COMBATING BLACK AND GREY LISTS OF UNFAIR CONTRACT TERMS IN ALGERIAN AND COMPARATIVE LAW

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Abstract
The issue of unfair contract terms constitutes one of the most significant challenges in consumer contract law, particularly with regard to restoring contractual equilibrium between the professional party and the consumer. It is insufficient merely to caution against such terms; the crucial question lies in how they are identified and legally characterised as abusive. The German legislator was a forerunner in this domain, adopting the 'lists approach' by dividing unfair terms into two categories: a Black List, comprising terms that are null and void by operation of law with no judicial discretion; and a Grey List, encompassing terms presumed to be unfair, subject to judicial assessment of their abusive character. The French legislator similarly developed a legislative framework to combat unfair terms. As for the Algerian legislator, significant importance has been accorded to this matter, regulated under Law No. 04-02 and Executive Decree No. 06-306. This study concludes that the Algerian legislator implicitly established a Black List through Law 04-02 — enumerating terms deemed unfair per se without granting the judge any discretionary power — while Executive Decree 06-306 adopted a non-exhaustive, illustrative enumeration, leaving scope for future regulatory additions. This approach reflects the legislator's intent to provide dynamic consumer protection that keeps pace with evolving commercial practices.

Keywords: unfair contract terms; black list; grey list; contractual equilibrium; consumer protection; Algerian law.

1. Introduction

Among the most prominent obstacles to the legal protection of contracting parties is the phenomenon known as unfair contract terms, through which the economically dominant party imposes imbalanced or disproportionate clauses that undermine the principle of contractual equilibrium and contractual justice. The significance of this subject has intensified in the context of economic development and the proliferation of large-scale consumer and commercial contracts, rendering the weaker party — whether a consumer or an emerging professional — susceptible to acquiescing to obligations that do not reflect genuine consent or whose legal consequences are not fully understood. This has transformed such terms into instruments of domination that transcend general legal rules, placing the legislator before the challenge of reconciling the principle of freedom of contract with the imperatives of protecting the weaker party and preventing the abuse of rights.

In response, comparative legislation and modern regulatory systems have established preventive, supervisory, and remedial mechanisms in the form of classificatory list systems — the Black List and the Grey List. The Black List comprises clauses that are absolutely void and contrary to public contractual order, prohibited from inclusion in contracts by law, whereas the Grey List encompasses terms carrying a presumption of unfairness that are subject to judicial review to assess their legality and consistency with the principle of good faith.

This raises an important research question: to what extent does the system of lists (Black and Grey) operate as an effective mechanism for restricting unfair terms in standard-form contracts, in a manner that ensures the legal protection of the weaker party without encroaching upon the essence of freedom of contract and transactional stability?

To address this question, the study is structured around two principal sections: the first examines the concept and definition of unfair contract terms; the second analyses the mechanisms for combating such terms within the framework of specific legal rules.

2. Section One: The Concept of Unfair Contract Terms

A thorough examination of the concept of unfair contract terms necessitates both a definition of such terms and an analysis of their distinguishing features.

2.1 Defining the Unfair Contract Term

2.1.1 Doctrinal Definitions

Scholarly opinion has advanced multiple approaches to formulating a comprehensive definition of the unfair contract term, depending on the legal perspective adopted. From the standpoint of a subjective criterion based on the characteristics of the contracting parties, an unfair term has been defined as a clause imposed by a professional upon a consumer or non-professional, exploiting economic superiority to extract unwarranted advantages that disrupt the principle of justice.1

Based on a formal criterion related to the mechanism of contract drafting, the definition has been framed as a clause unilaterally drawn up by a party occupying a dominant economic position, conferring upon it an excessive advantage against the other party.

By reference to an objective criterion focusing on the effect of the term on contractual economics, it has been defined as a clause that produces a manifest and unjustified imbalance in the rights and obligations arising from a consumer contract, constituting an excessive advantage for the professional at the consumer's expense resulting from the exercise of economic power.2

Some scholars have also defined it as a term whose presence in contracts of adhesion is no longer in dispute,3 while others characterise it as any term that — having regard to the advantage exclusive to the professional — leads to an inequality in the rights and obligations of the parties.4

Algerian doctrine has largely converged on defining the unfair term as a clause inserted by the professional against the consumer, the activation of which results in a manifest disruption of contractual equilibrium. The abusive character of the term is assessed at the time of concluding the legal act, by reference to the circumstances surrounding the contract, its subject matter, and the legal position of each party, in accordance with the requirements of justice.

It is notable that Algerian scholarly opinion has been influenced by Article 110 of the Algerian Civil Code, which provides that where a contract has been concluded by way of adhesion and contains unfair terms, the judge may modify such terms or relieve the adhering party therefrom, in accordance with the requirements of justice.5 This provision relies simultaneously on two criteria — the criterion of excessive advantage and the criterion of justice — the latter being inherently broad and subjective, as perceptions of justice vary from person to person and from judge to judge, potentially leading to inconsistent judicial outcomes with respect to the same clause.

