Examining Instances of Surprising Contractual Terms and the Approach of International Commercial Documents

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Abstract

Surprising terms are those drafted contrary to the Obligor's legitimate, normal, and reasonable expectations, which no ordinary person in the position of the accepting party could expect their existence of such terms in the contract. This is because the content, language, or manner of presenting these terms is generally overlooked by the other contracting party, who becomes bound to all the provisions by signing the contract while unaware of the surprising terms contained therein. This article explains the nature, instances, and criteria for identifying surprising contractual terms and aims to answer the following question by analyzing the legal status of these terms from the perspective of international commercial documents: Does the mere apparent acceptance and signing of the contract by the Obligor commits them to these terms? The findings of this study suggest that international commercial documents adopt a similar approach in this regard.

The UNIDROIT Principles of International Commercial Contracts have deemed invalid surprising terms incorporated in standard contracts with a feature the other party could not reasonably have expected and were not expressly accepted by the Obligor. Similarly, based on the Principles of European Contract Law, contractual terms that have not been individually negotiated are only admissible against a party who was unaware of them if the citing party took reasonable steps to bring those terms to the other party's attention prior to or at the time of contract formation. The mere inclusion of such terms in the contract text, even if signed by the other party, is insufficient to bind the Obligor to the obligations arising from those terms.

Keywords: *Contractual Terms, Surprising, Unexpected, Unfair, Apparent Intent, Actual Intent, Standard Contract*

Introduction

Contracts are one of the most important tools that human societies have utilized throughout history to regulate their relationships. Over time, science and technology have developed, cultural and social foundations of societies have developed and trade across national borders has increased. Hence, to meet new needs and contrary to the previous simple nature, contracts are now concluded in diverse forms with detailed provisions and complex, specialized terms. The evolution and complexity of contracts have led to the emergence of contracts whose provisions transform the fate of the contractual relationships between parties. At times, the terms incorporated in a contract undermine its validity. Furthermore, the subsidiary terms and subjects agreed upon in the contract maybe even more important to the parties than the main considerations. The existence of these very terms in the contract might have caused one of the parties' consent to conclude the contract and accept the obligations. Contractual terms might indicate decisive contractual discussions regarding the extent and type of liability of the contracting parties, the time of transferring reciprocal guarantee, terms concerning the limitation or immunity of one of the parties from specific liabilities, the possibility of unilateral amendment of the contract, automatic renewal of the contract, determining punitive penalties under prescribed conditions such as delay or non-performance of contractual obligations, determining the method of delivery of goods, determining dispute resolution methods, terms of payment or conditions causing the right of termination for one of the parties, or other contractual rights and obligations. Lack of awareness of any of these terms may directly impact the uninformed party's intent to accede to and accept the contract. Therefore, contracts play a significant role in facilitating business activities and commercial transactions by determining the rights and obligations of each contracting party. However, some of the terms incorporated in contracts, which are often unread, may be highly surprising, unexpected, and inherently unfair. The inclusion of surprising or unexpected terms in contracts is one of

the causes of disputes and lawsuits in commercial and economic relations between contracting parties.

This article explicates their inherent difference from other similar concepts, such as unfair and inequitable terms while examining the concept and nature of surprising terms. Moreover, it studies the legal status of these terms from the perspective of international commercial documents, including the UNIDROIT Principles of International Commercial Contracts and the Principles of European Contract Law. It will also examine the criteria and features that render contractual terms surprising. Ultimately, it identifies and introduces instances of surprising terms in various contracts.

Part One: Understanding the Nature of Surprising Terms

Section One: Defining Surprising Terms

Surprising terms are those stipulated contrary to the legitimate, normal, and reasonable expectations of the Obligor, such that no ordinary person in the position of the accepting party could expect the existence of such terms in the contract. When one of the contracting parties encounters such terms, they often claim to be unaware of such conditions that if they'd been aware of their existence at the time of conclusion and signing of the contract, they would have never accepted such a contract.

