



Consumer Protection from Unfair Contractual Terms

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Abusive clauses, consumer protection, contractual balance, judicial control

Abstract

Protection of the consumer from abusive clauses is considered one of most prominent legal challenges in modern contracts, especially under wide spread of standard and electronic contracts, and these clauses consist in provisions which the strong party imposes, whether because of his economic or technical superiority, on the weak party, which leads to imbalance in balance between rights and obligations. And Algerian legislation aims to protect the consumer through imposing criminal penalties on who imposes abusive clauses, with granting associations necessary rights to raise actions on behalf of individuals and demanding compensation for damages. Also civil penalty bases on general rules of responsibility for compensating damage resulting from these clauses. And judiciary plays basic role in restoring balance to contracts affected by abusive clauses, with respecting will of the parties and not touching essence of the contract. And judicial control shows development of contractual justice from mere formal acceptance of the contract to conscious and balanced consent takes into account economic and social reality of the parties. And this leads to enhancing confidence in commercial transactions and market stability, and guaranteeing effective protection for the weak party in contractual relationship.

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Introduction:

The economic and social developments have led to reshaping the contractual relations, where the economic activity has become subject to the dominance of a limited class of professionals, under concentration of means of production and growth of the monopolistic character of markets, and this coincided with a rapid technological development that has given to goods

and services a high degree of technical complexity, which has made the consumer in a weaker position, mostly lacking the necessary knowledge and expertise to understand the nature of the product or service, and limits of its use, and the risks that may arise from it.

And the adoption of modern contractual methods has contributed, such as the standard contracts and adhesion contracts, in deepening this imbalance, as the contract no longer reflects a common will based on negotiation and bargaining, but rather has become a result of the consumer's acceptance of conditions pre-set by the professional merchant, without him having an actual influence in determining its content, and this situation leads to emptying the principle of freedom of contract from its true content, and opens the field for including in the contract arbitrary conditions that undermine the balance between the reciprocal obligations.

And this imbalance appears more clearly in e-commerce contracts, which are based on contracting at a distance and using digital means, which increases the weakness of the consumer's position and enhances the superiority of the professional merchant from the technical and informational side. And accordingly, these contracts may become a suitable environment for imposing unfair conditions, which necessitates the establishment of special legal rules aimed at controlling the content of the contract and protecting the consumer as the weaker party in the contractual relationship, and based on what has been mentioned, we pose the following problem: To what extent are the legislative and judicial mechanisms effective in limiting contractual arbitrariness and ensuring contractual justice?

Section One: The Concept of Abusive Clauses in Contracting

The principle of contractual freedom is considered one of the basic pillars in civil law, as it grants the contracting parties a wide authority to determine the clauses of their contracts and stipulate what they see as appropriate, as long as that does not contradict the law, whether it is prohibited by a specific text or resulting from the conflict of the conditions with public order and public morals. And this freedom is based on the assumption that the will of the contracting parties is the main source of their obligations, and that the contract must reflect a balance between their different interests.

However, this freedom is not absolute, as it can be exploited by one of the parties to insert one-sided clauses that are characterized by arbitrariness, which disrupts the contractual balance and places the weaker party, usually the consumer, in a weak position unable to discuss or modify those clauses. And from here, the legal scrutiny emerges to determine whether the clause is considered abusive or not, and this requires adopting precise standards that take into account contractual justice, protection of the weaker party, and ensuring no exploitation of the economic or informational superiority of one of the parties, and to highlight the concept of abusive clauses we will address its definition (Requirement One) then to the characteristics and elements of the abusive clause (Requirement Two) as follows:

Requirement One: Definition of Abusive Clauses

The abusive clause is a provision in the contract that imposes obligations or restrictions on one party without there being a balance or equivalence with the obligations of the other party, which leads to undermining the principle of contractual justice and the reciprocal rights of the parties, and the arbitrariness is usually manifested in the exploitation by one of the parties of his economic or informational superiority for his benefit, so that harsh obligations or restrictions without legal or factual justification are imposed on the weaker party, often the consumer, and therefore, the abusive clause goes out of the scope of legitimate contractual freedom, to become a source of harm to the rights of the weaker party.

And in this direction, one of the jurists defined it as "that clause which results in a contractual imbalance in favor of the professional and which he imposes on the other party who has no experience or the contracting party who found himself in a position of inequality technical or economic or legal in facing the other party." (Hamad Allah, 1997, p. 53)

And there are jurisprudential definitions of the abusive clause which differ with the difference in the angle of view to the abusive clause, such as those that rely on the parties to the contractual relationship so that the abusive clauses are those conditions that the professional imposes on the non-professional or the consumer as a result of arbitrariness in using economic superiority, and others focused on the effect of abusive clauses on the contractual relationship and its balance where the abusive clause was defined as that clause which leads to a clear lack of balance between the rights and obligations of each of the professional and the consumer resulting from the consumer contract (Lahhal & Walaidi, 2015, pp. 36-37), and the abusive clause was also defined as "every clause inserted in the contract or its appendices and which results in harm to the rights and interests of the consumer that the law protects." (Abu Amr, 2011, p. 172)