2.1.2 Legal Definitions

The following section surveys the legislative definitions adopted in selected legal systems.

(a) European Legislation

The German legislator was among the first to address the concept of unfair contract terms. Article 246 of the German Civil Code provided that a term is unfair and void if it is unduly disadvantageous or excessively detrimental to the consumer in a manner incompatible with good faith or applicable trade practices. Subsequently, the Act on Standard Terms of Contracts (AGB-Gesetz) of 9 December 1976, which entered into force on 1 April 1977, defined an unfair term in its first article as 'terms formulated for use in a multitude of contracts, which one party to the contract (the user) imposes on the other party upon the conclusion of the contract, regardless of whether the terms form part of the contract or are contained in a separate document.'6

This definition indicates that the scope of legal protection from unfair terms extends beyond consumers to include professionals, that such protection applies exclusively to contracts of adhesion and not to negotiated contracts, that prior notification of the other party — in particular the consumer — is required for the terms to be effective, that the legislator has enumerated terms that are absolutely void, and that judicial discretion in determining the unfair character of a term is guided by the principle of good faith pursuant to Article 9 of the Act.

The French legislator initially defined the unfair contract term in Article 35 of Law No. 78-23 of 10 January 1978 on consumer information and protection. This provision authorised the prohibition, restriction, or regulation by decree of certain clauses in contracts between professionals and non-professionals or consumers, where such clauses appear to have been imposed through the abuse of economic power and confer an excessive advantage.7 This law was subsequently amended in 1995, with the unfair term redefined as a clause in contracts between professionals and non-professionals or consumers that creates a significant imbalance to the detriment of the consumer in the rights and obligations of the parties.8

Article 1104 of the French Civil Code has since become the foundational principle upon which the courts rely in their review of contractual equilibrium. By treating good faith as a mandatory rule of public order applicable from the pre-contractual stage through to performance, the imposition of terms that produce a manifest imbalance between the contracting parties' positions constitutes a departure from this principle. Consequently, good faith has evolved from a moral obligation into a legal instrument allowing the judge to invalidate terms that impair the core of the obligation, treating them as non-existent on grounds of their incompatibility with contractual integrity and reciprocal justice.

This judicial trend has been reinforced by the French Court of Cassation, which has affirmed in its jurisprudence that a term acquires an unfair character whenever it involves an act contrary to law that modifies the general principles of the contract in a manner incompatible with the requirements of contractual good faith.9

(b) Arab Legislation

The Egyptian legislator addressed the unfair contract term in Article 10 of Consumer Protection Law No. 67 of 2006, defining it as 'any term contained in a contract, document, or instrument related to a transaction with a consumer, where such term exempts the supplier of goods or the provider of services from any of their obligations stipulated in this Law.' The Egyptian Court of Cassation has further defined it as 'a term that contradicts the essence of the contract, being contrary to public order.'10

The Lebanese legislator defined the unfair term in Article 26(1) of Consumer Protection Law No. 659 of 4 February 2005, as amended by Law No. 265 of 15 April 2014, as 'clauses that aim at or may result in disrupting the balance between the rights and obligations of the professional and the consumer, to the detriment of the latter.'

The Algerian legislator defined the unfair term in Article 3(5) of Law No. 04-02 of 23 June 2004 establishing the rules applicable to commercial practices, as amended and supplemented, as follows: 'For the purposes of this Law, an unfair term means any clause or condition, whether standing alone or combined with one or more other clauses or conditions, which is likely to create a manifest imbalance between the rights and obligations of the parties to the contract.'11

It is noteworthy that the Algerian legislative approach to defining the unfair term follows the orientation of the German legislator, diverging from the French approach, in that it does not confine protection to consumer contracts alone but extends it to contractual relationships between professionals. This breadth is evidenced by the legislator's lack of precision regarding the legal status of the contracting parties, opening the application of anti-abusive clauses provisions to the business environment. To determine the scope of this protection, reference must be made to the definition of a 'contract' as set forth in Article 3(4) of Law No. 04-02 and confirmed by Article 1(2) of Executive Decree No. 06-306, which defines it as 'any agreement or arrangement aimed at the sale of goods or the provision of services, drawn up in advance by one of the parties to the agreement with the other party's acquiescence, such that the latter cannot effectively alter it.'12

2.2 Distinguishing Features of the Unfair Contract Term

It is essential to clarify certain important matters that may cause confusion for any party, and in particular for the weaker contracting party, by examining two significant issues: the constituent elements of the unfair term, and the criteria for its determination.