Surprising terms are sometimes included in contracts drafted by one of the parties and are thereby imposed on the other party due to their need and the monopolistic provision of the required goods or services, without the other party having an opportunity to influence the content of the contract. For example, in many cases, commercial companies use standard contracts in which the rights and obligations of each party, instances of a breach and its enforcement, method of resolving disputes arising from the contract, the governing law, and other important details are extensively foreseen. (Shiravi, 2021:155). In this case, prior to concluding the contract, the other party does not have an opportunity to negotiate the terms of the standard contract. Therefore, they either have to take it or leave it (Zulhafiz, 2017:178-179). In other instances,

individuals do not have a reasonable opportunity or possibility to become aware of all the provisions and clauses of detailed contracts, or the terms of the contract may be written in an ambiguous or complex language, such that individuals, due to lacking sufficient legal knowledge, are unable to understand the legal effects of the terms stipulated in the contract. Additionally, it is possible that the way of presenting these conditions, in terms of the writing style, is such that are often overlooked, like terms that are written very small or hidden on the back of a page or sheet.

Today, many people often proceed to conclude and sign contracts without reading them and are unaware of the incorporated terms and obligations. In some cases, the type and form of contracts contribute to this problem as well. Under many circumstances, whether in paper contracts or contracts concluded in electronic transactions and due to the lack of time to study detailed contracts, or the inability to understand the specialized and complex contractual texts, individuals skip through the text and sign it unread instead of fully reading the contracts. There might not even be an opportunity to be informed of the content of the contract before conclusion. Moreover, contracts concluded electronically also provide a potential ground for such issues. While entering or registering on a website, users generally do not read the terms and conditions of registration or use of the website, and accept them without reading, which are sometimes written very lengthily with tiny fonts, to access their desired content.

Section Two: Comparing Surprising Terms with Unfair Terms

After introducing and understanding the nature of surprising terms, we compare surprising terms with similar concepts such as unfair terms, with the aim of better understanding the two concepts and explaining their distinguishing features and line of demarcation.

Unfair or inequitable contractual terms are manifested in the existence of gross inequalities between the rights and obligations of the contracting parties. One instance of unfairness is a situation that indicates the abuse by the party with a superior position to the weaker

party, which can arise from the inequality of the parties in bargaining power or negotiating ability (Zulhafiz, 2017:11-12). Some scholars choose the "imposed terms" for these terms and refer to terms that one of the contracting parties imposes on the other party by abusing their economic, social, or professional position (Sardouinasab, 2011:44). It appears that determining whether a term is unfair shall be left to prevailing norms and expectations, and consider a term unfair when the conscience of human beings would never accept, taking into account the customs and practices prevailing at the time and place of contract formation (Ahmadi, 2015:18).

By careful consideration of the above definitions, we reach the view that due to various reasons, such as an emergency, undue influence, a monopoly, and the lack of a competitive market for specific goods and services, the non-negotiability of the terms of standard contracts, etc., one of the contracting parties may accept unilateral, unfair and abnormal terms and obligations resulting in a substantial inequality and imbalance in the rights and obligations of the parties. Therefore, the Obligor generally accepts unfair terms with knowledge of their unilaterality, abnormality, inequity of the contract or certain terms, and consequently the loss of one party in exchange for the exorbitant profit and gain for the other party, and proceeds to conclude the contract. Thus, the Obligor accepts the unfair terms incorporated in the contract willingly, aware, and with knowledge. However, in the case of surprising terms, the situation is generally different, as the Obligor is not aware of the existence of such terms in the contract at all, and these terms have not entered into the obligor's domain of intention, volition, and consent.

Although surprising terms may inherently be inequitable, it might not necessarily be the case. For example, if in a contract, a travel agency is obligated to reserve a specific hotel, such as the Hilton, but the client is not informed that if the travel agency fails to secure a reservation at the desired hotel, it is at liberty to reserve any other hotel at the level of the hotel subject to the contract. Nonetheless, such terms are considered surprising, as can be observed, they lack the element of unfairness.

Therefore, to identify surprising terms and unfair terms, it is essential to distinguish between the two categories and examine their foundations separately.

Part Two: Legal Status of Surprising Terms

In this part, we examine the legal status of surprising terms according to the approach adopted in the *UNIDROIT Principles of International Commercial Contracts* as well as the Principles of European Contract Law.

Section One: UNIDROIT Principles of International Commercial Contracts

The "*Principles of International Commercial Contracts*", codified in 2016, by the International Institute for the Unification of Private Law (UNIDROIT). According to the preamble of this document, the purpose of establishing these Principles is to provide general rules for international commercial contracts, interpret and supplement uniform international and domestic law, as well as to present a model for national and international legislators.