And there are those who defined it from the side of its nature, so the clause is abusive if it is unfair or not in the interest of the consumer an excessive and exaggerated condition that contradicts good faith required in transactions and it is especially

abusive if it is contrary or not compatible with the basic idea of the legal organization or defining the rights and obligations arising from the form of the contract and which also contradicts the spirit of right and justice. (Budali, 2007, p. 235)

Also, consumer contracts which are themselves characterized by the existence of a clear disparity in the factors of scientific and economic power between their parties, the aspects of addressing the abusive clause in them came within the framework of this concept, as an opinion in jurisprudence considered it a clause in the contract which results in a clear lack of balance between the rights and obligations for each of the professional and the consumer, and resulting from the consumer contract embodied in compensating this professional with an advantage as a result of his use of his economic power in facing the contracting party with him who is the consumer (Hamad Allah, 1997, p. 53) (Ali, 1998, p. 141), and in other words it is the clause that the professional imposes on the consumer as a result of misuse of his economic influence and for the purpose of obtaining an unfair advantage. (Bihl, 1978, p. 2909)

As for the legislative definition, although the term abusive clauses is used (Iraqi Civil Law, 1951, Art. 167, Art. 985; Egyptian Civil Law, 1948, Art. 149; Algerian Civil Law, 1975, Art. 110), but we do not find for it a definition agreed upon, but the matter appeared clearer with the emergence of modern legislative trends that establish protection of the consumer against abusive clauses, and since this protection is exceptional as it constitutes a departure from the general rules (Sanhouri, n.d., p. 41)

This, the Algerian legislator in the Consumer Protection Law (Algerian Law 09/03, 2009) did not define the abusive clauses as he had done so previously through the law relating to the rules applicable to commercial practices by defining the abusive clause and that in Article (3/5) which provides as follows: "Every clause or condition alone or jointly with one clause or several other clauses whose effect is to apparently undermine the balance between the rights and duties of the parties to the contract." (Algerian Law 02-04, 2004)

Requirement Two: Characteristics and Elements of the Abusive Clause

After addressing the definition of abusive clauses, we extract from it the characteristics that distinguish it (Branch One) and the elements (Branch Two) as follows:

Branch One: Characteristics of the Abusive Clause

The characteristics of the abusive clause can be summarized as follows:

First: that the abusive clause is a valid condition, not contrary to public order or morals but it remains valid despite that it disrupts the balance of the contract, as the arbitrariness does not concern the legality of the clause in itself, but rather the way of distributing the benefits and obligations between the parties.

Second: that measuring the arbitrariness in the clause is not by looking at each condition of the contracting conditions alone but by looking at the set of conditions, as one of the conditions may provide a benefit for the professional, in return there may be another condition that has granted to the weak party what corresponds to this advantage or benefit. (Larroumet, 1986, p. 437)

Third: that the protection from abusive clauses was found for the disparity in technical and economic power between the professional and the consumer, between a strong party skilled in the secrets of commercial transactions and between a party who ignores them.

Fourth: it is not required in the advantages or benefits that the abusive clause grants to be material but they may be non-material like depriving the weak party from claiming rescission.

Fifth: the meaning of arbitrariness differs from arbitrariness in the exercise of right: in contracts, the existence of a clause that violates the rights of the weak party is presumed abusive in itself, whether the intention of the professional party to harm is present or not, so good faith of the professional does not help in this case, because the goal is protection of the weak party.

Branch Two: Elements of the Abusive Clause

The abusive clause in consumer contracts is based on the availability of two concomitant elements; the first of them is that the clause results in achieving an exaggerated benefit in favor of the professional that leads to weakening the contractual position of the consumer and undermining the balance of obligations between the two parties, as for the second element it consists in the professional relying on his economic or technical superiority to impose these clauses, exploiting the urgent need of the consumer for the good or service and the absence of real possibility for him to negotiate regarding the content of the contract.

First: Achieving an exaggerated benefit in favor of the professional:

The abusive clauses are considered one of the most prominent manifestations of the imbalance that afflicts modern consumer contracts, considering them a direct result of the lack of equivalence existing between the two parties to the contractual relationship, where the professional exploits his economic position or technical expertise to impose ready-made contractual clauses that achieve for him unjustified advantages at the expense of the consumer, which leads to a substantial undermining of the contractual balance between the reciprocal rights and obligations. And the danger of these clauses increases in adhesion contracts, in which real negotiation is absent, and the role of the consumer is limited to acceptance or refusal without possibility to discuss the content of the contract. (Sanhouri, n.d., p. 43)

Also the Algerian legislator sought to confront the phenomenon of abusive clauses through adopting a dual legislative approach, which relies on one hand on determining the concept of the abusive clause and setting general standards for detecting it, and on the other hand on listing a set of clauses that are considered abusive by law text. And this is manifested clearly in the text of Article 29 of the law relating to consumer protection, which did not content itself with enumerating some abusive clauses, but rather established a general standard that allows subjecting other clauses not explicitly stipulated to control whenever it is proven that they cause a clear imbalance in the balance between the rights and obligations of the parties to the contract. (Ziush, 2020, p. 100)

And in the same context, the legislator reinforced this approach through the executive decree relating to abusive clauses (Algerian Executive Decree 306-06, 2006), where it listed in Article 05 of Chapter Two a model list that includes a number of clauses that are considered abusive by virtue of their nature, and this enables the judge and the competent bodies to rely on it as a legal presumption of arbitrariness. However, this list is not exhaustive, but remains expandable according to the general standards established by the law, which achieves broader protection for the consumer and contributes to strengthening the contractual balance and limiting the arbitrariness of professionals in adhesion contracts.

