

**Combating Arbitrary Conditions:
Ensuring that the Consumer's Will is Protected against Contractual
Imbalances**

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Abstract:

Due to his consumerism in a world characterized by technological development and the increase in commercial offers, the consumer is faced with numerous challenges, among which his exposure to the risks of arbitrary conditions imposed by economic or professional assistance in contracts of consumption, which leads to an apparent imbalance in contractual relations between parties of unequal positions, which requires the intervention of the legislator through the establishment of legal and regulatory guarantees to provide a fair consumer environment free from abusive contractual practices.

Keywords: consumer; arbitrariness; contract; balance; compliance.

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INTRODUCTION

The policy of economic openness that Algeria adopted as the basis of the Algerian economy has led to the emergence of certain vague and suspicious practices that negatively affect the will of the consumer, such as the emergence of contracts with unified and standard conditions, written in advance and prepared by a specialized team, in which there is no possibility of negotiating the conditions contained therein, causing a contractual imbalance.

Given that the imbalance in contractual relationships (Carminati, 2013, p. 19) and the great risks that the consumer process involves at all its stages, it has become necessary to establish legal rules and establish mechanisms, including administrative and judicial, to restore the contractual balance and protect the consumer from being a victim of their consumerism (Al-Adjemi, 2011, p. 55), that is to say the need to extend the scope of the protection imposed in the field of contracts of adhesion to consumer contracts, especially since it has often been proven that failure to comply with one or more conditions of adherence to the characteristics of certain consumer contracts leads to the consumer being deprived of this protection. With the aim of providing greater protection to the consumer from any arbitrary condition in the contract, and to put an end to the exploitation and exclusivity of the contractor who has cognitive and economic power and influence, the protection of the “weak party” consumer was actually embodied through the intervention of the legislator under legal texts that work to achieve a kind of contractual balance, where it emerged The first attempts to address this imbalance between the rights and obligations of contracting parties in Algerian civil law.

However, faced with the inability of general rules to ensure complete and global protection of the consumer against economically unequal contractual relationships, the Algerian legislator had to intervene to establish guarantees and demarcation lines to regulate and control contractual relationships existing between professionals and consumers who do not have the technical expertise necessary to negotiate, including concluding contracts, safely and freely. This was effectively achieved by

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establishing a homogeneous legal system within the framework of commercial practices in order to protect the consumer from these arbitrary conditions, which he termed as arbitrary contractual practices. He also addressed these conditions in accordance with Executive Decree No. 06-306 (Executive decree no. 06-306 defining the basic elements of contracts concluded between economic agents and consumers and clauses considered arbitrary of September 10, 2006, Algerian Official Journal No. 56 of September 11, 2006, modified by executive decr), amended and supplemented, which defines the basic elements of contracts concluded between economic agents and consumers and the clauses considered arbitrary, in addition to creating control mechanisms aimed at to ensure the protection of the weaker party, the consumer, against arbitrary clauses and to restore the balance of the contract concluded between him and the economically superior professional.

The importance of the subject is evident in the protection of the consumer against the arbitrary conditions of consumer contracts, a consequence of the enormous increase in demand for goods and services to which economic opening has led and the resulting imbalance between the rights and duties of the parties to these contracts. Based on the above, we ask: **what are the protective aspects approved by the legislator to protect the will of the consumer and the effectiveness of the mechanisms developed to guarantee the provision of a fair consumer environment free from conditions arbitrary?**

To respond to this problem, we relied on the descriptive approach in the study of arbitrary condition provisions, and on the analytical approach to analyze the different legal and regulatory texts linked to our theme. In order to understand all aspects of the subject, we have divided this study into two sections. In the first section we dealt with arbitrary condition provisions as a cause of contractual imbalance, and the second section were devoted to guarantees aimed at protecting the consumer's will from various forms of arbitrary contractual practices.

2. The provisions of the arbitrary condition as a cause of contractual imbalance

The regulation of arbitrary conditions, as recognized by Western jurisprudence, is considered a modern regulation that emerged after the emergence of the term itself (Petit, 2012, p. 222), and given the importance of combating these conditions to eliminate contractual imbalance and restore equality between the two parties of the contract, the question requires us to control the concept of these conditions by exposing ourselves to various legislative and jurisprudential definitions, as well as the elements that must be present in an element to be considered as arbitrary.

