The Social Sciences 11 (8): 1617-1621, 2016
ISSN: 1818-5800

Protection of the Weak Party from Unfair Contract Terms in Russian Contract Law

[1]Anna V. Kuzmina, [1]Andrey F. Baculin, [1]Anastasiya V. Kamaeva,
[1]Maxim A. Verholetov, [1]Nikolai N. Smirnov,
[1]Zarina K. Kondratenko and [2]Olga I. Miagkova
[1]Mari State University, Yoshkar-Ola, Russia
[2]The Russian Presidential Academy of National Economy and
Public Administration, Moscow, Russia

Abstract: The inclusion of rules governing the contract of adhesion in Article 428 of the civil code of the Russian Federation (Civil Code) in 1995 became one of the most important steps in the development of Russian contract law in accordance with the principles of freedom of contract, equality of parties and good faith. Legal doctrine of adhesion contracts is still of current interest due to lack of clear common understanding of its meaning in the Russian civil juris prudence and court practice despite there centamendments to Division III «general part of the law of obligations» of the Civil Code. Using the results of their comparative research the researchers of this study define the notion of unfair contract terms, determine the most effective model of judicial over sigh tover contracts as well as propose the ways of enhancing the protection of weak contractual party.

Key words: Unfair contract terms, inequality of bargaining power, contracts of adhesion, weak contractual party, obligations

INTRODUCTION

Over the past decade Russian Civil law doctrine has not developed any comprehensive research in the field of protecting the weak party against unfair terms in contracts of adhesion. Mean while the number of cases connected with the abuse by the stronger party of their dominant economic position to pursue their personal interests is constantly increasing. Some clarifications on implementing the provisions of Article 428 of the Civil Code were made by the Supreme Commercial Court of the Russian Federation. However, they are only fragmentary. So, one of the urgent tasks of Russian Civil Law doctrine is the analysis and the complex research of the contract of adhesion and the doctrine of unfair contract terms to develop an effective mechanism of the weak party's protection.

In continental European legal systems, the theory of the contracts of adhesion was highlighted in the works published at the beginning of the 20th century. Today European case law practice has developed the doctrine of the weak party's protection in the contracts on standard terms in the cases when the offerer in spite of the requirement of good faith, imposes the contractual partner extremely unfavorable conditions (Germany, England, etc.). This doctrine was defined not only in the national legislation of European countries but also in European directives and case law practice of the Court of Justice of the European Union. Modern foreign civil law doctrine pays more attention to the problem of unfair terms in contracts of adhesion in the light of the financial crisis (Smith, 2010).

Taking into account the need to harmonize the national legislation due to the Russia's entry into the global economy, the achievements of the foreign legal systems in the field of protecting the weak party are important for the future development of Russian legislation and caselaw practice. However, proposals on enhancing the protection of the weak party which were made by some Russian scholars exclusively on the basis of foreign experience require critical review and deep theoretical research considering the specific features of Russian Civil Law.

MATERIALS AND METHODS

As a methodological basis of the research, the researcher used the method of dialectics as a general scientific method of knowledge as well as specific scientific methods: historical, technical and legal, formallogical, the method of system analysis. In the process of studying and undersanding the specific legal

Corresponding Author: Anna V. Kuzmina, Mari State University, Yoshkar-Ola, Russia

structures, concepts and categories the researchers used the methods of logics and the method of lexical and grammatical analysis.

By using the comparative method of study the researchers found outthe approaches to the regulation of the weak party's protection which are common for several legal systems and determined the most effective institutions which could be borrowed by Russian Civil Law.

The research is based on the works of Russian and foreign scholars devoted to the study of contracts of adhesion and unfair contract terms.

The researchers have analyzed the National Civil Legislation of the Russian Federation, Germany, France, the United States of America and some other countries as well as European acts such as Council Directive 93/13/EEC of April, 5, 1993 on unfair terms in consumer Contracts and Draft Common Frame of Reference (DCFR).

Russian and European case-law practice concerning the issues of imposing unfair terms in contracts of adhesion forms the empirical basis of the research.

RESULTS AND DISCUSSION

Models of control over unfair terms: The judicial control over unfair terms can be found almost in every foreign legal system. The term is considered unfair if contrary to the requirement of good faith it causes significant imbalance in the parties' rights and obligations arising under the contract to the detriment of the adhering party.

The extent of judicial intervention into contractual freedom depends on the historical development of the national legal system, the variety of social, economic and ideological factors, etc. Nevertheless, the ways of dealing with the issue of unfair terms can be grouped into three basic models.

