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Legal Conditions of Unusual Terms Institution

Drd. Eugen Sârbu, attorney-at-law

Abstract

The institution of unusual clauses is a relatively new institution in the Romanian civil law, which has generated different interpretations in practice and in doctrine and which is aimed at preventing imbalances caused by the use of standard clauses. The standard terms serve the interests of the proposing party, setting out important aspects in the contractual relationship that is formed. They tend to change the contractual balance toward which each type of contract regulated by the legislator is approaching. This article analyses the legal conditions of unusual terms, which place one of the parties in a dominant position, shall entail. In particular, we will analyze (I) where the Romanian legislator was inspired to regulate the non-common clauses, (II) the conditions for a clause to be qualified as non-usual, (III) what penalty occurs in the event of non-compliance with the legal provisions on uncommon clauses, (IV) how we can derogate from the effect of the clauses, making them effective and holding the parties to perform that clause.

Keywords: standard clauses, unusual clauses, contractual imbalance, professional.

1. General presentation of unusual terms institution

The unusual terms institution derives from the abusive clauses regulated in consumer law. Both notions result from the same idea: it is unfair for a party to be bound by contractual provisions which it has not read and understood. „*The purpose of a regulation based on the theory of procedural fairness is to protect the internal will. The legal provisions edited for this purpose emphasize, in particular, the procedure of forming the contract and less the content of the con- tract*"[1]. Both institutions are based on negotiation and information formal duties. Both unfair and unusual terms regulate the imbalance between the parties, by establishing mechanisms able to protect the weaker party (the consumer, the weaker party in the negotiating process), setting aside terms on which there is a suspicion of lack of consent. Their common feature is the lack of negotiations and the contractual imbalance generated by them.

The Romanian legislator was inspired by the Italian Civil Code, namely Article 1341[2]. The

1 B. Oglindă, *Clauze neuzuale în reglementarea Noului Cod civil român - provocare pentru jurisprudență și doctrină*, "Pandectele Române", no. 3/2015.
2 Article 1341 Italian Civil Code: "*The general terms of the contract proposed by one of the co- contractors shall have*

institution is met also in the UNIDROIT Principles[3], which defines them as „surprising terms", in the Draft Common Frame of Reference and also in the Principles of European Contract Law[4] where they are named as „not negotiated terms".

According to the doctrine[5] on unusual terms, *„Article 1203 of the Romanian Civil Code preserved the form of the Article 1341 from the Italian Civil Code but instead of referring to "general conditions of the contract" as it is the original provision, it refers only to "standard terms". The Romanian legislator also added to the listing of unusual terms the „applicable law" (terms that provide in the detriment of the other party the applicable law).*"

The unusual terms are defined by the Article 1203 from the Civil Code as being *„standard clauses providing for the benefit of the party that is proposing them the limitation of liability, the right to unilaterally terminate the contract, to suspend the execution of obligations or standard clauses that provide in the detriment of the other party the preclusion of its rights or of the benefit of the term, the limitation of the right to oppose exceptions, the restriction of freedom to contract with other persons, the tacit renewal of the contract, the applicable law, the arbitration clause or standard clauses that derogate from the rules on jurisdiction of courts shall not have effect unless they are expressly accepted in writing by the other party*."

The premise for unusual terms is the existence of standard clauses. Only if we are dealing with standard clauses and they include an unusual term, the article 1203 of the Civil Code is applicable. Standard clauses are defined in the article 1202[6] of the Civil Code as terms pre-established by a party, in order to be generally and repeatedly used and included in the contract without being negotiated.

Usually, standard clauses serve the interests of the proposing party, who is elaborating a contract framework adapted to the economic area in which it operates. Therefore, although it has the advantage of shortening the negotiation time and covering a wide range of circumstances related to the specialized field of the contract, the use of standard clauses may also give rise to certain risks by giving a dominant position to the person proposing them and thus derogating from the principle of equality between the parties in the negotiation phase.

In order to prevent such risks, the Romanian law has regulated the institution of unusual clauses which alleviates the contractual imbalance created during the contract conclusion

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effect to the detriment of the other party if at the time of the conclusion of the contract they knew or ought to have known them by taking due care."