2.1 The necessity of controlling the concept of arbitrary condition and defining its elements

Through this sub-section, we touch on defining the term arbitrary condition in the first part and its elements in the second part.

A / Define arbitrary condition term

In the text of Article three, in its fifth paragraph, of the law relating to rules applied to commercial practices, the Algerian legislator defined the arbitrary condition as being any clause or condition, alone or in combination with one or more other clauses or conditions, which would clearly disrupt the balance between the rights and duties of the parties to the contract, that is to say, creating a sort of inequality and apparent disparity between the rights and obligations of the two parties to the contract. The European Directive of 1993 defined it in the text of Article three as being the condition which, despite the requirement of good faith, leads to the creation of an apparent imbalance to the disadvantage of consumers between the rights of the parties and their obligations resulting from the contract (Al-Rifai, 1994, p. 401).

Jurisprudence has paid attention to the definition of the arbitrary condition, especially in light of the shortcomings of the legislative definitions of this condition, especially the Arabic ones, and has provided numerous definitions regarding it, including considering the arbitrary condition as a condition incompatible with honour, integrity and good faith which must prevail in relationships, and which are also incompatible with the spirit of justice and truth.

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French (“The clause that is read by the most recent part, creates a significant effect on the part of the most accessible part.”) jurisprudence has defined it as the condition set in advance by the stronger party, which gives it unfair advantages over the other. It has also been defined by some jurists as the (Baqi, 2008) condition in which one part of the contract is subject to arbitrary imposition on the other, subjecting it without any real possibility of modifying it due to the inequality in which it exists, and which results in an apparent imbalance in the contractual balance between the rights and obligations of the parties at all its stages.

B / Arbitrary condition elements

Based on the definitions discussed above, it becomes clear that for the description of arbitrariness to be proven in the clause or condition, the following elements must be present (Boudali, 2010, p. 80):

a - There must be a contract for the sale of a good or the provision of a service:

Extrapolating the text of Article 3/4 of the Commercial Practices Law (Law No. 04-02, dated June 23, 2004 specifying the rules applicable to commercial practices, Official Gazette - Algeria, No. 21 of 2004, amended and supplemented by Law No. 10-06 dated August 15, 2010, Official Gazette - Algeria, No. 46, issued On August 1), it becomes clear that the legislator has adopted a new conception of the contract other than that contained in the general rules (Article 54 of Law No. 05-10 of 06-20-2005 amending and supplementing Order No. 75-58 of 02-26-1975 containing the Civil Code, Official Gazette No. 44 of 07-26-2005.), so that the contract subject to protection is limited to the contract whose object is the sale of goods or the provision of services exclusively and without distinction between goods intended for immediate consumption, such as food products and pharmaceutical products, and goods which are consumed over a longer period, such as cars, household appliances, etc...

b - The contract must be written:

The obligation to pre-form the contract between the economic aid and the consumer under article three in its fourth paragraph of the Commercial Practices Law is an explicit recognition that the application of

protection against arbitrary conditions in written contracts rather than in oral contracts which are difficult to associate with preconditions described as arbitrary and difficult to qualify as contracts of adhesion, especially since most case law considers that standard contracts constitute the predominant form of adhesion contracts.

Perhaps the limitation by the legislator of the scope of the protection with regard to arbitrary conditions on previously drawn up contracts initially indicates his desire to restrict the scope of the protection. However, with reference to Law 04-02, we note that it has expanded to a certain extent the forms in which the contract can be concluded (See article 3/4 of the aforementioned law no. 04-02 which stipulates that: "The contract may be concluded in the form of an invoice, deposit, schedule, delivery receipt, or any other document, whatever the nature of the form or content, which includes det).

c -Adhesion of the consumer

The drafting of the prior contract by the economic agent is not necessarily intended to disrupt the contractual balance, because the printed contract alone does not constitute a contract of adhesion, but rather the consumer must submit to the will (Baghdadi, 2015, p. 56) of the seller. What the legislator takes into account is the inability of the consumer to make a real modification to the contract despite his discussion of the terms of the contract. What is meant by real change is the fundamental modification of the contract, the extent of which is estimated by the discretionary authority of the judge.

