



Revista Facultad de Jurisprudencia

ISSN: 2588-0837

RFJ@puce.edu.ec

Pontificia Universidad Católica del Ecuador
Ecuador

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Legal Report No. 01 - 2023 The integral control of vexatious clauses in the Peruvian Civil Code
Revista Facultad de Jurisprudencia, vol. 13, 2023, Junio-Diciembre
Pontificia Universidad Católica del Ecuador
Ecuador

DOI: <https://doi.org/10.26807/rfj.vi.460>

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Legal Report No. 01 - 2023
The integral control of vexatious clauses in the Peruvian Civil Code

Informe Legal No 01 - 2023
El control integral de las cláusulas vejatorias en el Código Civil peruano

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Original Article (Report)

RFJ, No 13, 2023, pp. 290 - 304, ISSN 2588-0837

TO: Editorial Board

ABOUT: The need to establish a modern and updated regulation of integral control of vexatious clauses in the Peruvian Civil Code.

DATE: June 14th, 2020

ABSTRACT: The purpose of this report is to make a critical analysis of the normative areas that regulate the control of vexatious clauses that may be inserted in standardized contractual mechanisms, that is, to see whether or not it is necessary to maintain the legal framework of how this problem is being regulated, to conclude whether or not there is adequate comprehensive control of any clause that may generate a situation of imbalance in the contracting parties in this contractual mechanism.

KEYWORDS: Regulation, Civil Code, Integral Control, Vexatious Clauses.

RESUMEN: Este informe tiene por objeto hacer un análisis crítico de los ámbitos normativos que vienen regulando el control de cláusulas vejatorias que pueden ser insertas en los mecanismos contractuales estandarizados, es decir, ver si a la fecha es necesario mantener o no el marco legal de cómo se viene regulando esta problemática, para concluir si existe o no un adecuado control integral de cualquier clausulado que pueda generar una situación de desequilibrio en las partes contratantes en este mecanismo contractual.

PALABRAS CLAVE: Regulación, Código Civil, Control Integral, Cláusulas Vejatorias.

JEL CODE: K41.

1. BACKGROUND

At present, in our society, the consumerism of goods and services has been consolidated, since the great production erected since the industrial revolution, today, together with the expansion and opening of markets, together with globalization and the technological era, makes commercial transactions are increasingly numerous, dynamic, and even competitive, and therefore the use of contractual mechanisms that facilitate the procurement of goods or services has increased. It is then that the law, not being able to be alien to this phenomenon, must be in perennial linkage and observance with these vicissitudes that arise in our society and provide answers or solutions to the problems that arise in its development.

Article 18, paragraph d) established that a list of clauses inserted in general contracting clauses and adhesion contracts

that generate the improvement of the contractual situation of the person who drafts them at the expense of the consumers will be considered as not put in place. However, this law was repealed in 2010 by the Code of Consumer Protection and Defense (Law No. 29571) which establishes a more detailed regulation of these contractual mechanisms, under the figure of the consumer contract, in which a supplier and a consumer participate, under the concepts established in said Code, and even and unlike the civil code, it has more updated and effective control mechanisms, such as the general control of vexatiousness of a clause and a system of lists of vexatious and presumably vexatious clauses.

From the foregoing, it must be stated that to date the Civil Code maintains its article 1398 in force without any substantial modification, maintaining some cases of vexatious clauses that will not be valid, but it lacks comprehensive control in those cases outside the list provided in said norm and even that cannot be extended through interpretation or analogical application, lacking a framework of substantive and general control over the vexatiousness of any clause predisposed and that generates a detrimental situation to the adherents. Likewise, and although the Code of Consumer Protection and Defense contains a legal framework of control superior and improved to that of its civil counterpart, it must be kept in mind that its framework of protection is restrictive since it is intended to protect against those vexatious clauses that have been inserted in consumer contracts, that is, those entered into between a supplier and a consumer, being outside its scope all problems generated by the insertion of vexatious clauses in these contractual mechanisms entered into between businessmen and persons who are not considered consumers (final consumers).

