Original Article

Investigating the Examples of Unfair Conditions in Contract

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Abstract

Remaining bound to and venerating the private contracts between the individuals is amongst the essential principles of contracts well accepted in all the countries and the courts should not intervene in the individuals' private contracts. However, as a result of the economic and social relations, there are created contracts wherein there is no proportion between the exchangeable items. This has made the stronger party impose unfair conditions on the weaker party. The distinct example of such contracts is the agreements pertinent to the service-providing organizations and banks. In these contracts, due to the primary needs of the human beings and as a result of certain individuals' monopolistic privileges, the weaker party has been forced to give up to the unfair conditions set by the stronger party. This issue has been left unpredicted in the legal systems of the majority of the countries and the predicted examples, if any, pertain to certain cases hence not all the unjust contracts are covered and a general maxim cannot be drawn based thereon. The present article tries a brief investigation of the domestic laws and the regulations of some other major legal systems to deal with the nature, criteria and examples of such unfair conditions so that steps can be taken in moderating them in the contracts.

Keywords: unfair, unequal contract, unjust conditions

Introduction

Remaining adherent to and respecting the individuals' private contracts is amongst the essential principles of the contracts and the courts should not interfere with the private contracts endorsed between the individuals. Based thereon, the legislators cannot make any interventions at all while there is actually no such a limitation and the legal system of the various countries do not follow such a rule [1]. In some respects, a situation might come about that the contracts contain unfair conditions by the force of certain statuses and moods and these should not be approached indifferently because the in-contract balance would serve justice favorably.

Nowadays, there are many contracts wherein certain unfair conditions are imposed by a party to another and this blemishes the visage of justice. The distinct example of such agreements is an appended contract one party of which is in a superior position to the weaker party that gives up to the unfair conditions due to reasons like hardship, lack of counseling with the experts and specialists and subsequently incurs unfair and unjust conditions. The followings introduce some examples of the unfair contracts and unjust conditions:

1. When a person refers to a bank to apply for a loan and, having insufficient information and falling short of counseling with knowledgeable specialists and being unaware of the contingent consequences, signs contracts the contents of which are completely unequal and in favor of the bank.
2. The contracts for using necessary services like water, electricity and gas; in order to have the right to use the abovementioned utilities, the subscribers should accept contracts some conditions of which are unfair otherwise they should generally refrain from using the aforesaid utilities. Inequality of the conditions in some of these contracts is so huge that the visage of justice is blemished and the main route of the law, i.e. establishing justice and order, is shifted.

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How to cite this article: Zeighamzadeh, M., Almasi, N., Bayati, M. H., Investigating the Examples of Unfair Conditions in Contract. Arch Pharma Pract 2020;11(S1):92-7.

Of course, it has to be stated that no authority, even the legislator, denies the principle indicating the necessity and freedom of contracts and/or deprivation of them; however, the emergence of the large and monopolistic powers has resulted in the creation of unequal economic situation that imposes heavy and unfair obligations on the weaker parties within the format of agreement and settlement.

According to some jurists, the theory of the contracts' unfairness was put forth since 15th century in the common law's legal system and there are enacted rules and regulations during the recent decades like the law of the unfair conditions, passed in 1977, and the regulations of unfair conditions in the consumers' contracts, passed in 1994, in England's laws.

In Iran's laws, as well, there are unfair conditions proposed in the doctrine level but there is no explicit text in this regard in the civil law hence a lot of ambiguities have arisen with the legal system suffering from such a gap; however, there are certain laws like the maritime law and the labor and consumer law that have tangibly pointed the issue out. The present article tries investigating the nature of these unfair conditions to deal with the criteria and examples of these unfair contractual conditions so that it may take a step in this regard towards serving and establishing justice.

Chapter One: Difinitions

Paragraph One: Literal and Common Meaning of Unfair Contracts

The Arabic term "Insaf" is an infinitive rhyming with Ef'al and it means fairness and serving justice, doing the right thing, getting to the middle, taking the middle point of something and moderation [2]. The Arabic verb "Nasefat" also means fairness, justness and justice [3]. The term "unjustness in contract" is difficult to define; on the other hand, it is not useful to leave it vague because its ambiguity causes the instability of the contracts and judges' use of their own tastes and possibly invalidation of a correct contract.