2.2 Criteria for determining arbitrary conditions and the scope of their application

In article 3, paragraph 5 of Law 04-02, the Algerian legislator adopted a general and global standard for determining arbitrary conditions, which is a material standard represented by the apparent imbalance between the rights and duties of the parties to the contract and it is the same standard that the French legislator adopted in article 1-132 of the French law on consumption of the year 1995 and in article 3-1 of the European directive of 1993. The importance of defining the scope of application of the provisions

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relating to the fight against arbitrary conditions also appears through the divergence which exists between the different modern comparative legislations in determining the group of people concerned by the application of these conditions, and in the limitation of the objective field of their application, which we will discuss in the following:

A / Criteria for determining arbitrary conditions:

Determining arbitrary conditions depends on a set of criteria, which we will discuss below:

a - The criterion of abuse of economic power:

What is meant by this standard is the arbitrariness that makes its owner economically and technically superior, exercising their influence in the face of a weak consumer who lacks technical and legal expertise, what becomes clear of the strong party's exploitation of the weak party, driven by the need to accept the conditions contained in the contract without having the right to discuss them (Baqi, 2008, p. 404).

This standard has been criticized by a group of jurists for its ambiguity and inaccuracy, and for the fact that the professional uses his economic power to obtain an excessive advantage, while practical reality has proven that technical superiority is what allows him to be aware of the extent of the rights and obligations from which he can benefit at the expense of others (Jamai, 1996, pp. 280-281).

b - The criterion of excessive advantage

The French legislator has defined arbitrariness as the result obtained by the professional, so that the condition is only considered arbitrary if the latter is granted an excessive advantage, that is to say that the excessive advantage results from the arbitrariness of the professional in the use of his economic superiority (Boudali, 2010, p. 94).

Regarding how to assess excessive advantage, some lawyers believe that it is necessary to examine all contractual conditions to estimate contractual balance, and this is the most likely opinion, because if the condition is considered individually it can be considered arbitrary, but its arbitrary character disappears through all surrounding conditions. It is included in the contract, as is the case with the condition specifying the

liability of the professional, which corresponds to another condition which deals, for example, with a reduction in the price of the product for the benefit of the consumer (Ghestin, 1980, p. 686).

c - The criterion of apparent breach of contractual balance

The Algerian legislator followed the approach of the French legislator by adopting the criterion of apparent breach of the contractual balance (Article 3/5 of Law No. 04-02 states: “Every clause or condition, alone or in combination with one or several other clauses or conditions, would cause an apparent imbalance between the rights and duties of the parties to the contract.”), according to which it is sufficient - according to him to consider the arbitrary condition - that the economic aid includes conditions in the contract which would shift its balance to the expense of the consumer in terms of all rights and duties, whatever the sources of this failure, whether it is the professional exploitation of its economic power or its technical expertise in the subject of the contract.

Although jurists unanimously agree on the positivity and effectiveness of this norm in the field of proof of abuse in favor of the consumer, as well as on the exhaustion of all types of advantages offered by the arbitrary condition, whatever its nature, insofar as it leads to an imbalance in the contract, it has also not been exempt from criticism which see it as a simple repetition of the norm of excessive advantage, because the primary objective of preventing arbitrary conditions is to combat the imbalance resulting from the conditions included in the contract and not to ensure equality between the money or service provided and the price paid (Ketto, 2010, p. 122).

B / Scope of application of arbitrary conditions

The importance of determining the scope of application of the provisions relating to the fight against arbitrary conditions is clear from the divergences existing between the different modern comparative legislations in determining the group of persons concerned by the application of these conditions and the limitation of the objective field of their application.

a - The scope of application of arbitrary conditions in terms of persons

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Modern legislation has varied in defining the category of persons entitled to protection from arbitrary conditions. Some of them have limited the scope of application to the category of consumers only, and others have broadened this protection to include all parties to the contract who are the stakeholders subject to abuse, whether they are consumers or not (Abdel Moneim Musa, 2007, p. 120). As for the Algerian legislator, in the law on commercial practices, he initially followed the example of the German legislator by extending the scope of protection both to the consumer and to economic aid (See Article 01 and Article 03/4 of the aforementioned Law No. 04-02, amended and supplemented it.) when the contract was concluded by adhesion way, in other words, what matters is the nature of the contract, not its parts. However, referring to the text of Article 29 of the Trade Practices Law, it appears that the legislator has retreated from its position in defining the scope of this protection in terms of persons, and the same position that it took in the executive decree (Executive Decree No. 06-306 of September 10, 2006 defines the basic elements of contracts concluded between economic agents and consumers and the aforementioned clauses considered arbitrary.) taken in application of article 30 of law 04-02, which emerges from the text of article 1 thereof that the scope of application of these conditions is limited to contracts concluded between the consumer and the seller without extending to contracts concluded between economic agents among themselves.

