

# Problematic issues of protection of the weak party against unfair terms in Russian Contract Law. Contract of adhesion v. contract with unequal bargaining powers

## Temas problemáticos de protección de la parte débil contra términos injustos en el Derecho contractual ruso. Contrato de adhesión vs. Contrato con poderes de negociación desiguales

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#### ABSTRACT:

The inclusion of rules governing the contract of adhesion in article 428 of the Civil Code of the Russian Federation 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. Currently, the doctrine of the contract of adhesion is undergoing significant changes in Russian contract law. Section 428(3) of the Civil Code of Russia was supplemented with a new definition of "contract with unequal bargaining powers." In this article, the authors examine the legal nature of these two legal concepts and, based on the experience of foreign legal systems, modern trends in the development of laws designed to protect a weaker contractual party in European contract law make suggestions regarding improving the regulatory regime governing contracts of adhesion in Russia.

#### RESUMEN:

La inclusión de las normas que rigen el contrato de adhesión en el artículo 428 del Código Civil de la Federación de Rusia en 1995 se convirtió en uno de los pasos más importantes en el desarrollo del derecho contractual ruso de conformidad con los principios de libertad de contrato, igualdad de partes, y buena fe. Actualmente, la doctrina del contrato de adhesión está experimentando cambios significativos en el derecho contractual ruso. La sección 428 (3) del Código Civil de Rusia se completó con una nueva definición de "contrato con poderes de negociación desiguales". En este artículo, los autores examinan la naturaleza jurídica de estos dos conceptos jurídicos y, sobre la base de la experiencia de los tribunales extranjeros los sistemas, las tendencias modernas en el desarrollo de leyes diseñadas para proteger a una parte contractual más débil en la ley de contacto europea hacen

**Keywords:** contract of adhesion, inequality of bargaining power, good faith, unfair contract terms, reform of French law of obligations.

sugerencias con respecto a la mejora del régimen regulador que rige los contratos de adhesión en Rusia.  
**Palabras clave:** contrato de adhesión, desigualdad de poder de negociación, buena fe, cláusulas contractuales injustas, reforma del derecho francés de obligaciones.

## 1. Introduction

The 1994 Civil Code of Russia codified the concept of an adhesion contract, and also included a general prohibition on unfair practices aimed at imposing unfair contract provisions on another party. However, Russian contract legislation was ahead of the real economic conditions in the country. Therefore, the Civil Code provisions regarding adhesion contracts essentially stayed dormant and had not been enforced by courts for the next fifteen years.

In recent years, however, courts dealing with contractual disputes have started using those statutory provisions in order to afford certain protections to weaker contractual parties. The history of judicial application of Article 428 of the Civil Code of Russia (which addresses contracts of adhesion) reveals the need for further development of this legislation, including through adoption of certain European approaches, which seems logical given the historical similarities and intertwined nature of the Russian and continental European legal systems.

## 2. Method and Results

Russian legislators have long linked the control over contract's fairness 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 para. 1 of article 428 of the Civil Code, in order to be categorized as the contract of adhesion, an agreement must meet the following two requirements: (a) contractual terms must be determined by one of the parties in printed or other standard forms; and (b) 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. The second requirement, i.e. a special way of entering into a contract, has a particular importance since it entails certain legally significant consequences affecting the parties' procedural and substantive interests (Tsyplenkova A.V., 2002).

The meaning of the legal regime provided by article 428 of the Civil Code of Russia is expressed in Section 428 (2) of the Code which runs: «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».

The Supreme Commercial Court of the Russian Federation, in its Resolution on Freedom on Contracts and Its Limitations (dated March 14, 2014), departed from the statutory definition of «clearly burdensome clauses» and, for the first time, introduced a notion as unfair contract terms. The Court noted that terms causing a significant imbalance in the parties' interests and clearly burdensome to one of the parties' can be regarded as «unfair».

The judicial control over the fairness of contract terms is well-known to foreign legal systems. The extent of judicial intervention into the contractual freedom depends on the historical development of a national legal system, a variety of social, economic and ideological factors, etc. Nevertheless, according to the prevailing approach, judicial oversight with respect to lawful but unfair contractual terms can be exercised when the party, which formulated the terms, violates the requirements of procedural and substantive fairness. (Leff, 1967.)

Procedural unfairness generally arises in situations involving inequality of the parties' bargaining powers, when one of the parties has the exclusive ability to determine the content of the contractual terms while the other party is deprived of such an opportunity. One of the most typical examples demonstrating inequality of the parties' bargaining powers is the contract of adhesion discussed here.

