

## Unfair Contract Terms: Reflected by Criteria

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### ABSTRACT

In some contracts such as the standard ones we are faced with some terms which are not reasonably acceptable. These terms often ordain oppressively obligations and liabilities which are favorable to the strong transacting party and unfavorable to the weak transacting party. According to the contractual freedom, the weak party is obliged to accept the terms but it's not fair. These terms have been discussed in most of the world's legal systems and they have been presented as a base for the court's intervention in the contracts. In judicial process of some countries such as United States of America and England, there are plenty of cases in which courts did not give the judgment to enforce. The recognition of these terms is not transparent in different legal systems and there are also different approaches to it. The legal system of America has presented the general theory of the unfairness of the contract. In some European countries, deciding about these terms should be done considering the specific case and special circumstances of each judicial record. In the legal system of Iran the criteria of these terms are not determined and only some applicability of these terms could be achieved by studying the different laws. Although according to the significance of the issue, establishing laws and determining criteria are necessary.

**KEYWORDS:** term, criterion, contract, fairness, free will.

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### INTRODUCTION

Today unlike the past, although the transacting parties talk and do agree with each other before conducting a transaction, unequal economic conditions prevent one of the party bargaining and this will eventually result in inequality.

Nowadays in contrast to the past, most contracts are executed in an unequal and unfair circumstances. This fact came to view especially after the industrial revolution and the resulted economic gap between the manufacturer and the consumer classes. Producers often create a monopoly in the production and thus impose conditions on consumers that a reasonable person in the equal circumstances will never accept them. The producers are worried neither about reducing the number of their customers nor about refusing their conditions by the customers. This fact made the legal systems to identify though briefly, by establishing some rules the criteria of these terms. In this article, defining the unfair term we will next commence to study some criteria which were mentioned in different legal systems to recognize the unfairness of a term.

#### 1-The concept of "unfair contract terms"

Black's law dictionary define the contract or the unfair term as follows: "the contract or the contract term which due to the stronger distracting force of one of the parties is vigorously ordained in an unfair manner will be usually annulled because of its contradiction to the public order".[1]

Despite establishing an act called unfair terms in 1977, the legal system of England did not provide a definition for these terms. However, judicial precedent has abundantly scrutinized these terms and it has presented the criteria and definitions for these terms. The first definition concerning V. Jansen Field's lawsuit was presented in 1750 by Lord Hardwick which states that: "a contract which is not carried out by a sane person in normal circumstances and which an honest and reasonable person does not accept."

In addition to this factor, England's courts have mentioned other factors in order to recognize the unfairness of a term. Some of these factors are as follows: [2]

1. The monopoly of a particular producer on a production provides the context for the realization of injustice.
2. The terms will be considered as the unfair ones where the terms are not negotiated independently of the contract.
3. Inequality in transacting parties' force in some cases could also result in unfairness of the terms

Therefore, in order to give a definition for the unfair term we could say that it's a term which is introduced in the contract by one the transacting parties abusing his stronger transacting force (*mala fides*) in an ex parte and predetermined manner that will eventually lead to a gross inequality in each party's commitments.

#### **A) The Criteria of the legal system of England**

The Law of England as the representative of Common Law has been struggling since seventeenth century with these kinds of terms. Some of these battles are remarkable in the judicial procedure of this country.[3]

According to the established laws in the legal system of this country, the concerning criteria could be classified into four stages which are separately described as follows:

1. In 1900, in order to control the unfair terms the English legislator established for the first time a law called "the money lender Act".[4] The philosophy behind this legislation was that the conditions for receiving loan in England were considered as a fact of oppressive and one way terms for the borrower; thus the legislator with the aim of supporting this class determined some criteria for this act .[5]

The first criterion in this act is that before recognizing whether the loan granting contract has been exorbitant and unfair or not, the court should first consider the contents of the contract and if the contract was found either associated with other contracts or related to a contracts body as a unit then the court could commence to investigate all of them in order to decide if the contract is extortionate or not.

Article 138 of this act has established the terms and criteria to decide the unfairness and exorbitancy of the loan granting contract. According to this article if the contract obliges the borrower or his relatives to pay an exorbitant amount or also if the contents of the contract are obviously violating the fair behavior, the contract is considered as an unfair one.[6] To decide either of the exorbitance of the payment amount or the serious fair behavior violation the court considers not only the external and concrete factors such as the current rate of the interest while concluding the contract, the level of the risk accepted by the creditor and other related contracts but also the personal factors such as the debtor's age, his experience and expertise, his commercial ability, his physical and mental health, his economic situation and the pressures on him while concluding the contract. For example a loan contract by an interest rate of %48 was not found exorbitant because the creditor had not taken guarantee. (LTD V. Scott A. Ketley).[7]

2. The second legislative attempt was made in 1977 by establishing a act called unfair contract terms.[8] The title of this act is a little misleading; the substances of this act in contrast to its content try to battle the terms which exclude or restrict any liability.[9]

This act is engaged in terms and criteria which are more personal and are considered to recognize the reasonability of the terms which restrict the responsibility. These criteria will investigate:

1. The parties' transacting and bargaining status compared to each other.
2. If the consumer has had a particular motivation to conclude a contract with such terms and if there was this opportunity for him to conclude the contract without those terms?
3. If the consumer has been aware of the existence and the contents of those terms?
4. If the restricting terms of liability were dependent on observing the affairs which were observable while concluding the contract?
5. Whether the goods were manufactured, finished or provided by the particular order of the consumer and to meet his particular need?