And it is not required for the establishment of the arbitrariness that the advantages which the professional gets be limited to the financial side or cash, but they may take multiple forms that affect different elements of the contractual relation, like tightening obligations of the consumer, or restricting his rights, or expanding the scope of exempting the professional from the responsibility. And this variety in forms of the arbitrariness has pushed the modern jurisprudence to adopt an objective expanded concept for the abusive clauses, which bases on the actual effect that the clause causes inside the contract, and not on its nature or its formal naming. (Taha, n.d., p. 215)

And in this frame, the excessive advantages that the professional obtains as result of his arbitrariness in using his economic or technical superiority is considered the essential element in describing the abusive clause, whatever type of these advantages or their form. And the French legislator has expressed this direction clearly through Article (35) of the Law of Consumer Protection and Information for year 1978, which did not distinguish between the cash advantages and non-cash, but rather adopted the standard of the imbalance in the balance between rights and obligations of the two parties as basis for determining the abusive character of the clause, and this reflects a legislative will clear in expanding the scope of the protection prescribed for the consumer (French Law of Consumer Protection and Information, 1978, Art. 35)*

And from another side, went a considerable side from the jurisprudence to the necessity of estimating the arbitrariness in the frame of the contractual process as whole, and not through looking to each clause separately and isolated from rest of the contract clauses. The clause may appear, when analyzed in individual form, unfair or disrupted for the balance, but that it may be justified objectively if it is accompanied by counter advantages that return benefit to the consumer. And example of that the clauses that limit from responsibility of the professional, and which may be acceptable if resulted from it a reduction

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in price of the good or the service, by what achieves a type from the balance between the reciprocal interests, and this aligns with principle of the contractual justice.(Malaurie & Aynès, n.d., p. 314)

Also it is not allowed to confine the concept of the excessive advantages on the clauses related to the price or to payment methods only, as the arbitrariness may extend to include the clauses linked with execution of the contractual obligations, like delivery terms, or warranty conditions, or the restrictions imposed on right of the consumer in returning or rescission. And the comparative legislation has consecrated this wide understanding, where stated the second paragraph of Article (35) from French Law of Consumer Protection and Information for year 1978 that the abusive clauses may relate also to conditions of delivery of the thing subject of the contract, beside the clauses special to the price or installment, which reflects wideness of scope of the legal protection for the consumer and not confining it in narrow financial scope.

And is extracted from that that standard of the arbitrariness does not base on nature of the clause or its subject, but rather on extent of its effect in achieving actual balance inside the contract, the matter which justifies intervention of the legislator and the judiciary together for controlling the consumer relations, and limiting arbitrariness of the professional, and achieving the contractual justice under market economy.

And accordingly, protection of the consumer from the abusive clauses does not aim to restrict principle of contractual freedom or touching will of the professional, but rather aims to achieve a degree from contractual justice and prevent exploitation of the economic influence or technical in way disrupts the balance between parties of the contractual relation and undermines the confidence in consumer transactions.

Second: Arbitrariness of the Economic Influence of the Professional:

And it is called also the personal standard, (Al-Qayysi, 2002, p. 140) it is not enough for establishment of the abusive clause mere achievement of the excessive advantages that the professional obtains whether that was by traditional dealing or electronical (Buhentala, 2021, p. 832), nor mere what results from it of disruption in the balance between the rights and obligations arising from the contract, since the lack of balance may be sometimes natural result of legitimate economic or regulatory considerations, like difference of positions of the parties or nature of the professional activity. And accordingly, the decisive standard in describing the clause by abusive does not direct to the result alone, but rather to the cause which led to it, and represented in illegitimate exploitation of superiority of the professional on the consumer. So the arbitrariness does not achieve except if proven that disruption of the balance was direct fruit of misuse by the professional of his influence, whether this influence was economic or technical, and that had not this exploitation, would not possible inserting the unfair clause which touches justice of the contract and disrupts principle of contractual equality. (Sanhouri, n.d., p. 456)

And by economic influence is meant that position which allows one of the parties to the contractual relationship to impose his conditions on the other party without real discussion, exploiting his position in the market, or the nature of the market itself, or the state of economic dependence in which the consumer finds himself. And the professional may resort in this frame to illegitimate or unfair means, like linking the contracting to prior conditions, or exploiting scarcity of the alternative, or creating illusion of no possibility of contracting except according to a standard contract model. And it can be inferred the existence of this influence through a number of indicators, among them the position of the professional in the market, and nature of competition, and extent of availability of real alternatives for the consumer, besides the economic and social situation of this latter. And results from that the will of the consumer is defective, not in meaning of direct coercion (Taha, n.d., p. 233), but rather because of state of weakness and dependence which pushes him to accept conditions he would not accept in equal contractual circumstances. (Abdel Salam, n.d., pp. 56-57)