b - The scope of application of protection in terms of subject matter

Some modern legislations (The German law of 1976 is one of the first pieces of legislation that called for limiting the scope of protection to contracts of adhesion, followed by the European Directive of 1993.) have limited this scope to contracts of adhesion, as they are considered fertile ground for the emergence of arbitrary conditions, while others believe that the scope of protection against these conditions exceeds the limit of contracts of adhesion and extend to negotiation contracts, this is what the French legislator opted for, who adopted the broader trend to define the scope of this protection, in the 1978 law. Some jurists believe that the provisions relating to the prevention of arbitrary conditions should be

applied to all contracts, whatever their nature, whether sale, rental, deposit or insurance, and whatever their object, whether movable or immovable, linked to adhesion contracts or not(Ketto, 2010, p. 171)

As for the Algerian legislator, he affirmed in this regard, beyond any possibility of doubt or interpretation, that the object of the protection instituted against arbitrary conditions is limited to contracts of adhesion and nothing else, excluding thus the negotiation contracts, which goes in the same direction that the German legislator has taken.

In order to obtain the desired protection for the subject party, the Algerian legislator adopted the modern trend in terms of defining the adhesion contract and determining its characteristics, the essence of which is that it is based on conditions prepared for advance by the offerer and who do not accept any discussion or negotiation.

3. Guarantees to protect the will of the consumer against various forms of arbitrary contractual practices

The Algerian legislator, following the example of comparative legislation, took the initiative of enacting special laws which guarantee greater protection of the consumer against arbitrary practices which undermine his will and restrict his freedom to negotiate the condition imposed on him by the economic agent, which leads to an apparent violation of the contractual balance and the principle of will. The law specifies the rules applicable to commercial practices, since it provides in article 29 a set of conditions considered arbitrary by force of law. The regulation (Executive Decree No. 06-306 of September 10, 2006, mentioned above.)also specifies the fundamental elements of contracts concluded between economic agents and consumers and the clauses which are considered arbitrary, with the concern of the legislator to extend adequate protection against these conditions in consumer relations with the economic agent, and to control these arbitrary contractual clauses practices accompanied by sanctions aimed at deterring any economic agent aiming to include in the contracts that he draws up in advance arbitrary conditions which would manifestly disturb the balance between the rights and duties of the parties to the contract.

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3.1 Examples of abusive contractual practices

As part of the strategy to combat arbitrary conditions and prevent their presence in contracts concluded between the intervener and the consumer, the Algerian legislator stipulated a list of these conditions in the Commercial Practices Law, within the provisions of Article 29 thereof, which included 8 types of these practices. He cited them as an example, which leaves room for the judge to use Its discretionary power to adapt and assess the arbitrary nature of other conditions not mentioned in the list, and the legislator, under Article 30 of the same law, referred to regulation, specifying a supplementary list of arbitrary conditions that are prohibited from being implemented in various contracts, to leave the room open for other conditions with the aim of providing better and broader protection for the consumer. This was actually embodied in the issuance of Executive Decree No. 06-306 specifying the basic elements of contracts concluded between economic agents and consumers and the terms that are considered arbitrary.

Through these two articles, the forms of protection for the consumer from arbitrary conditions are determined according to the stages of concluding the contract, some of which relate to its formation, others to its implementation, and others to its dissolution, which we will now explain.

A / Arbitrary conditions relating to the formation of a contract

- Article 29 of Law No. 04-02 referred to two arbitrary conditions related to the formation of the contract, and in the same context, Executive Decree No. 06-03 stipulated a single condition, and we will discuss them as follows:

The seller acquires rights or privileges that do not correspond to similar rights or privileges recognized to the consumer(The first paragraph of Article 29 of the Trade Practices Law, mentioned above.), and this imbalance in the corresponding obligations is due to the fact that the economic agent exploits its position of strength to impose unjustified obligations on the consumer or deprive him of rights and privileges without granting him similar rights and privileges, such as having the right to terminate the contract unilaterally without granting this right to the consumer. This first form of arbitrary condition includes almost all the

other forms, which are in fact nothing but rights and privileges granted by the condition to the seller at the expense of the consumer.

