

“CONTROL BY NEGOTIATING”: A COMPARATIVE LAW STUDY

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Abstract

This article endeavours to carry out a brief comparison between negotiation in the Chilean and English legal systems, as a means of preventive control of unfair contractual terms, carried out by the main consumer rights protection agencies from both countries. In order to accomplish the aforementioned goal, the subject has been analysed according to the method of comparative law. Meaning, by means of specific comparative considerations concerning the regulation and application of preventive control via negotiation of unfair terms in each of the selected systems, it is determined which one of them has solved the problem better. From that analysis, it is concluded that the English model of control via negotiation has worked well and the Chilean legal system can learn lessons from it.

Keywords: *comparative law, unfair terms, preventive control, negotiation, consumer law, English law.*

1. INTRODUCTION

Mechanisms for controlling unfair terms can be classified,¹ according to the moment in which they take place,² in preventive and repressive. The deciding time limit between preventive and repressive control is the conclusion of the contract³. This study focuses on prevention of unfair terms. The importance of the aforementioned issue is related to the preventive role assigned to consumer law, since an appropriate consumer protection policy should mainly resort to mechanisms of

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1 For a synthesis of the typology of Mechanisms for controlling unfair terms, see: MORALES (2016).

2 GARCÍA (1969). In the same line: DE LA MAZA (2012).

3 This paper does not address the subject of repressive control of unfair terms in Chile. That subject has already been addressed by the local legal scholarship. Among other works by the same author, see: PIZARRO (2005); PIZARRO (2007).

preventive control,⁴ which are to operate as filters of unfair terms, thus leaving repressive mechanisms as a default means for correcting what preventive mechanisms could not prevent.

Preventive mechanisms are usually combined with abstract control,⁵ which is directed to general terms for contracting, in contrast to concrete control, which is made to contractual terms currently in force.

Mechanisms for controlling unfair terms can also be classified according to the subject implementing them. Thus, it can be distinguished among mechanisms of voluntary, administrative or judicial control.⁶

For their part, administrative control mechanisms normally consist of sectorial monitoring by a state administration entity.⁷ There are mandatory and mixed administrative control mechanisms. The former are mandatorily required, whereas the latter are characterized by the voluntary submission on the part of the supplier to the control exercised by the corresponding administrative organ.⁸ The peculiarity of the mixed control is the combination between the intervention of an administrative organ and the volition of the supplier, without being mandatory for the latter submitting to the control procedure.

From the perspective of Marion Träger, mechanisms for controlling unfair terms are different systems for managing the conflict between private autonomy and social justice,⁹ among which she includes judicial and administrative control, in addition of which she adds control by negotiating, understood as a way of influencing the design of general clauses or the contract of adherence, where the administrative entity deals with businesses in order to avoid the inclusion of unfair terms. The control by negotiating exercised by the British Director General of Fair Trading¹⁰ has been given as an example of this sort of control mechanism.

Following the previously explained summary of the different types of mechanisms for controlling unfair terms that are recognised by the legal doctrine, it is possible to identify several of them in the Chilean legal system.¹¹ Although, as some Chilean authors have pointed out,¹² the problem with our system is that there is no effective preventive control mechanism.

4 PIZARRO (2005), p. 403.

5 CARBALLO (2013).

6 POLO (1990), pp. 42-43.

7 DE LA MAZA (2012), p. 118.

8 POLO (1990), p. 46.

9 TRÄGER (2008), pp. 62-65.

10 TRÄGER (2008), p. 65.

11 It has been argued, for instance, that the control exercised by the *Superintendencia de Valores y Seguros* (Superintendence of Securities and Insurances) on deposited policies could operate as preventive control mechanisms: ISLER and MORALES (2018).

12 PIZARRO (2008), pp. 419-432; BARRIENTOS (2013), pp. 297-312; GASPAR (2013), pp. 455-464.

From the need to cope with this legal problem follows the relevance of comparative law as a method to overcome issues regarding aspects of the Chilean system. With regard to this, the Chilean system does not have a legal mechanism that provides consumers with legal protection from the inclusion of unfair terms. For the purposes of this work, comparative law is to be understood as a “methodology that can be used to draw comparisons among two or more subjects in various legal systems”.¹³ Among other things, this method is interesting because it allows a better knowledge of national law and facilitates its further improvement.¹⁴

In the style of Zweigert and Kötz,¹⁵ every study in the field of comparative law should state a question. In this case, the question that will guide the comparative analysis will be: how do the main state agencies in charge of consumer protection prevent the inclusion of unfair terms in the Chilean and English systems?

Furthermore, in order to develop the comparative analysis, the framework postulated by Gerhard Dannemann¹⁶ has been taken as a guide. Therefore, as it is the case with the majority of comparative law studies, this article unfolds through three scenarios. In the first scenario, the reasons for choosing the systems to be compared are explained. In the second scenario, a description of the relevant rules is presented, as well as the context in which they are applied in each of the selected legal systems. Finally, a comparative analysis of the solutions contemplated by the compared systems is carried out.

The above will demonstrate that the control by negotiating, so well developed in the English system, would be a viable mechanism in our legal system for preventively controlling unfair terms.

