



International Distribution Institute

Can standard clauses in distribution contracts signed by the counterpart be considered as abusive?

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German Civil Code – BGB

Section 305

Incorporation of standard business terms into the contract

- (1) Standard business terms are all contract terms pre-formulated **for more than two contracts** which one party to the contract (the user) presents to the other party upon the entering into of the contract. It is irrelevant whether the provisions take the form of a physically separate part of a contract or are made part of the contractual document itself, what their volume is, what typeface or font is used for them and what form the contract takes. Contract terms do not become standard business terms to the extent that they have been **negotiated in detail** between the parties.

- (2) Standard business terms only become a part of a contract ...

German Civil Code – BGB

Section 307

Test of reasonableness of contents

- (1) Provisions in standard business terms are ineffective if, contrary to the requirement of good faith, they **unreasonably disadvantage** the other party to the contract with the user. An unreasonable disadvantage may also arise from the provision **not being clear and comprehensible**.

- (2) An unreasonable disadvantage is, in case of doubt, to be assumed to exist if a provision
 1. is not compatible with essential principles of the statutory provision from which it deviates, or
 2. limits **essential rights or duties** inherent in the nature of the contract to such an extent that attainment of the purpose of the contract is jeopardized.

Unreasonable disadvantages:

- (1) Contractual right of the principal to unilaterally modify the contract territory of the distributor or to appoint a further distributor in the territory (BGH 25.05.1988)
- (2) Contractual right of the principal to unilaterally reduce the contract territory not assigned with exclusivity for reasons of market coverage (BGH 21.12.1983)
- (3) Right of the principal to terminate the contract extraordinarily if the turnover falls short in one calendar year by more than 30% of the minimum turnover agreed (OLG Koblenz 22.04.2010)
- (4) Notice period of 3 months unreasonably short (OLG Frankfurt 17.07.2001, OLG Hamm 21.04.2016)
- (5) Consequences of termination: Unilateral right of repurchase of the principal (Ferrari) without any indemnification of the distributor (BGH 17.11.1999)
- (6) Invoicing the contract products with the price relevant at the day of delivery (BGH 20.07.2005)
- (7) Purchase tie of 7 years (OLG München 19.06.2008)

German Civil Code – BGB

Section 306

Legal consequences of non-incorporation and ineffectiveness

- (1) If standard business terms in whole or in part have not become part of the contract or are ineffective, the remainder of the contract remains in effect.
- (2) To the extent that the terms have not become part of the contract or are ineffective, the contents of the contract are determined by the statutory provisions.
- (3) The contract is ineffective if upholding it, even taking into account the alteration provided in subsection (2) above, would be an unreasonable hardship for one party.

Conceivable remedies and solutions:

1. Draft clauses which do conform with sec. 307
counterargument: little freedom of design
2. Negotiate in detail each and every single clause
counterargument: impracticable
3. Agreement on a more flexible set of rules
counterargument: Art. 3 Rome I Regulation allows only the choice of a state law
4. Instead of German law agreement on the law of another state which offers more flexibility
counterargument: requires continuous monitoring

COMPARATIVE CONTEXT

Severity of German Law to be appraised in comparative context

- Phenomenon of standard contracts and terms universal
 - Obvious advantages
 - But also risks of abuses when different bargaining powers

- Everywhere more and more legal developments to protect the weaker party

- Two main approaches (which can be combined)
 - Rules applicable to contracts of adhesion in general
 - Specific rules for general conditions and terms

COMPARATIVE CONTEXT

Four illustrations :

- 1. European Union – Directive on Unfair Terms (1993)
- 2. Unidroit Principles of International Commercial Contracts
- 3. French law – before and after the reform of 2016
- 4. Swiss Law

COMPARATIVE CONTEXT

1. European Union - Directive on Unfair Terms (1993)

- Only consumer contracts
- Definition of “*unfair term*” (art. 3)
 - „ ... *If contrary to the requirement of good faith, it causes a significant imbalance in the parties’ rights and obligations under the contract, to the detriment of the consumer*“.
- Plain and intelligible language, interpretation *contra proferentem* (art. 5)
- Annex : Indicative and non-exhaustive list of terms that may be regarded as unfair

COMPARATIVE CONTEXT

2. UNIDROIT PRINCIPLES OF INTERNATIONAL COMMERCIAL CONTRACTS

- Soft law codification of the law of contracts
- Remarkable acceptance (case-law, model for legislators).
- Elaborated for commercial contracts but significant concerns for contractual fairness
 - Major stress in good faith (art. 1.7)
 - Gross disparity (art. 3.2.7)
 - Exemption clauses (art. 7.1.6) and penalty clauses (art. 7.4.13)
 - Specific rules on standard terms and conditions (art. 2.1.19 – 2.1.22, 4.6)

COMPARATIVE CONTEXT

2. UNIDROIT PRINCIPLES OF INTERNATIONAL COMMERCIAL CONTRACTS

- Specific rules on standard terms and conditions
 - Art. 2.1.20 : „ (1) *No term contained in standard terms which is of such a character that the other party could no reasonably have expected it, is effective unless it has been expressly accepted by that party ...*“.
 - Art. 4.6 : „*If contract terms supplied by one party are unclear, an interpretation against that party is preferred*“.

