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How digitalization has affected contract conclusion and the approval of unfair terms in these contracts

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Abstract

Digitalization has changed the way we deal with many activities. Thanks to the internet connection, each operation of our daily routine, from the simplest one to the most complex one, can now be performed through the use of a mobile phone, an iPad or a personal computer.

During this work, we will analyze how the e-commerce and the banking and financial sectors have been touched by digitalization, in particular with regard to the conclusion of contracts, with a specific focus on the unfair terms.

The possibility to conclude distance contracts through the use of electronic devices and different types of electronic signatures, raises some questions, especially about how the consent of the parties and the written approval of unfair terms could be expressed, respecting the rules provided for in the Italian Civil code.

We will see the different solutions that have been proposed to solve these problems, even though there is still not a unanimous orientation of the jurisprudence and the doctrine in this regard. In a second stage, we will focus on how this period of emergency due to the Covid-19 epidemic could open for new and interesting scenarios.

All things considered and given the importance of being digital in the current competitive environment, an intervention of the legislator and the creation of clear and specific rules would be desirable.

Key Words: digitalization, e-commerce, banking, contract's conclusion, unfair terms, consent, written approval, electronic signatures.

Summary

INTRODUCTION

In private and civil law, the parties to the contract are generally free to decide how to enter the contract, since they have equal standing and same bargaining power. Nevertheless, there is a specific class of contracts in which the conditions are set in advance by one of the parties (usually by the entrepreneur or by a company), and are proposed to a generality of possible contractors (usually consumers), so that the subscribing parties shall only express their consent, typically by signing a standard form. The economic reason for this type of contract is the need to ensure uniformity of content in all relationships of identical nature. This class of contracts comprises, for example, insurance and banking sector, transports sector, trade and services sectors.

In this context, one of the issues that arise concerns the protection of the weak party to the contract, in particular with regard to the presence of the so-called **"unfair terms"**. According to the definition provided by Article 3 of *Unfair contract terms Directive (93/13/EEC)* "*A contractual term which has not been individually negotiated shall be regarded as unfair if, contrary to the requirements of good faith, it causes a significant imbalance in the parties' rights and obligations arising under the contract, to the detriment of the consumer*".

In Italy the matter of unfair clauses is regulated by the Civil Code art. 1341[1] and by the "*Codice del consumo*"[2], arts. 33-37.

In particular, art. 1341 paragraph 2 c.c. includes a list of unfair terms – that unanimous jurisprudence and doctrine consider not to be of an exemplary but of an imperative nature – and provides that these terms must be specifically approved in written form.

The written approval must be specific: it must be carried out for each individual unfair clause and must be an approval separate from the subscription of the entire contractual text. As stated by jurisprudence, however, it is also sufficient to have a single subscription of several unfair clauses, provided that they are shown in such a way that allows the contracting party to know with certainty which are the clauses that approves[3]. The required approval is intended to draw the attention of the interested

[1] Amended by L. 6 February 1996 n. 52, in implementation of the above-mentioned Directive 93/13/EEC.
[2] D.Lgs. 6 September 2005 n. 206.
[3] Cass. 27 February 2012, n. 2970.

party on the particular onerousness of the individual clauses, so that they are induced in assessing their convenience, in order to accept or reject them after careful consideration.

The rules provided by the "*Codice del consumo*" apply only to contracts for the supply of goods or services that are concluded between a seller or a supplier and a consumer. For "consumer" we mean the natural person who is acting for purposes that are outside their trade, business or profession[4]. The *Codice del consumo*, besides taking the concept of unfair terms as provided by the European Directive above mentioned, furnishes a first list of clauses whose content is considered to be unfair until proven otherwise (the so-called *grey list*) and a second list of clauses considered null *iuris et de iure*, because of their particularly afflictive nature (the so-called *black list*). According to art. 36 of the *Codice del consumo*, the unfair terms listed in art. 33 and 34 are null while the rest of the contract remains valid.

With regard to the relationship between the two regulations, the provision contained in the "*Codice del consumo*" constitutes a special legislation, which applies only to relationships between consumers and entrepreneurs, while the Civil code rules have general application, which prescinds from the reference to predetermined categories. The control system referred to in art. 1341 c.c., therefore, also applies to contracts concluded by subjects with equal bargaining power, even if in the specific contract the party that draws up the conditions achieves a position of advantage.