3 Article 2.1.20 (Surprising terms): *"(1) No term contained in standard terms which is of such a character that the other party could not reasonably have expected it, is effective unless it has been expressly accepted by that party. (2) In determining whether a term is of such a character regard shall be had to its content, language and presentation*."

4 Article 2:104 (ex. art. 5.103 A) - Terms not individually negotiated: *"(1) Contract terms which have not been individually negotiated may be invoked against a party who did not know of them only if the party invoking them took reasonable steps to bring them to the other party's attention before or when the contract was concluded. (2) Terms are not brought appropriately to a party's attention by a mere reference to them in a contract document, even if that party signs the document*."

5 I. F. Popa, *"Tirania" clauzelor neuzuale*, „Revista Română de Drept Privat", no. 1/2016.

6 Article 1202, Civil Code- Standard terms: *"(1) Under the provisions of Article 1203 Civil Code, the provisions of this section shall also apply when standard clauses are used at the conclusion of the contract. (2) The standard clauses are the terms of the contract set out in advance by one of the parties for general and repeated use and which are included in the contract without having been negotiated with the other party. (3) The negotiated terms shall prevail over the standard terms. (4) Where both parties use standard clauses and do not agree on them, the contract shall, however, be concluded on the basis of the agreed terms and any common standard clauses in their substance, unless one of the parties notifies the other party either before the conclusion of the contract, or immediately thereafter, that it does not intend to be held by such a contract*."

phase by inserting certain standard clauses[7].

As examples of uncommon clauses encountered in practice, we present the following: "*With regard to the clause in Article IX, point 91.1 which states that, in the event of disputes, jurisdiction shall be assigned to the court at the purchaser's headquarters, the court shall find that it is subsumed to the system of unusual clauses.(...) It is noted that this clause has not been expressly accepted by the defendant and the court considers that only the signing of the full contract does not cover this legal requirement. To this end, there was a need for a declaration of express acceptance of the uncommonly agreed terms after the parties' signatures, which would bear a separate set of signatures. Consequently, it is noted that this term of jurisdiction is ineffective, as provided for by the Civil Code (...)*"[8].

Another example[9] in the practice of the Romanian courts is the following: *"(...) In all transport orders issued by the complainant, it prohibited its collaborators from establishing direct contractual relations with their customers, with the retribution of a penalty of 20,000 euros (Article 11 of the orders), and one of these costumers was PGS SOFA. The court considers that the clause restricting the right of collaborators to establish contractual relations meets the conditions for being an unusual clause.(...) This is also the case in the present case, and the complainant has imposed this standard clause to all its collaborators, clause which provides for limitations on their right to contract, without any express, one-off agreement, with regard to this clause; it is inserted directly into the transport orders (which ended quickly, by phone or by e-mail), but not into the framework contract between the parties*."

2. The legal conditions of unusual terms institution

As indicated above, for a clause to be classified as unusual, it must fulfill certain conditions. First, the clause must be a standard clause within the meaning of Article 1202 Civil Code. It must then be examined whether the clause in question falls within the list provided for in the Article 1203 Civil Code, and, finally, it has to be considered whether that clause creates a contractual imbalance, giving unfair benefits to the drafting party or by putting at a disadvantage the party accepting it.

2.1. In order to be unusual, it must be a standard clause

The conclusion of contracts is currently dominated by the use of predefined clauses as a set of rules established in advance by one of the parties and inserted into contracts, thus adapting them to its interest. Standard clauses are used in various areas, such as transport, banking or distribution of goods, and have the advantage that they reduce the duration of negotiations or even make them unnecessary.

Standard clauses are defined in Article 1202 Civil Code as terms predefined by a party and used in a general and repeated manner, included in each contract without further negotiation. They

7 B. Oglindă, op. cit., 2015, p. 15.
8Buzău District Court, Civil Decision no. 3704/2018, available online: www.sintact.ro, consulted on 1.10.2019.
9 Oradea Court, Civil Decision no 4055/2017, available online: www.sintact.ro, consulted on 1.10.2019.

have been defined over time in the doctrine[10] as clauses outside the contract, which are included without negotiation:

„*The parties shall be bound, according to the principle of obligation, to respect the contract between them, the content of which shall not be limited to what is provided for in it. In addition to customary practice (they must therefore be com- plied with if they are proven to be constantly used between the parties), the content of a contract also includes certain clauses not included in the contract signed by the parties, but in another document with which the contract is clearly linked. We are therefore talking here about external clauses, as the new Romanian Civil Code calls them, that is, those clauses which are not included in the contract signed by the parties but to which the contract refers*."