However, the jurisprudence did not agree on making the economic power a sole or decisive standard for the establishment of the abusive clause, as a side of it sees that this standard is characterized by ambiguity and practical difficulty in determination, that the economic influence does not necessarily accompany the size of the enterprise or its financial strength, as a simple professional or craftsman may enjoy a dominant position in narrow market or rare specialty, enables him to impose his conditions, while a large economic enterprise may be unable to do that in market characterized by severe competition. Also, relying on the situation in the market raises additional issues related to determining the concept of the market and its scope, whether local or national, and extent of influence of the enterprise in it, and this is known as professional superiority (Budali, 2007, p. 128) (Salama, n.d., p. 118)

And facing these difficulties, emerged the technical and technological superiority as a more realistic standard in interpreting the phenomenon of abusive clauses, as the professional, by virtue of his experience and habit of contracting within scope of his profession, enjoys precise knowledge of the legal and economic effects of contract conditions, and of the repeated risks associated with his activity, also he possesses the technical and organizational means that enable him to draft the contract in

a way preserves his interests and limits his responsibilities. And in contrast, the consumer is in a clear position of weakness, lacking in it the technical expertise and legal knowledge, and often deprived of real freedom of choice, as he has only acceptance or refusal, without ability to discuss the essential elements of the contract or modify them.

And nevertheless, the technical superiority does not separate from the economic superiority, but the relation between them is a relation of integration and concomitance, as often the economic superiority is a reflection of technical and organizational efficiency, also the technical control in itself is considered one of manifestations of economic power. And accordingly, the abusive clause is based on the meeting of the two elements of economic and technical superiority, which allows the professional to impose his contractual will and cause unjustified imbalance in the contractual balance, in a way contradicts the principle of good faith and necessitates intervention of the judge or the legislator to restore balance to the contract as protection for the consumer. (Saad, n.d., p. 301)

And the judiciary has consecrated this direction, especially the French judiciary, as the French Court of Cassation ruled that «lack of balance in itself is not sufficient to consider the clause abusive, unless it results from exploitation by the professional of his superior position». (Cour de cassation, 1992) Also it confirmed in another decision that the consideration in describing the clause as abusive «does not rest on mere arithmetic comparison between the obligations, but rather on the way the clause was imposed and extent of freedom of the consumer in accepting it» (Cour de cassation, 1995). And this direction aligns with position of the French legislator who linked the establishment of the abusive clause to the use by the professional of his economic or technical authority in the contractual relationship, indicating that arbitrariness presupposes a positive behavior represented in imposing the conditions based on position of dominance, not mere accidental disparity in contractual positions.

This direction has reflected on the jurisprudence of the Algerian judiciary, especially the Supreme Court, which confirmed in several decisions related to consumer contracts and adhesion contracts that the judge does not content himself with stopping at the appearance of the contract, but it is incumbent upon him to search in circumstances of its conclusion and extent of freedom of the weak party in accepting its conditions, and verify whether the lack of balance results from exploitation by the professional of his superior position.

Section Two: Mechanisms for Protecting the Consumer from Abusive Clauses

The Algerian legislator realized, like comparative legislations, that the principle of supremacy of will is no longer sufficient to guarantee contractual justice in consumer relations, due to the structural imbalance between the professional and the consumer, especially in adhesion contracts, and therefore, we address the traditional mechanisms and the modern mechanisms to limit the phenomenon of abusive clauses and restore balance to the contractual relationship, as protection for the weak party and guarantee for stability of transactions, and we address the legislative protection (Requirement One), then to the judicial protection of the consumer from abusive clauses as follows:

Requirement One: Legislative Protection of the Consumer from Abusive Clauses

The civil legislations in most cases base on establishing a set of general rules that aim to achieve contractual justice and guarantee a degree of balance between positions of the contractors, and that from the rules which the civil law ensures in various legislations, as their texts include principles that can be relied upon to confront some manifestations of abusive clauses, even if indirectly. So these general rules allow the consumer, whenever conditions of their application are met, to benefit from the legal protection prescribed for the weak party in the contractual relationship, even in absence of a special text that treats abusive clauses explicitly.

Branch One: Protection from Abusive Clauses in General Rules

It is observed that the civil legislator, and among them the Algerian legislator, did not address abusive clauses as an independent legal system, but rather treated them within a traditional narrow framework represented basically in adhesion contracts without others of contracts, (Al-Sarifi, 2000, p. 7) so in this type of contracts, the professional or the specialist monopolizes the authority of preparing the contract and drafting its conditions beforehand, without granting the other party a real opportunity for negotiation or modifying the clauses, (Karmish, 2020, p. 158) however confining the idea of the abusive clause to adhesion contracts no longer keeps pace with modern economic and commercial developments, as contemporary practices have produced new patterns of contracting that do not necessarily apply to them descriptions of traditional adhesion, and nevertheless characterized by existence of essential disparity in negotiating power between their parties. So the superiority that one of the contractors enjoys may not result only from monopolizing a good or service, but rather may return to his possession of technical expertise, or advanced technical information, or organizational and economic control that places the other party, especially the consumer, in actual position of weakness (Boulmerka, 2025, p. 22)