Article 1.7 of this document recognizes the necessity of acting in good faith and fair dealing in the formation of contracts and the prohibition of limiting or exempting from this obligation. The formation of contracts using prepared standard terms is also recognized under the title "standard terms" in Article 2.1.19. Additionally, the relevant provisions of the general rules of formation are asserted in several articles. Article 2.1.20 explicitly rules on the legal status of unexpected (surprising) terms. The first part of this article stipulates that no term incorporated in standard terms shall be operative if it has a particular feature that the other party could not reasonably have expected unless it has been explicitly accepted by that party.

This principle protects the contracting party who accepts the standard terms of the other party. Since by concluding the contract, the Obligor shall comply with and implement the terms of the contract, even if they

have not read the contract terms (Ben-Sahar, 2008:1), this principle excludes terms from the contract that contain features that the other party could not reasonably have expected. This is the result of the principle of good faith and fair dealing. While the law acknowledges the parties' use of standard terms and contracts to save money and time, the party drafting the standard contract cannot abuse the standard terms to surprise the other party, unless the other party explicitly accepts these surprising terms.

This principle is also justifiable according to paragraph 1 of Article 4 of this document. The first part of this paragraph stipulates that a contract shall be interpreted according to the common intention of the parties, but unexpected terms incorporated in contracts not expressly brought to the attention of the other party cannot have fallen within the scope of the intent and consent of the party bound by those terms. Therefore, the requirement to interpret contractual terms based on the common intention of the parties precludes the validity of surprising terms that have not been subject to the intent and consent of one of the contracting parties. The second part of this article states that where the common intention of the parties cannot be established, the contract shall be interpreted in the way that reasonable persons of the same kind as the parties would interpret it in the same circumstances. Accordingly, Article 2.1.20 of this document has made reasonableness the criterion for determining whether terms incorporated in standard contracts have a surprising feature.

Therefore, paragraph 3 of Article 4 of the document has made it mandatory, to interpret a contract to discern the common intention of the parties, to take into account all preliminary negotiations between the parties, any practices established between them, their subsequent conduct, the nature and purpose of the contract, and any relevant trade usages. In cases of encountering surprising contractual terms, which a person of free will would not normally accept in similar contracts, the judicial authority should, at a minimum, determine the scope and extent of such obligations, go beyond the content of the signed contractual terms, and seek the true will of the bound party, and if unable to reach

it with certainty, should determine the inward intent of the bound person by invalidating the unexpected terms incorporated in the contract, based on all conditions and circumstances, the course and content of the parties' negotiations, the legitimate, reasonable and normal expectations and concerns of the parties in similar contracts, and the presumption arising from these matters. Therefore, the UNIDROIT Principles of International Commercial Contracts have rightly deemed invalid surprising terms incorporated in standard contracts that have not been expressly accepted by the Obligor and have not considered them applicable against the Obligor.

Section Two: Principles of European Contract Law

The Principles of European Contract Law (2002) is another important document of general contract rules drafted by the Commission on European Contract Law to unify the structure of contract law in collaboration with a group of eminent legal scholars from European Union member states. Under Article 1:201 of the Principles of European Contract Law, similar to the UNIDROIT Principles, the obligation to act in accordance with good faith and fair dealing is recognized as a general duty of the parties to any contract. Limiting or exempting the parties from this obligation, as an overarching rule in all stages of contract formation, is prohibited.

This document does not specifically recognize terms under the title of "surprising terms". Alternatively, as a unified standard, article 2:104 of this document lays down rules and provisions regarding terms that have not been individually negotiated but have been incorporated into the contract, which can be extended to unexpected terms included in the contract without entering the common intent of the parties

According to Article 2:104 of this document, contractual terms that have not been individually negotiated are only admissible against an unaware party if the invoking party took reasonable steps to bring those terms to the other party's attention before or at the time of contract formation. Paragraph 2 of this article states that merely including terms in the contract text, even if signed by the other party, does not mean that

these terms have been properly brought to the Obligor's attention, and is insufficient to bind the Obligor by those terms.