The first model is biased in favour of the consumer as the potentially weaker side of the transaction, exploited by the superior economic power of the «professional» side. The stronger market power in the form of superior negotiation and information power leads to one-sided abuse of both freedom of contract and freedom of choice. From this perspective, the need for market control arises from the notion of abuse of economic power. This view is well evident in the French loi Scrivener where the motive for intervention lies mainly in the need to prevent the abuse of power to the detriment of the more vulnerable party, the consumer.

Unfair contract terms directive also appears to be a good example of the consumer protection model. As Court of Justice of the European Union noted in Oceano case, «the system of protection introduced by the directive is based on the idea that the consumer is in a weak position vis-a-vis the seller or supplier as regards both his bargaining power and his level of knowledge. This leads to the consumer agreeing to terms drawn up in advance by the seller or supplier without being able to influence the content of the terms» (Joined Cases C-240/98-C-244/98 Oceano Grupo Editorial and Salvat Editores, 2000).

In some countries not only consumers but also businesses can be regarded as a weak party in case of gross inequality of bargaining power between partners (USA). For example, the court in case Sosik v. Albin Marine, Inc. found a disclaimer clause in the contract between merchants to be unconscionable citing the facts that the partieswere «not of equal commercial sophistication». The court noted that the adhering party was a merchant or a businessperson in the conduct of his business, but not a merchant for the transaction in question (No. 020539B, 2003 WL 21500516 (Mass. Super. Ct. 2003).

According to the second model, the reason for intervention against unfair terms lies in the use of standardised contract terms in market transactions. Although, this facilitates market transactions by saving time and money it presents the inherent danger of depriving one party of the possibility of revising the terms of the contract in detail and thus requires some external control on the fairness of the transaction. This approach is well represented by the German BGB (and the previous AGB-G) whose provisions apply to contracts on standard terms and conditions of business where there had been no individual negotiation including business-to-business contracts and only in a few cases subjects contracts with non-professionals to a stricter control.

The reason for interfering with the contract in the case of standard terms is not to be an abuse of any kind in imposing term not a question of a «little man» versus the «big company» but rather the fact that the parties are not likely to negotiate the details of standard terms in each and every case. Indeed, this would contradict the very purpose of using standard terms. Thus, saving transaction costs is a strong incentive, even for a consumer in a strong market position to accept standard terms whatever their content (Markesinis *et al*., 2006).

Finally, the general fairness model is the most far-reaching including both consumer relationships and business-to-business relationships within the scope of fairness rules and extending those rules to cover not only standard terms but also individually negotiated terms. Such a model recognises that the contract mechanisms can lead to unfair results in all kinds of relationships and with regard to all kind of terms and it underscores that the enforcement machinery of the state should not be made

available to put into effect contracts that are considerably unfair. The principle of fairness therefore is not a principle limited to consumer relations or standard-form contracting; rather it should permeate the whole of contract law. A well-known example of legislation that is based on the general fairness model is that found in Nordic contract law. Probably the most (internationally) well-known provision in Nordic contract law is the general clause in § 36 of the almost identical Nordic Contract Acts, according to which a court may set aside or adjust a term of a contract if its application leads to unfair results (Wilhemsson, 2008).

Control over fairness in Russian contract law: Russian legislators have long linked the control over unfair terms exclusively with the contracts of adhesion. It must be noted that unlike in most of the countries (where the legislature regulates the formation of contracts on standard terms but the definition of such contracts remains a doctrinal rather than a statutory concept), Russia specifically defines the «contract of adhesion» by statute. Pursuant to Article 428 of the Civil Code, a contract of adhesion is a contract the terms of which are determined by one of the parties and formalized in pre-printed or other standard forms and the only way of accepting these terms is by adhering to the proposed contract as a whole.

The definition of "le contrat d'adhesion" was first introduced by French scholar Raymond Saleilles in the beginning of the 20th century. The definition quickly took root first in French and later in the international Civil Law doctrine. Analyzing the provisions of German Civil Code, Saleilles pointed out in his study that "there are so-called contracts which are only named after a contract without having the legal structure… contracts of adhesion where one party significantly prevails over the other one and serves as a unilateral declaration of will power thus dictating its terms not so much to a certain individual as to an indefinite number of people" .

According to paragraph 2 of Article 428 of the Civil Code, the party adhering to a contract has the right to demand the rescission or modification of the contract, even if the contract does not contradict a statute or other legal act if such a contract deprives that party of the rights usually given under similar contracts or excludes or substantially limits the other party's contractual liability or contains other clearly burdensome terms, i.e., the party would not have accepted the contract if it had an opportunity to freely negotiate the contractual terms.

