A.

INTRODUCTION - PRE-EXISTING LEGISLATION IN FRANCE

There is no section in the French Of the Civil code that deals with unfair terms or exemption clauses. The Of the Civil code, enacted in 1804, promotes freedom of contract based on the equality of contracting parties. Through negotiation, parties would defend their interests and agree to a fair contract. Hence, the adage “qui dit contractuel, dit juste” (what is contractual is fair). Equality of contractual rights, however, does not mean equality of economic powers. In day-to-day transactions, contractual parties are rarely of similar bargaining powers. Negotiation becomes a Utopia. In reality, the freedom of contract principle benefits strong parties who impose their will on weaker ones. The strong parties draft standard form contracts to which weaker parties have no choice but comply. French contract law has a special name for this type of contract, that is ‘contrat d’adhésion.’ There is no exact English translation of this expression. 1

In the 1970s, the Cour de cassation (the highest civil court) did not limit unfair terms. 2 It controlled only two types of terms: terms excluding guarantees as to the conformity of the good sold 3 and exemption of liability clauses. 4 The Cour de cassation could have gone further and could have intervened to remove unfair terms from consumer contracts. It could, firstly, have constructed the contract so as to benefit the weaker party according to section 1156 of the Civil code. 5 This section applies, however, when the term is ambiguous. If an exemption clause is clear, the judge cannot interpret it. He must respect the clear will of the parties even if it amounts to one party gaining an unfair advantage. Secondly, the Cour de cassation could have used section 1162 of the Civil code 6 on constructing a contract in favour of the debtor (the one who is engaged or gives a consideration). The problem with this interpretation is that the professional is most of the time the debtor, the one who provides goods or services. It is, then, not in the interest of the consumer to interpret an unfair term in favour of the professional. Finally, the Cour de cassation could have, but did not, used section 1134 para. 3 of the Civil code on performing contracts in good faith. Good faith is not an autonomous legal concept that can be used on its own to gain contractual fairness. 7

Two reasons prompted Parliament to intervene at the end of the 1970s: the lack of judicial control on unfair terms and the increase of standard contract forms. The statute on unfair terms was voted the 10th of January 1978, 8 and was named after Ms Scrivener, who was then junior minister for consumers and the main instigator of the bill. The long title of that statute is loi sur la protection et l’information des consommateurs de produits et de service. In this statute, an unfair term is called a ‘clause abusive’ or excessive term which conveys the idea of an abuse of economic power. In 1988 a statute completed the 1978 Act by allowing consumer groups to bring an action against professionals in order to suppress unfair terms in standard contract forms. 9

In 1993, all statutes concerning consumer law were gathered in a Consumer code. 10 The relevant section of the Scrivener Act 1978 became section L. 132-1 to L. 134-1 of the Consumer code.

4 See Capitant/Terré/Lequette (n. 2) at 132.
5 Section 1156 of the Civil code: ‘One must in agreements seek what the common intention of the contracting parties was, rather than pay attention to the literal meaning of the terms’.
6 Section 1162 of the Civil code: ‘In case of doubt, an agreement shall be interpreted against the one who has stipulated, and in favour of the one who has contracted the obligation’.
8 L. n. 78-23, 10 January 1978, JO 11 January 1978 at 301.
B.  FUNDAMENTALS ON THE IMPLEMENTATION OF THE DIRECTIVE 93/13/EEC IN FRANCE

A statute passed on the first of February 1995 implemented the 1993 Directive on Unfair Terms. The 1995 Act replaced the Scrivener Act 1978 and the relevant sections of the Consumer code were changed. The implementation of the Directive in France was not controversial, certainly not compared with the implementation of the Directive 1999/44 on certain aspects of the sale of consumer goods and associated guarantees which was implemented in February 2005.

The 1995 Act implementing the Directive has not revolutionised the existing legal framework of consumer protection. Both the 1978 Act and the 1995 Act have the same purpose: protecting consumers against unfair terms and both have their own advantages. The two main advantages of the Directive over the 1978 Act are the recognition of an interpretation of the contract in favour of the consumer and a simplification of the definition of an unfair term. The implementing Act has three main advantages over the Directive. Firstly, French law has a broader concept of consumer than the Directive in that section L. 132-1 of the Consumer code applies to legal persons and professionals contracting out of their trade. Secondly, the definition of the subject matter is broader in the 1995 Act than in the Directive: section L. 132-1 applies to negotiated and non-negotiated terms and to contractual provisions enacted by the Administration. Thirdly, the 1995 Act excludes the concept of good faith as a criterion for assessing unfair terms.