2.2.1 Constituent Elements of the Unfair Term

Based on the Algerian legislator's definition of the unfair term in Article 3 of Law No. 04-02, three elements must be present for a contractual term to be classified as unfair:

(a) Connection to Contracts of Adhesion

Perhaps the most distinctive feature of the Algerian legislative approach is the restriction of protection from unfair terms to contracts of adhesion. The legislator requires, as a precondition for characterising a contractual clause as 'unfair', that it be contained in a contract drafted in advance by one of the parties without the other party having the ability to negotiate or materially alter it. This orientation finds its legal basis in Article 3(4) of Law No. 04-02 on commercial practices, as well as in Article 1(2) of Executive Decree No. 06-306.13

(b) The Criterion of Prior Written Form

From the express wording of Article 3(4) of Law No. 04-02 and Article 1(2) of Executive Decree No. 06-306, it is apparent that the legislator requires prior material drafting of the clause for it to fall within the scope of protection. The use of the expression 'drawn up in advance' demonstrates the necessity of recording terms in written form as a material prerequisite for their existence. This criterion extends beyond the original contractual document to encompass all ancillary instruments and documents, regardless of their legal nature or technical designation.14

(c) Manifest Disruption of Contractual Equilibrium

The Algerian legislator has enshrined 'manifest disruption' as an objective and substantive criterion for characterising a contractual clause as unfair. Article 3(5) of Law No. 04-02 expressly provides that the relevant consideration is the clause's capacity to produce its consequence — namely, the disruption of the balance of rights and obligations between the parties to the contractual relationship. This element constitutes the fundamental pillar and essential core upon which the concept of unfairness rests in Algerian legislation. It is evident that the Algerian legislator was influenced by the French approach in adopting this same criterion through Article L. 212-1 of the Consumer Code (Order No. 2016-301).

2.2.2 Criteria for Determining the Unfair Character of a Term

Legislative criteria for identifying unfairness have varied considerably. Examining the French experience, Law No. 78-23 of 1978 required the conjunction of two elements: exploitation by the professional of its economic power, and the conferring of an excessive advantage as a result. However, this approach underwent a fundamental transformation through Law No. 95-96 of 1995, which abandoned the 'exploitation of power' criterion in favour of a more objective standard centred on 'significant imbalance' between the parties' rights and obligations.

In contrast to the ambivalence characterising certain comparative systems between subjective and material criteria, the Algerian legislator has charted a distinctive course in formulating the standards of contractual unfairness, establishing comprehensive protection based on three substantive elements:

(i) Criterion of Abuse of Economic Power: Legal opinion has diverged on the relative nature of the economic power criterion. One school of thought has criticised this criterion for its vagueness and lack of precision, arguing that a professional's ability to extract an excessive advantage does not necessarily correlate with the scale of the enterprise. Economic power is not measured by the size of the undertaking but by its market dominance: a small trader may hold a local monopoly granting contractual power comparable to that of large national corporations. To clarify the concept, legal scholars have identified several indicators of a professional's 'actual power', including: the severity of the contractual imbalance as evidence of the professional's dominance; the exploitation of a position of economic 'control or dominance' that enables the professional to impose preferential terms serving exclusively its own interests; and the 'technical and knowledge superiority' of the professional as the primary tool for imposing unfair terms, rendering the economic power criterion — previously adopted by the French legislator — of limited practical utility in the face of the professional's technical ascendancy.15

(ii) Criterion of Excessive Advantage as a Consequence of Contractual Unfairness: A clause in a consumer contract is classified as unfair whenever it results from an unjust exploitation of the professional's economic influence, provided that it confers upon the professional an excessive or grossly disproportionate advantage. This criterion emerges as a necessary consequence of the first (economic influence); the 'excessive advantage' represents the material outcome of that influence, establishing a direct causal link between the two. Unfairness is thus not constituted merely by the possession of economic power but is manifested in the professional's acquisition of manifestly inequitable and unjustified contractual privileges. The judge does not assess the excessiveness of the advantage by reference to subjective criteria but relies upon objective standards and factual circumstances, assessing the reciprocal obligations in the contract and comparing them with analogous transactions in the market. Excessiveness is established when the advantage granted to the professional lacks any economic or legal justification, or when it impairs the contractual substance to a degree that deprives the consumer of the benefit of the service or goods — a degree of disproportionality that exceeds the bounds of 'contractual justice' and necessitates judicial intervention to restore the lost balance by declaring the term void.16

(iii) Criterion of Manifest Disruption of the Balance of Obligations: Contemporary legal thinking has drawn this criterion from European Directive No. 93/13, which laid the cornerstone by defining the unfair term in its Article 3 as: 'a contractual term which has not been individually negotiated shall be regarded as unfair if, contrary to the requirement of good faith, it causes a significant imbalance in the parties' rights and obligations arising under the contract, to the detriment of the consumer.' This is the criterion subsequently adopted by the French legislator in response to European requirements.17 The Algerian legislator has resolved this legislative choice by adopting the criterion of manifest disruption of the balance between the parties' rights and obligations, setting aside the traditional criteria based on 'economic superiority' or 'excessive advantage'. This orientation is clearly reflected in Article 3 of Law No. 04-02, which makes 'material imbalance' in contractual equilibrium the essence of unfairness, confining it to the context of contracts of adhesion to ensure effective protection.