2. CHILEAN LAW AND ENGLISH LAW: WHY?

As previously stated, the legal systems subjected to comparative analysis are the Chilean and English ones. Regarding Chilean law, its choosing is a matter of perspective. This investigation looks into a legal problem that takes place in the context of the preventive control of unfair terms in the Chilean legal order. Therefore, Chilean law is the starting point for the comparison.

With regard to the English legal system, three are the reasons that motivate its selection. The first reason is that the United Kingdom has been a member of the European Union¹⁷ and the importance of this, is that the Chilean legislator has taken European legislation into account by regulating content control of unfair terms,

13 MANCERA (2008), p. 217.

14 DAVID and UFFERT-SPINOSI (2010), pp. 5-6.

15 ZWEIGERT and KÖTZ (2000), pp. 38-39.

16 DANNEMANN (2006), pp. 406 and ff.

17 Regardless of the *Brexit*, until now it was obligated to implement different European directives, among them Directive 93/13 on Unfair Terms.

following to a large extent the European model,¹⁸ established by the Directive 93/13 on Unfair Terms in Consumer Contracts.¹⁹

The second reason is that the aforementioned directive had a very good reception in the United Kingdom, as explained below. In fact, according to Micklitz,²⁰ in the European context, three models for controlling unfair terms have distinguished themselves: the German model, the French and the English ones. The analysis of the German model²¹ is discarded on account of language barriers. Following Mancera,²² in the process of comparing legal systems there are several factors to be considered, one of them being precisely the idiomatic barrier –translation problems may arise when choosing a system–, which are insuperable if the comparative jurist possesses no knowledge whatsoever of the language used by the rules and regulations that make up the legal system in question. This precludes the possibility of accessing primary sources. Therefore, two possible objects of comparison remain: the French and English legal systems.

As stated earlier, the English system is an example of favourable reception of the Directive 93/13. In that regard, it is argued that the English and French systems constitute opposite cases of reception of the Directive 93/13, the first one having reacted very favourably, whereas the second one has behaved more reluctantly,²³ circumstance that has been reflected both academically as well as in the process of implementation and application of the Directive.²⁴

In contrast, as previously stated, the English system was receptive. Proof of this is the almost literal implementation of the Directive,²⁵ initially carried out in the United Kingdom by the Unfair Terms in Consumer Contracts Regulations (UTC-CR). Even the definition of unfair term was copied literally from article 3.1 of the Directive, including the reference to good faith,²⁶ element that has not been a part

18 As noted by Professors Pizarro and De la Maza. PIZARRO (2005), p. 391 and DE LA MAZA (2012), p. 131.

19 EUROPEAN UNION: COUNCIL DIRECTIVE 93/13/CEE, OF APRIL 5TH, 1993, ON UNFAIR TERMS IN CONSUMER CONTRACTS. IN WHAT FOLLOWS, “DIRECTIVE 93/13” OR JUST “THE DIRECTIVE”.

20 MICKLITZ (2008), pp. 24 and ff.

21 In Germany, the control model was structured in the context of a process of “double collectivization” of contracting. The first collectivization level was given by the phenomenon of adhesion contracts, and the second collectivization level by the general conditions for contracting elaborated by groups of businesses belonging to a certain sector. Over the first level of collectivization operates judicial control by German courts, in which standards of good faith and *bonos mores* are applied. The control over the second level of collectivization, is part of free competition law. MICKLITZ (2008), pp. 25-26.

22 MANCERA (2008), pp. 237-240. In the same line, on “the paramount importance of foreign language proficiency” in the comparison process: FERRANTE (2016), pp. 601-618.

23 NIGLIA (2003), pp. 184 and ff.

24 NIGLIA (2003), p. 194.

25 Directive 93/13 was implemented in the English legal system through The Unfair Terms in Consumer Contracts Regulations 1994, later replaced by The Unfair Terms in Consumer Contracts Regulations 1999. The current act implementing the directive is the Consumer Rights Act 2015.

26 Article 3.1. of the Directive: “A contractual term which has not been individually negotiated shall be regarded as

of the common law, or at least until now had not played an explicit role in English contract law.²⁷

The proper adaptation to the European norm manifests regarding its application. Hence, during the early years of its implementation, the administrative organ in charge of applying these provisions, which at the time was the Director General of Fair Trading, played a central role in monitoring general terms and adhesion contracts.²⁸

According to the Commission of the European Communities,²⁹ during the first five years of implementation, the Office of Fair Trading³⁰ (OFT), applying the implemented Directive, examined an average of 800 cases every year, of which more than fifty gave way to administrative actions against suppliers and, in most of the cases, to the substitution or suppression of the terms in question.³¹

Even though regulation relative to unfair terms pre-existed in English law, this did not hinder the incorporation of the Directive, although it brought other problems of normative overlapping, which have been overcome at present.³²

Taken previous paragraphs into consideration, since here comparative law is addressed as a method for overcoming deficits of the national legal system, and considering that the current Chilean legislation on unfair terms control closely follows the Directive 93/13, it is concluded that it is convenient to focus the current analysis on a system that has properly adapted itself to the aforementioned regulation.