The advantages of the implementing Act over the Directive provide better protection for the consumer. The Directive is a minimum standard of protection as stated in its consideration 12 and article 8. It is, therefore, possible for national countries to develop a higher level of protection, which is what the implementing Act has done.

C.  SCOPE OF APPLICATION

The scope of application of the 1995 Act is broader than the Directive. The notion of consumer contract and the definition of the contract subject matter in the 1995 Act are based on the 1978 Act and its interpretation by the Cour de cassation.

I.  Scope of application as regards the person affected - consumer contracts

The main difference between the Directive and its implementation in French law is in relation to the notion of a consumer. In the Directive, a consumer is defined in article 2 (b) as a ‘natural person who is acting for purposes which are outside his trade, business or profession.’ The 1995 Act differs from the Directive in two respects: it applies to legal persons and it protects professionals who act for their trade but outside of their speciality.

1.  Natural and legal persons

Article 2 (b) of the Directive is unambiguous: a consumer is a natural person or a human being. Conversely, according to article 2 (c), a seller or supplier is either a natural person or a legal person. Those two paragraphs put together show without doubt that the use of the sole expression ‘natural person’ in article 2(b) was deliberate. The Commission did not intend legal persons to be considered as consumers. The European Court of Justice has not broadened the strict definition of a consumer when the opportunity arose in 2001. The ECJ clearly stated that the term consumer ‘must be interpreted as referring solely to natural persons’.

The 1995 Act implementing the Directive has not restricted its application to natural persons or personne physique. Section L. 132-1 para. 1 of the Consumer code reads as follow: ‘In contracts concluded between a professional and a non-professional or

consumers, clauses which aim to create or result in the creation, to the detriment of the non-professional or the consumer, of a significant imbalance between the rights and obligations of the parties to the contract, are unfair’ (emphasis added). The legislator deliberately added the term ‘non-professional’ to consumer. It was a reference to the Scrivener Act 1978 and the Cour de cassation’s case law. Since 1987, the Cour de cassation interpreted section 35 of the 1978 Act as applying to any legal person or personne morale such as companies, societies and associations.\(^{15}\)

At the beginning of 2005, the Cour de cassation has interpreted the term ‘non-professional’ as being broader than the Directive and its interpretation by the European Court of Justice. In its judgment, the Cour de cassation explicitly referred to the 2001 decision of the ECJ. It did not, however, feel bound by it. The Cour de cassation distinguished between the two concepts of consumer and non-professional. It admitted that the ECJ’s definition of a consumer as a natural person was binding in national courts. It continued by stating that it was free to interpret concepts that were not within the scope of the Directive and, as such, were non-European concepts. The concept of non-professional in section L. 132-1 is a separate concept from the Directive that is particular to the French legal system and consequently, its interpretation belongs to French national courts. Accordingly, the Cour de cassation decided that ‘the distinctive notion of “non-professional”, used by the French legislator, did not exclude legal persons from the protection of unfair terms’.\(^{16}\) In order to comply with the harmonisation of European concepts, the judge did not interpret the concept of consumer but interpreted that of ‘non-professional’ as meaning a legal person which is an autonomous concept from European law.

The Cour de cassation has accepted that the protection of unfair terms provided by section L. 132-1 of the Consumer code includes legal persons as well as natural persons. This extension favours professionals who act outside of their speciality.

