

DOI: <https://doi.org/10.36719/2663-4619/100/172-176>

Shafag Mammadova
Baku State University
master student
shafagmammadova84@gmail.com

STANDARDIZED TERMS OF CONTRACT IN THE CONTEXT OF UNFAIR CONTRACT TERMS

Abstract

Due to the shifting social norms, cultural standards, and demands in today's world, the law is also changing and attempting to strike a balance between justice and modern solutions. The notion of freedom of contract, which is fundamental to both liberal and private legal systems, has undergone several limitations since the Industrial Revolution, contributing to the evolution of law. Standardized terms of contract are included in contracts used in many fields such as banking, insurance, travel, transport and labor law. In terms of standardized terms of contract, these two points should not be overlooked. The first of these is that the will of the parties is essential within the scope of freedom of contract. In markets dominated by competitive conditions, conditions agreed by negotiation or bargaining should not be interfered with, even if it is against the consumer. The second is that non-negotiated conditions do not impose obligations against the consumer contrary to the principle of honesty. In consumer transactions other than the standardized terms of contract where the seller or provider is not in a dominant position, the main thing is that the parties mutually negotiate and accept their performance obligations.

Keywords: *freedom of contract, standardized terms of contract, unfair contract terms, vertical agreements, consumer*

Şəfəq Məmmədova
Bakı Dövlət Universiteti
magistrant
shafagmammadova84@gmail.com

Standart müqavilə şərtləri haqsız müqavilə şərtlərinin kontekstində

Xülasə

Müasir həyatda mədəni kodların, sosial həyat və ehtiyacların dəyişməsi ilə qanun da təkmilləşir və günə uyğun həllər çıxararaq ədalətin tarazlığını təmin etməyə çalışır. Liberal və fərdiyyətçi hüquq sistemlərinin əvəzsiz prinsipi olan müqavilə azadlığı da Sənaye İnqilabı ilə başlayan prosesdə bir çox cəhətdən məhdudlaşdırılaraq hüququn təkamülündə iştirak etmişdir. Bank işi, sığorta, səyahət, nəqliyyat və xidmət hüququ kimi bir çox sahədə istifadə edilən müqavilələrdə ümumi əməliyyat şərtləri yer alır. Standart müqavilə şərtləri baxımından aşağıdakı iki məsələ diqqətdən kənarda qalmamalıdır. Bunlardan birincisi, müqavilə azadlığı çərçivəsində tərəflərin iradəsinin əsas olmasıdır. Rəqabət şəraitinin hökm sürdüyü bazarlarda, istehlakçının ziyanına olsa belə, danışıqlar və ya sövdələşmə yolu ilə razılaşdırılmış şərtlərə müdaxilə edilməməlidir. İkincisi, razılaşdırılmamış şərtlər istehlakçıya qarşı dürüstlük prinsipinə zidd öhdəliklər qoymamasıdır. Satıcı və ya təchizatçının üstünlük təşkil etmədiyi standart müqavilə şərtlərindən başqa istehlak əməliyyatlarında əsas odur ki, tərəflər qarşılıqlı danışıqlar aparsınlar və icra öhdəliklərini qəbul etsinlər.

Açar sözlər: *müqavilə azadlığı, müqavilənin standart şərtləri, haqsız müqavilə şərtləri, vertical razılaşmalar, istehlakçı*

Introduction

The Unfair Contract Terms Directive (93/13/EEC) protects consumers against unfair standard contract terms imposed by traders. It applies to all kinds of contracts on the purchase of goods and services, for instance online or off-line-purchases of consumer goods, gym subscriptions or contracts on financial services, such as loans (1).

Standard contract terms have to be drafted in plain intelligible language and ambiguities are to be interpreted in favor of consumers. Contract terms are unfair and, therefore, not binding on consumers if, contrary to the requirements of good faith, they cause significant imbalance in the parties' rights and obligations to the detriment of the consumer. A list of examples of terms that may be regarded as unfair illustrates this general requirement.

EU countries must make sure that effective means exist under national law to enforce these rights and to prevent the continued use of unfair contract terms.

As to the Directive adopted by the European Union Council in order to protect the consumer against abusive clauses in consumer contracts, we can give a definition to "unfair terms" like this, "Contractual terms that are included in the contract without negotiation with the consumer and that cause an imbalance in the contractual rights and obligations of the parties to the detriment of the consumer, in a way that violates the rule of honesty".

The concept of unfair conditions includes general transaction conditions, but has a wider meaning than these conditions (Havutçu, 2003: 219). Contracts that often contain unfair terms are loan contracts between banks and consumers, insurance, transportation, electricity, water, etc. Such contracts are becoming increasingly common in areas such as the provision of services. The review of unfair terms in contracts made in these areas will be in accordance with the provisions of Law of Azerbaijan Republic on protection of consumer rights if one of the parties to the contract is a consumer. Because in terms of its application area, it only provides the opportunity to review the standardized terms of contract used against consumers, whereas the review of standardized terms of contract used between non-consumers, especially merchants, is excluded from the regulation area.

