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Editorial

On the Usefulness of Default Rules and Disproportionate Sanctions in Consumer Law

In this third issue of 2021, our readers will find a relatively classic mix of contributions dealing with most of the core domains of private law: contract, tort, family, property & trust.

In contract law, we have two more critical contributions on the new harmonised rules on contracts for digital content and digital services, by Raphäel Gellert and Ignacio Fernández Chacón. As the Editorial in issue 1 was devoted to the digital acquis, I will however tackle another topic, which is closely related to the article by Marco Farina on unfair terms and supplementation of the contract.

Farina's article is mainly dealing with 'essential' clauses and gives not only a careful analysis of the case law but also an interesting evaluation of the various solutions. I nevertheless tend to believe that there is something wrong with the even more radical position in the case law concerning non-essential clauses. In the civil law tradition (and to a lesser extent in common law), the law has developed for contracts in general, and for certain types of contracts more in detail, default rules (whether mandatory or not) 'meant to reflect the balance that the legislature intended to establish between all the rights and obligations of the parties' (as the European Court of Justice (ECJ) recognized in *Dziubak*, C-260/18, paragraph 59–60). The reason to declare a contract term not binding under the Unfair terms Directive is mainly that 'contrary to the requirement of good faith, it causes a significant imbalance in the parties' rights and obligations arising under the contract, to the detriment of the consumer'. When the term is not binding because it causes an imbalance, the deletion of a non-essential term restores the balance normally by simply applying the default rules. If a penalty clause is void, the claimant has to prove the damage caused by the non-performance; if a notice period is shorter than the default notice period, causing an imbalance, the default period applies; if a termination period is longer than the default period determined by law, causing an imbalance, the default period applies. Moreover, the tendency in general contract law in recent decades is precisely the opposite of the one found in recent case law of the ECJ, namely to mitigate sanctions such as nullity by applying the proportionality principle (a disproportionate clause being replaced by the judge by a proportionate clause).

There are, however, good reasons not to apply this mitigation in consumer contract law. Sanctioning an abusive term by its prohibition or nullity has no effect when the term is replaced by the judge with a term which is still to the detriment of

the consumer, but without a significant imbalance, e.g., a reduced penalty clause (what in German is called *geltungserhaltende Reduktion*). It is thus perfectly understandable that the ECJ applies very strict standards for the possibility to replace the abusive term with another term, unless the consumer demands it or – in case of an essential term – it is in the consumers' interest to save the contract. These standards are further elaborated in Farina's article.

Much more problematic are the decisions that seem to prohibit the judge to simply apply the default rules (whether harmonised or as rules of the applicable contract law), such as the rules determining the damages due for breach of contract when damage is actually proven, the notice periods that must be respected (as minimum periods for termination or maximum periods to complain), etc. In *Dziubak*, the ECJ did recognize, as quoted above, that on one hand 'the purpose of that provision, and in particular of its second part, is not to cancel all contracts containing unfair terms but to substitute for the formal balance established by the contract between the rights and obligations of the parties real balance re-establishing equality between them' (paragraph 39), and on the other hand 'Those provisions are meant to reflect the balance that the legislature intended to establish between all the rights and obligations of the parties to certain contracts in cases where the parties have not departed from a standard rule provided for by the national legislature in relation to the contracts concerned'(paragraphs 59–60). Such a balance should be respected by the courts. The opposite doctrine may be the result of a certain myopia, given the nature of the consumer contracts that have led to this case law, largely credit contracts (loans). But it is not necessary to depreciate the applicable default rules completely in order to have an effective remedy for the consumer in those cases. If the business lending money is stipulating not only its restitution (which is the essence of the contract) but also a price for the period of use of the money, in the form of interest, it is possible to understand the default rules as dictating only restitution and interest for late restitution, but no interest for the period before restitution was due. There is no need to set aside default rules. The same thing is often true in contracts for suretyship containing abusive terms to the detriment of the consumer surety. If the business stipulates more than is allowed in a balanced case, the unreasonable obligations of the surety will simply be cancelled, and there is no default rule allowing to replace them with another more reasonable obligation. An effective protection of consumers does not require to set aside default rules. In other cases, setting aside not only the abusive terms, but also the default rules is clearly disproportionate. Compare the situation where contract clauses are contrary to mandatory rules of consumer law and therefore not binding either. A business has duly informed the consumer of his right of withdrawal, but stipulates a period for withdrawal that is shorter than the mandatory default rule (14 days in Article 9 Consumer Rights Directive): the nullity of such a clause does not mean that the 14 days period does no longer apply and that the right of withdrawal is eternal. A business stipulates that the consumer has to pay a higher amount for use of the goods after withdrawal then what is permitted by

Article 14 paragraph 2 and 3 Consumer Rights Directive: the nullity of such a clause does not mean that the liability of paragraph 2 or 3 does no longer apply and that the consumer does never have to pay anything. But with reference to the case law of the ECJ, the Belgian Court of cassation has decided that when a lease contract stipulates, in case of breach of contract by the tenant terminating early, disproportionate damages for relocation, the clause is abusive and the tenant is not entitled to any damages for relocation, not even for the damage proven (Cass. 9 October 2020, C.19.0631.N, *Feka*). The case is even more problematic because Belgian law applies the rules on unfair terms overshootingly also to individually negotiated terms, where the Unfair Terms Directive does not apply and there is no 'further use' of these terms in the sense of Article 7 Unfair Terms Directive. We must hope that the ECJ is thus willing to take the balance intended by – national or supranational – legislators in contract law more seriously.

Another balance is the object of another contribution: Hannelore Thijs on the Franco-German common optional matrimonial property regime, according to the author a 'modern and balanced compromise' between national traditions and thus a guide for further harmonization. Further, Hilde Verweij tries to strike a balance as to the liability of parents endangering their own children, especially inspired by solutions in German and Dutch law. A masterpiece of comparative tort law, *Comparative Tort Law. Cases, Materials and Exercises* by Thomas Kadner Graziano, is reviewed and applauded by Marta Infantino. Finally, Gökçe Kurtulan Guner is developing the arguments in favour of adoption of trust law in civil law jurisdictions, at least for commercial purposes and the added value they may have compared to their civil law alternatives. Enjoy reading!

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