Nowadays **digitalization** has affected many aspects of our lives, including the negotiation and the conclusion of contracts, which can now be performed by electronic means. The spread of this way of contract negotiation has soon raised the issue of how the requirement of the **specific written approval** provided by art. 1341 paragraph 2 c.c. for the unfair terms, unilaterally established by the entrepreneur*s*, can be satisfied.

Strictly linked to the issue is the topic of **electronic signature** which is going to substitute the classic signature made on a piece of paper. During this work, we will see that different signatures apply to different types of contracts, especially as far as the e-

[4] Art. 3 lett. a), D. Lgs. September 6, 2005 n. 206, also known as *Codice del Consumo*.

commerce and the banking contracts are concerned, focusing on the requirements that need to be satisfied in each specific case.

ABOUT ELECTRONIC SIGNATURES

The handwritten subscription is no longer the only possible instrument that can be used in different processes of interaction between actors across all economic sectors. In fact, today the Italian legal system offers several solutions based on multiple types of electronic signatures, in particular:

- *Electronic signature*, defined as «data in electronic form which is attached to or logically associated with other data in electronic form and which is used by the signatory to sign»[5]. The process could be connected to the use of a simple password or a biometric signature;
- *Advanced electronic signature*, defined as an «electronic signature which meets the requirements set out in article 26»[6], which states that «an advanced electronic signature shall meet the following requirements:
  a) *it is uniquely linked to the signatory;*
  b) *it is capable of identifying the signatory;*
  c) *it is created using electronic signature creation data that the signatory can, with a high level of confidence, use under his sole control; and*
  d) *it is linked to the data signed therewith in such a way that any subsequent change in the data is detectable»;*
- *Qualified electronic signature*, defined as an «advanced electronic signature that is created by a qualified electronic signature creation device, and which is based on a qualified certificate for electronic signatures»[7];

[5] Art. 3 point 10, EU REGULATION n. 910/2014 on electronic identification and trust services for electronic transactions in the internal market and repealing Directive 1999/93/EC (EIDAS).
[6] Art. 3 point 11, EU REGULATION n. 910/2014 on electronic identification and trust services for electronic transactions in the internal market and repealing Directive 1999/93/EC (EIDAS).
[7] Art. 3 point 12, EU REGULATION n. 910/2014 on electronic identification and trust services for electronic transactions in the internal market and repealing Directive 1999/93/EC (EIDAS).

- *Digital signature*, which exists only in Italy and is defined as a special type of qualified signature based on a cryptographic key system, a public and a private one, which are interrelated, enabling the holder via the private key and the recipient via the public key to make clear and verify the provenance and integrity of an IT document or a set of IT documents, respectively[8]. The digital signature process is run through the use of a smart card or a token.

For what concerns the evidentiary effects of the different types of electronic signatures, art. 20 paragraph 1-bis CAD provides that the IT document fulfills the requirements of the written form and has the effect provided for in art. 2702 c.c.[9] in presence of a digital signature, other qualified electronic signature or advanced electronic signature. In any case, it is formed after computer identification of its author, through a process meeting the requirements set by AgID[10] pursuant to art. 71 in such a way as to ensure the security, integrity and non-modifiability of the document, and clearly and unequivocally, its attribution to the author.

In all other cases, the suitability of the IT document to meet the requirement of written form and its evidential value shall be freely evaluated in court, in relation to its characteristics of security, integrity and non-modifiability.

Advanced electronic signatures, qualified signatures and digital signatures may be used to sign any act, for which the legal system requires signature:

- to sign the privacy consent to the processing of sensitive data;
- to sign unfair terms contained in a contract;
- to sign banking, financial and insurance contracts;
- to sign any contract, whether or not it requires written form.

[8] Art.1 lett. s), D. Lgs. March 7, 2005 n. 82, also known as *Codice dell'Amministrazione Digitale* (CAD).
[9] Which states that: private writing gives full evidence, till contestations, of the provenance of statements by the person who subscribed it, if the person against whom the writing is produced recognizes its subscription or if the latter is legally considered as recognized.
[10] *Agenzia per l'Italia Digitale*.