However, it appears that informing the contracting party of the contractual terms is not an absolute duty regarding all clauses of the contract. In certain cases, depending on the circumstances, it may not be necessary to consider this duty as essential. For example, in a particular trade, specific terms may be part of the common practice of contracts so that a claim of unawareness of the existence of such terms by the trader would not be acceptable. Furthermore, in a particular trade custom, there may be binding terms that the other party is unaware of (Shoarian, Torabi, 2010:114).

Nevertheless, the ruling of this article is certainly enforceable for surprising terms that a person would not normally expect in a similar contract. On this premise, it can be argued that surprising terms shall be separately brought to the attention of the other party and approved and ratified by them. The mere inclusion of such terms in the contract and obtaining the signature of the bound party will not result in their obligation and commitment, because it is the actual intent of the parties if emanating from a free and independent person, that can lead to the incurrence of obligations, not signing a contract that incorporated terms and conditions were not intended by the accepting party. Therefore, this document does not consider mere apparent acceptance of these terms by the Obligor, through signing the contract, as an alignment of the actual and apparent intent of the contracting parties as well. Consequently, it does not render them bound by the terms and obligations incorporated in the contract. To protect the actual intent of the parties and prevent one contracting party from being disadvantaged, the drafters of these Principles have deemed contractual terms that are incorporated into the contract without separate negotiation of the parties and drawing the other party's attention to them to be non-invokable against the other party.

According to this Article, what constitutes "reasonable steps" to bring surprising terms to the other party's attention? Is merely verbally informing the other party of the terms in question sufficient, or shall the

invoking party separately negotiate them and obtain the express acceptance of the other party? Considering the reference to the criterion of reasonableness in this article, actions taken to make the other party aware of the provisions of the contract, which are customarily deemed sufficient to draw the other party's attention, would fall under the category of reasonable steps. For instance, presenting the terms in question in a highlighted format or with a different color or font from the normal format of other clauses, placing the terms in a separate box, negotiating the terms, and obtaining a separate signature from the other party for such terms and referencing to their contents which demonstrate awareness and acceptance by the contracting party, could all be considered reasonable steps to draw the other party's attention (Ayres, Schwartz, 2014:545). Hence, it appears that if the party invoking the surprising terms fulfills their customary duty to inform the other party, for instance, if the Obligor has accepted the terms in question in a separate document and acknowledged awareness of their content, a subsequent claim of ignorance by the accepting party would not be acceptable. This arises from their failure to study the contract terms, despite the obligation to do so, which is inexcusable and constitutes acting against their interests.

Part Three: Criteria for Identifying Surprising Terms

Determining whether a standard term is unexpected depends on existing trade customs, practices established between the parties, and their contractual negotiations. To decide whether a contractual term is unexpected, multiple factors must be examined, such as assessing the bound party's presumed knowledge or ignorance of the subject matter of the term considering their level of expertise and familiarity with the subject of the contract, the availability of a reasonable and logical opportunity to carefully study the contract, the prevailing conditions and circumstances at the time of contract formation, the adherence of the Obligee to the principles of transparency and good faith etc. In the second part of Article 2.1.20 of UNIDROIT Principles of International Commercial Contracts, three criteria are explicitly stated – the content,

language, and manner of presentation of a term – that can be considered in determining whether it is surprising. Moreover, given the recognition of the principle of the duty to act with transparency and good faith, and fair dealing in this document, these criteria can be used to identify unexpected terms as well. We will introduce these criteria as follows.

Section One: Provisions and Content of the Term

Article 2.1.20 Expresses that *"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.*" The terms contained in a contract may initially be unexpected for the accepting party due to their content. Since this document states the criterion of a contract being characterized as unexpected based on a customary standard, the unexpectedness of a term by its content is realized when its substance is far from the expectations of any ordinary person of the same kind as the accepting party in terms of the existing customs in the subject matter of trade, previous practices established between the parties, their contractual negotiations, and generally the circumstances surrounding the contract. To determine whether a subject matter is customary, Article 5 of the *Common European Sales Law* takes into account the nature and purpose of the contract, the circumstances of each case, relevant trade usages, and professional practices. Therefore, it appears that a claim of a term being surprising by a trader who commonly uses a particular type of standard contract in their trade practice is hardly acceptable. The principle is that traders are aware of the customs of their profession, and the burden of proving otherwise rests on them.