To the Algerian legislator's credit is this transition from subjective economic criteria (focused on the professional's influence and financial power) to objective legal standards. Economic power is not always indicative of unfairness: a simple trader may exercise local monopolistic power to dictate terms, while a large enterprise may maintain contractual balance to protect its commercial reputation. Accordingly, the adoption of the 'manifest disruption' criterion provides the judiciary with a flexible mechanism to combat unfair terms and promote contractual justice, regardless of the professional's economic scale — representing a foundational step towards building a comprehensive legal framework for the protection of the weaker party.

In conclusion, the Algerian legislator has adopted a modern conciliatory approach: while drawing from the French legislator the criterion of 'manifest imbalance' as an objective foundation, it has made the 'contract of adhesion' a necessary formal framework for the existence of unfairness. In the Algerian legislative system, unfairness is no longer merely an exploitation of economic influence or the acquisition of an excessive advantage, but has become a fundamental defect affecting the justice of distribution between the rights and obligations in contracts where negotiation is absent and will is imposed in advance. This orientation reinforces the role of the judge as a supervisor of the legality of contractual clauses, granting broad authority to set aside any written term — whatever its purported basis — where it has been established that such term unduly burdens the weaker party (the consumer or the adhering professional).

3. Section Two: Combating Unfair Contract Terms through Special Legal Rules

The prohibition of unfair contract terms constitutes a fundamental pillar of contractual justice. The central challenge lies in devising precise criteria for characterising such terms and the procedural means of combating them. Examining leading legislative experiences reveals a diversity of approaches: the German legislator was a pioneer with its Act on Standard Terms of Contracts of 1976, adopting the 'lists approach' based on the presumption of unfairness for specified terms. It distributed these terms between a Black List (Article 10) containing eight categories of terms void by operation of law without any judicial discretion, and a Grey List (Article 11) containing ten categories in respect of which the judge retains a degree of discretion to annul them based on their compliance with legal standards.19

The French legislator, for its part, developed a legislative path to combat these terms from Law No. 78-23 of 1978 through to the qualitative transformation of Law No. 95-96 of 1995. This protection was further reinforced by the 'Châtel' Law of 28 January 2005, which introduced substantive amendments to the French Consumer Code, adding to the indicative list a new category of unfair terms: those which abruptly oblige the consumer to accept alternative dispute resolution systems.20

Turning to the Algerian legislator, it accorded the matter exceptional attention: it did not merely incorporate it within general rules but devoted an independent executive decree and a complete chapter to defining unfair terms, treating them as 'abusive contractual practices'. Accordingly, the nature of the legal protection guaranteed by the Algerian legislator may be analysed according to the following dimensions:

3.1 Pre-Contractual Protection

From a systematic examination of the legal provisions enacted by the Algerian legislator to address unfair terms, it is apparent that — despite the absence of explicit reference to the terms 'Black List' and 'Grey List' — the legislator has implicitly adopted a distinction that aligns with this technical categorisation. This is clearly evidenced by Article 29 of Law No. 04-02 on commercial practices, which exhaustively enumerates eight terms deemed unfair and prohibited in contractual relations with consumers. These are mandatory and definitive clauses that do not afford the judge any discretionary power in their characterisation, placing them objectively within the domain of the 'Black List'.

By contrast, the provisions of Executive Decree No. 06-306 and any supplementary regulatory texts or judicial cases open the field for the incorporation of other clauses within what is known as the 'Grey List' — terms that admit of judicial interpretation and assessment according to the circumstances of each case and the context surrounding the contract, allowing for their modification or exclusion depending on the severity of the disruption to contractual equilibrium.

3.1.1 Prior Determination of Essential Elements of Consumer Contracts

Seeking to preserve contractual equilibrium and shield it from adhesion clauses, the Algerian legislator has adopted a preventive approach based on the 'prior specification of contractual content', through the adoption of standardised contractual models that prevent the professional from unilaterally drafting contractual terms.21 In this framework, the legislator delegated to the executive authority the power to determine the mandatory components and content of consumer contracts pursuant to Article 30 of Law No. 04-02, which provides for the 'determination of the essential elements of contracts through regulation'.

In implementation of this legislative delegation, Executive Decree No. 06-306 was issued to define the essential components of contractual relationships between economic operators and consumers, with a detailed inventory of prohibited clauses. Article 2 of the Decree enshrines the principle that contracts must include elements pertaining to the 'fundamental rights of the consumer', ensuring the transparency and integrity of commercial transactions, the right to prior information, the safety and conformity of goods and services, and provisions regarding guarantee and after-sales service. Pursuant to Article 3 of the same Decree, these substantive elements include: characteristics and nature of goods and/or services; prices and tariffs; payment modalities; delivery conditions and deadlines; penalties for late payment and/or delivery; guarantee and conformity modalities for goods and/or services; conditions for modifying contractual terms; dispute resolution modalities; and contract termination procedures.