UNFAIR TERMS IN THE ERA OF DIGITALIZATION

E-commerce contracts

One of the sectors which has been most affected by digitalization is the trade sector. Over the years, the latter has seen the birth of digital platforms within which people can sell and buy any kind of objects. In this regard, we talk about **e-commerce**, whose typical way of concluding a contract is through the so-called **point and click**. Basically, the contracting parties are asked to confirm through the click on a box – after having read the general terms and conditions of the contract – their own acceptance of the contractual provisions.

With regard to the above-mentioned point-and-click contracts, the most controversial issue relates to unfair terms: these are terms that can create a particular disadvantage on one of the parties to the contract and for this reason, as we have already mentioned in the text, our legal system provides that these clauses must be expressly approved in writing. The e-commerce is not exempt from compliance with those provisions and terms.

Art. 1341 c.c. basically requires two elements: the specific approval of the clauses and the written form of such approval. With regard to the first element the solution has been identified in the creation of two distinct forms, to be approved with a double and separate click: one for the approval of the overall contractual regulation and the other for the approval of unfair clauses. On the other hand, for what concerns the need for such acceptance to be given in writing, the issue appears to be much more complicated, given that, despite the increasing spread of telematic contracts, there is not yet a well-established case-law.

According to a first, more restrictive approach, unfair clauses must be approved with the use of the digital signature by the party signing the contract, since the mere click is not enough for the approval of the contractual text sufficient for this purpose[11].

In accordance to a more recent approach, however, by imposing, for the successful conclusion of such contracts, the use of a sophisticated instrument, not yet massively

[11] Court of Catanzaro, order 30 April 2012.

spread among the public, would lead to the risk of crippling the development, at the national level, of an entire sector of global trades. Moreover, by adhering to the more restrictive approach mentioned above, one would end up confusing the plan of knowledge of the clause, which art. 1341 c.c. intends to safeguard trough the requirement of the specific subscription of the clause, with that of certainty regarding the provenance of the declaration, which is instead linked to the technological instrument constituted by the digital signature[12].

Therefore, although the point-and-click is now used by several online platforms, its legal validity is still controversial, which is why an action by the national legislator is needed. In fact, given the current diffusion of new ways of concluding contracts through online means, requiring the formality of double approval (in particular, in writing, at least in relation to unfair terms) appears with reference to telematic contracts anachronistic and strongly penalizing.

In any case, to completely exclude the possibility that the "simple" electronic signature can achieve the formal requirements provided by art. 1341 c.c., with regard to the effectiveness of unfair clauses, seems to be not in line with the *principle of neutrality* stated by art. 25 paragraph 1 of the EU Regulation n. 910/2014 (known as the EIDAS regulation) which is directly applicable in our country.

The article which states that «an electronic signature shall not be denied legal effect and admissibility as evidence in legal proceedings solely on the grounds that it is in an electronic form or that it does not meet the requirements for qualified electronic signatures» seems to require a flexible assessment of the suitability of the IT tool used in each specific case to meet the requirements underlying the formal requirement imposed by law, without authorizing *a priori* limitations, which are not justified by a technical unfitness in relation to the aim to be pursued.

Indeed, if the *ratio* of the specific written approval required by art. 1341 c.c. is to protect the weak contracting party, by bringing his attention to the onerous clauses contained within the contract, the same result could be also achieved - as it already happens in practice - requiring to the adherent, in respect of unfair clauses, a specific and separate click from the one provided for the acceptance of the entire contractual

[12] Court of Naples, sentence 13 March 2018, n. 2508.

settlement in which they are included. Everything mentioned above must be followed keeping also in mind the considerations made by the jurisprudence, with reference to the suitability of the specific approval with the simple electronic signature to satisfy the *ratio* of the protection of the adherent, in the same way in which an advanced electronic signature would be suitable.