- Imposing immediate and final obligations on the consumer in contracts, while he, that is, the economic aid, contracts with conditions that he fulfills whenever he wants (See the second paragraph of the same previous article.), which contradicts the provisions of commitment in the general rules that require the absence of the obligation if it is suspended on a suspensive condition that makes the existence of the obligation dependent on the pure will of the obligor. (See the text of Article 205 of the Algerian Civil Code.)

- Impose clauses of which the consumer was not aware before concluding the contract (Paragraph 7 of Article 5 of Executive Decree No. 06-306 mentioned previously), that is to say, prevent contracts in which the wishes of the contracting parties are not identical. Such contracts are only binding on the consumer if he expressly accepts the terms. (Omran, 2003, p. 225)

B / Examples of arbitrary conditions relating to the performance of a contract

These conditions are those stipulated in paragraphs 3, 4, 5 and 7 of Article 29 of Law 04-02 and Article 05 of Executive Decree No. 06-306, which are:

a - The economic agent retains the authority to amend the basic elements of the contract or the features of the product delivered or the service provided without the consent of the consumer. (Paragraph 3 of Article 29 of Law 04-02 mentioned above and Paragraph 2 of Article 5 of Executive Decree No 06-306 mentioned above.) What is to blame for the text of this paragraph is that the prohibition of amendment is limited to the basic elements of the contract, and in the sense of violation, the other elements that are not considered essential are not subject to the rule of arbitrariness and are not covered by the prohibition. An example of this is if the amendment extends the period of delivery of the product or implementation of the service, which negatively affects the interest of the consumer.

b - The reduction of the basic elements of contracts, because article five of the aforementioned executive decree stipulates in its second paragraph that the conditions by which economic agent reduces the basic elements of

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contracts mentioned in articles 02 and 03 of the same decree are considered arbitrary. It should be noted that Article 2 highlights the nature of the basic elements such as those that must be included in the contracts concluded between the economic agent and the consumer, in addition to the elements related to the fundamental rights of the consumer, which concern prior information of the consumer, the integrity and transparency of commercial operations, the safety and conformity of goods or services, as well as the guarantee and after-sales service. (Article 3 of the same decree.)

c - The economic agent has the exclusive right to interpret one or more conditions of the contract, or the exclusivity to make a decision regarding the compliance of the business process with the terms of the contract. This is what allows the economic agent to interpret the content of the contract (In accordance with paragraph 05 of Article 29.) in a way that serves his interest to the detriment of the consumer's interest, for example if the contract is ambiguous and prevents its execution, then the economic agent interprets this ambiguity in its favor.

d - Obliging the consumer to fulfill his obligations while the economic agent has not fulfilled his (al-Sanhouri, 1968, p. 698), as if the economic aid seeks to pressure the consumer to pay the price before proceeding with execution of his commitment to deliver the product or perform the service, and thus imposes on the consumer an arbitrary condition contrary to the requirements of justice and the obligatory force of the contract.

e - The exclusiveness of economic aid to change the deadlines of the contract. This condition, according to Paragraph 07 of Article 29, is the exclusivity of changing the deadlines for delivering the product or the deadlines for implementing the service. This clause represents an amendment to the contract and therefore should rather have been contained in paragraph 3 of Article 29 to avoid repetition.

C / Examples of arbitrary terms for terminating a contract

The contract may be terminated before the fulfillment of the obligations it creates (al-Sanhouri, 1968, p. 689) for reasons which are sometimes due to the will of the parties and other times for involuntary reasons, such as in the case of force majeure. This is why, as a

precautionary measure, the legislator took care to specify the conditions considered arbitrary in terms of termination of the contract by the text of article 29 of law 04-02 are as follows:

a - Refusal of the consumer's right to terminate the contract:

If the economic aid fails to fulfill one or more obligations on its part(Paragraph 6 of Article 29 of Law 04-02.), although the right of termination is one of the legitimate rights granted by law to any entrepreneur whenever the co-contractor fails to fulfill his obligation(See Article 119 of the Algerian Civil Code.), Executive Decree No.06-306 included this condition in the fourth paragraph of article 5, according to which the consumer is not authorized in the event of force majeure to terminate the contract only in exchange for the payment of compensation, which is an arbitrary condition contrary to the general rules which renders the contract void in the event of force majeure making the performance of contractual obligations impossible.

b - Threatening the consumer to sever the contractual relationship:

Economic agents cannot threaten the consumer with breaking the contractual relationship simply because the consumer rejects new commercial conditions that were not previously included in the contract, especially if these conditions are unequal, such a condition complies with the requirements of current contracts in which the implementation of the obligations included therein requires a certain amount of time, such as supply contracts and maintenance contracts.