2. The Non-professional and the consumer

Since the Scrivener Act 1978, the protection of unfair terms includes ‘non-professionals’ as well as consumers. A consumer buys goods or services for his personal or familial use. By contrast, the concept of ‘non-professional’ is not self-evident. In 1987, the Cour de cassation interpreted the concept of non-professional as meaning a professional who does not act within his own trade or business.\(^ {17}\) This interpretation aimed to protect industrial and commercial SMEs, individual traders and associations which rarely have the option of negotiating the content of a contract. An elaborated case law developed from this position.\(^ {18}\) The criterion developed by the Cour was first of ignorance. A company or an individual trader who acted outside his trade or business was a ‘non-professional’ who deserved the same protection as a consumer because he was in the same position of ignorance. He was not a professional in the subject matter of the contract. In 1995, the Cour abandoned this criterion for a new one of direct connection (rapport direct) between the activity of the professional and the contract.\(^ {19}\) This new criteria has been criticised for its lack of clarity,\(^ {20}\) since the Cour de cassation has defined neither the concepts of activity nor of direct connection which are left to the interpretation of lower courts (i.e. local courts and courts of appeal). This has lead to divergent interpretations of the same situation as shown by two examples. Firstly, the purchase of an alarm system by a doctor had no direct connection with his profession in Rennes, whereas it had in Grenoble. Secondly the purchase of a computer programme by a dentist had no direct connection with his profession in Toulouse, whereas it had in Versailles.\(^ {21}\)

The new criteria of direct connection between the professional’s activity and the contract should be interpreted as to exclude all contracts which were entered into to develop or to extend the professional’s business. The judge should not take into account the competence or abilities of the professional, but the aim of the contract (finalité professionnelle de l'opération). Was the aim of the contract to develop his

\(^{15}\) Cass. 1\textsuperscript{er} civ., 28 April 1987: Bull. I n. 134 at 103.

\(^{16}\) Cass. 1\textsuperscript{er} civ., 15 March 2005: to be published; Dalloz 2005 AJ at 887 obs. Rondey. (author’s translation)

\(^{17}\) Cass. 1\textsuperscript{er} civ., 28 April 1987: Bull. I n. 134 at 103.

\(^{18}\) Jamin/Mazeaud (eds), Les clauses abusives entre les professionnels (Paris: Economica, 1998).


\(^{21}\) Puisant (n. 20).
activity? If the answer is yes; then the contract has a direct connection with his activity and the professional should be excluded from the scope of protection of consumer law.

The 1995 Act departs from the rule in the Directive which is aimed at protecting consumers. That is the reason why the concept of non-professional should be defined as strictly as possible to limit the scope of consumer law to consumers. Professionals contracting in areas they are not familiar with should base their claims on contract law rather than consumer law.\(^2\)

II. Scope of application as regards the subject matter

There are several differences between the Directive and the 1995 Act on the scope of application of the Act as regards the subject matter. The main differences are on negotiated and non-negotiated terms and the control of contractual terms that have a regulatory origin.

1. Negotiated and non-negotiated terms

Section L. 132-1 para. 4 reads: ‘These provisions apply whatever the contract form or medium. This is the case, in particular, for purchase orders, invoices, performance bonds, delivery notes or slips, travel vouchers or tickets, containing stipulations which may, or may not, have been freely negotiated, or references to general terms fixed in advance.’ (emphases added)

The 1995 Act, like the Scrivener Act 1978, does not differentiate between terms that are freely negotiated and those which are not. All terms are covered by the Act in order to protect weaker parties from so-called negotiations. In the case of consumers, the inclusion of non-negotiated terms does not make much difference since consumer contracts are rarely negotiated. This extension benefits professionals when the contract has no direct connection with their business. In most contracts concluded by professionals and ‘non-professionals’, there are negotiated terms in the sense that they were freely accepted by the non-professional. Those terms are rarely, however, negotiated in the sense where both parties had equal bargaining powers. It would have been too difficult to distinguish between terms that were freely negotiated and those which were not. The integration of non-negotiated terms completes the protection given to non-professionals.


The 1995 Act did not implement article 1 (2) of the Directive excluding mandatory statutory or regulatory provisions and international conventions from its scope. This solution is similar to the Scrivener Act 1978.

a. Statutory provisions

Section L. 132-1 of the Consumer code does not include the exception of article 1 (2). A court could assess the validity of a contractual term that complies with a mandatory statutory provision. Until now, no case law has assessed the fairness of a term that complied with a statute. On the contrary, recent case law shows that both the Cour de cassation and the Conseil d’État (highest administrative court) are reluctant to assess the fairness of a term that complies with a statute.