The Algerian legislator has pursued a legislative policy based on mandatory rules to re-establish the lost balance in consumer contracts, recognising the structural vulnerability of the consumer as the weaker party who lacks negotiating power in the face of pre-drafted adhesion formulations. By linking the essential elements constituting the contract to the 'fundamental rights of the consumer', the legislator has transformed these elements from mere contractual clauses into legal obligations not subject to derogation by agreement. The legislative purpose behind imposing these elements serves two complementary objectives: first, a protective purpose aimed at safeguarding the consumer's consent by ensuring a minimum of inviolable rights; and second, an informational purpose aimed at acquainting the contracting party with the reciprocal obligations arising from the contractual relationship. The legislator thereby ensures that the contract is concluded on the basis of 'informed consent', with the consumer fully aware of the rights and obligations incumbent upon each party, minimising the risk of unfairness before it occurs.

3.1.2 Unfair Terms Relating to the Contract Formation Stage

The contract formation stage constitutes the fundamental pillar of legal protection, for the moment the consumer expresses contractual intent, the consumer finds itself drawn into pre-prepared formulations that impose acquiescence to their terms. Given the finality of contractual obligation imposed at this stage, the legislator has, in Article 29 of Law No. 04-02, prohibited two substantive terms embodying unfairness at the inception of the contractual relationship:

(i) Granting Unilateral Advantages to the Economic Operator without Reciprocal Benefit for the Consumer: The legislator, pursuant to Article 29(2) of Law No. 04-02, has prohibited the professional from obtaining rights or advantages not matched by an equivalent right for the consumer, given the manifest injustice this entails, justifying nullity in affirmation of the principle of contractual equality. The application of this restriction raises a legal issue regarding its possible encroachment upon the principle of 'freedom of contract', since the legislator imposes a numerical symmetry in reciprocal rights and advantages without establishing a precise or objective standard to which the judge may refer to assess the required 'rate of symmetry', making the assessment of the imbalance an objective matter that varies with the nature of the contract, without providing a genuine and precise criterion that can be relied upon to measure it.22

(ii) Temporal Asymmetry in the Performance of Obligations (Inequitable Time Limits): Article 29(2) of Law No. 04-02 enshrines protection against 'delay in performance' provisions for the benefit of the professional. It prohibits the inclusion of terms that impose immediate and final obligations upon the consumer while granting the operator the right to perform its corresponding obligations according to flexible time limits or conditions contingent upon its unilateral will.23 Unfairness is clearly manifested when the professional imposes immediate and irrevocable obligations upon the consumer while keeping its corresponding obligations contingent upon its own unilateral will — a situation that legally strips the contract of its bilateral character. This legislative approach is consistent with the general rules of civil law, particularly Article 205 of the Civil Code, which provides that an obligation does not arise if it is made subject to a suspensive condition that makes its existence contingent upon the sole will of the obligor. Consequently, the inclusion of such a clause empties the contract of its binding force and renders it legally void, for want of the material element of the corresponding obligation, causing substantial harm to the consumer who contracted for the purpose of satisfying essential needs.

(iii) Reduction of the Essential Elements of Contracts: Under Article 5 of Executive Decree No. 06-306, any term aimed at 'reducing the essential elements of contracts' as set out in Articles 2 and 3 of the same Decree is classified as unfair. This prohibition operates as a safeguard against circumventing the minimum fundamental rights of the consumer: the legislator treats those elements as part of contractual public order that may not be diminished or fragmented. Any attempt to curtail these obligations (such as information, guarantee, and conformity) constitutes unfairness warranting nullity.

(iv) Surprising the Consumer with Unknown Terms at the Time of Contracting: In affirmation of the principle of contractual transparency, Article 5(7) of Executive Decree No. 06-306 considers the imposition of terms of which the consumer was not informed prior to conclusion of the contract to constitute an unfair practice. The principle that a contract is the law of the contracting parties necessarily requires the mutual convergence of the two wills upon the substance of all terms at the time of contracting; any subsequent insertion of terms or hidden conditions not covered by the initial negotiation phase constitutes a departure from the binding force of the contract and does not take effect against the consumer without explicit new acceptance.

3.2 Post-Contractual Protection

This form of protection is of a practical nature, comprising the terms the legislator has provided for the weaker party in connection with the contractual relationship. It encompasses the following:

3.2.1 Terms Relating to Contract Performance

The Algerian legislator did not confine its supervisory role to the contract formation stage alone but extended the protection umbrella to the performance stage, in order to ensure the continuity of contractual equilibrium and prevent the professional from abusing the authority granted under the contract. In this context, Article 29 of Law No. 04-02 (Paragraphs 3, 4, 5, and 7) contains four substantive clauses classified as void unfair terms, targeting practices that may arise during the course of the contractual relationship:

(i) Prohibition of Unilateral Modification of Essential Contractual Elements and Subject Matter: Pursuant to Article 29(4) of Law No. 04-02, any term granting the professional the unilateral authority to modify the essential elements of the contract or to alter the distinctive characteristics of the product or service without the explicit consent of the consumer is classified as an unfair term. The legislator has attached direct nullity to such clauses without requiring the consumer to establish their unfair character. This prohibition is consonant with the constitutional principle of contracts enshrined in Article 106 of the Civil Code — that 'a contract is the law of the contracting parties' — which cannot be annulled or modified by unilateral will, thus preserving contractual stability and preventing purely voluntary terms.