In order to avoid the reaction of the consumer who could reject these conditions due to their conflict with his interests, the economic agent seeks from the beginning to include the condition which stipulates the possibility of terminating the contractual relationship in the event that the consumer rejects these conditions. To reach the arbitrary nature of this condition, the content of the threat must be, on the one hand, the termination of the contractual relationship, and the case must be linked to the rejection by the consumer of new conditions disproportionate to the obligations of assistance imposed on him on the other hand.

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We conclude from the above that the Algerian legislator took the same position as the German (- The German law of December 9, 1976 on arbitrary general conditions of contracts included two lists of arbitrary conditions. The first is a black list, which includes 8 types of conditions considered invalid by force of law, and the second is a gray list), (List, which includes 10 types of conditions, for which the judge has discretionary power as to their invalidation or non-invalidation, depending on whether it is up to the professional to prove that they do not provide him with any excessive advantage), (For more details, see Mohamed Boudali, *Arbitrary Conditions*, op. cit., p.20) legislator when he adopted the list system to deal with arbitrary conditions, whether through those mentioned in the text of the article 29 of the Commercial Practices Law or through what was included in Article 05 of the aforementioned Executive Decree No.06-306, which, despite the ambiguity surrounding it in many cases, whether in terms formulation, overlap between images, or even repetition of some of them, the merit goes to it for having broadened the scope of application of protection established, in particular for the consumer (The legislator restricted the protection established against arbitrary conditions through the text of Article 29 of Law 04-02, as well as Executive Decree No. 06-306, to the consumer group only, in violation of the requirements of Article 1 of Law 04-02), (which considered the goal of this law to be to define rules and principles of transparency. And the integrity of commercial practices that take place between economic agents and between them and consumers.), (as well as what is stipulated in Article 3/4 of the same law), and the re-establishment of the contractual balance between the parties to the contract.

3.2 Guarantees of consumer protection against arbitrary conditions

Referring to the law on commercial practices, we note that the Algerian legislator has granted consumer protection associations the right to demand the termination of arbitrary clauses included in contracts with the aim of relieving the consumer and strengthening the deterrence of the abusive economic agent who exploits his position. (See Article 65 of Law No. 04/02 amended and supplemented.) He also wishes to create an administrative control body whose mission would be to discover the

arbitrary nature of contracts concluded between two groups where positions are unequal, namely the Arbitrary Clauses Committee.

Concerning the role of the judge in ensuring the protection of the consumer against arbitrary clauses, we note that the interest of the legislator has focused on the criminal sanction (Article 38 of Law 04-02 amended and supplemented) imposed against arbitrary clauses and has not made reference at all in the law no.04-02 to the civil penalty despite the demonstrated effectiveness of the latter (The matter concerns Law No. 10-06 of August 15, 2010, Official Gazette No. 46, amending and supplementing Law No. 04-02 of June 23, 2004, which specifies the rules applied to commercial practices.) in the face of arbitrary contractual practices, which requires recourse to general rules in order to seek the civil penalty resulting from an arbitrary contract in the light of forgetfulness or of the legislator's negligence on this shortcoming, which he did not remedy in the context of the recent modification of the law on commercial practices.

A / Administrative control is a guarantee to protect the consumer from arbitrary conditions

The Algerian legislator, like the French legislator, created an administrative and consultative body which ensures the protection of consumers by controlling to what extent consumer contracts are subject to arbitrary conditions, in accordance with Executive Decree No. 06-306, which specifies the fundamental elements of contracts concluded between economic agents and consumers and the clauses considered arbitrary. This commission was installed in February 2018 and the nominal list of its members was announced in 2017 in accordance with the ministerial decree of November 27, 2017. Chapter three of this decree provides the appointment of a Commission for arbitrary clauses to the Minister responsible for Commerce, and it is called in the body of the text "the Commission". (See Article 6 of Executive Decree No. 06-306 mentioned above.) This dependence on the Ministry of Commerce actually deprives it of the status of an independent (Benhalima, 2022, p. 173) administrative authority. This commission (Article 02 of Executive Decree No. 08-44 amending Decree No. 06-306.) is made up of permanent members and five

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successor members, represented by representatives of the Minister responsible for Commerce, specialists in the field of commercial practices, representatives of the Minister of Justice, specialists in contract law, representatives of the Competition Council, two economic representatives, representing the Algerian Chamber of Commerce and Industry, qualified in business law and contracts, and representatives of consumer protection associations, qualified in the field of business law and contracts. It may also request help from any other person likely to be useful to it in its work. The members of the commission are appointed for a renewable 3-year term.