The concept of substantive unfairness deals with the substance of contractual terms, i.e. the extent to which such terms reflect each party's interests. In foreign jurisprudence, the substantive unfairness often relates to a significant imbalance in the parties' rights and obligations to the detriment of the party that adhered to such terms. (Nebbia, 2007.)

In 2015, the Russian legislature amended the Civil Code of Russia in order to, among other goals, emphasize the principles of fair dealings in contract relationships. Although the Russian legislature retained the previous definition of «contract of adhesion», the following statutory provisions were modified. First, if a weaker party to a contract of adhesion was subjected to unfair contract provisions, such a party may seek modification or rescission of the contract not only going forward (as allowed prior to the legislative amendment) but also retrospectively (i.e., from the moment of contract formation).

Second, amended Section 428 now protects both consumers and entrepreneurs if inequality of contractual bargaining powers is established. Previously, this section afforded protections to entrepreneurs only if they did not know and should not have known the actual terms of an executed contract when they adhered to such contract terms.

Third, Section 428(3) of the Civil Code of Russia, which contains a definition of «contract of adhesion», was supplemented with a new definition of «contract with unequal bargaining powers.» The latter term means a contract with the essential terms determined primarily by one party, while the other party's ability to negotiate contract terms is significantly limited due to the inequality of the parties' bargaining powers.

Therefore, according to the drafters' intent, article 428 of the Civil Code governs two types of contract: the contract of adhesion and the contract with unequal bargaining power of the parties. However, legislative consolidation of the contracts where parties possess unequal bargaining power seems to be incorrect since there exist no features justifying treating these contracts as a separate legal institute. Inequality of bargaining power is just one of the characteristics of the contract of adhesion. Some scholars make an attempt to draw a distinction between these two definitions based on presence or absence of a standard offer aimed at multiple use (Karapetov, 2012). In our opinion, such approach does not sound persuasive. If the term has been drawn up for the particular contract, the other party will hardly refuse to negotiate it simply because it is one of a set of standard terms. If the other party refuses to negotiate the term, that is probably because it finds them appropriate to its needs.

Moreover, the definition of a contract of adhesion in Section 428(1) of the Russian Civil Code appears to be greatly influenced by the continental law of contracts, while the concept of contracts with unequal bargaining powers in Section 428(3) is more characteristic of common legal system. For instance, the doctrine of inequality of bargaining power is currently integrated into US treaty law (§ 2-302 of the Uniform Commercial Code) as one of the conditions for restriction of freedom of contract for protecting party against unconscionable terms.

Nevertheless no predictable judicial standards for determining inequality of bargaining power has been formed yet by present time.

First, many courts address it in terms of the weaker party's lack of meaningful alternatives, necessity, the nature of the good or service or inability to negotiate terms. Second, they refer to a host of potential factors relating to characteristics of the parties and characteristics of the transaction to imbue the inequality of bargaining power doctrine (for instance, business sophistication, education or knowledge, monopoly power, consumer status etc). Finally, many courts eschew standards for assessing inequality of bargaining power, relying instead upon a

«we-know-it-when-we-see-it» approach. As it's stressed in American literature, after almost a century of searching, the doctrine in question still remains obscure (Barnhizer D.D., 2005). Today one can't be sure that Russian judges will be more prepared to resolve disputes on the basis of this doctrine in comparison with their American colleagues. For these reasons providing a general rule of protecting weak party in all contracts with unequal bargaining powers does not seem rational.

With this respect French legislative approach represents a great interest. Although the concept of adhesion contracts has been extensively studied in the French legal doctrine (Saleilles, R., 1901), the definition of a contract of adhesion appeared for the first time in the French Civil Code only in 2016. New article 1171 provides that: «In contract of adhesion, any clause that creates a significant imbalance between the rights and obligations of the parties to the contract is deemed unwritten. Appraisal of the significant imbalance concerns neither the main purpose of the contract, nor the adequacy of the price to the service rendered». Section 1110 of the French Civil Code defines «contract of adhesion» as a contract, the essential terms of which are drafted in advance by one party rather than being drafted as a result of contract negotiations. Earlier French legislator provided protection against abusive clauses exclusively to consumers in accordance with Consumer Code. Meanwhile after enactment of Ordinance № 2016-131 on February 10, 2016 the courts were empowered to deem unwritten abusive clauses also in business-to-business contracts. However, in contrast to Russia, no radical steps like expanding the scope of judicial control over contractual fairness to all contracts with elements of unequal bargaining power were made by the drafters.

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### **3. Conclusions**

On the one hand, having introduced a new version of Section 428(3) 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, 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 (Baculin, 2015.). In our opinion, introducing the new version of Section 428(3) 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.

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 our opinion, this goal should be achieved by further improving the contract of adhesion rather than by creating concurrent institutions of control.

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