(ii) Monopolisation of Contract Interpretation: Article 29(5) prohibits the economic operator from unilaterally interpreting the contract or any of its terms, as this would constitute a forfeiture of the consumer's legal rights. By reference to the general rules, particularly Article 111 of the Civil Code, the principle is that clear language is to be applied as written, and that interpretation is an exceptional judicial prerogative exercised by the judge alone in cases of ambiguity; it may never be left to the discretion of the stronger party (the professional) to be construed in a manner serving its own interests.

(iii) Undermining the Principle of Reciprocity of Obligations and Binding Force: Article 29(6) treats as inherently unfair those terms that relieve the professional from performing its obligations while keeping the consumer bound to perform under all circumstances. This type of clause eviscerates the essence of 'bilateral contracts' and potentially carries the same meaning as the reciprocity of obligations in contracts binding on both parties,24 contravening the binding force of the contract as provided in Articles 119 and 123 of the Civil Code. It is neither legally sound nor equitable that one party be compelled to perform while the other is granted a license for free release from its corresponding obligations.

(iv) Unilateral Power to Alter Performance and Delivery Deadlines: The legislator, pursuant to Article 29(8), has prohibited any clause granting the professional the unilateral right to modify the dates for delivery of goods or the periods for performance of services. This prohibition is a natural extension of the protection of the essential elements of the contract, given the central importance of time in consumer contracts; any manipulation of time limits represents a disruption of the consumer's legitimate expectations and a destabilisation of the material balance of the contract.

3.2.2 Unfair Terms Relating to Dissolution of the Contractual Relationship

Article 29 of Law No. 04-02 affords special protection to the consumer during the termination phase of the contract, targeting clauses that impede the consumer's right to withdraw from the contractual relationship or that grant the professional the power of arbitrary termination. These consist of two principal conditions:

(i) Prohibition of Forfeiture of the Consumer's Right to Terminate: Article 29(7) declares void any term aimed at depriving the consumer of the right to rescind the contract where the professional is in breach of its contractual obligations. Such deprivation constitutes a disregard of an established legal principle holding that rescission is the natural consequence of non-performance in bilateral contracts. The creditor's right to be released from the contractual bond upon the debtor's failure to perform the corresponding obligation is a protective mechanism aimed at averting harm resulting from non-performance.25 This is enshrined in Article 119 of the Algerian Civil Code, which grants a contracting party in bilateral contracts the option of seeking specific performance or rescission with damages. Any clause restricting this right constitutes manifest unfairness that offends the very essence of contractual justice.

(ii) Prohibition of Threats to Terminate the Contractual Relationship: Article 29(9) treats as an inherently unfair practice the professional's threat to sever the contractual relationship as a means of pressuring the consumer into accepting new and inequitable commercial terms.26 The inclusion of such threats in the body of the contract or their implied presence falls outside the bounds of legality and enters the domain of 'coercion', as the professional thereby exercises illegitimate pressure that generates apprehension in the consumer, compelling the consumer either to relinquish established rights or to accept onerous obligations for fear of losing the service or goods which may be essential.27 The legislator has thus addressed forms of psychological and economic coercion exercised by the professional to unilaterally modify the contract under threat of termination.

(iii) Prohibition of Restricting Termination upon Force Majeure: Article 5(4) of Executive Decree No. 06-306 declares void any term preventing the consumer from terminating the contract in the event of force majeure except upon payment of compensation to the economic operator. This prohibition constitutes a faithful application of the general rules in Article 121 of the Civil Code, which provides for 'dissolution by operation of law': whenever performance of an obligation becomes impossible due to a foreign cause, the corresponding obligations are extinguished and the contract lapses by force of law. Imposing any compensation on the consumer in such circumstances constitutes unjust enrichment and a serious violation of distributive contractual justice.

3.2.3 Unfair Terms Relating to the Effects of the Contract

Article 5 of Executive Decree No. 06-306 sets out eight model clauses designed to regulate the consequences arising from the contractual relationship, analysed as follows:

(i) Retention by the Professional of Unilateral Power to Modify or Terminate: A legal issue arises in the Decree's formulation, which links unfairness to 'failure to pay compensation', potentially implying — by inverse interpretation — that unilateral modification may be permissible if accompanied by compensation. This raises the question of whether financial compensation is adequate to remedy the harm caused by the disruption of contractual stability.

(ii) Unilateral Disclaimer of Contractual Liability: The legislator treats as unfair any term relieving the professional from the consequences of non-performance (whether total or partial) or defective performance of its obligations, as this constitutes a disregard of the principle of contractual liability.

(iii) Absence of Reciprocity in the Recovery of Payments Made: The legislator has prohibited the professional from retaining payments made (such as a deposit) upon the consumer's termination of the contract, without the consumer having an equivalent right to recover double the amount or obtain compensation where termination is at the professional's initiative, applying the criterion of 'absence of symmetry' to characterise the unfair nature of such a term.