3. The third English legislative attempt was related to The Regulation on Unfair Terms in Consumer Contracts.[10] This act which seeks to equalize the rights of the member states of European Union has been derived from the directive 93/13 of European Union and acts as a mother law.

According to the UTCCR regulations to recognize the unfairness of a term, four decisive elements are taken to account:

- (i) The contract term must not be negotiated in a particular and individual manner (this term emphasize on the elements of getting satisfaction and agreement while concluding legal transactions in a conscious manner).
- (ii) Lack of good faith; the contract in which the good faith is lacking is suspected to be unfair.
- (iii) Developing a remarkable inequality in parties' rights and commitments which is derived from the contract.
- (iv) And will eventually result in causing damage to the customer.

The regulation 6(1) in evaluating the "unfairness" requires the court to investigate the factors which have led to the contract and to give attention to the goods and services proper and also to consider the equality of the contract terms which follow the seller's interest by excluding the customer's rights. Thereby if the important inequality in parties' rights and commitments result in causing damage to customer, the unfairness of the term is ascertained .[10]

4. The latest attempt of European Union respecting to supporting border of customer has been done by approving a directive ordained for the unfair commercial practices .[11]

Its executive directive was enforced in December 12, 2007. This directive is applied for advertising and the development, selling or providing all kinds of goods for a client and in contrast to the previous laws, it imposes

a maximum level of uniformization regarding the unfair practices to all the legal laws of the member states. The aims of the "unfair commercial practices" directive are to forbid the use of all particular unfair commercial practices against the clients and also to regulate the domestic markets in order to support the clients.[12]

Article 5 requires a general interdiction of using all kinds of unfair commercial practices. According to the regulations of the directive a commercial practice will be assumed as an unfair one in two conditions below:

1. Being against the principles of the professional behavior;
2. Perverting fundamentally the manufacturer and the consumer economic behavior.

#### **B) A glance at the legal system of the America**

In this legal system, the unfair terms became common by accepting the commercial uniform law in different states. Three criteria have been presented in this legal system to recognize the unfairness and exorbitance of a contract:[13]

**A) Being one way:** It means that the content of the contract is in favor of one party and against the other one in a gross manner; as an example for such cases could be mentioned a photograph developing contract which stipulates that the photographer has no responsibility in case of getting lost the negatives.

**B) Being imposed:** It implies that the weak party to the contract has not accepted the term by the sense of agreement; the other party to the contract has abused his status. An example for this case could be a contract which allows one of the parties to cause damage intentionally to the other one without accepting any liability.

**C) Being unexpected:** it means that some terms are included intentionally in the contract so that the real meaning of the contract is not clear to the other party and after concluding the contract its real meaning reveals, that is extremely unexpected to that party; like a situation in which one party to the contract has not command of the parlance of the contract or he has not enough expertise or experience to identify the contents and the consequences of the contract.

#### **C)The legal system of Australia**

The evaluation of some of the unfair terms in legal system of Australia has been done by the Australian consumer law established in 2010; in addition to this law we could mention the unfair contract terms law of Australia which has been examined in step with the related regulations in England (Victoria) from the viewpoint of classic contractual theory and the economy in behavior point of view.

According to the unfair contract terms law of Australia, the court will consider to the subjects below to evaluate whether a term is unfair or not:

1)The court must consider the contract on the whole to evaluate if a particular term is unfair or not. Understanding the details of the contract conclusion by the court seems to be the reason of this issue; perhaps it may be occurred that considering these details cause taking an unfair term as the fair one

2)Transparency of the term: according to the latter law, in evaluating the term, the court must consider the transparency of the term. Having the characteristics below a term will be taken transparent:

1. The language should be understandable and logically presented.
2. The writing should be Legible and accurate
3. It should be expressed in a clear and obvious manner
4. It should be in access to any party who is affected by the term.