Comparably, one of the parties may shape and create a particular understanding of the contract terms, method of performance, and contractual obligations and requirements in the mind of the other party through various means. However, the contract may stipulate something contrary to the expectations and understandings that one party has reasonably and normally relied upon. For example, such understanding may be a result of specific conduct or silence of one party in a situation

where the other party to the contract reasonably and normally expected that the first party would resolve any misunderstandings or mistakes to rectify the conflict of interpretation. On these grounds, paragraph 8 of Article 1 of the UNIDROIT Principles states that a party cannot act inconsistently with an understanding that they have induced in the other party, and upon which the other party has reasonably and legitimately relied.

Section Two: Language of the Term

Language is another reason why a specific term of a contract may be considered surprising for the accepting party. First, the language factor plays a crucial role in international transactions. If a contract is drafted in a foreign language, it cannot be ruled out that some of the terms, despite being sufficiently clear for the party sharing the same language, may not convey all the effects and consequences to the accepting party. Thus, in this scenario, one contracting party may claim that the surprising terms mentioned in the contract were not intended based on the foreign language of the contract.

Conversely, contractual terms may be written in ambiguous, vague, or complex language, making it difficult for individuals without sufficient legal knowledge to understand the legal effects of the contractual terms. Consequently, one party to the contract may exploit the other party's weakness to impose unexpected demands on them. In such circumstances, the expertise of the disadvantaged party and their level of experience and familiarity with the subject matter of the contract should be considered. Equally, a lawyer cannot claim a lack of understanding legal effects of a contractual term, and a professional and experienced person in the subject matter of a contract cannot reasonably claim that a term is unexpected due to a lack of understanding of a particular concept related to the subject matter of the contract. Thus, depending on the level of expertise and awareness of the accepting party and whether the accepting party belongs to the same professional category as the offering party to the contract, a contractual term with a

specific wording may be considered ambiguous and vague in some circumstances, but crystal clear in others (Akhlaghi, Imam, 2006:84).

Section Three: Manner and Form of Presenting the Term

Regardless of accepting a contract, a contracting party will not be bound by terms whose manner of presentation and form of writing is such that they could not reasonably have expected their existence in the contract. The reason for providing this principle is to avoid situations where the stronger party secretly includes terms in standard contracts to impose their desired conditions on the other party, which they would not have accepted had they been made aware of them. For instance, the desired terms of the contract drafter may be printed in tiny font on one of the several pages of lengthy contracts or overleaf and overlooked by the signatory. In the case of Tilden Rent-A-Car Co. v. Clendenning[1], concerning a dispute between a car rental company and an individual who rented a car from the company, the Ontario Court of Appeal in Canada addressed this issue. In this case, the car rental company referred to a term in the rental agreement stating that if the customer had consumed alcohol, regardless of the amount and whether the alcohol had intoxicated them or not, in the event of an accident and damage to the vehicle, the renter would be liable for all specified damages. The court argued that this term was printed in small font on the back of the first page of the contract. Under these circumstances, signing the contract does not constitute consent to all unexpected terms that the accepting party was unaware of. The court further stated that signing a contract could only be considered a sign of consent to a document if the accepting party's awareness of the contract's contents could reasonably and customarily be assumed. Therefore, in this case, the plaintiff cannot rely on unusual and unreasonable printed terms that did not attract customers' attention due to their format.

Furthermore, the context in which contracts are presented and the time given to the contracting party to accept and sign can be considered other

1. Available at : https://canlii.ca/t/g1bxl

influential factors in raising claims concerning unexpected contractual terms. For example, in contracts signed in electronic environments, users generally do not read the terms and conditions of registration or website use when signing in or signing up on a website. Instead, to access their desired content, they accept these terms without reading them, sometimes lengthy and written in small font. As in the case of Uber Technologies Inc. v. David Heller[1], concerning a dispute between Uber and one of its drivers, the Supreme Court of Canada addressed this issue. In this case, the plaintiff did not follow the arbitration clause in the contract for dispute resolution between drivers and Uber and instead filed their claim in a Canadian court. Subsequently, Uber objected to the Canadian court's jurisdiction due to the contract's arbitration clause, which designated the Amsterdam Arbitration Tribunal as the competent arbitration authority. Ultimately, the Supreme Court of Canada argued that since the contract was a lengthy standard contract concluded electronically, and the driver had no choice but to "click to agree" to the terms, they had no opportunity to negotiate its provision. Secondly, the driver was unaware of the provisions and the existence of the clause designating a foreign country as the competent authority for dispute resolution and the high costs associated with arbitration. The contracting party took no action to draw the accepting party's attention to this clause. Therefore, the defendant's (Uber's) objection regarding the existence of the arbitration clause was unjustified, and the term designating a foreign country as the competent authority for dispute resolution was deemed invalid.