In 2004, the Conseil d’État gave a preliminary ruling at the request of a civil court. The question was on the validity of section L. 8 of the Code of Postal Services. The Conseil d’État denied its competence because it could not assess the validity of a statute (Code of Postal Services) in regard with another statute (section L. 132-1 of the Consumer code).\(^2\)

The Cour de cassation took a similar view when it had to assess the fairness of a term in a contract of managing agent.\(^2\) The term could have been deemed unfair. However, before the Cour de cassation reached its final decision, a statute allowed the term that was in the contract. The Cour decided that a term that complied with a statute could not be unfair.\(^2\) This case is interesting, not the least because the Cour de cassation did not take the opportunity to assess the fairness of the statute itself. It is possible to deduce from this refusal that the Cour is reluctant to assess the fairness of terms that comply with statutory provisions (mandatory or not).


\(^3\) CE, 24 March 2004: published on http://www.legifrance.gouv.fr (n. 255317)


\(^5\) ‘La clause stipulée en conformité de ce texte ne peut revêtir un caractère abusif.’
The reluctance of both courts can be explained by the principle of the separation of powers. Since a 1790 Act, it is enshrined in French legal culture that courts cannot judge statutes. There are three powers: the legislative, the executive and the judiciary. Each power has an independent scope of activity. Administrative courts judge the Administration, not parliamentary acts. Civil courts judge the acts of private individuals, not statute voted by Parliament. Therefore, the exception of article 1(2), even if not written in the Consumer code, exists in French law.

h. Regulatory provisions

Administrative decisions must comply with the following written norms: the 1958 Constitution, statutes and regulations. Those norms are arranged in hierarchical order and regulatory provisions are at the bottom. If a regulatory provision does not comply with a norm that is at a higher place in the hierarchy, it can be avoided by judicial review.

The 1995 Act belongs to the hierarchy of norms and the Administration must comply with it. This statute, however, applies only to contractual relationships between professionals and non-professionnals or consumers. It follows from that, that when the Administration takes a decision that is not contractual by nature, the 1995 Act does not apply. For example, the Administrative Court of appeal of Marseilles decided that a decision taken by a mayor to allow a fun fair was a policy decision that was regulatory and not contractual. Therefore, the decision did not have to comply with section L. 132-1 of the Consumer code.

By contrast, the administration must comply with the 1995 Act in its contractual relations with consumers. In 1994, in a case of water distribution by a public company, the Conseil d’Etat checked that a contractual term which had a regulatory origin was not unfair. It did not, however, refer to section L. 132-1 of the Consumer code. In 2001, a similar case arose. The Conseil d’Etat assessed the fairness of the term in regard to section L. 132-1 of the Consumer code in both its 1978 and 1995 drafting. The Conseil d’Etat applied the test of excessive advantage according to the 1978 test and of significant imbalance according to the 1995 test. It went further and added one criteria to the test of fairness: that a term should be assessed in regards to the particularities and necessities of the public service. This addition of a criteria for public services complies with consideration 16 of the Directive which states that the condition of article 3(1) can be supplemented in particular in sale or supply activities of a public nature providing collective services which take account of solidarity among users. Consideration 16 allows the judge to make an overall evaluation of the different interests involved. Therefore, the decision of the Conseil d’Etat complies with the Directive. The unfairness of a term in a contract concluded by a state authority is assessed according to the particular needs of the public service.

Unfair terms are allowed neither in contracts concluded by the Administration nor in regulatory provisions enacted by the Administration. A difficulty arises when the Administration, as a regulatory body, enacts contractual models (contrat type) that are used in the private sector by professionals in their standard contract forms. Almost all contractual models concern transport of goods, animals or persons by road or employment contracts for unqualified young people, one concerned the aid to elderly persons. The integration of a regulatory term in a contract does not transform it into a private contractual clause. Even if both parties are private individuals, a regulatory provision must be assessed by an administrative court because of the principle of the separation of powers. Since the 1790 Act, the validity of a regulatory decision must be assessed by an administrative court. Then, if the term has its origin in a regulation, a civil court must defer its judgment to an administrative court. A civil court cannot assess the

26 L. 16 August 1790, Recueil Duvergier at 361.
fairness of a term that either duplicates an administrative model or concerns a state company. 37