On the other hand, a clause can be a standard one even if it is inserted in the contract draft, if it meets the condition stated in Article 1202 of the Romanian Civil Code.

Therefore, in order for a clause to be considered a standard term, it has to fulfill two conditions: to be established by one of the parties in order to be used in a general and repeated manner and to not have been negotiated with the other party.

i. With regard to the first condition, in the comments of Unidroit Principles[11], it is assessed that it is not important neither how the clauses are presented (whether they have been incorporated in the contract or they are available in and additional document), nor who drafted them, nor the number of standard terms used by one of the parties.

What is important is the drafting of these clauses in advance for general and repeated use. It was also considered that it is not important whether that clause was actually used in relations with other persons or whether it had only the purpose to be used in the future. Of course, there remains the problem that the party invoking the standard nature of a clause should prove that the purpose of the clause is to be used repeatedly. This characteristic of the clause can be deduced from the way it is drafted, meaning that the clause does not detail specific features from the particular contract (for example, it does not detail specific features of goods, services, works that are object of the contract), but they can be included and can regulate, in general, a contract concluded by the tenderer in its area of activity[12].

In the doctrine[13], it was assessed that what is important when we look at this condition is the intention of the author of the clause. A clause may be standard since the first effective use, as the mere repetition of a clause in similar contracts concluded by the same party does not necessarily lead to the clause being qualified as standard. In relations between professionals, who frequently conclude a particular type of contract, there is a simple presumption that they intend to use generally and repeatedly a clause which frequently appears in the type of contracts used in their area of activity.

ii. Looking at the second condition, namely, the lack of negotiations, we consider that negotiations consist in a contradictory discussion between two par- ties, with the real

10 G.I Tita- Nicolescu, *Considerații generale privind principiul obligativității efectelor contractului în reglementarea Noului Cod civil*, „Pandectele Romane" no. 9/2012, p. 23.
11 UNIDROIT, *Principiile UNIDROIT 2010*, C.H. Beck, Bucharest, 2015, p. 70-73.
12 E. Sârbu, *Pot fi neuzuale clauzele standard specifice unui sector de business?*, "Revista Romana de Drept al Afacerilor" no. 1/2019, p. 37.
13 A. A. Moise, *Comentariu art 1203*, in F. A. Baias a.o, *Noul Cod Civil. Comentariu pe articole*, C.H. Beck, 2nd ed., Bucharest, 2014, p. 1337-1339.

possibility of amending certain clauses or proposing certain provisions. The lack of negotiations is a fact that must be analyzed objectively. Standardization is not removed by the existence of an opportunity to negotiate the clause, but only by effective negotiations, by giving effect to the possibility to negotiate that clause. At the same time, the lack of negotiations should be analyzed in relation to each clause and not by looking at clauses globally.

In practice[14], in relation to this condition, the institution of unusual terms was applied in a highly critical manner from our perspective, misunderstanding its purpose and with the effect of converting the institution of unusual terms into an institution that is not applicable in any context: „*Thus, first, the Court notes that, since the parties have agreed on both the law applicable to the contract (Spanish law) and the Spanish jurisdiction, the provisions of Article 1203 of the Romanian Civil Code are not applicable, and therefore such support is ungrounded in the light of the circumstances of the case.*

On the other hand, the claimant itself invoked the contract between her and D_ in the form of the offer followed by the acceptance, a contract valid in its entirety, concluded between absences, widely practiced between traders. How- ever, since the applicant himself claims in support of his subjective rights the contractual legal relationship entered into in this form, part of the clauses cannot be removed from the contract itself, because some of them would be customary and some would be uncommonly used, as it pleases, or as it is in the procedural interest that the case may be judged in Romania or Spain. Thus emphasizing the Court's conclusion that the contract was valid in the form of the tender followed by acceptance, including the clause on the applicable law and the Spanish juris- diction, the Court will reject that criticism as being unfounded."

This court decision is deeply criticized from three perspectives.