Section Four: Lack of Good Faith

Article 1.7 of the UNIDROIT Principles of International Commercial Contracts recognizes the requirement to act in good faith and fair dealing. The obligation of the contracting parties to act in accordance

1. Uber Technologies Inc. v. Heller. D. 2021. 38544, Available at https://www.scc-csc.ca/case-dossier/cb/2020/38534-eng.aspx .

with the principle of good faith is so crucial that paragraph two of this article prohibits the parties from excluding or limiting this obligation. The principle of good faith is not subject to the principle of freedom of contract, and any such agreement contrary to accepted practice, if it exists, would be void.

Good faith has been used in legal literature along with numerous concepts such as honesty, fairness, equity, absence of intention to harm, etc. indicating a certain ambiguity and breadth of its scope (Eskini, Niazi Shahraki, 2007:7). In this regard, it is suggested that a coherent and well-established criterion for examining the good or bad faith of individuals, as a subjective concept, has not been defined in the laws (Zaki, 1998:101). Accordingly, the standards and requirements that the parties to a contract shall observe under the principle of good faith vary depending on the prevailing circumstances at the time of the contract, the type of trade subject, the degree of complexity of that profession, and the nature and period of the contract. Applying the principle of good faith requires determining the appropriate conduct of the contracting parties in consideration of all the circumstances and conditions prevailing after concluding a contract and its nature. Although legal scholars and systems have not reached a consensus on the definition of the principle of good faith, legal scholars believe that the parties to a contract must observe the principle of good faith in all stages of contract negotiations, conclusion, performance, and interpretation (Jafarpour, 2005:144). Therefore, the scope of the principle of good faith is not limited to the interpretation of contracts but rather provides a standard conduct for the parties from the beginning to the end of the contractual relationship. In other words, each party is obligated to act towards the other party in a manner that does not harm them while considering their reasonable and legitimate expectations. If the process of establishing a contractual relationship indicates a failure to comply with the requirements of the principle of good faith and a reasonable degree of honesty and transparency by one of the contracting parties to protect the interests of the other party, it establishes a basis for recognizing conditions that unfairly place the other party in unexpected and

surprising situations that result in harm. Such a situation is contrary to observing the principle of good faith, which requires that if there are any conditions that the contracting party cannot reasonably expect, the party drafting the contract must inform the accepting party of the existence of such conditions.

Chapter Four: Examples of Surprising Terms

After explicating the nature of surprising terms, analyzing their legal status, and presenting criteria for identifying them, this part aims to introduce various examples of such terms in different contracts to learn about their instances.

Section One: Surprising Terms in Banking Contracts

Currently, the method of concluding banking contracts has provided a basis for customers to raise claims regarding their encounter with unexpected terms in these contracts. The problems facing the banking industry witnessed in both the deposit and facilities sectors, relate to customers' lack of awareness of the provisions of banking contracts. Typically, these contracts are lengthy and contain complex articles and clauses that make them difficult for the general public to understand. Furthermore, the negligence and oversight of bank officials in explaining the terms of the contract to customers exacerbate this situation. In some cases, bank officials, by merely pointing out the place for signature, deprive the customer of even a cursory opportunity to review it. Consequently, individuals robotically follow the bank official's instructions and sign the documents, unaware of the terms and conditions drafted by the bank. In general, four scenarios can be envisioned for a customer's lack of awareness of the provisions of banking contracts: In the first case, the customer is unaware of the contract and its contractual form. In the second case, despite being aware of the contract, the customer is unaware of its elements. In the third case, the customer is unaware of how the contract is executed. In the fourth scenario, the customer is unaware of the clauses included in