There are disadvantages of such a solution. Firstly, procedural length; civil courts defer the case to an administrative court and wait for its decision. Then, it is bound by the ruling of the administrative court and can give a judgment. Secondly, there is a high risk of disparity between decisions taken by the civil judge and the administrative judge. The fairness of a term in the same kind of service (such as education, or a hospital) depends on the assessment of the civil judge when it is provided by a private company, but depends on the administrative judge when it is provided by the state. This might create differences about what is a fair term and what is not, as unfair terms in public services are appreciated differently. Thirdly, a civil judge can apply European law. 38 Therefore, he could directly apply the Directive without deferring its interpretation to the administrative judge. 39


Section L. 132-1 para 7 reads as follows: ‘Evaluation of the unfair nature of terms in the sense of the first paragraph does not involve either the definition of the main purpose of the contract nor the adequacy of the price of, or remuneration for, the goods being sold or the service being offered provided that the terms are written in a clear and comprehensible manner.’

The adequacy of price is not assessed in French law except in the rare case of lésion. The Directive and the 1995 Act apply the same principle. A judge should not assess the economic efficiency of a contract. This solution is appropriate because the determination of the price depends on market competition rather than negotiation between parties. Furthermore, a consumer freely chooses to buy goods and services at a given price, what he should be protected against are unfair terms governing the rest of the transaction.


The 1993 Directive excludes contracts relating to employment, to succession rights, to rights under family law, and to the incorporation and organization of companies or partnership agreements (consideration 10).

These contracts are not specifically excluded from the scope of section L. 132-1 of the Consumer code. That section applies to all contracts concluded between professionals and non-professionals or consumers and which are usually considered as consumer contracts, i.e. a contract for the acquisition of goods or for the provision of services. Thus, the definition of consumer contract in French law excludes employment contracts covered by labour law, succession rights, family law and company law.

The fairness of the contracts mentioned in consideration 10 can be assessed by other contractual legal concepts. The fairness of contracts relating to family law and succession rights are assessed by section 6 of the Civil code. Those contracts have to comply with public order and moral or ‘bonnes moeurs’ which might be largely interpreted by the Court as to include unfair contractual terms. Section 1134 of the Civil code provides that contracts should be executed in good faith. Thus, the Cour de cassation avoided an unfair term in an employment contract because it had not been stated in good faith. 42 In a contract of services between professionals, the Cour de cassation used the concept of cause or consideration (s. 1131 of the Civil code) to

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avoid an unfair term between professionals. In that case, a contract had been concluded between Chronopost and a professional for the express delivery of a parcel. The delivery was delayed and the professional sued Chronopost. A term in the contract limited the claim to the price paid for the delivery. The Cour de cassation decided that the term limiting Chronopost’s liability destroyed the heart of the bargain and consequently, there was no cause or consideration for the contract. The logical outcome of this decision should have been to avoid the contract. The Cour de cassation, however, avoided only the term. The use of a contract law concept is a means for the judge to limit unfair terms in professional contracts.

D. Integration or Incorporation of Standard Contract Terms into the Contract

Section L. 132-1 para. 4 of the Consumer code provides that all terms whatever their form or medium can be deemed unfair. That section gives the examples of purchase order, order form, invoice, performance bond, receipt, guarantee slip, delivery note or slip, travel voucher or ticket. Any document containing contractual terms forms part of a contract.

It is, however, necessary for the term to have been accepted by the consumer. The consumer must be able to read and understand the terms to accept them. The Cour de cassation’s case law shows that terms unknown by the consumer were not accepted.

E. Interpretation of the General Standard of Fairness

Section L. 132-1 of the Consumer code defines unfair terms and sets the standard for review.

I. Section L. 132-1 du Code de la Consommation

According to the Scrivener Act 1978, a term was unfair if it fulfilled two conditions. The term was imposed by an abuse of economic power that gave an excessive advantage to the strong party, hence ‘clause abusive’ or abusive term. The Cour de cassation interpreted those two conditions as one, if there was an excessive advantage, it had to have been forced upon the consumer by an abuse of economic power.