In 1915, the appeal court in New York issued the following sentence in the case of Mandal vs. Laibman: "a contract is unfair and contradictory to the contractual conscience if, considering the norms and procedures governing the time and place of contract endorsement, it is so unfair and uncommon that the enforcement of its conditions cannot be ruled" [4]. According to what was mentioned, in order to recognize the contract's conditions as unfair, one should emphasize on the parties' rights and obligations and such an inequality is essentially imposed by a stronger party to a weaker party. Thus, it can be stated that the unfair conditions are those that have not been negotiated and the stronger party has imposed them impermissibly onto the weaker party for his or her being in a superior position.

1) Differences between the Unfair Conditions and Fairness-Contradicting Cases:

Commonly, fairness includes the entirety of a legal action and the thing that is eventually considered contradictory to fairness is the legal action in whole. If an action is recognized as "contradictory to fairness" in the norms, it cannot be considered flawed for its mere fairness contradiction and it cannot be also considered incorrect in legal terms unless there is set a specific legal mandate for it such as the option of "defectiveness"; however the "unfair condition" has a special position and unfairness can be, of course, generalized to the whole contract. If there is set a special legal mandate, it is normally limited to the same condition and the compensation of its adverse outcomes [5].

2) Differences between the Unfair Conditions and Extraneous Conditions:

In Iran's statutory provisions, the concept of extraneous conditions has not been given a room but, in common law, the law of lenders pointed to the extraneous conditions for the first time in 1900 and it was later on revised in 1927. In article 138 of this law, there are stipulated scales and criteria for recognizing the extraneousness and unfairness of the lending contracts. Corresponding to this article, the lending contract is considered extraneous and unfair if the borrower and/or his or her kin have been obliged within the contract to pay an extravagant sum of money and/or if the contract's contents are found violating the principles of fair behavior in a completely vivid manner. In determining the extraneousness and extravagance of the sum to be returned and/or the serious and essential violation of the principle of fair behavior, the court not only pays to the external and objective factors like the common interest rates, the creditor's degree of risk-taking and other relevant contracts but also considers the personal factors like the debtor's age, his or her experience, his or her business ability, his or her health and psychological status as well as the economic conditions and statuses of him or her and also the financial pressures imposed on him or her at the time of contract endorsement, as well. After recognizing the extravagance of the contract, the court enjoys a vast authority in serving justice between the parties. The court may moderate the repayment conditions it has found extravagant in such a way that they appear reasonable and common and/or it may also improve in another way the status of the debtor or the surety [6].

Chapter Two: Examples Of Unfair And Unjust Conditions

Veneration of the individuals' private contracts is amongst the principles envisioned indispensable in all of the countries and nobody can cause any flaw in their indispensability due to the contract's inequality. Of course, it has to be noted that the contracts are endorsed under unjust conditions and one of the parties has agreed thereto under unfair conditions with the other party being well aware of such a situation in which case the court should intervene in these contracts and avoid authentication of such contracts and establish contractual balance between the parties. Thus, every condition composed in unequal economic, social, expertise and scientific situation of the transacting parties in a manner extremely in favor of a party is qualified for unjustness hence viewed as imposed. Disregarding the subject and its effect, the main issue in the

discussions on unfair conditions is the transacting parties' inequality that naturally results in tyrannical results while being deceitfully glazed with the parties' agreement. The European Community's guideline accepted in April, 1993, was a step taken in line with fighting these conditions. A list of the unfair and imposed conditions' examples was attached to this guideline that, as proposed in the guideline itself, is not exclusive and only plays the role of a guide for the countries' national judges so as to help them make case-specific judgments personally according to the disputed contract and the relevant cases. Thus, considering the non-exclusiveness of these conditions, several examples and their conditions have been presented beneath:

Paragraph One: Formations and Resources of One Party against the Other and the Power Inequality in Transactions:
Contracts in which certain conditions are imposed on a weaker party due to the other party's possession of more formations and his or her subsequent acquisition of a superior position; one example pertains to the contracts that render the business or task of a transacting party unique such as when a club signs a contract with a football player and obliges him or her not to play in any other team after the endorsement of the contract; or, when a company restricts its engineers within the format of a contract and prevents them from doing a task similar to that of the company and also prohibits their continuing of their occupation after retirement; or, when a contract is signed under unfair conditions with a laborer who is subsequently obliged to work harder and receive lower; here, a party can dissolve the contract if s/he finds the contract disadvantageous.

It might be said that a party having stronger and larger formations would have more superior bargaining power because the vast formations provide him or her with greater management power and wider area of operation. Although such an element can be posited in some lawsuits that have been recognized unfair by the court, it appears that it can be determinant because it is not always the case that a company enjoying a larger volume of formation and development can have stronger power of bargaining. In some of the cases, the larger companies need customer and, in order to attract their customers and encourage them to make purchases, they might withdraw from taking advantage of many of their competencies in bargaining [7].

Paragraph Two: Necessity of the Contract Subject

Under the new economic circumstances, a new form of contract has been formed with one party possessing all the powers and privileges and the other enjoying the least of the advantages. One example of such a contract is where the contract subject is amongst the essential and vital matters of human life and the other party is obliged incumbently to enter the contract like the contracts related to water and gas subscription which is envisaged as a sort of appended contract. As it is seen, there is a difference between the appended and the other ordinary contracts. Thus, in order to better understand the adhesion contracts, their definition has to be offered.

Most of the writers have not offered a comprehensive definition of the adhesion contracts and they have mostly dealt with the expressing of their properties and descriptions. So, to offer a comprehensive definition of the appended contract, we should state that "appended contract is the one wherein the conditions and contents have been previously prepared by a party and the other accepts them without any dispute; the subject of these contracts is usually necessary goods or services that are monopolistically possessed legally or practically by the supplier; competition might be actually very limited for such goods and services" [8].

Adhesion contracts can be divided into three sets: A) contracts that are signed with one of the government's exclusive institutions and organizations such as water, electricity, gas and other utilities' contracts signed between the people and these institutions; B) contracts that the people enter with the nongovernmental but exclusive institutions and the individuals are incumbently coerced to sign them with those institutions; and C) the contracts that have exited their bilateral form and are in the form of recognizance letters such as those offered in the banks.

The contracts mentioned in all these three sets are excluded from the principles and basics and a suggestion is made by the stronger party and the weaker party has to accept it without having any right for changing them and/or generally withdraw from their subjects but since the necessary needs are satisfied within the format of these contracts, they are usually incumbently forced to accept them.

Paragraph Three: Use of Similar Forms and Non-Involvement of Parties' Will in Conditions

The parties should reach an agreement about every contract. Due to the same reason, courts cannot intervene in these conditions unless in certain cases and with the parties' will. Standard contracts are amongst the agreements wherein no settlement is reached and the weaker party has played no role in arranging them. The text of these contracts is essentially previously composed by the large business companies and use for similar cases; since their contents are not usually concluded in an agreement, they are essentially in favor of the stronger party. Of course, the standard contracts are not always in favor of the stronger parties and the stronger party sometimes prepares standard contracts for absorbing customers with their conditions having been predicted in favor of weaker parties.

The conditions should be vividly expressed in the contracts. They are occasionally mentioned implicitly depending on the parties' situations such as when they are typed in very fine fonts in the backside of the paper so as to remain hidden from the contract's party and/or they are inserted on the front side of the contract paper but beneath the signature and seal; these contracts should be interpreted in case disputes arise

according to the existent conditions and evidence and as ruled by the norms.