COMPARATIVE CONTEXT

3. FRANCE

- Before the reform of 2016
 - Already much case-law on contracts of adhesion
 - 1978 : first regulation on abusive clauses
 - 1995 : implementation of the Directive of 1993

- 2008 : major development
 - Commercial Code, new art. L.442-6
 - Liability of professionals for inserting unbalanced clauses in contracts

COMPARATIVE CONTEXT

3. FRANCE

- Commercial Code (since 1998)

L.442-6. *„Causes the liability of its author and obliges it to indemnify the resulting damage the fact for any producer ...*

2° to impose or try to impose on a commercial partner obligations creating a significant imbalance in the parties' rights and obligations“.

COMPARATIVE CONTEXT

3. FRANCE - Reform of 2016

- Introduction of specific rules on contracts of adhesion in the Civil Code
 - Definition (art. 1110)
 - Significantly unbalanced clauses deemed „*unwritten*“ (art. 1171)
 - Interpretation *contra proferentem* (art. 1190)

- Also possible application of rules of a more general scope
 - „*Economic violence*“ (art. 1143)
 - Clause depriving essential obligations of their substance deemed „*unwritten*“ (art. 1170)

COMPARATIVE CONTEXT

3. FRANCE - Reform of 2016 – Civil code

- „**1110.** ... *A contract of adhesion is a contract the general conditions of which are determined in advance by one party, without negotiation.*
- **1171.** *In a contract of adhesion, any clause that causes significant imbalance between the parties' rights and obligations is deemed to be unwritten“.*
- **1190.** *In case of doubt, ... a contract of adhesion (is interpreted) against that party which has submitted it“.*

COMPARATIVE CONTEXT

3. FRANCE - Reform of 2016 – Civil code

- „**1143**. *There is ... violence when one party, abusing from the other party's state of dependence, obtains an undertaking that other party would not have assumed in the absence of such constraint, and gains a manifestly excessive advantage from it.*
- **1170**. *Any clause which deprives of its substance the obligor's essential obligation is deemed to be unwritten“.*

COMPARATIVE CONTEXT

3. FRANCE - Reform of 2016

- Previous specific regimes concerning abusive clauses still apply
 - Consumers : Code de la consommation
 - Between professionals : Commercial Code
 - coexistence with the new Civil Code provisions
- Innovation : regulation of abusive clauses in contracts of adhesion between individuals

COMPARATIVE CONTEXT

4. SWITZERLAND

- Taken as an example
because Swiss law sometimes referred to in Germany
as being more lenient on general conditions
than German law
- Probably so,
but Switzerland is no „legal paradise“ for standard terms

COMPARATIVE CONTEXT

4. SWITZERLAND

Swiss case-law on standard terms :

- Terms have to be „*integrated*“ i.e. accepted
(requires information and accessibility)
- Particular clauses prevail over general ones
- In case of doubt, *contra proferentem* interpretation
- „*Unusual*“ clauses ineffective unless special attention drawn on them

COMPARATIVE CONTEXT

4. SWITZERLAND

- Also, since 2012, Switzerland also has
general rules concerning abusive clauses
(inspired by the EU Directive)
(modified art. 8 of a law of 1986 on unfair competition)
- Only for consumer contracts,
but commentators point out that
if a clause would be abusive under art. 8,
it could often also be considered as „*unusual*“
and affect its validity under the general
principles,
even in B2B relationships

COMPARATIVE CONTEXT - CONCLUSIONS

- How does this brief comparative overview contribute to our concern about the possible vulnerability of some clauses in general conditions ?

- 1. Importance of choosing / determining
the law applicable to the contract

- 2. In that process, identify the rules applicable
to clauses in general conditions
 - either part of the general law of contract
 - or rules specific to standard terms / adhesion
contracts

COMPARATIVE CONTEXT - CONCLUSIONS

- 3. Verify the scope of application of each rule
 - Application to all contracts ?
 - Only to consumer contracts ?
 - Specific to B2B relationships ?

- 4. Choice of a more lenient law ?
 - There are certainly degrees of severity
 - ... but the general tendency is to increase
the protection of the weaker party,
even between professionals

COMPARATIVE CONTEXT - CONCLUSIONS

- 5. Merits of balanced contracts
 - Interest of existing „*neutral*“ standard contracts ?
 - ICC
 - ITC/UNCTAD
 - Others ?