And in this context, consumer contracts emerged as the most prominent model for this imbalance, where the consumer finds himself facing conditions prepared in advance, often complex or technical, and he has towards them only acceptance or abstention from contracting, without having the real ability to assess their legal and financial effects on his contractual position. And this led to growth of the jurisprudential and legislative trend calling for expanding the scope of protection from abusive clauses to include all contracts in which essential imbalance in contractual balance appears, regardless of their formal classification as adhesion contracts or otherwise. (Karfa, 2017)

And starting from these considerations, modern legislations directed towards strengthening the protective role of the judiciary, and granting courts authority to intervene to remove or modify the conditions that lead to imbalance in balance between obligations of the contractors, whenever proven arbitrariness of the strong party in imposing them. And this judicial intervention includes restoring balance to the contract, either by modifying the abusive clause in what achieves justice, or by exempting the weak party from applying it totally or partially, and that achieving principle of good faith in executing contracts, and guaranteeing stability of transactions and protection for the consumer from exploitation (Bouarrouj & Budalio, 2021, p. 255)

And based on that, importance of judicial authority is embodied in that it represents the effective tool for confronting abusive clauses and restoring consideration to principle of contractual balance, and this justifies dedicating this requirement to studying authority of the judge in restoring balance to the imbalanced contract due to abusive clauses.

Emerged in contemporary legislations, especially in European Union countries, an advanced legislative direction aims to establish a special legal system to combat abusive clauses in consumer contracts, and that in response to what economic reality has produced from dominance of standard contracts and adhesion contracts, and what resulted from them of clear imbalance in contractual balance between the professional and the consumer.

And is considered the French Law of Information and Protection of Consumers for Goods and Services issued on 10 January 1978 and its amendments from the first texts that consecrated this direction, before it is reinforced more clearly with issuance of French Consumer Law of 1993, (Loi n° 93-949, 1993) and the Belgian Law specific to protection of consumers of 1991 and the Dutch of 1987 (AlJamili, 2002, p. 222) and we discuss among these laws the French law as it came with new principles not familiar which prompted one of the jurists to describe issuance of this law as legislative leap. (Abdel Basit, 1996, p. 262)

Where these laws came with new legal concepts and principles that constituted departure from traditional rules of contract theory, especially in terms of limiting principle of supremacy of will and consecrating idea of contractual justice.

And effect of this legislative transformation reached a degree pushed a considerable side from jurisprudence (Calais-Auloy & Steinmetz, n.d., p. 217) to consider issuance of these texts a real legislative leap and basic starting point for restoring contractual balance, through transition from logic of subsequent protection to logic of prior prevention from arbitrariness, and this reflects clearly the transformation in philosophy of the legislator from protecting the abstract will to protecting the weak party in contractual relationship.

And based on that, study of this direction requires stopping at the protection system which the French legislator established, and which bases on two integrated mechanisms one cannot dispense with the other; the first preventive legislative confrontation embodied in the control which the Commission of Abusive Clauses exercises through examining the standard contracts and proposing deletion or modification of the unfair clauses, by what limits their spread before offering them to the consumer, and the second remedial judicial confrontation consists in intervention of the judiciary to annul the abusive clauses or modify them at dispute, with interpreting the doubt always in favor of the consumer, consecration for the protective character of these rules.

The French legislation knew a more clear development in field of combating abusive clauses, especially after amending the civil law year 2016. So stated Article 1171 of the French Civil Code that:

"In adhesion contracts, every clause which causes significant imbalance between rights and obligations of the parties is considered as not written."

And it is noted that the French legislator adopted a style more strict, as he considered the abusive clause as if not existing, without need to judgment of its annulment or modification of the contract as whole, and this is considered advanced form from judicial exemption, guarantees survival of the contract and exclusion of the unfair clauses only (Ghestin, n.d., p. 389), also the French Consumer Law reinforced this protection through enabling the judge to monitor content of the contractual clauses, regardless of the formal acceptance which the consumer shows.

Also authority of the judge in exempting the adhering party from abusive clauses is not considered arbitral or absolute authority, but rather it is authority restricted by objective controls, represented basically in:

- Proof of existence of adhesion contract;
- Achievement of serious imbalance in contractual balance;
- Establishment of real exploitation of economic or technical superiority;
- Taking into account requirements of justice and good faith.

So the judge does not intervene to create new contract, but rather to remove effects of the clauses which were imposed arbitrarily, and restore the balance which was disrupted since origin of the contract.

Branch Two: Protection from Abusive Clauses in Special Rules

The Algerian legislator approved organization of protection of the consumer from abusive clauses through Executive Decree No. 06-306 dated 10 September 2006, modified and complemented, which determined bases of protection of the consumer in contracts, and especially regarding abusive clauses, through Articles 6 to 16 of the executive decree, which addressed formation of the Commission of Abusive Clauses and its competencies. (Official Journal Algerian Issue 56, 2006)

And the Commission of Abusive Clauses is from the legal organizations which the French legislator created in Article 36 of the Law of Information and Protection of Consumers (French Consumer Code, n.d., art. 36), and which the French Consumer Law of 1993 also confirmed its existence and the commission includes fifteen members representing each of consumers and professionals.