(iv) Disproportionate Penalty Clause: This arises upon the determination of a compensatory amount payable by the consumer without a corresponding provision for the professional's liability in equivalent circumstances.

(v) Imposition of Additional and Unjustified Burdens upon the Consumer: Such as unilaterally requiring the consumer to bear enforcement costs and professional fees, or imposing duties that fall within the scope of the professional's responsibility.

(vi) Prohibition of Unilateral Claim to Enforcement Costs: Any clause entitling the economic operator to require the consumer to bear all costs, charges, and fees arising from contractual enforcement proceedings, while denying the consumer an equivalent right against the operator, is considered unfair, as it constitutes a violation of the principle of equality before the courts and entrenches asymmetry between the parties' litigating positions.

(vii) Prohibition of Absolute Exemption from Professional Liability: Any term aimed at relieving the professional from performing its core contractual obligations or granting it exceptional privileges allowing it to evade the duties and legal demands arising from the nature of its professional activity is classified as unfair. This prohibition aims to prevent exemption from contractual liability and to ensure that the obligations incumbent upon the professional retain their binding force.

(viii) Prohibition of Transfer of Professional Burdens and Responsibilities to the Consumer: Any term aimed at burdening the consumer with charges or obligations that fall within the scope of the legal or professional responsibility of the economic operator is classified as unfair. The legislator's intention is to prevent the 'transfer of professional risks' to the weaker party and to ensure that each party bears the consequences of its own direct responsibilities without injustice.

From a systematic examination of these clauses, it emerges that the Algerian legislator has adopted a comprehensive legislative policy that combines 'positive obligation' (what contracts must contain in terms of essential elements) and 'negative prohibition' (what contracts must be free from in terms of unfair clauses). The significance of this approach lies in making the protection of the consumer and the preservation of fundamental rights a standard of contractual public order. What further attests to the sophistication of the legislative thinking is that the legislator did not adopt a 'rigid exhaustive' approach for these terms but presented them by way of illustration and guidance — a position enshrined in Article 30 of Law No. 04-02, which grants the regulatory authority a continuing power to specify the essential elements of contracts and to prohibit any newly emerging terms whose unfair character is established.28

This legislative openness grants the Algerian legal system sufficient flexibility to keep pace with commercial developments, while also conferring upon the courts and the competent committees (such as the Unfair Terms Committee established under Decree No. 06-306) broad jurisdiction to characterise and exclude any contractual practice that may disrupt the presumed balance between the professional and the consumer.

4. Conclusion

The supervision of unfair terms in contracts concluded between professionals and consumers has become an imperative dictated by considerations of contractual justice. Both legislation and legal doctrine have converged in rejecting any clause aimed at causing a serious disruption to the balance of the contractual relationship. This is most clearly manifested in the subjection of 'contracts of adhesion' to strict scrutiny, given the absence of negotiating power on the part of the consumer, who is often compelled to sign pre-prepared terms without the practical opportunity to examine them.

The Algerian legislator has pursued a dual approach: 'positive regulation' by obliging the professional to include fundamental essential elements in contracts, and 'negative prohibition' by excluding clauses that grant the professional exclusive privileges not matched by equivalent consumer rights. The legislator has relied upon objective criteria in characterising unfairness, favouring the criterion of 'manifest disruption of the balance of obligations' over subjective economic criteria, and employing the mechanism of lists (Black and Grey) as effective protective tools ensuring the preservation of the weaker party's rights without extinguishing the principle of freedom of contract.

Although the Algerian legislator has not explicitly employed the term 'Black List', it has enshrined its substance in Article 29 of Law No. 04-02 on commercial practices. This article sets out eight specific terms, exhaustively enumerated, that are deemed unfair by operation of law. In respect of these terms, the judge possesses no discretionary power: the mere establishment of the existence of the term obliges the judge to declare it void. This corresponds precisely to the concept of the 'Black List' as understood in comparative law (including German and French legislation). The 'Grey List' approach is revealed, by contrast, in Executive Decree No. 06-306 and in Article 30 of Law No. 04-02, whereby the legislator has granted the executive authority the power to add further terms and to periodically determine the essential elements of contracts. Unlike the Black List, these terms (such as those contained in Article 5 of Decree No. 06-306) afford the judge a margin of interpretation and assessment; the unfair character is linked therein to the degree of 'manifest disruption of equilibrium', rendering them a 'Grey List' open to interpretation according to the circumstances of each contract.

4.1 Principal Findings

The study arrives at the following principal conclusions:

— The Algerian legislator has not confined unfair terms to a rigid text but has made the system an open one.

— The lists contained in current texts are illustrative and indicative, not exhaustive and conclusive.

— The judiciary and the Unfair Terms Committee are accorded the right to derive new terms based on the criterion of 'disruption of balance', thereby ensuring renewed and dynamic protection for the consumer that keeps pace with the development of commercial practices.