the contract, which are the terms of the contract (Khatibi, 2021:111). For example, in some clauses included in banking contracts, the bank's unilateral determination and claims regarding a partner are considered valid and binding, such as the bank's determination of a partner's, guarantor's, or surety's violation of the contract terms. By using the bank's discretion as the criterion for establishing a violation of regulations or any of the contract's terms and conditions, the bank's interpretation is declared valid and uncontestable. Similarly, this applies to the clause that establishes the validity and the bank's books and account statements being the criterion for action in any matter, which the applicant of facilities shall accept under any circumstances. (Hajjarkargar, Hassani, Khajehzadeh, 2022:151-152). Due to the lack of customers' free will in determining and negotiating these terms, and if they are included in the contract under circumstances where the other party is unaware of their existence, they can be considered surprising terms.

Section Two: Surprising Terms in Air Transport Contracts and Airline Tickets

In air transport contracts, as a type of consumer contract concluded between airlines (as specialists) and passengers (as non-professional consumers), there are many instances of limitations or exculpatory clauses that absolve airlines of liability, as well as a lack of proportional balance between the rights and obligations of the parties. In addition to the lack of transparency in the provisions of these contracts, passengers do not have access to the contractual terms. Consequently, in many cases, the recipient of transportation services may encounter conditions they were unaware of existence in the transportation contract, such as a clause in air travel contracts that obligates passengers to pay the new ticket price if it increases after the date of reservation, rather than the price at the time of reservation.

Moreover, in a common type of agreement in air transport known as code-sharing, the contractual operator A undertakes the sale and promotion of operator B's transportation services, presenting them as if

they were their services. However, the actual transportation of passengers and cargo is performed by an airline other than the one declared in the travel documents (such as the ticket). In such a contract, the passenger believes that the flight is operated by the airline from which they purchased the ticket while in reality, the flight is operated by another operator (Khoeini, Salmanzadeh, 200: 63). It appears that when an airline acts in a manner that leads the passenger to purchase a ticket with the assumption and intention that the flight operations will be carried out by that same airline, without providing the passenger with sufficient information to identify the actual carrier, it constitutes a form of fraud toward the passenger. This falls within the scope of the conditions set forth in Article 1.8 of the *UNIDROIT Principles of International Commercial Contracts*, placing the passenger in an unexpected and surprising situation, unless the passenger was informed from the outset, prior to booking the ticket, about the specific nature of this type of flight, where the carrier is different from the contractual operator. Accordingly, the courts of Spain and Belgium, in recent rulings against Brussels Airlines and Iberia, stated that the code-sharing clause would not be valid unless the passenger had explicitly consented to that agreement (Karimi, Esfandiarifar, 2018: 727-728).

Moreover, in most air trips, the passenger, as the recipient of services, is presented with a printed or electronic document unilaterally prepared by the transportation service provider, called a ticket. Since the ticket is unilaterally drafted and issued by the transportation operator, its terms and conditions are often drafted in favor of the service provider or carrier, while the passenger is unaware of its provisions, or becomes aware only after purchasing and receipt of the ticket. In such circumstances, the carrier may rely on the ticket's provisions to provide or discontinue expected subsequent services. The ticket can be considered a transportation contract, a passenger’s identification document, and authorization for passage, or merely a document provided to the passenger as a result of a prior written or verbal contract with the transportation operator. In any case, the unexpected terms stipulated in tickets that have been unilaterally drafted by one party may

not be enforceable against the other party if they only become aware of the terms after paying for the transportation services (Malakouti, 2024:23-24). Because, under these circumstances, the provisions of the unexpected terms in the ticket did not fall within the passenger's intention and will at the time of concluding the transportation contract.