And role of the commission consists in reviewing the standard contracts offered to consumers to search for abusive clauses, where the commission guides in exercising its jurisdiction by the general standard of the abusive clause stated in Article 35 of the Law of Information and Protection of Consumers and when sensing any abusive clause, jurisdiction of the commission convenes by issuing recommendations for cancellation or modification or prohibition of these clauses, since authority of cancellation or determining abusive clauses is from direct competence of the legislator. (Larroumet, 1986, p. 378)

Also Article 37 of the Law of Information and Protection of Consumer provided for determining role of the Commission of Abusive Clauses in reviewing the standard contracts which professionals usually present to consumers, and that for purpose of detecting any clauses that may be abusive, so if the commission finds that one of the clauses carries character of arbitrariness, it has the right to issue recommendations for modification, cancellation, or prohibition of this clause, and these procedures are considered from forms of preventive control on consumers, as the commission undertakes study and analysis of the clauses included in contracts before using them to determine extent of their arbitrariness. (Amanj, 2005, p. 236)

Also it undertakes issuing and publishing recommendations of not including them in contracts and the commission does its works either based on request of Minister of Consumer Affairs or consumer protection associations or based on request of the professionals concerned with these clauses and for the Minister to publish these clarifications presented by the commission. (Abdel Basit, 1996, p. 164)

It is clear that the Commission of Abusive Clauses works with purely consultative and administrative function, where its recommendations do not bind any party legally, so it lacks any judicial or legislative force, and does not bear authority of cancellation or modification of abusive clauses, as these powers remain from competence of the legislator alone, and thus, recommendations of the commission remain non-binding legally, and exercised mostly on professionals for purpose of moral pressure or ethical obligation.

And nevertheless, importance of the commission in monitoring contracts does not diminish its preventive role, as it undertakes analysis of drafting of clauses and their nature, what allows the consumer to conduct precise comparisons for the reciprocal obligations.

And from this standpoint, recommendations of the commission are considered effective tool for informing the consumer of abusive clauses and providing him with necessary information for taking enlightened decisions. But limitation of these recommendations lies in not being legally binding, which limits their direct effectiveness. (Abdel Salam, 1998, p. 124)

Also the Algerian legislator consecrated special protection for the consumer considering him the weak party in the contractual relationship, and that through enabling him to resort to judiciary to demand modification or cancellation of abusive clauses

included in consumer contracts, besides granting him right to initiate criminal action against every economic actor who imposes abusive clauses contrary to provisions of Consumer Protection Law and Suppression of Fraud, however practical application of this protection revealed abstention of many consumers from initiating judicial actions, due to high costs of litigation and length of its procedures, which may exceed in some cases value of the good or service subject of the dispute.

And to avoid this shortcoming, the Algerian legislator directed towards adopting mechanism of class action, through granting consumer protection associations active role in defending collective interests of consumers. So stated Article 23 of Law No. 09-03 relating to Consumer Protection and Suppression of Fraud on permissibility of establishing these associations as civil party, whenever one consumer or several consumers exposed to individual damages issued from same actor and of common origin, also the legislator empowered, by virtue of Article 65 first paragraph of same law, consumer protection associations and professional associations, and likewise every natural or moral person having interest, right to raise judicial actions against economic agents violating provisions of this law, with possibility of establishing as civil party to demand compensation for damages subsequent to consumers (Yusuf, 2024, p. 223).

And right of these associations in demanding compensation bases on general rules of civil liability, especially provisions of Article 124 of Algerian Civil Law, which decides compensation for damage resulting from fault, with taking into account particularity of collective interest of consumers which these associations represent⁴. And in addition to that, consumer protection associations recognized with public benefit enjoy system of judicial assistance, which enhances their capacity to undertake their protective role, and consecrates their effectiveness as legal mechanism for combating abusive clauses and achieving contractual balance in consumer relations.

Requirement Two: Judicial Protection of the Consumer from Abusive Clauses

Judicial intervention in contractual relations, especially in adhesion contracts and consumer contracts, has become a legal necessity imposed by contemporary economic and social transformations, which produced clear disparity in contractual positions between the parties, as the consumer often faces standard contracts prepared beforehand by the professional, without having real possibility to discuss their conditions or realize their legal and economic effects, the matter which makes his consent formal and empties principle of supremacy of will from its true content. (Sanhouri, n.d., p. 287)

Judicial powers vary in confronting abusive clauses with difference of legal systems, according to difference of directions of legislators in determining extent of judge intervention in contractual relations. However, approval by the legislator of judge authority in examining contractual clauses and assessing extent of their arbitrariness constitutes qualitative development in field of consumer protection, as it allows excluding clauses which disrupt contractual balance and incline in illegitimate way to benefit of the professional. And this judicial intervention is considered effective means for restoring consideration to principle of contractual justice and achieving balance between reciprocal rights and obligations.