4.2 Recommendations

While acknowledging these legislative achievements, legal effectiveness requires keeping pace with current economic and technological transformations. The following recommendations are accordingly proposed to strengthen the protective system:

1. Enshrining the Principle of Prior Information: by granting the weaker contracting party a statutory period to peruse the contractual terms in a manner that precludes ignorance before signing, thus protecting consent from the consequences of adhesion formulations.
2. Simplifying Mechanisms for Contractual Release: by streamlining the procedures for rescinding or annulling contracts containing unfair terms at any stage of the contractual relationship, reducing the procedural burden on the consumer.
3. Strengthening the Penal Approach: by enacting dissuasive financial and disciplinary sanctions against professionals found to have deliberately inserted prohibited unfair terms, ensuring both general and specific deterrence.
4. Dynamic Legislative Regulation: by accelerating the updating of regulatory lists (through decrees) to pursue newly emerging forms of contractual unfairness, particularly in the context of the growing proliferation of electronic contracts and digital services.

Footnotes

[1] Ahmed Rabaahi, The Effect of the Professional's Economic Superiority in Imposing Unfair Terms under Algerian and Comparative Law, Journal of North African Economics, No. 5, pp. 346–347, Algeria.

[2] Ibid.

[3] Henry Bricks, Les clauses abusives, Thèse, Paris, 1982, p. 9.

[4] Hamdallah Hamdallah, Consumer Protection against Unfair Terms in Consumer Contracts: A Comparative Study, Dar Al-Fikr Al-Arabi, Cairo, 1997, p. 53.

[5] Salma Ben Saidi, Consumer Protection from Unfair Terms in Consumer Contracts, Master's Thesis, University of Batna, Algeria, 2014, p. 57.

[6] Muhammad Bouali, Unfair Terms in Contracts in Algerian Law: A Comparative Study with French, German, and Egyptian Law, p. 18.

[7] Art. 35 of Law No. 78-23 (translation from French original).

[8] Zahia Houriya Si Youssef, Consumer Protection from Unfair Terms: A Comparative Study, Journal of Social and Human Sciences, No. 18, June 2008, p. 130, Algeria.

[9] French Court of Cassation, Civil Division, 21 April 1960, Collection of Cassation Judgments, Year 1, No. 55, p. 330. See also: Commercial Division, 1 December 1995 (Grand Arrêt); Chronopost Case, 22 October 1996.

[10] Egyptian Court of Cassation, Civil Division, No. 298, 25 February 1990.

[11] Law No. 04-02 of 23 June 2004 establishing the rules applicable to commercial practices, Official Gazette No. 41, as amended and supplemented.
[12] Executive Decree No. 06-306 of 10 September 2006 determining the essential elements of contracts concluded between economic operators and consumers and unfair terms, Official Gazette No. 65, as amended and supplemented.
[13] Khalid Maashu, The Role of the Judge in Protecting the Consumer from Unfair Terms, Master's Thesis in Business Law, University of Guelma, Algeria, 2016, p. 59.
[14] Muhammad Said Jaafour, Introduction to Legal Sciences: A Concise Theory of Law, Dar Houma, Algeria, 2004, p. 109.
[15] Muhammad Bouali, Combating Unfair Terms in Contracts: A Comparative Study, Dar Al-Fajr for Publishing and Distribution, Egypt, 2007, pp. 128–129.
[16] Si Taib Muhammad Amin, Unfair Terms in Consumer Contracts: A Comparative Study, Master's Thesis, University of Tlemcen, 2008, p. 113.
[17] Directive 93/13/EEC of the Council of the European Communities, Art. 3 (translation from French original).
[18] Paisant, G., Les clauses abusives et la présentation des contrats dans la loi No. 95-96 du 01-02-1995, p. 99.
[19] Muwaffaq Hammad, Civil Protection of the Consumer in Electronic Commerce Contracts: A Comparative Study, Zein Legal Publications, p. 141.
[20] Muhammad Bouali, Unfair Terms in Contracts in Algerian Law, op. cit., p. 21.
[21] Ben Qwaydar Zubairi, Consumer Protection from Illegal Commercial Practices under Law No. 04-02, Master's Thesis in Private Law, University of Tlemcen, Algeria, 2006, p. 102.
[22] Radiya Al-Atiyawi, Unfair Terms under Law No. 04-02, Master's Thesis in Contracts and Liability, University of Algiers, 2011, p. 109.
[23] Law No. 04-02, op. cit.
[24] Nawal Kimush, Consumer Protection under the Law on Commercial Practices, Master's Thesis in Private Law, University of Algiers, 2011, p. 64.
[25] Hammu Hussayna, Dissolution of Contract by Rescission, Master's Thesis in Law, Mouloud Mammeri University, Tizi Ouzou, 2011, p. 2.
[26] Law No. 04-02, op. cit.
[27] Filali Ali, Obligations (General Theory of Contract), Moufem for Publishing and Distribution, Algeria, 2010, p. 185.
[28] Law No. 04-02, op. cit.

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