Article 3 of the Directive has two conditions. A term is unfair if, contrary to the requirement of good faith, it causes a significant imbalance in the parties’ rights and obligations. The 1995 Act has implemented only one of the two conditions: a term is unfair if it creates a significant imbalance in the parties’ rights and obligations. The differences with the 1978 Act are; on the one hand, that the condition of abuse of economic power has disappeared because it would have added a condition not required by the Directive, and on the other hand, the excessive advantage has become a significant imbalance. The two notions are similar, the advantage being positive for the professional and the imbalance being negative for the consumer. They are two sides of the same coin, even if the current interpretation is better for the consumer because an imbalance does not imply an advantage to the professional. The condition of good faith has not been implemented in section L. 132-1 para 1 of the Consumer code. The requirement of good faith adds an unnecessary condition to the definition of an unfair term. It is an ambiguous and redundant concept. If there is a significant imbalance, the professional cannot be of good faith because the contractual balance is breached in his favour which is in itself contrary to good faith. Similarly, it is contrary to good faith for the professional to claim the application of a term that gives him a significant advantage over the consumer. The implementation is wider than the Directive itself because it is enough to prove that the term creates a significant imbalance without reference to bad faith which is assumed by the legislator. Therefore, the French position is more protective than the Directive.

II. Standard for review

Section L. 132-1 para 5 of the Consumer code states that all relevant circumstances must be taken into account to assess the fairness of a term. The appreciation of fairness in particular cases is a question that is left to national courts. The European

44 See Ghestin/Marchessaux-Van Melle (n. 11) para. 9.
Court of Justice does not assess the fairness of a term in particular circumstances, but defines a common framework of possible unfair terms in the abstract.\(^{48}\) The general criteria of unfairness is contrary to general principles of contract law or sale law. For example, the seller cannot limit his delivery obligation, the bailee cannot limit his restitution obligation, the professional cannot limit the consumer’s right to claim for breach of contract. The fact that the term is often written in contract does not make it more acceptable or less unfair.\(^{49}\) There are two different standards of fairness depending on the claimant. Firstly, the interpretation of the term is in concreto when the claim is made by an individual. The judge has to assess the fairness of the advantages and disadvantages of a term according to the consumer’s particular circumstances. The Cour de cassation steps out of its role as an abstract judge and controls the interpretation of what is fair or unfair in particular circumstances, which helps to unify the definition of unfairness.\(^{50}\) Secondly, when a consumer group brings a claim, the interpretation of the fairness of the term is in abstracto (section L. 421-1 and following).\(^{51}\) The judge cannot assess the fairness of the contract in the particular circumstances of the case because there are none. The judge has to assess in the abstract if the term is fair or if it creates a significant imbalance in the parties’ rights and obligations in the case of the average consumer in normal circumstances. If the term is unfair, it is deleted from all contracts of the same type (section L. 421-2). The term has to be in the standard contracts at the time the action is brought against the professional.\(^{52}\) A consumer group can claim damages for the damage caused to its collective interest. The tortious action is based on section 1382 of the Civil code.\(^{53}\)

### III. Rule on transparency

Section L. 133-2 of the Consumer code implements article 5 of the Directive which states that the contract must be written in plain and intelligible language. That section is not within the section on unfair terms but in a distinct part on contract interpretation. Therefore, this section states a rule of construction of the contract and not of a separate criterion of intelligibility of the term to be considered when assessing its fairness. The Cour de cassation, however, decided that an ambiguous term was unfair.\(^{54}\) Article 5 of the Directive states that courts have to choose the interpretation of an ambiguous terms that is the most favourable to the consumer. There was no such rule of interpretation in the Consumer code. The judge could only refer to existing interpretation rules of the Civil code. For example, according to section 1162 of the Civil code\(^{55}\) an ambiguous term should be constructed in favour of the debtor. The problem with this section is that the professional is the debtor, the one who provides goods or services. It is, then, not in the interest of the consumer to interpret an unfair term in favour of the professional. That is the reason why normal rules of construction did not protect consumers.

The implementation of this rule in section L. 133-2 para 2 is an improvement in French law.\(^{56}\) The Cour de cassation used it for the first time in 2003.\(^{57}\)

### F. The effects of the list of unfair terms

The lists of unfair terms

There are three types of lists of unfair terms: lists enacted by the government, the list in annexe of the directive, and lists written by the Comission des clauses abusives.