In order to be categorized as the contract of adhesion, an agreement must meet the following two requirements:

- Contractual terms must be determined by one of the parties in printed or other standard forms
- Acceptance of such terms by the other party must be complete and unequivocal, i.e., the party must adhere to all of the terms en bloc and cannot change their content upon entering into the contract

Thus, lack of real and meaningful negotiation of the terms included in the standard form doesn't constitute a sufficient condition for carrying out judicial control over the contract's content, as it is done in German Civil Code.

The essence of the adhesion contract is not its «formishness» (that is just a symptom) but the fact that one of the parties has at least for the purposes of the transaction in question, some of the powers of a monopolist. This «monopolistic power» need not be that wielded by a «true» monopolist, legal or other. It may be. But that is not a requisite of the adhesion contract. In some cases, the «monopoly» power may be only in a certain locality when the purchaser is not mobile enough to get another seller who will offer other terms. In some cases the monopoly power is really an expression of oligopoly power, e.g., contract forms containing identical clauses written by competitors who nevertheless together blanket the market. The hallmark of the adhesion contract and its alleged evil is that the purveyor of such a contract is in the position for one reason or another to refuse to bargain, to put the other party to a take-it-or-leave-it option (Leff, 1967).

Therefore, the main feature of the contract of adhesion is the inability of the adhering party to influence the contractual terms. The contracting party is to be protected only if it had a weak bargaining power against its partner.

The party has a greater bargaining power if it is able to convince the other negotiator to make thecontract on its own terms even if the other party would rather not do it (Korobkin, 2004).

Thus, the Russian model of control over unfair terms represents the synthesis of two models, i.e., for the purpose of defendingthe weaker contractual party the judicial oversight is carried outon standard terms included in the contract of adhesion.

However, the scope of application of the rules regulating the protection of the weak party in Russian Civil Code has recently changed.

In paragraph 9 of the resolution on Freedom on contracts and its limitations (dated March 14, 2014), the Plenum of the Supreme Commercial Court of the Russian Federation stated: «The court may apply paragraph 2 of Article 428 of the Civil Code and rescind or modify a contract at the request of one party if the court

determines that the contract terms were drafted in advance by the other party and contain clearly burdensome provisions causing a significant imbalance in the parties' positions (unfair terms) and that the aggrieved party has been deprived of the opportunity to negotiate the contract terms (weak contractual party)».

The Resolution almost literally reproduces a new version of paragraph 3 of Article 428 of the Civil Code which runs: «the provisions of paragraph 2 of Article 428 of the Civil Code should also apply to those contracts which while not meeting the formal requirements of the contract of adhesion were formulated by one of the parties and the other party because of gross inequality of bargaining power was deprived of the opportunity to freely negotiate certain contract terms».

A new version of Article 428 in the Draft Amendments to the Civil Code does not differentiate between the two types of contracts on the basis of the adhering party's business status. Therefore, the adhering party would be able to use the special protections designed for contracts of adhesion regardless of that party's lack or presence of a business status.

The legislator's referring to paragraph 2 of Article 428 of the Civil Code means that the protection of the adhering party against clearly burdensome clauses in contracts of adhesion becomes a case of the defense of the weak party in any contracts in which the court findsa gross inequality of bargaining power.

What's the difference between contracts of adhesion and contracts with unequal bargaining power of the parties?

Firstly, in paragraph 3 of Article 428 of the Civil Code there is no indication of including terms intoprinted or other standard forms.

As it is stated by some scholars, since there is not any legal definition of printed or other standard forms in the Russian Civil Code it's more appropriate to use the notion «standard terms» which is familiar to foreign legal systems.

The difficulty in proving the «formishness» of the contract as well as unreasonable exclusion of the terms drafted in advance only for a single transaction from a judicial review has generated in the scientific literature theidea of either:

- Reforming of paragraph 1 of Article 428 of the Civil Code by excluding the criteria of standard terms from the legal definition of the contract of adhesion or
- Applying the provisions on protection of the weak contractual party in contracts of adhesion to non-standardized contracts as well

According to the proponents of such an approach, unequal bargaining power of the parties must serve as a sufficient reason for protecting theweak party against the unfair terms.

However, some authorsconsider that the contract of adhesion doesn't necessarily require the offer to be drafted for multitude contracts. Giving literal interpretation of paragraph 1 of Article 428 of the Civil Code A. Tsyplenkova concludes that the contract can be classified as the contract of adhesion regardless of whether the printed forms were drafted for single or multitude contracts.