The commission exercises two roles, one preventive and the other consultative. Its preventive role, as stipulated in article 07 of decree 06-306, is to issue recommendations including a proposal to remove or modify the arbitrary condition included in contracts concluded between stakeholders and consumers, which has an adhesion character. Noting that these recommendations lack a binding element. In its preventive role, the commission also carries out studies and expertise related to the implementation of contracts with consumers. As for its advisory role, its legal basis is found in the text of article 6 of the same decree, where it gives advisory opinions to several parties, such as the regulatory authority, which is authorized by law to intervene to prevent certain arbitrary provisions. It also advises consumer protection associations on certain abusive contractual practices and the judicial authorities when they are invited to do so. However, despite the importance of the role of this committee in achieving protection, its nature and its decisions mean that it does not achieve the objective of its creation.(Assali, 2014-2015, p. 191)

B / The role of the judiciary in consumer protection

The judicial system is considered the most important body that seeks to protect the consumer from arbitrary conditions, as it has jurisdiction to impose sanctions, in view of the silence of the Algerian legislator on the fate of the arbitrary conditions that he included in the text of article 29 of law 04-02, the question arises of the sanction provided for them, is this an invalidation similar to that of the French legislator, or what has been decided in the general rules, in particular in the text of article 110 of the

civil law, which allows the judge, when he notes the existence of an arbitrary condition or if the condition is legally specified, either amend it or exempt the compliant party from it, as required by the rules of justice. Any agreement stipulating otherwise is also void. In practice, nullity is considered the natural sanction which results from the presence of an arbitrary clause. Indeed, the French courts invalidate clauses considered arbitrary in the contract, in application of the text of article 1-132L in its sixth paragraph, which held that arbitrary clauses are considered invalid, and this invalidity extends to the condition but not to the contract, because the contract remains valid.(Calais Auloy & Steinmetz, 2003, p. 140)

A jurisprudential controversy arose as to the legal nature of the invalidity pronounced against the arbitrary condition, whether absolute or relative. Some case law considers that, given that the prohibition of arbitrary conditions is linked to public order, this makes the nullity which attaches to an arbitrary condition an absolute nullity, while others consider that, since the nullity was decided to protect the consumer's interest, it can only be relative, even if it is linked to the general regime(Jamai, 1996, p. 264), provided that the consumer is the only one to have the right to demand invalidation and that the general regime provided for in the consumer protection law is the general, economic, protective regime, because the goal of the legislator is to protect the weaker party in the contractual relationship, that is to say the consumer of course, and this is the prevailing opinion, because the mere invalidation of the arbitrary condition and the contract remaining valid and producing its effects would contribute to establishing effective protection of the consumer by giving him the possibility of benefiting from the good or service which is the subject of the contract.(Boudali, 2010, p. 44)

As for the Algerian legislator, as we mentioned previously, he did not intervene under a special text of the law on commercial practices to determine the civil sanction imposed against the arbitrary condition contained in the contract, which requires recourse to general rules because they fall under general sharia law. In this context, we rely on what was stipulated in article 110 of the Algerian Civil Code, which specifies the

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types of intervention of the judge in adhesion contracts containing arbitrary conditions, represented by the power to modify the arbitrary conditions or to exempt the civil party from them.

a - The judge's power to amend arbitrary conditions

The power of the judge to modify the arbitrary condition while maintaining it is considered one of the most important aspects of the protection that the legislator has granted to the consumer in the face of arbitrary conditions imposed on him by the economic agent. However, the judge is not authorized, in accordance with the text of article 110 of the Algerian Civil Code, to modify the arbitrary conditions contained in the adhesion contract, on his own initiative, but at the request of the subject party, in accordance with the principle of Impartiality of the civil judge (Boudali, 2010, p. 59). Furthermore, the judge should not, on the basis of the amendment, create a new condition, because this contradicts the principle of the obligatory force of the contract, which does not allow the judge to create obligations or rights that the parties contracting parties did not want, except in exceptional cases.