\(^{48}\) ECJ 1st April 2004 C-237/02 [2004] OJCE C106/19


\(^{50}\) Cass. 1ère civ., 26 May 1993: Bull. I n. 192 at 132.

\(^{51}\) Calais-Auloy/Steinmetz, see (n. 7) at 210.


\(^{53}\) Cass. 1ère civ., 1st February 2005 (three cases): to be published Bull. (n. 03-13779, 03-16905, 03-16935).


\(^{55}\) Section 1162 of the Civil code: ‘In case of doubt, an agreement shall be interpreted against the one who has stipulated, and in favour of the one who has contracted the obligation’.

\(^{56}\) Ghestin/Marchessaux-Van Melle, see (n. 11) at para. 10.

Firstly, the government was given the power to list unfair terms in 1978. According to section 35 of this Act, the government had to draft a black list of unfair terms which the judge would have to avoid. A statutory instrument came into force in March 1978 and listed three unfair terms. Unfortunately, one of the three terms was avoided by the Conseil d'État because the government had exceeded its delegated powers. The two remaining terms are firstly section R 132-1 of the Consumer code on limiting the amount of damages when the professional does not fulfil his obligations, and secondly section R 132-2 of the Consumer code on forbidding the professional to modify the contract unilaterally. The decision of the Conseil d'État created a vacuum because the government never enacted another list of unfair terms and judges did not have the power to avoid them. In 1988, a statute entitled consumer associations to bring an action to assess the fairness of standard form contracts. It implicitly gave judges the power to assess the fairness of terms. In 1991, the Cour de cassation explicitly empowered judges to assess the validity of unfair terms.

The 1995 Act implementing the Directive has opted for a list of terms and an interpretation by the judge (hence acknowledging the 1991 decision of the Cour de cassation). Section L. 132-2 para 2 gives the power to the government to write a list of unfair terms. The government has not yet made such a list. It seems unlikely that it will do so since the Act was enacted ten years ago and past experience has shown that it has not worked since 1978.

Secondly, section L. 132-1 para 3 refers to the annexe of the Directive which is copied in the Consumer code. This list is informative and not compulsory. Even when a term is in the annexe, the claimant has to prove that it created a significant imbalance in the parties’ rights and obligations in the particular circumstances of the case. The annexe is a guide for professionals and judges when assessing the fairness of a term.

Thirdly, an administrative body called the Commission des clauses abusives or Unfair Terms Commission has the power to list unfair terms. This Commission was created in 1978 and has thirteen members who are representatives of suppliers, consumers, lawyers. It advises the Government (and since 1993 judges) about the opportunity to forbid, limit or regulate exemption clauses. Since 1978, it has drafted a list of more than fifty unfair terms in different contracts. Those lists are, however, purely informative. The Commission’s opinion does not bind judges.

The black list of unfair terms consists of two terms since its creation in 1978. Other lists are purely informative. That is the reason why it can be said that lists of unfair terms are not part of French consumer law.

The effects of the decision of unfairness

The 1995 Act is mandatory or ordre publique (art. L. 132-1 para 9). It means that judges can assess the fairness of a term even if the claimant has not asked them to. This approach complies with the European Court of Justice’s decisions of June 2000 and November 2002 where it was decided that judges could, even if not asked, assess the fairness of a term.

When the judge decides that a term is unfair, it is avoided (art. L. 132-1 para 6). The judge does not have the power to amend the contract, for example, he cannot limit or extend a period to make the term fairer. According to article 6(1) of the Directive the contract is valid if it can stand without the unfair term (art. L. 132-1 para 8).

G. CONCLUDING REMARKS

The 1993 Directive was not a bombshell in French consumer law. It made three positive contributions: interpretation of a term in favour of a consumer, simplification of the definition of an unfair term to one criteria of significant

62 Calais-Auloy/Steinmetz see (n. 7) at 208.
imbalance, and official recognition of the judges’ power to assess the fairness of contractual terms.

The Directive sets a minimum standard from which French law has departed in three ways. Firstly, the Consumer code has a wider definition of a consumer to include legal persons and professionals when the contract has no direct connection with their business. Secondly, the definition of the subject matter is broader to include negotiated clauses, which benefits professionals. Finally, administrative courts have decided to control the fairness of regulatory terms enacted by the Administration.