And therefore, judicial role in this field does not limit to protecting individual interest of the consumer only, but extends to include achieving stability of consumer transactions and enhancing confidence in the market, through deterring professionals from inserting unfair clauses, and establishing more transparent and just contractual practices. And thus the judiciary becomes central element in system of consumer protection, and basic pillar for guaranteeing safety of contractual balance in consumer contracts.

Branch One: Authority of the Judge in Modifying Abusive Clauses in Adhesion Contract

It is no longer acceptable to keep contractual freedom in its absolute form, but rather it became necessary to subject it to restrictions aiming to achieve contractual justice and prevent exploitation by the strong party of his economic or technical superiority. And for this purpose, the legislator granted judiciary authority of intervention in adhesion contracts, whenever proven existence of abusive clauses whose effect is undermining contractual balance, and that through modifying these clauses or exempting the adhering party from them, by what achieves justice and preserves economic purpose of the contract (Taha, n.d., p. 65)

And the Algerian legislator consecrated this direction explicitly in Article 110 of Algerian Civil Law, which empowered the judge authority to modify abusive clauses in adhesion contracts or exempt the adhering party from them if justice requires that, with deciding nullity of every agreement that provides for depriving the judge from exercising this authority or limiting it, as protection for the weak party and prevention of circumventing mandatory rules.

And in comparative law, the French legislator adopted approach more clear and wider, as he did not confine abusive clauses in traditional adhesion contracts, but extended scope of protection to all consumer contracts. So stated Article L212-1 from French Consumer Law that every clause which results in essential imbalance between rights and obligations of the parties at

expense of the consumer is considered abusive clause, even if not contrary to public order or morals. Also the French legislator reinforced this protection by text of Article 1171 from French Civil Code after amendment 2016, which approved judicial control on abusive clauses in adhesion contracts in general.

And judicial intervention in this field does not limit to protecting individual interest of the consumer only, but extends to include protecting economic balance and guaranteeing stability of transactions, as spread of abusive clauses whose effect is undermining confidence in contractual relations and disrupting principle of equality between contractors. Also allowing the strong party to insert clauses that prevent or restrict authority of judiciary in control leads to emptying legislative protection from its content and turning it to formal protection that does not achieve its practical goals. (Al-Terminiti, 1961, p. 16)

And despite what raised jurisprudentially from criticisms regarding wideness of scope of judicial intervention in contracts, under pretext of touching contractual freedom or stability of transactions, however this fear does not stand, because intervention of the judge does not occur in arbitratative form (Al-Sadda, 1946, pp. 407-408), but remains restricted by objective standards based on justice and good faith and restoring the balance which disrupted initially by effect of unfair clauses, without creating new contract or touching essence of legitimate contractual will.

And accordingly, judicial control on abusive clauses represents one of most important mechanisms of modern contractual justice, and reflects development of traditional concept of consent from mere formal acceptance to conscious and equal consent, taking into account economic and social reality of the parties, especially under wide spread of standard and electronic contracts.

Branch Two: Authority of the Judge in Exempting the Adhering Party from Abusive Clauses

Modern economic transformations produced, and what accompanied it from expansion in standard contracts and adhesion contracts, new contractual reality characterized by clear imbalance in positions of contractors, where the strong party - and often is professional or specialist - monopolizes drafting conditions of the contract, while the adhering party has only acceptance of them without discussion. And this situation led to prevalence of abusive clauses which disrupt contractual balance and burden the weak party with obligations not equivalent to his rights.

And starting from this reality, the legislator did not stand as spectator, but approved intervention of judiciary as basic mechanism for restoring contractual balance, and that through enabling it from exempting the adhering party from abusive clauses which impose on him exploitation of superiority of the other party.

The Algerian Civil Law did not dedicate independent organization for abusive clauses in general, however it treated them within frame of adhesion contracts, where stated Article 110 of Algerian Civil Law that:

"If the contract was concluded by way of adhesion, and it included abusive clauses, it is permissible for the judge to modify these clauses or to exempt the adhering party from them, and that according to what justice dictates..."

And is inferred from this text that the Algerian legislator empowered the judge with wide discretionary authority, not limited to modifying the abusive clause, but extends to exempting the adhering party from applying it totally whenever proven that the clause causes serious undermining of contractual balance. Also this authority is from mandatory rules, as becomes null every agreement aims to deprive the judge from exercising it or limiting it, for what in that of touching legislative protection prescribed for the weak party. (Sanhouri, n.d., p. 463)

And importance of authority of the judge in exempting the adhering party from abusive clauses increases in modern consumer contracts, especially electronic contracts, due to what they characterized by technical complexity and multitude of conditions, and this makes it difficult on the consumer to realize their legal and financial effects. And this exemption is considered effective tool for guaranteeing actual protection for the weak party, and enhancing confidence in transactions, and achieving contractual justice in its objective dimension.

And the abusive clause is considered, according to modern legislations, subject to annulment or modification by judiciary and is evaluated according to specific standards include: absence of balance between obligations and rights, lack of real interest for the clause in achieving goals of the contract, and exploitation of financial or informational superiority of one of the parties at expense of the other party, and undermining principle of good faith and contractual justice. And in context of electronic contracts, this definition acquires special importance, where the consumer becomes more exposed to practice of arbitrariness because of absence of direct negotiation, which makes legal intervention necessity for protecting his rights and achieving balance in contractual relationship.