In the case of vexatious clauses inserted in unilaterally stipulated contracts, the civil code does not have mechanisms of control of substance and general form to detect this type of clauses, and to date has only established a reduced group of clauses that it considers invalid in case they are inserted in a mass contract; and although the Code of Consumer Protection and Defense has a more detailed and updated regulation, it only regulates consumer contracts, where a supplier and a consumer must necessarily participate, leaving defenseless the entire mass of adherents who make use of this contractual mechanism, in which even companies or businessmen may be involved, since this contractual phenomenon is not designed for the exclusive use of certain subjects, but to dynamize massive transactions in a competitive market, and therefore for all subjects of law, which makes it necessary to establish mechanisms of general protection for all those who make use of these contractual mechanisms and do not remain in a state of defenselessness due to lack of legal mechanisms that adequately regulate their use.

2. CONSIDERATIONS OF THE PERUVIAN LEGAL SYSTEM

The Peruvian legal system has two normative bodies that regulate the phenomenon of mass contracting, and therefore the control of vexatious clauses, the first one is found in the Civil Code (1984), since articles 1390 to 1401, regulate the use of general contracting clauses and contracts of adhesion, and within these is the control of abusive clauses inserted in these contractual mechanisms, whose article 1398 stipulates as:

Invalid those general contracting clauses (not administratively approved) and those inserted in adhesion contracts that establish in favor of those who have drafted their exonerations or limitations

of liability; powers to suspend the execution of the contract, to rescind or terminate it, and to prohibit the other party the right to raise defenses or to tacitly extend or renew the contract.

As can be seen, although said regulation establishes a list of clauses that are considered vexatious, it has not taken into account that the universe of clauses that can generate a contractual imbalance is much greater than that foreseen, and even due to the variety of operations in which its use is immersed, it has given rise to problems regarding its scope of application, either through extensive interpretation or analogy, which is why it is not an adequate means of control for these contractual mechanisms. In addition to being of such massive and varied use, it is complicated to apply to other assumptions, since this contractual mechanism is so expanded in its use that it exceeds even the private sphere, since it can be observed in commercial relations that are also regulated by Maritime Law, Aeronautical Law, and even within Public Law, which has generated difficulties and made it impossible for the operators of the Law not to make an adequate application of control due to the shortcomings contained in said norm of the Civil Code.

In addition, there is a lack of contractual institutes and remedies provided by the civil code that is compatible with such contractual practice, since those existing in the referred code are to be applied to contracts entered into consensually by both parties and perfected by mutual agreement, since they are contracts where erected on a unilateral predisposition and perfected using assent (adhesion), it is incompatible or inapplicable to apply certain contractual remedies provided in the same code for this type of contracts, since such remedies have been designed for parity contracts. Therefore, the civil

code has a narrow control framework and does not have a general and adequate control mechanism to mitigate the insertion of any vexatious clause that may be inserted in these contractual mechanisms.

The second body of law that regulates the use of these contractual mechanisms is the Consumer Protection and Defense Code (Law No. 29571), which, taking as a reference the vexatiousness control model of the German system, has regulated the control of vexatious clauses by introducing a control of content together with a system of lists, but a problem arises with respect to its suitability as a control framework and also on its application, firstly, because this control system has been established without taking into account that it was foreseen in Germany for its judicial system, not to be applied in administrative courts (as has been done in our country), since the substantive control and its declaration of invalidity (of a vexatious clause) only corresponds to its determination and declaration in the jurisdictional sphere, It should be added that this Code of Consumer Protection and Defense has a narrow scope of application, since it has been foreseen to be applied only to consumer contracts, that is to say, only to that contract where a supplier and a consumer participate, and the latter has been defined in the same code as that natural or legal person who acquires, uses or enjoys as final recipients goods or services, and as has been previously stated, the use of these contractual mechanisms exceeds those made only by consumers, since there are many natural persons, such as businessmen; and legal persons, such as public and private, who acquire goods and services, even natural persons subscribe them not as final consumers, and are exposed to violations in their legal situation with the insertion of vexatious clauses, but as they are not final consumers, they will not be protected within the scope

of protection of said Code, and will have to resort to the Civil Code, which contains the deficiencies described. The same can be said concerning Law No. 28578, called “Complementary Law to the Consumer Protection Law on Financial Services”, which regulates the control of vexatious clauses, but is intended to regulate and protect the contractual phenomena arising from the services provided by financial entities, and is focused on the development of such activities. In other words, its scope of application is more restrictive than that of the Consumer Protection and Defense Code since it only applies to consumer contracts between a supplier of financial services and a final consumer.