This approval were obtained through reasoning this experience that the consumers generally did not read the terms of the standard contracts; in addition the terms in standard contracts were presented in the legal parlance and in an ambiguous manner so that it was difficult for the consumers to understand its meaning. Besides, in some cases these terms are not even available for the consumers while concluding the contract. [14]

#### **D)The Legal system of Iran**

In our legal system, despite the presence of Islamic jurisprudence fundamentals, these terms have not been directly legislated. It seems that the reason of this fact is for the lack of identifying the nature of these fundamentals and it requires more accurate scrutiny and expertism. However, in different acts the applicability of these terms has been mentioned in a particular manner and without presenting a criterion to recognize them. For example, we could mention the article 46 of electronic commerce act approved in 1382 which stipulates that: "applying the contract terms which are against the regulations of this section and also imposing unfair terms which damage the consumers are not effective." Also the marine act approved in 1964 could be mention here which stipulates that: " any help or rescue contract which has been concluded while the danger or affected by the danger and the court finds the terms of this contract to be unfair, could be annulled or modified by the court on the demand of any party to the contract..." Thus an independent codification and determining the criteria such as those in the legal system of England, America and Australia are necessary.

#### **Conclusion**

After studying the criteria in different legal systems the results below are achieved:

1. In the legal system of England, there has been the motive for battling against the unfair terms since eighteenth century and this motive still exists in this legal system. Therefore several acts have been established to codify the criteria of these terms. Among these criteria we could mention the most important ones such as "the presence of gross inequality" and "the behavior by mala fides" in concluding contract; it means that a term would be considered as an unfair one in which the person in whose favor the condition is made has not had good faith in obtaining the term and this fact has resulted in a gross difference in the economic value of the considerations. However, some criteria have been mentioned in this legal system to recognize the unfair terms; it should be noted that these criteria are as the analogies; therefore the unfair terms criteria are not limited to these terms and it's the court's duty to decide for each particular case on the whole by considering the circumstances of each case.

2. The legal system of Australia which has been affected by the legal system of England has considered the balance and equality of the considerations as the essential condition and has presented two main criteria for the fairness of a term:

Firstly: The court must consider and study on the whole; the court must consider and study the original contract and the term, related contracts, related terms and also the circumstances while concluding the contract and eventually decide considering all these factors.

Secondly: The term must be transparent, that means it should be written in the standard language and be logically and accurately presented so that the person who is responsible to perform the condition could understand it; the presence of these criteria in the contract will lead to take a term as a fair one.

3. In the legal system of America the legislatures have invoked the general criteria. These criteria could be summarized in three criteria of "being one way", "being imposed" and "being unexpected". In this legal system the theory of the unfairness of a contract has been communized and could be implemented in all the contracts.

4. In the legal system of Iran these criteria have not been determined. The reason of this fact is that except the two cases mentioned before, fundamentally these terms possess no position in the statute laws. Besides, in those two limited cases (the electronic commerce and the marine acts) the criteria are not determined and only the particular applicability has been presented. Therefore based on this fact, by determining the exact concept of the unfairness of the contract, Iran's legislative must provide the judges with decisive and clear applicability and criteria in a transparent manner.

## REFERENCES

- 1- Campbell, Henry, Black's law dictionary, 16<sup>th</sup> ed, West Publishing Co, 1990, P 1525.
- 2 - Catherine Elliott and Frances Quinn, contract law, 6<sup>th</sup> ed, 2007, England, P 146-148.
- 3- Among these cases in which the court reopened the parties' private agreement to redetermine the terms, we could mention the private agreements in which the heirs presumptive transferred their future heritage for a few amount of money in cash or by getting mortgage.
- 4-The money lenders Act 1900
5. Today, the contents and regulations of this act are presented in the loan granting act approved in 1974.
6. Guest, A.G, Chitty on contracts, vol2, 27<sup>th</sup> ed, London, 1994, pp 593-594; as quoted by Shiravi, *ibid*, p14.
- 7- Shiravi, Abdol-Hossein, The theory of unfair terms and the unconscionability of the contract terms, Journal of Higher Education Complex of Qom, Year IV, Number14, 2002, p10.
- 8- Unfair contract terms 1977.
- 9- Richard Lawson, Exclusion Clauses & Unfair Contract Terms, 6<sup>th</sup> edition, Sweet & Maxwell, 2000, p186.
- 10- The Regulation On Unfair terms In Consumer Contracts 1999
- 11- Richard Lawson, *Op cit*, p195.
- 12- Wolfgang Schuhmacher, *The Unfair Commercial Practices Directive*, emerald, 2002, p.129.
- 13- Paul Bennett Marrow, "Contractual Unconscionability: Identifying & Understanding", *New York state Bar Journal*, Vol. 72, No. 2, 2000, p.6; as quoted by dr Shiravi, Abdol-Hossein, the theory of unfair terms and the unconscionability of the contract terms, Journal of Higher Education Complex of Qom, Year IV, Number14, 2002, p22.
- 14- Jeannie Paterson, the Australian unfair contract Terms law: the Rise of substantive unfairness as a Ground for Review of standard form consumer contracts, *Melbourne university law Review*, vol.33, 2010, P949-950.