According to part 2 of Article 15 of the Constitution of the Republic of Azerbaijan, the state of Azerbaijan creates conditions for the development of a socially oriented economy on the basis of market relations, guarantees free entrepreneurship, and does not allow monopoly and unfair competition in economic relations (3).

According to Article 16 of the Constitution, the state of Azerbaijan takes care of improving the welfare of the people and every citizen, its social protection and a decent standard of living (3).

According to Article 16 of the Law "On the Protection of Consumer Rights", contractual conditions that limit the rights of the consumer compared to the rights provided for in the legislation are invalid (4).

Articles 417-420 of the Civil Code of the Republic of Azerbaijan of Chapter 20 ("Contract Law"), Paragraph 3 ("Standard Terms of the Contract") provide the definition of the standard terms of the contract, making such terms an integral part of the contract cases is determined, a list of conditions considered invalid even if included in the contract is indicated (Mülki Məcəllə, 2016: 245-247).

In order for a clause in a consumer contract to be considered an unfair term, this clause must first be included in the contract without negotiation with the consumer (Aslan, 2016: 317). As can be seen, the other party cannot foresee and influence the content of the conditions prepared unilaterally in advance, nor can they make them a subject of bargaining during contract negotiations. Thus, the principle of "equality of the parties", one of the most fundamental principles of freedom of contract, is damaged.

In order to talk about negotiation, it is not enough for the parties to review the contract terms together; it is also necessary for the party preparing the contract terms to be ready to make changes in the terms in line with the opinions and offers of the other party (Aydoğdu, 2014: 189). Therefore, first of all, in the presence of such an indication, it can be determined whether the unfair terms included in the contract are subject to inspection. Because the first thing to consider here is whether

there is negotiation or bargaining between the parties. If it can be accepted that the parties have equal bargaining power, then this contract is an individual contract and the contract provision cannot be described as an unfair term.

According to Article 417.2 of the AR Civil Code, if the parties have defined the terms of the contract in detail, these are not considered standard terms of the contract (Mülki Məcəllə, 2016: 245).

In general, it is clear from the Articles 417-420 of the AR Civil Code, especially from the article 417.2, that only the standard conditions of the contract, that is, the conditions that are not the subject of mutual negotiation between the parties to the contract, can be considered as unfair conditions in the cases provided for in that paragraph. As it can be seen, the first sign of an unfair condition is its unilateral inclusion in the contract by the seller (producer, executive, creditor) without discussing and agreeing with the consumer on an individual basis, that is, without detailed determination. The term "individually discussed and agreed upon" means the absence of real (actual) influence of consumers on its content when concluding a contract (Skory, 2007: 10).

If some terms of the contract have been negotiated, a connection has been established with the standard contract in terms of considering the unnegotiated contract terms as unfair terms. Accordingly, if, as a result of the interpretation of the contract as a whole, it is understood that it is a standard contract, the fact that certain elements of a record or an individual provision of the contract have been negotiated will not prevent the application of unfair term provisions in terms of the non-negotiated records of this contract (Uzunallı, 2013: 402).

In examining whether a contract term is unfair or not, it must be examined whether that term has become an integral part of the contract. This requirement comes from Article 418.1 of the Civil Code. According to that article, the standard terms of the contract become part of the contract concluded between the party who proposed it and the other party only if the proposing party writes a visual note at the place of conclusion of the contract and refers to these terms, and the other party familiarizes himself with those terms and agrees to these terms. to be able to accept.

Apparently, the legislator requires that the party who proposed the standard condition of the contract must clearly convey such conditions to the attention of the counterparty. For example, if the standard terms of the contract are indicated on the back of the document containing the offer to conclude the contract, then the first page of that document should have a clear reference to the said terms; in contracts concluded via the Internet, it is enough for the consumer to have the opportunity to familiarize himself with the standard terms of the contract on the website before placing an order via the Internet.

"Thornton vs. The decision of December 17, 1970 in the Shoe Lane Parking case is quite interesting. The facts of the case are that the plaintiff entered the new automatic garage with his car. He had never been in that garage before. The traffic light at the entrance shows "red" and when the car approaches, the installed device presents a ticket. The plaintiff took the ticket and entered the garage after the green light and parked his car. When the plaintiff returned, he discovered that there had been a traffic accident and that his car had been damaged. The plaintiff demanded compensation for the damage from the defendant - the owner of the garage. The defendant referred to the existence of a condition in the ticket excluding their liability. The ticket indicated the date of entry of the car and the fact that it must be presented at the time of pick-up. In the lower left corner of the ticket, it is indicated in small letters that it is governed by the restrictive conditions displayed in the garage. On the column behind the post where the ticket device was attached, the "conditions" were written in figure 8 letters. In the second condition, it was stated that the defendant is not responsible for the damage caused while the consumer's car was in the garage. The court decision stated: "This condition is so broad and infringing on rights that the court cannot order any person to be bound by it except in cases where it is most clearly brought to its attention. ... In order to draw attention to it properly, it was required that the condition be written in red letters and printed in the form of a "red hand" pointing to it or in another equivalent form (Gerven, 2010: 286).