b - The judge's power to cancel arbitrary conditions

In order for the legislator to be able to achieve a contractual balance in accordance with what justice requires, the condition is arbitrary when it relates to one of the forms provided for in article 29 of law 04-02, as well as to Article 09 of Executive Decree No. 06-306, in particular with anything that constitutes a violation of the fundamental rules and principles on which the contract is based, such as the principles of equality, good faith and honorable relations. The request for cancellation of arbitrary conditions only results in the invalidation of the disputed condition(s), without prejudice to the other clauses of the contract, which remain productive of their effects with regard to both parties to the contract, in accordance with article 104 of the Algerian Civil Code, which stipulates that if the contract in any part is void or voidable, in the event of invalidation, that part alone is invalidated, unless it becomes evident that the contract would not have been concluded without the invalid part which has occurred or is subject to invalidation, in which case the entire contract is invalid. Any agreement that

violates the provisions of article 110 of the Algerian Civil Code is considered void, as well as any agreement aimed at depriving the compliant party of recourse to justice to demand a modification or exemption from arbitrary conditions.

With regard to the criminal protection of the consumer against arbitrary contractual practices, the Algerian legislator in the law on commercial practices criminalized the offense of arbitrary contractual practices under the provisions of article 38 thereof, as well as by extrapolating the provisions of the Commercial Practices Law relating to the penalty imposed on economic agents who violate its provisions relating to the legality and integrity of commercial practices, including those concerning arbitrary contractual practices, we found that there are two types of sanctions, one of which is original, such as the fine, as a criminal sanction for arbitrary contractual practice when it is proven that the provisions of articles 26, 27, 28 and 29 of this law have been violated, and she is punished with a fine of 50,000 DZD to 5,000,000 DZD. As well as other complementary sanctions, the most important of which is that prohibiting the exercise of a commercial activity and removing it from the commercial register.

4. CONCLUSION

At the end of our study on the question of the struggle against arbitrary conditions as a guarantee of protecting the will of the consumer against contractual imbalance, we concluded that by studying the laws related to consumer protection, in particular that which includes principles applied to commercial practices, which aim to regulate the market and maintain its stability by activating the principles of transparency and integrity which represent the appropriate and important scope for evaluating commercial behavior and rebalancing contractual relationships, in particular those linking the economic agent to the consumer, the economically and cognitively weak party, to whom the Algerian legislator has guaranteed particular protection against harmful practices, particularly arbitrary ones, which materialized in the intervention of the Algerian legislator on several occasions in order to establish special rules which would restore the balance

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between the interests of the consumer, considered the cornerstone and fundamental pillar of the economic equation, and to trace the limits of existing relations between professionals and consumers and to supervise them administratively and judicially in ensuring control and monitoring to correct imbalances in their relationships.

However, despite the great care taken by the legislator to protect the weak link in the contractual relationship and to remedy the imbalance resulting from the adhesion contract, by imposing sanctions to dissuade any economic aid that seeks to include in the contracts it drafts in advance arbitrary elements that clearly disrupt the balance between the rights and duties of the parties to the contract, remedy arbitrary conditions, taking into account the absence of definition of the arbitrary condition and the absence of extension of the scope of protection to anything other than membership contracts, remains insufficient to guarantee the desired protection and achieve its effectiveness.

Taking into account the inability of civil law rules to ensure adequate protection of the consumer against arbitrary conditions and the shortcomings recorded in private laws relating to consumer protection, such as the fact that the legislator has not explicitly provided the civil sanction for arbitrary conditions in law 04-02, we suggest that the legislator rectify the situation and take the necessary measures which would make it possible to restore the balance in favor of the consumer through strict control of abusive conditions in the contracts concluded between him and the professional and by activating the role of consumer protection associations, by ensuring the protection of consumer rights and by working to raise awareness by establishing consumer confidence among citizens, and by strengthening these associations with material means necessary for the accomplishment of their tasks, in addition to activating the role of the Arbitrary Clauses Commission to denounce arbitrary clauses in contracts concluded between the consumer and the professional, and by broadening its powers so as to achieve the objective of his creation.

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In accordance with paragraph 05 of Article 29. (s.d.).

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