Given the above, the problem can be summarized as follows:

- A) The civil code has a regulatory deficiency on mass contracting, specifically concerning the control of vexatious clauses, which does not allow to alleviate all the problems and abuses that can be generated with the use of these contractual mechanisms, to all the legal subjects that are immersed in this form of contracting.
- B) There is restrictive protection by the Code of Consumer Protection and Defense, since it does not perform a substantive control regarding the vexatiousness of a clause, and both said code and the Complementary Law to the Consumer Protection Law on Financial Services (Law No. 28578), are intended to regulate consumer relations.

The legislative deficiency pointed out by the Civil Code has caused a complete lack of general and effective protection to all the legal subjects that are immersed in this contractual practice, together with the incompatibility of

control that exists concerning recourse and control with other institutes and contractual remedies provided for in said code, since these have been provided for parity contracts; on the other hand, the restrictive protection given only to consumers by the Code of Consumer Protection and Defense leads to evidence that in our Peruvian system there is no adequate and full protection concerning all the adherents in general, who establish contractual relations based on this form of contracting, and this is mainly because our civil code to date does not adequately regulate the pathological aspects of this form of contract, and it is the regulatory framework that has to carry out the adequate and full control of these.

From the above, the objective of the report seeks to answer the following questions: Is it necessary to establish a modern and updated regulation of integral control of vexatious clauses in the Peruvian Civil Code? Is the regulation of control of vexatious clauses in the Code of Consumer Protection and Defense satisfactory or sufficient to protect all contracting parties from abusive clauses?

3. REGULATORY MODEL OF VEXATIOUS CLAUSES: FURTHER CONSIDERATIONS

In the Peruvian Legal System, two bodies of law have regulated the problem of vexatious clauses in contracts of adhesion and general contracting clauses: i) The Civil Code; and ii) The Code of Defense and Consumer Protection (within it we include the Complementary Law to the Consumer Protection Law on Financial Services. Law No. 28578). The aforementioned codes have as a ratio the protection of the adherents in this form of contracting, but the civil code has established in its article 1398 the control for a group of clauses

that considers them vexatious and therefore sanctions them with their invalidity, not providing greater control mechanisms to the other assumptions that also generate a contractual imbalance and a detrimental situation for the adherent, which would result in a lack of full control of vexatiousness for the use of this contractual mechanism.

Although the Code of Consumer Protection and Defense has established a legal framework of control more updated to its civil counterpart, it does not perform control of substances for not being able to establish and declare the invalidity of these and is intended to protect certain persons (consumers) who have signed a consumer contract, which is only a part of the diversity of contracts that are perfected through this contractual mechanism, so its framework of application is restrictive.

This situation has led to the fact that many sectors and agents that interact and develop in the Peruvian market, and acquire goods or services through these forms of mass contracting, cannot be fully protected by the rules that regulate this contractual phenomenon, either by the insertion of vexatious contractual content that is not provided for in Article 1398 of the Civil Code, or by the activity they perform, by the nature of the transaction carried out or even depending on the situation or contractual position in which the contracting parties find themselves.

This leads to a lack of effective protection of the rights of those subjects that are within this form of contracting and do not comply with the requirements provided by one of these laws, therefore there is a lack of control and full protection regarding the entire universe of vexatious clauses that can be inserted in this form of contracting, and for all subjects that

make use of it, being necessary to establish a framework of full control within our Peruvian legal system.

Because of this situation, the civil code needs to have a medium-sized good or service adhesion. To this end, it is important to modify article 1398 of the civil code and to update and establish mechanisms of substantive control on vexatiousness and protection of the adherent contracting party, providing contractual remedies that seek contractual rebalancing, since they are by and necessary for this type of contracting.