Banking contracts

For years, the banking sector has shown little openness to **digital transformation**, even though it understands its potential. As a result of the distrust of Italians with regard to changes (especially when it comes to financial services), the **banking sector** has accumulated, compared to others, a certain delay in the process of digitalization. However, there are many signs that this gap can be filled in the coming years. Banks are indeed facing many new opportunities and challenges thanks to the introduction of tools such as mobiles, cloud, alternative form of payment, analytics and the new Psd2 Directive[13]. Therefore, we can notice that the process of digital transformation goes beyond the simple streamlining and strengthening of traditional processes (i.e. dematerialization of bank's internal procedures).

Among other things, digitalization has opened up for the possibility of concluding several types of banking contracts through online means, without the need to personally go to the bank. These contracts are characterized by the fact that they are prepared unilaterally by the bank and then offered for subscription to the costumer (a typical example is the bank account contract), and they often include **unfair clauses.** These unfair clauses could be, for instance, the ones which give to the bank the power to execute or decline client's orders, or to execute them at its own discretion without informing the latter; the clauses which confer on the bank the unilateral power to change the terms of an indeterminate duration contract in the absence of a justified reason; the clauses which exclude the bank's responsibility for facts not directly attributable to it.

[13] Payment services (PSD2) - Directive EU 2015/2366.

First of all, it should be noted that banking contracts are subject to a specific regulation dictated by D. Lgs. no. 385 1 September 1993, also known as *Testo Unico Bancario* (TUB).

In particular, art. 117 TUB states that:

1. Contracts shall be drawn up in writing and a copy shall be given to customers.

(…)

3. In the event of non-compliance with the prescribed form, the contract shall be null and void[14]*.*

For this reason, they are included among the contracts indicated in **art. 1350** paragraph 1 n. 13 c.c., for the validity of which the **written form** is required *ad substantiam*. This is an important difference if compared to the e-commerce contracts analyzed above, which are free in terms of contract form.

The written form required *ad substantiam* has also consequences on the possibility of concluding this type contracts through electronic means, given that the CAD provides that the documents referred to in art. 1350 paragraph 1 n. 13 c.c. drawn up on an IT document or formed by means of electronic data-processing techniques shall be signed, under penalty of invalidity, with advanced electronic signature, qualified electronic signature or digital signature[15].

Thus, for the conclusion of banking contracts in digital form, the simple electronic signature is not enough. Neither any exception is provided for the express approval of the unfair clauses contained in them: also in this case, the contract is subject to art. 1341 c.c.; basically, the contracting party must approve the entire contractual regulation and the unfair clauses contained therein – to which the bank will draw the attention of the customer, as it happens in practice through, for instance, the use of separate screens - and must do so with one of the signatures above indicated.

This, however, constitutes a significant limitation on the possibility of concluding such contracts in digital form, since such instruments are still not widely used among retail customers.

[14] The written form is required also by articles 125-bis, 126-quinquies and 126-quinquiesdecies TUB.
[15] Art. 21 paragraph 2-bis, CAD.

The *"Decreto Liquidità"*: new perspectives after the Covid-19 epidemic?

A push towards simplification for the conclusion of banking distance contracts may have come with art. 4 of D.L. April 8, 2020 n. 23 (known as "*Decreto Liquidità"*). The provision, which is one of the extraordinary measures adopted by the Italian Government during the emergency related to Covid-19 epidemic, affected the way of concluding of banking distance contracts with retail customers.

In particular, the law provides that contracts concluded by banks with retail customers, during the period of emergency (as decided by the Ministers' Council on January 31, 2020), have the evidentiary effects referred to in art. 20 paragraph 1-bis CAD, even if the customers express their consent by ordinary email or by other suitable tools.

Therefore, the issue refers to the written form both *ad probationem* and *ad substantiam*. The simple electronic signature takes on the same evidentiary effects pursuant to art. 2702 c.c. that digital signature, advanced electronic signature and qualified electronic signature have, provided that certain conditions are met, in particular:

a) that the use of electronic mail or other suitable means is accompanied by a valid copy of the identification document;

b) that the contract referred to is identifiable with certainty;

c) that the documentation is preserved together with the contract in such a way as to ensure its security, integrity and non-modifiability.

