude or perform the contract, without providing for the consumer to receive compensation of an equivalent amount from the seller or supplier where the latter is the party cancelling the contract; the right of the professional to dissolve the contract on a discretionary basis where the same facility is not granted to the consumer; the right of the professional to retain the sums paid for services not yet supplied by him when the seller or supplier himself dissolves the contract; the right of the professional to terminate a contract of indeterminate duration without reasonable notice except where there are serious grounds for doing so. These final provisions do not oppose to terms by which the supplier of financial services reserves his right to unilaterally dispose the termination of an indeterminate duration contract without serious grounds to do so, on the condition that the supplier immediately informs other contractual parties.

e) Terms related to some restrictions: imposing unjustified restrictions in managing consumers providing or requesting supplementary evidence which, according to the law, is object to other parts of the contract;

f) Terms related to product prize: providing for the price of goods to be determined at the time of delivery or allowing a seller of goods or supplier of services to increase their price without in both cases giving the consumer the corresponding right to cancel the contract if the final price is too high in relation to the price agreed when the contract was concluded. These provisions do not oppose the price indexation clauses, as long as they are legal, on the condition of explicitly explaining the method by which the prices fluctuate.

It should be mentioned that terms related to: the right of the professional to alter the terms of the contract unilaterally without a valid reason which is specified in the contract, determining the price of goods at the time of delivery or allowing a seller of goods or supplier of services to increase their price without in both cases giving the consumer the corresponding right to cancel the contract if the final price is too high in relation to the price agreed when the contract was concluded, respectively the right of the professional to terminate a contract of indeterminate duration without reasonable notice except where there are serious grounds for doing so, do not apply to:

- transactions in transferable securities, financial instruments and other products or services where the price is linked to fluctuations in a stock exchange quotation or index, or a financial market rate that the seller or supplier does not control;

- contracts for the purchase or sale of foreign currency, traveler's checks or international money orders denominated in foreign currency.

3. A few considerations on the legal effects of unfair terms

From a sanctioning point of view, the legal regime applicable to unfair terms is slightly unclear. Thus, according to article 6 paragraph 1 of Directive 93/13/EEC, the unfair terms used in a contract concluded with a consumer by a seller or supplier shall, as provided for under their national law, not be binding on the consumer and that the contract shall continue to bind the parties upon those terms if it is capable of continuing in existence without the unfair terms. Member States shall take all legal necessary measures so that an unfair term does not become binding for the consumer. Therefore, after eliminating it, the rest of the contract should remain mandatory for all parties.

Also, the transposal text of these provisions in Romanian law does not offer enough clues in order to establish the precise applicable sanction for an unfair term. Thus, according with article 6 of Law no. 193/2000, "the unfair terms in a contract, ascertained either personally, either by the competent authorities, shall not produce any effects on the consumer; the contract might continue, only if possible after eliminating the unfair terms, with consumer's approval,".

Even though the legal literature supported both the idea of an absolute nullity for the unfair terms[29] and of considering them as unwritten terms[30], we believe the only appropriate sanction in this case is absolute nullity.

In case of establishing a term as unfair, the sanction is absolute partial nullity, because an absolutely null unfair term does not necessarily affect the validity of the entire contract. Only if, after eliminating the unfair term/terms, the contract can no longer produce any effects, the nullity will expand to all contractual clauses. In any case, the unfair terms can be either completely eliminated from the contract, either replaced with clauses compatible with consumer protection law. This solution result implicitly from article 13 and 14 of Law no. 193/2000[31].

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[29] See also, C. Toader, A. Ciobanu, *Un pas important spre integrarea europeană: Legea nr. 193/2000 privind clauzele abuzive, OG nr. 87/2000 privind răspunderea producatorilor şi O.U.G. 130/2000 privind contractele la distanţă*, Revista de Drept Comercial nr. 3/2001, p. 78; I. Fl. Popa, *Reprimarea clauzelor abuzive*, in "Pandectele Române" no. 2/2004, *op. cit.*, p. 231.

[30] See also, J. Goicovici, *Dreptul consumaţiei,* Ed. Sfera Juridică, 2008, p. 79 şi următ.