Section Three: Surprising Terms in Maritime Bills of Lading

Today, the bill of lading plays a crucial role in facilitating commercial transactions and international transportation. In addition to being a receipt for the goods received by the carrier, a bill of lading serves as evidence of a transportation contract and a title document for the goods covered by it (Arab Ahmadi, Elsan, Noushadi, 2005:141). In the realm of international marine transportation, bills of lading are classified into various types for several reasons. A charter party is a type of bill of lading. If the carrier, to secure its fleet and fulfill its obligation to transport others' goods, enters into a ship charter agreement with the ship owner, the bill of lading issued by the carrier for transporting others' goods via the chartered ship is called a charter party. Ship charter parties, like any other contract, contain terms that allocate various liabilities and risks between the parties (the ship owner and the charterer). These terms include limitation of liability for one party, exemption from liability, stipulation of liquidated damages (contractual lump-sum damages), immunity clauses, requirements to obtain necessary insurance policies, or other terms and conditions specifying the parties' obligations towards each other. Conversely, the charterer, as the carrier, will enter into a transportation contract with the Consignor and issue a bill of lading. To prevent conflicts between the terms and obligations in these two contracts and preserve the liability allocation scheme in the ship charter agreement, the charter party incorporates the terms of the ship charter agreement through clauses known as "*incorporation clauses*". *The doctrine of incorporation by reference* means an oral or written contract incorporates oral or written terms external to the contract by expressly or implicitly referring to them in its text, such that the external terms have the same value as the terms contained within the contract. The common feature of such contracts is that the incorporated contractual terms and the terms in the contract that refer to the other

contract form a unified contract as if they were drafted simultaneously, and their terms shall be interpreted together and as a whole (Arbabi, Hatamipour, 2019:2). Therefore, the bills of lading issued by the carrier may refer to the terms of a ship charter party, but the shipper may be unaware of the provisions of that agreement. In such circumstances, the holder of the bill of lading may encounter unexpected conditions that were outside their intention and will at the time of concluding the contract with the carrier.

Conclusion

Presently, invoking various examples of surprising contractual terms has turned into a significant problem as one of the causes of disputes between parties to different contracts. Surprising terms are those that have been drafted contrary to the legitimate, customary, and reasonable expectations of the Obligor, and no ordinary person in the position of the accepting party could expect the existence of such conditions in the contract. These terms are not agreed upon or negotiated by the contracting parties and are imposed by one party with a superior and exclusive position in providing certain goods and services, through pre-designed standard contracts, without being brought to the attention of the other party. Typically, due to the type and form of the contract, the context in which it was concluded, its complexity, lack of transparency, lengthy provisions, lack of sufficient expertise to understand the content of the contractual terms, or lack of reasonable opportunity to become aware of these conditions, the other party to the contract remains unaware of its provisions. Therefore, unlike unfair and unjust terms, where the Obligor is aware of and accepts the unilateral, unusual, and unfair nature of the contract or certain terms through their own will; the Obligor is unaware of the existence of unexpected terms in the contract, and these terms have not entered the Obligor's domain of the intention, will, and consent. Accordingly, Article 20-1-2 of the *UNIDROIT Principles of International Commercial Contracts* (2016) explicitly recognizes unexpected (surprising) terms and states that no term included in a standard contract with a characteristic that the other party could not reasonably expect will be valid. It then considers the content, language, and manner of presentation to determine whether a term is surprising. Therefore, the UNIDROIT Principles do not accurately

consider surprising terms incorporated in standard contracts, which have not been explicitly accepted by the Obligor, as valid and enforceable against the Obligor. Additionally, based on Article 2:104 of the *Principles of European Contract Law*, contractual terms that have not been individually negotiated by the parties are only binding on a party who was unaware of them if the party invoking those terms took reasonable steps to bring them to the other party's attention before or at the time of conclusion of the contract. Paragraph two of this article states that merely including terms in the contract text, even if signed by the other party, does not necessarily mean that these terms have been properly brought to the Obligor's attention, and is not sufficient to render the obligations arising from those terms binding on the Obligor. Thus, it can be argued that based on the position taken in the Principles of European Contract Law, surprising terms shall be separately brought to the attention of the other party and confirmed and ratified by them. Consequently, merely including such terms in the contract text and obtaining the Obligor's signature does not establish an obligation or commitment on their part. It is the true will of the parties, expressed freely and independently, that can give rise to obligations, not merely signing a contract whose terms and conditions were not intended or willed by the accepting party. Hence, this document does not consider the mere apparent acceptance of these terms by the Obligor, through signing the contract, as a reflection of the valid alignment of the parties' true and apparent intentions. As a result, it does not hold them bound by the terms and obligations contained in the contract. In summary, the drafters of the *Principles of European Contract Law* do not recognize terms that have been incorporated in the contract, but not separately negotiated by the parties and whose existence has not been brought to the other party's attention, admissible against the other party in order to protect the true intention of the parties and prevent one party from suffering losses.

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