First, it establishes that an applicable law clause cannot be de plano an unusual clause, when the chosen law does not regulate the institution of unusual clauses. However, if the conclusion of the contract is governed by Romanian law, irrespective of the provisions of the law chosen, the clause will be governed by Romanian law in terms of its validity or its unusual character. Since article 1203 of the Civil Code regulates that a clause of applicable law can be an unusual term, it follows that the reasoning of the court is in conflict with the provision of the law which it infringes by limiting the scope of the institution.

Secondly, it is questionable how the condition of express and written acceptance is being treated. The court is assuming that, as long as the contract in electronic form is widely accepted in all legal systems, then an electronic offer, followed by an electronic acceptance, is worth the contract assumed as a whole, including the applicable law clause and jurisdiction clause. However, the application of the express and written conditions of acceptance is not excluded in the case of an electronic contract. It remains the obligation to extract the two clauses from the entire proposed contract and to draw the acceptant's attention over these clauses, and ask him to expressly accept them, even though it is an electronic acceptance, by e-mail exchanges. The mere acceptance of the offer as a whole cannot be assimilated to the achievement of the institution's aim, because it does not achieve the desire to highlight the surprising terms.

Thirdly, the reprehensible interpretation of the institution of unusual terms in the above case

14 Bucharest Court of Appeal, Civil Decision no. 465/2015, available online: www.sintact.ro, consulted on 1.10.2019.

shows a structural misunderstanding of this institution, revealed by the following reasoning: *„part of the clauses cannot be removed from the contract itself, because some of them would be customary and some would be uncommonly used, as it pleases, or as it is in the procedural interest that the case may be judged in Romania or Spain*."

Dissociating between the notion of procedural law abuse, which the court seems to be sanctioning, and the notion of unusual terms, we believe that the application of unusual terms institution must have an effect contrary to the one from the case-law cited above, because the purpose of unusual terms institution is precisely the one denied by the court - to remove the unusual term from the contract itself. The abuse of procedural law differs from unusual terms. The abuse of procedural law concerns the conduct of the party during the trial, whereas the examination of unusual terms is made referring to the time of conclusion of the contract, on the basis of the conditions drawn up by Article 1203 of the Civil Code. Nothing prevents the admission of both institutions in this case, both the abuse of procedural law and unusual terms. But to reject the institution of unusual clauses by analyzing the abuse of procedural law is a superficial approach, carried out in breach of the principle of availability, because the court has in fact shown a refusal to judge the party's factual and legal reasons.

2.2. The clause shall fall within the list provided for in Article 1203 of the Civil Code

Looking at the second condition, we can classify the clauses into three categories:

A. Standard clauses which are established for the benefit of the proposing party and provides a limitation of liability, the right to unilaterally terminate the contract or to suspend the performance of obligations;

B. Standard clauses providing against the other party the preclusion of time limit or its right, limitation of the right to oppose exceptions, restriction of the freedom to contract with other persons, tacit renewal of the contract;

C. Clauses providing for applicable law, arbitration clauses or clauses derogating from the rules of jurisdiction of the courts.

In the comments made on UNIDROIT Principles[15] it is specified that "*notwithstanding its acceptance of the standard terms as a whole, the adhering party is not bound by those terms which by virtue of their content, language or presentation are of such a character that it could not reasonably have expected them. The reason for this exception is the desire to avoid a party which uses standard terms taking undue advantage of its position by surreptitiously attempting to impose terms on the other party which that party would scarcely have accepted had it been aware of them*".

As in the case of unfair terms, the legislator has chosen to list the terms in order to simplify the identification of those who may fall within the category of unusual terms. Even if there is a list, the law specialists insisted that it is not enough that a clause is mentioned on that list to be qualified as an unusual clause: "*In both cases, the insertion in the contract of such a clause of the list does not implicitly qualify it as non-usual or abusive. A contractual term listed on the list of Law No 193/2000 will be unfair if it meets the criteria laid down by law. A clause of those listed in*

15 UNIDROIT, *Principiile UNIDROIT 2010*, C.H. Beck, Bucharest, 2015, p. 70-73.

Article 1.203 Civil Code shall also be classified as unusual in so far as the conditions presented above for the application of Article 1203 Civil Code are fulfilled.[16]"

In practice, Article 1203 of the Civil Code has been interpreted differently. Some courts[17] considered the list as a restrictive one. For example: "*Specifically and restrictively, the standard clauses considered by the law to be un- common are listed by the Civil Code, a list which, for ease, we define in three categories*."