Paragraph Four: Receiving No Independent Counseling

Receiving counseling and advice before concluding contract can prevent entering of unfair contracts to a large extent. An example of the unfair contractual conditions is when a party to a contract uses specialized forces and advisors but the other party enters the transaction without counseling and information with the stronger party seeking misuse of such circumstances. For example, an England's court disapproved a purchase contract wherein the price was a lot lower than the real price based on the reason that the sellers had not received any legal counseling before the conclusion of the contract and the stronger party misused this situation. The court expressed that it has to be seen whether the parties of a contract are really in equal situations or not and the contract has to be annulled if the stronger party is found misusing the situation [4].

Paragraph Five: Transaction with Poor Persons and Inadmissible Pressure:

Another example is when a person does not know how much his hereditament is and a contract's party pre-purchases the entire hereditament while being aware of his ignorance; then, the seller finds out that it has been more than that. Or, the other example was when a worker became the surety of his employer for a sum of 21 thousand pounds while this amount of money was asserted by the court to have been too much for a worker and it finally issued a sentence indicating the unfairness of the contract and the worker was deposed from suretyship. The court reached such a judgment based on two matters: the first one is the uncommonness of the contract and the second was inadmissible pressure; "the worker had entered the contract by the force of the inadmissible pressure the employer had imposed on him". Therefore, if a contracts results in earning an unfair benefit from a poor person more than s/he can afford, it will be also considered as an example of the unfair contracts

Considering the abovementioned materials, the followings should be taken into account when ruling the inequality of the contracts:

Firstly, the contract's contents should not be vividly in favor of one of the parties and against the other party in such a way that the entire contractual privileges are given to one of the parties and the other one is deprived of even his or her logical privileges. For instance, when a person sells his property and stipulates in the contract that the buyer can determine the method of paying and the amount of the price as s/he wishes [6].

Secondly, it is not only sufficient to pay to the price for determining the unfairness rather the costs made by a party should be compared with all of the goods and services s/he receives from the other party and the imposed risks; as an example, consider a car manufacturer who offers his vehicles along with financial and life as well as car body insurance. Even if s/he sells his cars for a price higher than the common prices, it cannot be stated that the vehicle's contractual price is extravagant and unfair. The longer the duration of the insurance and warrant, the higher the price differences will be. Although it is difficult to imagine the useful application and result of these costly conditions before the occurrence of an accident and it is accordingly not so much easy to calculate them for reaching a real price for the vehicles, it is readily understandable following the occurrence of an accident [7].

Paragraph Six: Lack of One Party's Good Will

There are possibly other examples in which the unfair conditions are imposed on a party without them being mentioned in the contract such as when there are conditions between the parties before concluding the contract but they are not mentioned in the contract's text and these same conditions cause greater bargaining power for a contract's party because if there were not pre-contractual conditions, the transaction party would never sit for a transaction of such a type; another example is when a transacting party exhibits deceitful behavior that causes him or her enjoy a greater power of bargaining. It is via considering the contractual good will that one can get rid of the existent gaps because the judges are subsequently provided with the authority of investigating the contracts' texts so it can be claimed that lack of good will in the contract can causes annulment of a contract even if there are not any flaws related to the parties' agreement and consent.

Paragraph Seven: Information Equality and Bargaining Power:

Here, it is possible for a party to a contract to create an unequal and unjust contract by not telling part of the important descriptions to another party or by adding several unfair conditions to the contract without notifying the other party thereof. Conditions should be always clearly and understandably set in the contracts. The party writing the conditions should use words within the literacy level of the other party so that the possibility of the contingent misuses of information and knowledge inequality can be limited [9]. The transparency of the contract is considered as one of the essential conditions. Resultantly, the stronger party of the contract should be obliged to do his or her best to clarify the contract's conditions.

Paragraph Eight: Non-Transparent and Misleading Conditions

In transactions, the subjects and conditions should be clear and the parties should have reached an agreement regarding each of the conditions. Misleading and non-transparent conditions are sometimes inserted in the transaction by a party and the ambiguity of them causes misleading of the other transacting party and/or a clever deceit might be hidden therein. An example is when you give your hard disk to a person to keep it for you and it is stated in the backside of the receipt you have been given that you will be provided with a similar hard disk in case of its destruction and/or defection. Although this condition might be in favor of the loss-incurred

person, it is originally a deceitful condition because it is solely pertinent to the material losses and intellectual losses are not included and the loss cause's liabilities are solely limited to the material losses. Therefore, in order for a transaction's conditions to be credible and binding, they should be transparent and explicit and the parties should accept them otherwise every deceiving condition that is embedded in the contract within the format of delimitation of liability's type, amount and justification burden will be unfair and unacceptable.