It is also provided that the requirement of the delivery of a copy is met by making available to the customer a copy of the text of the contract on durable means[16] and that the intermediary delivers a paper copy of the contract as soon as possible after the end of the state of emergency. Finally, the article concludes that the withdrawal can be manifested with the same instruments above mentioned.

[16] Art. 121 lett. l) TUB identifies as durable means any instrument enabling the customer to retain information which is addressed to him personally in such a way that he may have access to it in the future for a period of time appropriate to the purpose for which is intended and which allows the identical reproduction of the information stored.

Basically, the law provides, for a limited period of time, an "alternative" way to fulfill the requirements of the written form and consent of the parties as outlined by the TUB cited above. In fact, it goes beyond and modifies the discipline imposed by the CAD, ensuring effectiveness (until contestations) to the expression of the parties' consent through the use of their own uncertified e-mail address or other suitable means.

The provision is therefore directed towards that part of the customers – expressively identified, in accordance with Bank of Italy guidelines, as "retail customers", which are: consumers; natural persons engaged in a professional or craft activity; non-profit entities; micro-enterprises – which do not possess the IT equipment necessary for the conclusion of the distance contract (i.e. certified e-mail PEC and digital or electronic signatures).

This is an exceptional and temporary provision, which only regulates the contracts concluded between the date in which the decree entered into force and the termination date of the emergency state. Without any doubt this is an important simplification, but not without threats for its application.

Above all, the entire process must be managed in such a way as to enable the clients to give their consent in a clear and easy way, taking into account all the choices and options that are required to allow them to take a position. In particular, as far as we are interested in, for what concerns the unfair terms, which could be contained in the contracts concluded remotely, and in relation to which, it will always be necessary to ensure a proper knowledge by the customer and their specific approval.

It is therefore necessary to manage the possible legal and operational risks arising from the use of this new solution, defining clear processes that can mediate between the ease and simplicity of use by the customer and the compliance with the regulations, avoiding the risk of nullity and future judicial litigations (for instance the case in which the customer disclaims the ID used during the procedure) that could systemically undermine the stability of the volumes of business carried out by banks with customers.

Another important issue is that of the storage of the documents in a way that ensures their security, integrity and non-modifiability. In this regard, the use of the blockchain could be of extreme utility, in order to keep track of transactions and mail exchanges between the contracting parties in a sure, transparent and non-modifiable way.

This transitory derogation introduced by means of decree is a very important test. Its proper functioning during this time of emergency could be a precedent that, if it proves to have positive and functional results, could lead to the acceptance of alternative forms of consensus more consistent with operations concluded at a distance. Moreover, this innovation could represent a further significant step towards the country's digitalization, today more than ever essential to transform a time of crisis and health emergency into opportunities for growth, development and competitiveness.

CONCLUSION

During this work, an analysis of the effects of digitalization on the conclusion of the contracts and on the approval of the unfair terms contained therein has been provided.

The conclusion of contracts with these new methods necessitates compliance with the rules on unfair terms, with the need to coordinate the requirement for the specific approval expressed in writing with the rules provided for IT documents and the use of electronic and digital signatures.
We have seen what problems have arisen in a highly developed sector such as e-commerce, especially concerning the use of very popular tools such as *point and click*, whose validity is still being discussed in our legal system, given the absence of a specific legislation and precise jurisprudential guidelines.

With regard to the banking sector, further limitations are given by the specific regulation provided by the TUB, which requires the written form *ad substantiam* for the conclusion of banking contracts, with the additional prediction that in the event that such contracts are concluded with digital means, the use of advanced electronic signature, qualified electronic signature or digital signature is necessary. These are instruments that are not yet widely spread among the public at this very moment, and this is probably the biggest limit for the diffusion of such type of contracts.
In this regard, it would be desirable that the legislator takes action to redefine distance contracts regulations, including rules on the approval of unfair terms and taking into account that the *ratio legis* is to determine a careful assessment of such clauses by the

contracting party.

A significant push towards the simplification of the process of concluding contracts has been given, in respect to the banking sector, with the "*Decreto Liquidità*". We will see whether this innovation will remain limited to the emergency period or whether it will prove to be a positive precedent that will be followed by further measures bringing the banking sector closer to an increasingly digitalized world.

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