On the other hand, other courts[18] have established that the legislator's listing is one that helps to take of evidence and does not limit the examples of clauses: "*The listing of these clauses shall result in the presumption of stipulations which fall under one of the above categories as lacking transparency, leading to a simplification of the evidently effects*."

However, other authors believe that the list provided for in Article 1203 of the Civil Code should be interpreted restrictively: "*In our opinion, expressed in another study on the uncommon clauses, the list of clauses in Article 1203 of the Civil Code is a limited one*"[19].

"*Article 1203 of the Civil Code only affects certain standard clauses, restrictively provided by the text. In other words, each time we meet a prior provision laid down by one of the parties, for general and repeated use and which is included in the contract without having been negotiated with the other party, and that provision is not on the list mentioned by Article 1203 of the Civil Code, the standard clause shall be capable of being binding without the express written acceptance*"[20].

An important benchmark for balancing the two opinions set out above could be how contractual coding projects deals with this dilemma. UNIDROIT Principles[21] do not list the clauses that could be considered surprising, but they indicate of the general criteria that will be used to qualify a clause as unusual. The same flexible approach is found in the Principles of European Contract Law[22], Draft Common Frame of Goods and Contracts for the International of Goods[23].

In our opinion, we support the extensive interpretation thesis, as we show in a former study: "*The Italian doctrine argues that the list of oppressive clauses is rigid, and the possibility of extending by analogy the scope of Article 1341 of the Italian Civil Code to other categories of clauses is excluded. However, even in the court's practice, extensive interpretation is nevertheless claimed to be admissible only at the level and within the limits of each of the categories of clauses listed, to the extent that certain contractual provisions may be framed in the mile- stones outlined*

16 B. Oglindă, op. cit., 2015, p. 16.
17 Oradea Court, Civil decision no. 4807/2019, available online: www.sintact.ro, consulted on 1.10.2019.
18 Bacău Tribunal, Civil Decision no. 1029/2018, available online: www.sintact.ro, consulted on 1.10.2019.
19 C. Tabirta, *Despre eroarea-viciu de consimţământ în noul Cod civil*, "Revista Romana de Drept al Afacerilor" no 6/2013, p. 65.
20 A. A. Moise, op. cit., 2014, p. 1337-1339.
21 UNIDROIT, *Principiile UNIDROIT 2010*, C.H. Beck, Bucharest, 2015, p. 70-73.
22 Article 2:104 (ex. art. 5.103 A) - Terms not individually negotiated: *"(1) Contract terms which have not been individually negotiated may be invoked against a party who did not know of them only if the party invoking them took reasonable steps to bring them to the other party's attention before or when the contract was concluded. (2) Terms are not brought appropriately to a party's attention by a mere reference to them in a contract document, even if that party signs the document.*"
23 Art. II.—8:103: Interpretation against supplier of term or dominant party*:"(1) Where there is doubt about the meaning of a term not individually negotiated, an interpretation of the term against the party who supplied it is to be preferred. (2) Where there is doubt about the meaning of any other term, and that term has been established under the dominant influence of one party, an interpretation of the term against that party is to be preferred.*"

in Article 1341 Italian Civil Code. Thus, an extensive interpretation is allowed under each type of clause listed"[24].

2.3. The clause should create a contractual imbalance in the sense of stipulating either for the benefit of one party or to the detriment of the other party

Standard clauses limiting the liability of a party, providing the right to terminate the contract unilaterally or to suspend performance of obligations are uncommon clauses only if those benefits are offered to the proposing party. If the right is stipulated in favor of another person than the one proposing the clause, it will not require express written acceptance to produce effects, leaving a standard clause operable without the need to be accepted expressly and in writing. Standard clauses which provide the preclusion of the right or the benefit of the term, the limitation of the right to oppose exceptions, the restriction of the freedom to contract with other persons, the tacit renewal of the contract, the applicable law, the arbitration clauses, derogations concerning the jurisdiction of courts will not be considered unusual terms if they are stipulated to the detriment of the party proposing them. In order that the provisions of article 1203 to be applicable, they must be stipulated to the disadvantage of the party who has not proposed them and who must accept them on the proposal of the other co-contractor.

