

EUROPEAN CONTRACT LAW PART I – SLIDE I

Europe and the Law of Consumer Contracts

**LIUC - Prof. Diana Cerini
European Contract Law**

Topics treated in this part I:

- A short introduction to EU Law
- Projects for unification/Harmonisation of European Contract Law
- The perspective of consumer fundamental rights and its influence on EC Law
- Consumer contracts fairness: unfair contract terms and other applicable rules
- Social justice and its influence on European contract law
- Analysis of consumer credit contracts and other financial contracts

The position of consumer law in the general perspective of European contract law

The general landscape and general remarks: in the discussions on European contract law, the important position of European consumer law is broadly acknowledged:

- In fact, even though there are exceptions, undoubtedly the core of European (Union) contract law primarily consists of directives in the area of consumer law!
- In many legal systems, these directives have extensively influenced the very heart of contract law, especially in the area of unfair contract terms and consumer sales.
- Result → areas of 'Europeanised' contract law have emerged within national contract

Let's stop just a moment: do we all know what is European Law?

Questions:

- 1) What are the sources of European Law ?
- 2) What are the relevant legal formants in European Law?
- 3) What is the impact on national law?

The importance of the role of the Supranational Courts

- The ECHR (European Court of Human Rights)
 - Protection of fundamental rights and influence on private law
- The ECJ (The European Court of Justice) → application of EC law and influence on private law

Ways to unify...

- Draft of the Common Frame of reference
- Codification?
- Optional Instruments ? (Hey, what are optional laws or optional instruments?)
- Case law ?
- *Other ways.....discussion*

Why a European protection in contract law

The idea of legal consumer protection appeared in the European Union for the first time in the seventies as an element of the Community economic strategy.

Since that time consumer protection developed steadily from an economic-political market instrument into the autonomous Community policy that has its own source in the EC Treaty and is perceived currently as a catalyst of legal reforms in the European Union.

An importance of a present position of consumer policy in the European Union is best expressed and justified by the level of consumer transactions in generation of the GDP, amounting to 53 %.

«Steps».....

Step 1: The protection of consumer interests was not initially considered as a sphere of the Community institutions activities and was compelled by the progressive harmonization of the European economic law that became the law of the internal market

Step 2: The need of consumer protection was for the first time mentioned as an element of the European policy, extending it beyond the pure economic sphere into the social dimension → Paris 1972: consumer protection could serve as a mean that could serve for the realization of the Community tasks as envisaged in the Rome Treaty. The final effect of the meeting of the heads of state and government of the unifying Europe was the requirement addressed to the European Commission for the submission of a programme of the consumer policy strategy and the creation in 1973 of Consumers' Consultative Committee.

Step 3: the floods of EU directives on consumers and consumer contract law

-> from minimum harmonization to maximum harmonization ?

The relation “B to C”: consumer protection in European law

Some preliminary questions:

Ok, you have to protect and pay attention to consumers. BUT: *Who is the “consumer”?*

- 1) Consumers v. professionals
- 2) Why should the consumer be protected?
- 3) How can the consumer be protected?

Some “applications” of consumer protection laws

The idea of “fundamental rights” of consumers and the impact on contract law:

- 1) the rules concerning a fair information and transparency
- 2) the right of withdrawal
- 3) the rules concerning unfair contract terms
- 4) the unfair practices
- 5) the protection given by the Control Authorities
- 6) the over-indebtedness of consumers and families

....continues....

7) the safety of consumers

8) the right to correct advertising

9) The principle of non discrimination in contract law and

Etc.....

An application: principle of non discrimination- the Test Achats Case and the decision of the ECJ Court

Council Directive 2004/113/EC (“the Gender Directive”) brought into force within the EU in 2004 a new prescription, in Article 5(1), against the use of gender differentiated insurance underwriting practices.

“...in all new contracts concluded after 21 December 2007 at the latest, the use of sex as a factor in the calculation of premiums and benefits for the purposes of insurance...shall not result in differences in individuals’ premiums and benefits”

The insurance industry lobbied hard, and persuaded the European Parliament to adopt a qualification to that prescription, in Article 5(2), based on the use of relevant and accurate actuarial and statistical data.

In other words, under the Gender Directive, it remained permissible to use gender differentiated pricing techniques, where this was based on relevant and accurate actuarial and statistical data.

What does the decision says?

Another application.
**THE UNFAIR CONTRACT TERMS DIRECTIVE
(93-13-CEE) AND THE IMPACT ON FINANCIAL
CONTRACTS**

Questions:

- When a contract term is unfair
- Who is protected by the directive
- Why the directive is important for financial and insurance contracts in a European perspective

A CONTRACT TERM IS UNFAIR WHEN:

1. It has not been individually negotiated;
2. It is contrary to the requirement of good faith;
3. It causes significant imbalance in the parties contractual rights and obligations to the detriment of the consumer.

THE CONSUMER

The consumer is a natural person who is acting for purposes which are outside his business

Example:

Miss Love buys an insurance contract against fire for her house in the countryside

THE «PROFESSIONAL»

- *WHO IS THE PROFESSIONAL?*
- *The seller or supplier of goods and services and more in general the natural person who is acting for purposes relating to his trade, business or profession, whether publicly owned or privately owned.*

UNFAIR CONTRACT TERMS IN INSURANCE CONTRACT: some examples

- The insurer is granted special rights to rescind the contract;
- The insurer is entitled to rescind the contract unilaterally without stating why;
- The insurer is entitled to terminate the contract at very short notice, while the insured party is required to give much longer notice;
- A penalty clause entitles the insurer to retain part of the premium on termination of the contract;
- The insurer is allowed excessively long deadlines to pay out compensation;
- The use of arbitration is the only mean of protection accorded

OTHER EXAMPLES:

- ✓ *INSURANCE CONTRACTS: The insurer is granted special rights to rescind the contract after an insured event occurs; or the travel agency cancels the trip → unilateral rescission;*
- ✓ *TRAVEL AGENCY CONTRACT: The travel agency provides for a penalty clause which entitles the professional to retain a large part of the sum on termination of the contract while in case of cancelling of the trip nothing is due to the consumer;*
- ✓ *IN GENERAL: The standard form provides that in case a controversy arises the competent court will be that of Rome while the contract is entered into in Milan and the consumers lives in fact there.*

How can I fight against an unfair term?

- ✓ *I can fight alone → individual action*
- ✓ *I can “fight” with a consumer association or any other organisation having a legitimate interest to act → collective action.*
 - → remember European action on collective actions and mediation!

Annexes and materials to get on web

Specific materials will be suggested at lesson.

Also make reference to

- Directive EC/93/13
- Consolidation directive on consumer rights
- Decision Test Achat