Similar reasoning can be found in American case-law practice. For example, despite the fact that California Supreme Court has defined the term «contract of adhesion as:

- A standardized contract
- Imposed and drafted by the party of superior bargaining strength
- That provides the subscribing party only with the opportunity to adhere to the contract or reject it the Court's recent decisions have not included the «standardized contract» element in their description of an adhesion contract. Thus, it is possible to have a contract of adhesion when a contract is used in one transaction that is is not standardized for use in multiple transactions (Grand Prospect Partners, L.P. v. Ross Dress for Less, Inc., the Court of Appeal of the State of California, Fifth Appellate District, 2015)

Secondly, unlike the contract of adhesion, the weak party, seeking for protection on the basis of paragraph 3 of the Article 428 of the Civil Code, must prove that it was precluded to influence not on the contract as a whole but on itscertain terms.

Introducing special regulation of contracts in which the adhering party was deprived of the opportunity to influence only certain terms,is caused by terminological inaccuracy in the legal definition of contract of adhesion.

Literal interpretation of Article 428 of the Civil Code leads to the conclusion that in order to constitute the contract of adhesion, all of the contractual terms must be pre-determined by one party whereas the other party has to accept those terms with no opportunity to offer changes. Individual negotiation of the particular terms excludes the classification of the contract as a contract of adhesion.

In fact, parties often negotiate certain significant terms upon entering into a contract while using standard forms drafted by one of the parties for the remaining terms.

Supreme Commercial Court of the Russian Federation, using a teleological interpretation of Article 428 of the Civil Code, noted in its Informational Letter (dated September 13, 2011) that the presence of negotiated terms in a loan agreement (e.g., the loan amount, repayment period, etc.) does not prevent the application of Article 428 of the Civil Code to the remaining terms which the borrower had to adhere to.

The terminological mistake made by the legislator in paragraph 1 could be corrected by supplementing Article 428 of the Civil Code with the provision that the rules of the contract of adhesion don't apply to the terms which have been negotiated in detail between the parties rather than by introducing a new special regulation in paragraph 3 of the article (Baculin *et al*., 2015). Such amendments will authorize the courts to classify the terms of the contract which the party had to adhere to as a contract of adhesion and significantly broaden the scope of judicial oversight over unfair contract terms.

CONCLUSION

On the one hand having introduced a new version of paragraph 3 of Article 428 of the Civil Code as the way of solving the problems the courts usually face while applying the provisions regulating contracts of adhesion, the Russian legislator enhanced the level of the weak party's protection against unfair terms. On the other hand by spreading the rules on protection of the weak party in contracts of adhesion to all contracts with an element of inequality of bargaining power which don't meet the formal requirements of the contract of adhesion, the legislator generated the conflicts of norms in Article 428 of the Civil Code. Although, de jure the drafters kept the previously used definition of the contract of adhesion, de facto they changed its meaning. As it was noted in the study, there is no scientific difference between contracts of adhesion and contracts with unequal bargaining power of the parties. Introducing the new version of paragraph 3 to Article 428 of the Civil Code may only exacerbate the cornerstone problem of determining by the parties the proper way of protecting their rights and legal interests.

In general, the legislator's proposal to establish two parallel regimes of control over unfair terms in the Civil Code is supported in Russian legal doctrine. We suppose that implementing the new provision of Article 428 of the Civil Code for controlling unfair terms makes the existence of the mechanism of the weak party's protection in contracts of adhesion superfluous. The standard form of the contract will just serve as an evidenceof inability of the adhering party to influence the terms.

When given a limited scope of application, the contract of adhesion will retain its independent significance only in Civil Law doctrine, whereas paragraph 1 of Article 428 of the Civil Code will be regarded as no more than a mere permission to the parties to apply such concept as a contract of adhesion.

The definition of the contract of adhesion provided in Article 428 of the Civil Code is imperfect and the legal regulation of this institution is clearly insufficient.

The case law practice revealed inadequacy of the existing legal regulations of the contract of adhesion for the weak party's protection against unfair terms. Undoubtedly, modern tendencies of the market economy require reforms of the institute of control over contracts with unequal bargaining power between parties. In the opinion this goal should be achieved by further improving the contract of adhesion rather than by creating concurrent institutions of control.

REFERENCES

Baculin, A., A. Kuzmina and O. Miagkova, 2015. Contract of adhesion and conceptual changes in russian contract law. Rev. Eur. Stud., 8: 15-22.

Korobkin, R., 2004. Bargaining power as threat of impasse. Marquette Law Rev., 87: 867-871.

Leff, A., 1967. Unconscionability and the code: The emperor's new clause. Uni. Pennsylvania Law Rev., 115: 485-559.

Markesinis, B., H. Unberath and A.C. Johnston, 2006. The German law of contract: A comparative Treatise. Hart Publishing, UK., USA.

Smith, S., 2010. Reforming the law of adhesion contracts: A judicial response to the subprime mortgage crisis. Lewis Clark L. Rev., Vol. 14.

Wilhemsson, T., 2008. Various approaches to unfair terms and their background philosophies. Juridica Int., 251: 51-57.