The doctrine[25] considered that clauses limiting liability or giving the right to unilaterally terminate the contract or to suspend the performance of obligations would not be qualified as unusual if they set out those benefits in favor of the opposing party or in favor of a third party: "*In the case of standard terms limiting the liability of a party, or giving the right to terminate the contract unilaterally or to suspend performance of obligations, article 1203 shall apply only if those benefits are offered to the one proposing the clause. Consequently, if that right is stipulated in favor of another person other than the one proposing the clause, the clause may remain standard, but there will be no need to expressly accept it in writing in order to be effective. In addition, the clauses providing for preclusion of the benefit of the term, limitation of the right to oppose exceptions, restriction of the freedom to contract with other persons, applicable law, tacit renewal of the contract or arbitration clauses will only fall within the scope of article 1203 of the Civil Code if stipulated to the detriment of the other party. With regard to the clauses derogating from the rules of jurisdiction, article 1203 of the Civil Code shall apply irrespective of whether they are stipulated or not to the detriment of the opposing party*."

As regards the clauses which derogate from the rules of jurisdiction or the arbitration clauses, the literature[26] was of the opinion that regardless of whether the text does not fall into one of the two categories (in favor/to the detriment) there is a simple presumption that the party proposing that clause will do so for its benefit and not necessarily to the detriment of the other party: "*In the case of clauses that regulates jurisdiction, we believe that article 1203 of the Civil Code shall apply, irrespective of whether they are stipulated to the detriment of the opposing party to the standard clause or not. In practice, the party using a standard choice-of-court clause would be expected to stipulate the jurisdiction of the court in his place of residence or*

24 E. Sârbu, op. cit., 2019, p. 38.

25 A. A. Moise, op. cit., 2014, p. 1337-1339.
26 Gh.-L. Zidaru, *Comentariu art. 126 C.Proc.Civ*, in V. M. Ciobanu a.o. *Noul Cod de Procedură Civilă, comentariu pe articole*, Universul Juridic, Bucharest, 2013, pp. 371-373.

establishment, which would be an advantage to the detriment of the opposing party. Whether it should be noted that a standard choice-of-court clause must be unfavorable to the party adhering to the clause, we consider that no evidence is necessary to establish the potentially unfavorable character, which is the result of the circumstances of the case."

3. Legal effects of unusual terms institution

The doctrine and the jurisprudence illustrated all the views on the matter: absolute invalidity of the clause, relative nullity, unenforceability or, more simply, regarding the clause as unwritten.

Enforceability implies that the rights and obligations between the parties are validly founded, and for various reasons they cannot be opposed to third parties. This penalty cannot apply to unusual terms, since the legislator provides that they will not have any effect if they are not expressly accepted in writing.

Seeking to differentiate the unwritten clauses from the null and void clauses, the doctrine[27] has concluded that the difference was a formal one - in the case of unwritten clauses, the legislator expressly indicates them in the legislative text. "Substantially, both categories of clauses are subject to the same legal regime and cause the same legal inefficiency."[28]

The non-written clauses were then considered as partial null and void[29]. With regard to what kind of nullity affects the unwritten clauses, special literature[30] has said that we are talking about an absolute and partial nullity, since only absolute nullity could work ex officio, from the very moment of insertion of the clause in contract.

In essence, the mechanism of unusual clauses is intended to lead to a limitation of the contractual field to those clauses in respect of which it is certain that they have been noticed and agreed by both parties, with the natural consequence of the exclusion of the uncommon clauses.

The proper solution would be to consider the clause as unwritten. In fact, the practical issue is reduced as long as the clause does not produce effects, as expressed by the legislator itself in the final part of article 1203 Civil Code.

Since the unusual clause cannot refer to the main subject of the contract, which is supposed to be always foreseen by contracting parties, the unusual clause will not lead to the termination of the contract. Furthermore, its removal from the contractual field will result in its replacement with the applicable legal provisions. If the intention of the parties was to attribute an essential character to the unusual clause, considering that they don't have any effect if they are not expressly accepted, then the contract will be void in full. Nothing prevents the parties from replacing clauses which are ineffective with new contractual provisions, negotiated or at least accepted by the subscribing party.