According article 420.2 of The Civil Code, a standard term of a contract, even if it is included in the contract, is void if it is detrimental to the other party to the contract contrary to the principles of trust and good faith. At this time, the conditions under which those conditions were included in the contract, the mutual interests of the parties, etc. should be taken into account. In order for a contractual clause to be considered an unfair term, it must not have been negotiated with the consumer, and this clause must cause an imbalance in the rights and obligations of the parties arising from the contract, to the detriment of the consumer, contrary to the rule of honesty.

Regarding this, in a decision given by the Supreme Court of Turkey (10), "With the case at hand, the plaintiff requests the refund of the amounts collected from him under different names due to the loan agreement he signed with the defendant bank, and as emphasized in the established jurisprudence of our chamber, the defendant bank is a merchant and has the right to claim the expenses it has incurred from the consumer." However, considering that the concrete dispute arises from consumer law, it must be accepted that the bank can only request mandatory, reasonable and documented file expenses from the consumer for granting the loan in question.

It should be noted right away that although it is understood that the main purpose of the banks in taking out life insurance for the borrower is to guarantee the loan debt and that the loan borrower becomes obliged to pay a certain premium due to life insurance, it is clear that the borrower consumers also have an interest in being covered by life insurance. This being the case, it is not possible to accept that the records regarding the life insurance premiums collected within the scope of the contract are unfair conditions." and stated that a provision that is not contrary to the rule of honesty and is in favor of the consumer cannot be described as an unfair term, even if it is determined unilaterally in the contract in advance.

Article 420.2 of the AR Civil Code requires that the standard condition of the contract be considered as an unfair condition, as well as contrary to the principles of trust and honesty, as well as being harmful to the counterparty. In other words, the important aspect of conflicting with the principles of trust and good faith is that it results in a significant inconsistency between the rights and obligations of the parties arising from the contract to the detriment of the consumer. The House of Lords in its 2002 decision in the case of Director General of Fair-Trading v First National Bank plc explained the requirement of "substantial inconsistency" as follows: "If the term is so severe as to alter substantially the rights and obligations of the parties under the contract in favor of the seller (executor), then there is a significant discrepancy" (Stone, 2009: 334).

Conclusion

The freedom of contract principle is one of the cornerstones of contract law. This concept generally grants the parties the flexibility to create a contract with whomever they wish, to determine the content of the contract, to alter the terms of the contract, and to terminate the agreement. In this sense, the freedom of contract uses contracts\agreements to unite individuals with disparate interests. Freedom of contract is not absolute freedom and may be limited by law.

Today, the intensity of work and transactions in almost every field of commercial life, the need for a professional approach, makes it necessary to use standard contract terms. Apart from the aspect of protecting the interests of the user (regulator), the standard terms and conditions written with experience, caution and professional knowledge; gives the parties the habit of cautious approach to time, experienced or possible problems and the opportunity to think (evaluate) before the contract.

The Civil Code of Azerbaijan Republic does not provide the definition of an unfair contract term. Articles 417-420 of the Civil Code of Azerbaijan Republic characterize an unfair term as a term that is unilaterally determined and included in the contract by the party who offered it for repeated use, but contrary to the principles of trust and honesty, which is harmful to the other party to the contract - the consumer. The Civil Code of Azerbaijan Republic provides a non-exhaustive list of unfair contract terms, which will be of some help to a court dealing with any dispute regarding unfair contract terms.

References

1. EU Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts
2. Havutçu, A. (2003). Açık İçerik Denetimi Yoluyla Tüketicinin Genel İşlem Şartlarına Karşı Korunması, İzmir.
3. Azərbaycan Respublikasının Konstitusiyası.
4. Azərbaycan Respublikasının Mülki Məcəlləsi. (2016). Qanun nəşriyyatı. Bakı, 815 s.
5. Aslan, Y.İ. (2016). Tüketici Hukuku Dersleri, Bursa.
6. Aydoğdu, M. (2014). Türk Borçlar Hukuku'nda Genel İşlem Koşullarının ve Tüketici Hukukunda Haksız Şartların Denetimi. Ankara.
7. Skory, M. (2007). Abusive clauses (application of the provisions of Directive 93/13 in Poland and in selected countries of the European Union (Germany, Great Britain, France, the Czech Republic, Slovakia and Hungary). Warsaw, 26 p.
8. Uzunallı, S. (2013) "Genel İşlem Şartlarının Haksız Rekabet Hükümleriyle Denetlenmesi", İÜHF Mecmuası, C. 71, s.2. İstanbul.
9. Gerven, W. (2010). Cases, Materials and Text on Consumer Law., Oxford, Hart Publishing.
10. "İstehlakçıların hüquqlarının müdafiəsi haqqında" Azərbaycan Respublikasının qanunu.
11. Stone, R. (2009). The Modern Law of Contract. Routledge-Cavendish, London and New York.
12. The German General Transaction Conditions Act, 1 April 1977.

Received: 18.01.2024

Accepted: 03.03.2024