And besides that, judiciary relies on set of legal mechanisms aiming to protect the weak party in consumer contracts, and that on two integrated levels. The first level consists in civil penalties resulting from inserting abusive clauses, where the judge has authority to annul these clauses or cancel them or disable their legal effects whenever proven that they disrupt contractual balance or touch rights of the consumer. And this penalty aims to restore balance between parties of the contract and correct the imbalance resulting from exploitation by the professional of his economic or legal position.

As for the second level, it is embodied in criminal penalties (Algerian Law 04/02, 2004, Art. 38)¹, which can be imposed on the professional in case of his violation of legal provisions regulating combating abusive clauses, especially when his behavior constitutes touch to economic public order or undermining rules of consumer protection. And is intended from these punishments achieving deterrent function prevents repetition of arbitrary practices, and enhances respect of professionals for legal controls imposed on them.

And thus, it becomes clear that intervention of judiciary does not limit to mere removal of the abusive clause from the contract, but exceeds that to establishing integrated system for judicial protection combines corrective dimension and deterrent dimension, by what guarantees effective protection for the consumer and achieving stability in consumer transactions.

Conclusion:

This study highlights that abusive clauses no longer incidental phenomenon in consumer contracts, but became accompanying feature for modern contracting, especially under spread of adhesion contracts and complexity of legal drafting and use of digital media, and this returns basically to imbalance of contractual power balances between the consumer and the professional, where this latter monopolizes economic and technical and organizational superiority enables him to impose contractual conditions serve his interests at expense of the weak party.

And the study showed that protection of the consumer from abusive clauses constitutes exception on principle of supremacy of will, justified by considerations of contractual justice and social stability, and this pushed most modern legislations, and among them Algerian legislation, to intervene for restoring contractual balance through integrated legislative and regulatory and judicial mechanisms.

First: The Results Reached

1. The essential standard for the abusive clause consists in apparent or serious undermining of balance between rights and obligations of the two parties, regardless of nature of advantages which the professional achieves, whether financial, procedural or legal.
2. It is not possible to evaluate abusive character of the clause isolated from contractual process as whole, as the clause may appear unfair when looked at individually, but it becomes justified when placed in its general context.
3. The Algerian legislator relied on mechanism of lists for determining abusive clauses, however this mechanism remains deficient in encompassing all forms of newly invented arbitrariness, especially in electronic contracts.
4. The commission charged with studying abusive clauses undertakes important preventive and informative role, but non-binding character of its recommendations reduces from its practical effectiveness.
5. The judiciary constitutes real safety valve for protecting the consumer, through its authority in annulling or cancelling abusive clauses, however limitation of Algerian judicial jurisprudence in this field weakens the prescribed protection.
6. Comparative legislation showed, especially French, clear direction towards strengthening protective role of the judge and enabling him for automatic intervention to annul abusive clauses, and this consecrates more effective protection for the consumer.

* A financial fine is imposed on every professional (economic actor) who includes in his contracts concluded with the consumer abusive clauses, its value estimated from 50 thousand dinars to 5 million Algerian dinars where it provided for that by virtue of Article 38 of Law of Rules Applicable to Commercial Practices 04/02.

Second: The Proposals:

1. Reinforcing Algerian legislative framework with explicit text grants the judge authority to raise issue of arbitrariness on his own initiative, without binding by requests of litigants, like French legislation.
2. Reviewing and updating executive decree relating to abusive clauses periodically, with inserting abusive clauses specific to electronic contracts and digital applications.
3. Granting recommendations of abusive clauses commission greater legal force, or at least obliging professionals to justify not taking them.
4. Consecrating principle of contractual transparency by obliging professionals to draft contracts in clear and comprehensible language, with highlighting essential and unfair conditions by distinguished font.
5. Spreading consumer legal culture through media and educational institutions, by what raises consumer awareness and limits his unconscious acceptance of unfair conditions.
6. Encouraging adoption of alternative means for settling consumer disputes, for what they have of role in achieving effective and quick protection at less cost.

Ethical Considerations

This study is based exclusively on doctrinal legal analysis, including legislation, judicial decisions, and scholarly literature related to consumer protection and unfair contractual terms. It does not involve human participants, personal data, surveys, interviews, or experimental research. Consequently, ethical approval from an institutional review board was not required. The research was conducted in accordance with generally accepted principles of academic integrity, objectivity, and responsible scholarship.

Author Contributions

- **Dr. Ouadjaout Souad:** Conceptualization of the study, development of the theoretical framework, analysis of Algerian legislation on abusive contractual clauses, and drafting of the manuscript.
- **Dr. Azzouz Meftah:** Legal analysis of judicial control mechanisms, critical revision of the manuscript, and contribution to the discussion of consumer protection policies and contractual balance.

All authors have read and approved the final version of the manuscript and agree to be accountable for all aspects of the work.

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Conflict of Interest

The authors declare that they have no known competing financial or personal interests that could have appeared to influence the work reported in this paper.

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