27 M. Nicolae, *Nulitatea parțială și clauzele considerate nescrise în lumina Noului Cod civil. Aspecte de drept material și drept tranzitoriu*, „Dreptul" no. 11/2012, p. 11.
28 Ibidem.
29 G. Boroi, C. Anghelescu, *Curs de Drept Civil. Parte general*, Hamangiu, Bucharest, 2012, pp. 247-250.
30 Ibidem.

Unanimously accepted in the doctrine[31] was that in order to produce effects, the clause must be accepted in writing by the opposing party otherwise, the clause will have no effect: *"As long as it is expressly accepted by the other party, it will have effect as any other valid clause in a contract. If it is not accepted, an unusual clause does not produce any effect and is considered unwritten. The legislator by means of this enumeration only establishes informative formalism and the penalty for not respecting it. The legislator, making this enumeration only establishes an informative formalism and the penalty for not respecting it. Not knowing or understanding such a clause, it will not have any effect and it should be considered unwritten."*

4. Derogation from the effects of unusual clauses: express and written agreement of the party affected by the contractual imbalance caused by the unusual terms

According to the law, in order to produce effects, unusual clauses must be expressly accepted in writing. In the doctrine[32], it was said that acceptance of the entire contract, in general terms, was not enough, because the inferior party is no longer protected in the negotiation process.

Thus, in the case of an uncommon clause, proof of full understanding must be provided by separate and express acceptance. In the absence of a valid consent, the clause will be considered unwritten. In practice, only the serial number of the unusual contract terms and/or the headings of the unusual terms shall be used, as appropriate, or placing the declaration of express acceptance of the uncommon terms after the parties' signatures, and to bear a separate set of signatures or expressly assuming them in a separate document.

The doctrine[33] also considered that the mere signing of the contract does not include the express agreement on unusual terms: *"Although the law does not expressly provide, we consider that the mere signing of the document establishing the agreement which also contains standard clauses is not sufficient to prove that those unusual clauses have been effectively agreed by the party. It is necessary to draw the party's attention to the existence of certain special clauses and to obtain his express consent regarding them. Evidence of such disclosure results from formalities such as the graphic demonstration of those clauses (thickening, writing in print characters of a certain size), followed either by a reference to each clause or by a final clause providing, in an intelligible form, both graphically and conceptually, that the party has become aware of the terms. We believe that a written clause in small, unclear, printed in a non-ordinary manner does not comply with the provisions of article 1203 of the Civil Code and should be considered as unbinding. We do not rule out that the agreement is expressed in an addendum, but only if it is concluded at the same time as the agreement containing the standard clauses."*

However, there are also opinions that there is no need to sign after: *"Any written wording (distinct from the clauses in question) which indicates that the party has accepted those clauses meets the legal requirements. It does not matter whether the acceptance is followed by a signature of the party specifically made for that acceptance (distinct from the principal signature on the document) or whether the acceptance itself is handwritten or not, it is sufficient that the document establishing acceptance will give the express undertaking of the clause.*

31 B. Oglindă, *Dreptul afacerilor - Teoria generală a contractului*, Universul Juridic, Bucharest, 2012, p. 90.
32 Gh.-L. Zidaru, op. cit., 2013, pp.371-373.
33 Ibidem.

Therefore, the document establishing acceptance may be the one establishing the contract which contains the standard clauses, but also another document representing an addendum"[34].

However, it was considered in the doctrine[35] that there are also cases where express acceptance of unusual clauses is not necessary, such as when the clause is laid down in a regulatory act, when the contract is authentic, when the clauses are drawn up by a third party who is not representing a party, or when the clauses have been inserted as a result of collective bargaining, as is the case in collective labor agreements.

A similar situation is also regarding the terms that translate commercial or regulatory usages. In this case, the requirement of express acceptance is re- placed by the presumption of knowing the practices in question.[36]

Thus, even if a standard clause is included in the contract by the party in a dominant position, if that clause is the result of cooperation and negotiation between the parties, express and written consent is no longer required for it to have effect, since article 1203 of the Civil Code does not apply anymore. In this situation, the conduct of the party invoking the application of Article 1203 NCC in order to remove the applicability of the clause may be regarded as abusive.[37]