[31] The Romanian Constitutional Court seized with an exception of unconstitutionality of article 13 paragraph 1 and 2 of Law no. 193/2000 has rejected the exception by Decision no. 1.535/17.11.2009, stating that: „either seized directly by the consumer, either by the representatives of the National Authority for Consumer Protection or by other authorized specialists from public authorities administration, the court is the only authority entitled to decide on the existence of an unfair term in a

On the other hand, the legislator stipulated at article 7 of Law no. 193/2000, that if the contract can no longer produce any effects after the elimination of the unfair terms, the consumer is entitled to ask for the termination of the contract, with damages, when applicable. This legal text was highly criticized by the doctrine, who considered it as an "almost illegal" translation of the corresponding text of the directive[32]. In fact, the applicable sanction should be nullity and not annulment or rescission, because introducing an unfair term in a contract is not equivalent with the non-execution of a contractual obligation but with the infringement of a prohibitive provision[33].

In any case, in support of the idea that unfair terms are sanctioned with absolute nullity comes the protection character of a general public interest, as guaranteed by the legislation regulating consumer protection, doubled by the fact that representatives from the National Agency for Consumer Protection may observe by default the existence of unfair terms in contracts concluded between professionals and consumers. Therefore, the latter are legally entitled to ask the court to compel the professionals to modify existing contracts, by eliminating unfair terms or they can even enforce contraventional sanctions[34].

References:

[1] J. Goicovici, *Dreptul consumației,* Ed. Sfera Juridică, 2008;

[2] B. Jaluzot, *La bonne foi dans les contrats. Etude comparative de droit francais, allemand et japonais,* Dalloz, Paris 2001;

[3] Gh. Piperea, *Teoria clauzelor abuzive. Relația cu ordinea publică şi abuzul de drept,* http://www.piperea.ro/articol/despre-clauzele-abuzive-din-contractele-de-credit-bancar/.

[4] E. Poillot, *Droit europeen de la consommation et uniformisation du droit des contrats*, forward by P. de Vareilles-Sommieres, LGDJ, Paris, 2006 ;

[5] L. Pop, I.-F. Popa, S.I. Vidu, *Tratat elementar de drept civil. Obligațiile,* Ed. Universul Juridic, Bucureşti, 2012;

[6] I. Fl. Popa, *Reprimarea clauzelor abuzive*, în Pandectele Române nr. 2/2004;

contract. The Court establishes that, in the first hypothesis, the professional can be hold responsible under civil tort liability, according with the provisions of the Civil Code while, in the second hypothesis, according with the provisions of article 13 together with article 16 of Law no.193/2000, the responsibility has a contractual nature, the act being sanctioned with a contraventional fine. Even though the act by which the court is seized is different, depending on the consumer's choice, this doesn't alter the right of the professional to defend themselves. In front of the court, the parties are equally entitled to exercise their procedural guarantees, by defending themselves as they consider appropriate".

[32] I. Fl. Popa, *Reprimarea clauzelor abuzive*, în Pandectele Române nr. 2/2004, *op. cit.,* p. 214.

[33] C. Toader, A. Ciobanu, *Un pas important spre integrarea europeană: Legea nr. 193/2000 privind clauzele abuzive, O.G. nr. 87/2000 privind răspunderea producatorilor şi O.U.G. no. 130/2000 privind contractele la distanță*, *op. cit.,* p. 74-78.

[34] According with the provisions of article 16 of Law no. 193/2000 regarding the unfair terms in the contracts signed between consumers and professionals.

[7] F. Prip, *Aprecierea caracterului abuziv al clauzelor contractelor de consum, în Consumerismul contractual. Repere pentru o teorie generală a contractelor de consum,* coordonator P. Vasilescu, Ed. Sfera Juridică, Cluj-Napoca, 2006;

[8] Gh. Stancu, *Particularităţile raporturilor contractuale, în cadrul dreptului consumului*, Dreptul nr. 2/2009;

[9] C. Toader, A. Ciobanu, *Un pas important spre integrarea europeană: Legea nr. 193/2000 privind clauzele abuzive, O.G. nr. 87/2000 privind răspunderea producatorilor şi O.U.G. nr. 130/2000 privind contractele la distanţă*, Revista de Drept Comercial nr. 3/2001.