4. PROPOSAL: CHANGES IN THE SYSTEM

We propose a critical analysis of the normative areas that regulate the control of vexatious clauses that may be inserted in standardized contractual mechanisms, i.e., to see whether it is necessary to maintain the legal framework of how this problem is being regulated, to conclude whether there is adequate comprehensive control of any clause that may generate a situation of imbalance in the contracting parties in this contractual mechanism. For this purpose, it is essential to make a normative analysis of how this contractual phenomenon is regulated to date, to be able to highlight whether there are deficiencies and problems, since from the above it is evident that there is a lack of an adequate regulation to control the pathological situations that may occur in this type of contracting, since the civil code does not provide a general and comprehensive control of any vexatious clause, nor does it provide a protection or protection framework for the non-stipulating party or adherent to these contracts, which can lead to abuses by the stipulating party in case he does not make correct and adequate use of these contracts. On the other

hand, the Code of Consumer Protection and Defense does not apply to all these contractual mechanisms, but only under certain subjective requirements since it requires the necessary participation of a consumer.

In this context, in our legal system, there is a deficient regulation and protection of vexatious clauses, since although the application of the existing rules seeks to counteract such abuse, and can protect any contracting party, it has only provided for the control of a group of vexatious clauses, without enabling a general control of their vexatiousness; and in the consumer protection and defense code, it protects a group of subjects (consumers) who have entered into a consumer contract, which leads to a lack of protection of the contractual situation of non-consumer contracting parties, since basically, our legal system has focused basic protection mechanisms on certain types of subjects and on certain commercial activities, which have been included within their respective scope of application.

In addition, it should be borne in mind that in the absence of comprehensive control of vexatious clauses in the Civil Code, it should be taken into account that the legal structure provided in Book VII (contracts, general part), is composed of a series of legal institutes and remedies that regulate parity contracting. Therefore, the use of these are incompatible and especially does not allow their application to standardized contractual mechanisms, where precisely there is a lack of parity and contractual freedom of the parties, since its perfection is achieved through the act of adhesion, so it is necessary to establish a comprehensive and updated control mechanism to alleviate any vexatious situation.

Given this situation, this report aims to describe and

identify the need to establish a legal framework of general and substantive control to avoid the insertion of any vexatious clause in these contractual mechanisms. To this end, it justifies and proposes the need to modify and update the civil code that regulates the contractual phenomenon generated by mass contracting, which should be based on considering that this form of control applies to all legal subjects involved in this type of contractual relations, and thus obtain efficient and total protection of the subjects included in these contracts.

5. REGULATORY REQUIREMENTS OF THE SYSTEM

The need to establish an adequate and comprehensive regulation of vexatious clauses that are inserted in mass contracts is evident, and for this purpose, it is necessary to study the existing regulation within our legal system, analyzing the provisions of the civil code and the code of consumer protection and defense, to verify the existence of deficiencies in the normative regulation and its application.

Likewise, it is identified and described that although the consumer protection and defense code has foreseen a comprehensive control framework, it only establishes protection for consumers considered in its regulatory framework, not being able to be applied to other contracting parties exposed to these situations of vexation, and therefore its solution is sectorial, This without taking into account that a control mechanism established for a judicial control system has been foreseen, but that in our country it was implemented for administrative headquarters, which also evidences a deficit of due control since it will not be possible to invalidate in said headquarters a vexatious clause, which reaffirms our proposal for a solution through a modification of the civil code.

CONCLUSIONS

The vexatious and presumably vexatious, which makes it necessary to modify the civil code in this matter, and to establish a legal framework of full control so that any predisposed content that generates a contractual imbalance, to the detriment of those who adhere to it, is corrected and rebalanced and thus maintain contractual equity.

Although the Consumer Protection and Defense Code has regulated vexatiousness control mechanisms, taking into account the German system, it must be taken into account that such a system has been designed for its application in court, since the declaration of invalidity of a vexatious clause is foreseen to be determined and declared by a judge, and even though it has been decided that an administrative officer may not apply it, this does not make it impossible for it to continue to be inserted in other contracts, which does not definitively solve the use of this clause, in addition to the fact that its application is restrictive, since it has been focused only on consumer contracts where a final consumer necessarily participates.

Through this report we propose an amendment to the civil code regarding the regulation of adhesion contracts and general contracting clauses, specifically inserting a general background control mechanism and together with a system of lists, to avoid the insertion of any clause that leads to a contractual imbalance and violates good faith in this matter.

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Received: 04-01-2022

Approved: 01-7-2022

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