Not even the court practice has not been constant. There have been courts that have taken the view that it is necessary to respect the formalism imposed by the legislator and the parties must agree to each clause: "*only by signing the full contract, the legal requirement laid down in article 1203 from the Civil Code is not covered. To this end, there should be a declaration of express acceptance of the unusual terms after the parties' signatures, which will bear a separate set of signatures*"[38] or "*as stated in the literature[39], express acceptance has the meaning of a nominated acceptance of the non-usual clause, which is entitled to the wording of the above legal text. This is also the situation in the present case, and the complainant has imposed this standard clause to all its collaborators, clause which provides for limitations on their right to contract, without any express agreement with regard to this clause, it is inserted directly into the transport orders (which ended quickly, by phone or by e-mail), but not into the framework contract between the parties*."[40]

We can also recall the following example: "*express acceptance implies the nominalized acceptance of the clause, i.e. possibly the nominal indication of the unusual clause that is the subject of acceptance.*"[41]

However, there were courts that were not of the same opinion. For example: "*if unusual standard clauses are incorporated in the document establishing the contract which is endorsed by the signature of the parties, article 1203 is no longer applicable, since it must be considered that the party has given his consent in respect of the entire content of the contract. Indeed, it would be excessive if in such a situation the party had to express his consent twice, both in terms of the*

34 A. A. Moise, op. cit., 2014, p. 1337-1339.
35 L. Pop, I.F. Popa, S.I. Vidu, *Tratat elementar de drept civil - Obligațiile*, Universul Juridic, Bucharest, 2012, p.126.
36 E. Sârbu, op. cit., 2019, p. 38.
37 Ibidem.
38 Buzău District Court, Civil Decision no. 3704/2018, available online: www.sintact.ro, consulted on 1.10.2019.
39 L. Pop, I.F. Popa, S.I. Vidu, op. cit., 2012, p. 126.
40 Oradea Court, Civil Decision no. 4055/2017, available online: www.sintact.ro, consulted on 1.10.2019.
41 Bacău Tribunal, Civil Decision no. 1029/2018, available online: www.sintact.ro, consulted on 1.10.2019.

conclusion of the entire contract and regarding any unusual standard clauses in the contract, on the one hand, and on the other, it would mean a disregard for the mental capacity of persons, who cannot understand the legal consequences of their acts, which is unacceptable"[42].

In the comments made on UNDROIT Principles[43], it was stated that: "*A particular term contained in standard terms may come as a surprise to the adhering party first by reason of its content. The risk of the adhering party being taken by surprise by the kind of terms so far discussed clearly no longer exists if in a given case the other party draws the adhering party's attention to them and the adhering party accepts them. This Article therefore provides that a party may no longer rely on the "surprising" nature of a term in order to challenge its effectiveness, once it has expressly accepted the term*."

In the examples given above, we can appreciate that the use of unusual clauses is not prohibited by law, but they must be made known to the parties either at the time of the negotiation of the contract or following subsequent amendment of the contract which also occurred following the negotiation of the parties. The clauses shall remain uncommon, creating an imbalance between the contracting parties, but by express acceptance, the party is accepting them and is assuming them and the contract shall thus be validly concluded by the express agreement of the parties.

5. Conclusions

The institution of unusual terms is a new institution in the Romanian contract law and produces different interpretations in both doctrine and judicial practice. This new legal provision improves the situation of the weaker party in the contract.

At this point in the Romanian case-law, it is highly questionable whether the desire of the legislator has been achieved in practice. We have analyzed above court decisions showing a structural misunderstanding of the institution, as well as decisions showing the correct and effective application of this institution in balancing onerous contracts for the vulnerable party in the negotiation phase.

We can only express the hope that this study will bring a contribution to the unification of judicial practice and to the application of this institution in the spirit and in the legal conditions in which the legislator has created it.

The dichotomy between the institution's restrictive or expansive scope also remains topical, but as long as the clause creates a significant contractual imbalance and unfairly links the weaker part to respect issues that it has not known and understood, we appreciate that the judge or arbitrator should interpret the scope of the institution expansive and carefully check whether the clause could fall within the typologies listed in article 1203 Civil Code, so that the social and economic purpose of justice brings the restoration of contractual equity and ensures a business environment where "small players" also have their chance to survive and make profit.

42 Bucharest District Court 2, Civil Decision no. 5115/2016, available online: www.sintact.ro, consulted on 1.10.2019.
43 UNIDROIT, *Principiile UNIDROIT, 2010*, C.H. Beck, Bucharest, 2015, pp. 70-73.

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