Paragraph Nine: Transaction with Ignorant and Illiterate Persons

An example is when a person enters an unreasonable contract while having insufficient awareness and literacy. Here, it has to be seen whether the contract's party has knowingly endorsed such a contract or s/he has not had sufficient knowledge about with the diagnosis of the issue being left to the judge and norms. As a specimen, in the case of Earl of Aylesford vs. Morris, the judge reasoned that the conditions have not been concluded in an agreement between the two parties because the contract's parties have not had sufficient information.

Paragraph Ten: Threat

There is this possibility that a party threatens that s/he will not endorse the contract if his or her suggestions are not accepted. Such a threat is also a function of the obtained profit. This advantage may come about due to the idea that a party would not lose anything or would lose at least lower than the other party even if the contract is not endorsed. Although this factor cannot be ignored as the effect of the superior position, it cannot alone cause the creation of contractual weakness in one party in case of the market's competitiveness [7]. Thus, this example is not alone indicative of unfair conditions in the contracts.

Chapter Three: Unfair Conditions In Other Legal Systems

Although comparative study is not amongst the essential axes of the present study, reference to the main common law and roman-German systems will not be useless.

Paragraph One: Unfair Conditions and Common Law System

Human beings are creatures inherently free and they do their best to create this freedom and break the chains. Undoubtedly, the conditions accepted by the parties freely and knowingly and through negotiation are binding between the parties but the main problem is where the conditions inserted in the contract are occasionally not agreed by the parties and/or they are found not being aware of their results as a result of which unacceptable outcomes are imposed on a party and/or the smallest violation might result in imposing of unfair outcomes to an opposite party. Since 17th century, the equity courts intervene in the contracts in certain cases and prevent the enforcement of the ones that are unfair and against conscience in the England's laws following g the approval of the principle of contract's non-contradictoriness. Since the England's laws are more relying on the judicial procedures, the unfair contracts drew attentions in the equity courts.

Paragraph Two: Roman-German Legal System

Roman-German legal system is amongst the written law's legal systems. Thus, it does not have the possibility of regulation revision as done in Iran's law system. In France's law, the correct and non-unfair conditions are considered binding. That is because France's laws like Iran's laws have taken measures in a case-specific manner and in certain regulations for counteracting these conditions with the most important reason stated for such a fight against these unjust conditions being pertinent to the public order and establishment of justice. In the laws of such countries as Germany and Swiss, the legal articles have been explicitly predicted in this regard and the contracts are invalid and/or revocable where there is a vivid disproportion between the items to be exchanged.

Paragraph Three: Unfair Conditions in Iran's Laws

Unfair conditions in Iran's laws are determined through the investigation of the fact that whether they are feasible in adherence to Iran's lawmaking policies or not? In better terms, it has to be seen whether the philosophical tendencies in the laws of Iran allow such discussions or not? The necessary and notable point is that Iran's legal and lawmaking system has been inspired by two sources: a part has been excerpted from the foreign countries' statutory provisions and regulations and another part has been derived of Imamiyyeh Jurisprudence and the discussions related to the goal of the legal regulations and philosophical attitudes take different forms depending on the idea that whether one is speaking about the regulations forged by the norms-oriented legislator or the regulations derived of Imamiyyeh Jurisprudence. In case of speaking about the regulations borrowed from the foreign countries or about the cases that the norms-oriented legislator (legislature) engages in enactment of the statutory provisions and regulations, it will be possible to discuss the "goal of regulations" because the legislator might have certain philosophical tendencies and attitudes and subsequently enact laws in line with accomplishing those specific attitudes. Moreover, the norms-oriented legislator is consisted of a group of human individuals who, no matter how knowledgeable and informed, are surely not aware of all the expediencies of the human beings' lives in definite terms and this is why the norms-based regulations are constantly and perpetually changing. However, the discussion about the goal of laws in the Islamic system (Imamiyyeh Jurisprudence) can be proposed in another way. Imamiyyeh Jurisprudents believe that the canonical ruler pays attention to all the interests and expediencies in enacting the regulations and considers the present and the future. Therefore, the initial principles and regulations enacted by the great canonical ruler are not limited to the expediencies and interests of their fabrication time and, of course, not restricted

to any temporal or special condition of a special type. The canonical ruler is aware of all the far and near expediencies and disadvantages as well as all the necessities of the human life and his forgings apply to all the times and places. The discussions related to the goal of the Islamic laws (Imamiyyeh Jurisprudence) do not only incorporate the law enactment stage rather they are limited to the duties of the law executors and functionaries; hence, they are put forth in regard of the enforcement of the rules and regulations not the creation of them [10]. Thus, in order to accomplish the goal of law in Iran's legal system and perceive the philosophical foundations of the legal policies, the goal of norm-based and Islam-based laws should be explored each according to its own specific style.

Conclusion

According to what was mentioned, the principle of governance of will and the necessity of contracts is non-deniable in all the countries and no person, even the legislator, can deny it. However, it has been with the development of urbanization and emergence of economic superpowers that heavy duties are imposed on the contracts' parties which are regularly the very weaker parties and this issue is against fairness. In England's legal system that is somehow the mother of common law, the theory of contractual unfairness has not gained much of a general aspect and the legislators have solely taken measures in line with the enactment of such regulations only in certain cases and this issue has not been taken into account by the judges for a reason or another hence no special procedure has been created. In the Islamic system, as well, it can be inferred considering the existent resources that the justice governs all the legal verdicts and regulations and even contracts as a general principle; so, according to such general concepts as fairness and justice and no-loss axiom, the unfair conditions should not be treated indifferently while, on the other hand, the principle of the necessity and authenticity of the unfair conditions is per se correct in its own specific sense based on the principle of the freedom of contracts and governance of the parties' will though they are contradictory to the ethics and conscience. Thus, in order to break through this dead end, one should be seeking for creating justice because the main mission of the law is establishing order and, in the second place, serving justice and this justice cannot be brought about unless there are comprehensive and effective regulations created specifying the examples of unfair conditions thereby to bridge the existent gaps because this issue is like a double-side sword that if pulled out renders shaky the individuals' freedom, on the one hand, and weakens justice and fairness, on the other. So, it is necessary for the legislator to enact effective regulations according to the existing gaps for bridging them. These regulations should be free of any sort of extremism and shortcoming so that the contractual justice can be served in respect to both of the parties.

References

1. Katouziyan N, General regulations of the contracts, Tehran, Bahman Borna, 2007; p.85.
2. Amid H, Persian dictionary, v.1, Amir Kabir Publication Center, 1982; p.249.
3. Amid H, Persian Dictionary, v.2, Amir Kabir, 1908.
4. Shiravi A Al-H, The theory of contracts' unfairness and conscience-contradictoriness in the common law system, journal of the higher education complex, Qom, 2003; 4(14): 8.
5. Taghzadeh I, Ahmadi A, Position of unfair conditions in Iran's laws with a glance at the electronic business law, article, 2016; 46, P.14.
6. Shiravi A Al-H, Standard contracts in the common law system, journal of higher education complex, 2003; 4(12): 69-70.
7. Sardo'einasab M, Kazempour J, Indicators of contracts' unfairness", journal of justice department's laws, 2012; no.75.
8. Asadeh A Al-M F, Oqud Al-Ez'an Fi Al-Qanun Al-Mesri, Jame'ah Fo'ad Al-Avval, 1949; p.77.
9. Kazempour SJ, Comparative investigation of supporting the weak party in the laws of Italy and US, legal journal of justice department, fall, 2011; no.71.
10. Katouziyan N, Philosophy of laws, v.1, Tehran, Enteshar Corporate Press, 1998; 501-502.