The third reason for choosing the English system is its adequate performance. In the words of Zweigert and Kötz, among the general considerations of the comparative process, if a foreign solution is taken into account, the first question to be answered is whether it has been satisfactory in its country of origin.³³ This questions

unfair if, contrary to the requirement of good faith, it causes a significant imbalance in the parties' rights and obligations arising under the contract, to the detriment of the consumer."

Section 5.1 UTCCR 1999: "A contractual term which has not been individually negotiated shall be regarded as unfair if, contrary to the requirement of good faith, it causes a significant imbalance in the parties' rights and obligations arising under the contract, to the detriment of the consumer."

27 For an analysis of the application of the principle of good faith as a means of unfair terms control in English law, see: MICKLITZ (2005), pp. 292-429.

28 NIGLIA (2003), p. 184.

29 Comisión de las Comunidades Europeas (2000 Report from the Commission on the implementation of Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts". (2001/C 116/25). Brussels, p. 26.

30 Since April 1st, 2014, the OFT does not longer exists and their powers went to different bodies including the Competition and Markets Authority y la Financial Conduct Authority, [online] <<https://www.gov.uk/government/organisations/office-of-fair-trading>>, [query: August 25th, 2013].

31 Comisión de las Comunidades Europeas (2000), 34p.

32 MORALES (2017), pp. 281-304.

33 ZWIEGERT and KÖTZ, (2000), p. 19.

concerns the effectiveness with which the selected country has resolved the issue or first question of the “functionality test”.³⁴

It is very difficult to affirm categorically that one or more mechanisms for controlling unfair terms are effective.³⁵ According to the *Diccionario del Español Jurídico la Real Academia Española* (Legal Spanish Dictionary of the Spanish Royal Academy), “*eficacia de las normas jurídicas*” (“effectiveness of legal rules”) consists in “*el despliegue de los efectos previstos en las normas jurídicas*”³⁶ (“the production of the effects set out by legal rules”). Therefore, in order to ascribe effectiveness to a system or control mechanism, it is in the first place necessary to know precisely its objectives and then evaluate via a study –ideally an interdisciplinary one– the impact of the introduced measures, in order to establish to what degree those objectives have been accomplished. To measure degrees of effectiveness is certainly not the aim of this investigation. For some, this is quite simply an impossible task.³⁷

It is therefore preferable, at least in the context of this investigation, to analyse mechanisms that function or to some demonstrable extent fulfil the functions for which they were established, basing that assertion on reports of official bodies and views expressed in the authorised specialised legal literature.

The first relevant background document in this respect is the Report from the Commission of the European Communities (CCE) on the implementation of Directive 93/13,³⁸ which goal was to evaluate the application of the European regulation during the first five years after the deadline for its transposition. This report highlights the case of the United Kingdom and the role played by the then still existing Office for Fair Trade (in what follows, OFT) in the eradication of unfair terms, the aforementioned agency having accomplished in a period of three years the modification or elimination of such terms by 1.200 suppliers.

This good performance of the English system is also backed by important specialized European legal doctrine. In this regard, for example, Alpa,³⁹ in a comparative study on the Italian and English implementations of Directive 93/13 considers the latter as much more articulate and effective. This author, when assessing the impact of the Directive, notes that the Italians regard the English model with interest, since

34 MANCERA (2008), p. 229.

35 NIGLIA (2003), p. 222.

36 Real Academia Española. Diccionario del español jurídico: <<http://dej.rae.es/#/entry-id/E108100>> [consulted on December 4th, 2017]

37 NIGLIA (2003), p. 222.

38 Comisión de las Comunidades Europeas (2000). This is the only report on the application of Directive 93/13 by the member states that this organism has emitted. Europe Direct. Case_ID: 1034290 / 4058184] Question about Directive 93/13 [online] In: <elisa.moralesortiz@gmail.com> April 8th, 2015 <citizen_reply@edcc.ec.europa.eu> [query: 2015-08-08]

39 ALPA (2008). “Standard Contract Terms: The Role of the Courts and Moral Persuasion by Independent Authorities”. In: COLLINS, Hugh (Ed.) *Standard Contract Terms in Europe. A Basis for and a Challenge to European Contract Law*, (The Netherlands. Kluwer Law Internationals BV), pp. 75-92.

the work performed by the OFT has brought about impressive results. In the same vein, Niglia remarks that the English case stands out from the French and German ones, due to the massive administrative intervention from the OFT in the application of the referred European regulation.⁴⁰

3. “CONTROL BY NEGOTIATION” IN THE CHILEAN SYSTEM

The *Servicio Nacional del Consumidor* (“National Consumer Service”; in what follows, Sernac) is the Chilean state agency which enforces the rules contained in the LPDC and in other regulations related to consumer protection.⁴¹ Regarding unfair terms monitoring,⁴² the Sernac can activate judicial control by requesting the declaration of invalidity of one or more of them, based on article 16 in connection with article 50 of the LPDC. Other functions can also be linked to unfair terms monitoring, for instance the reception of claims and complaints, granting and revoking seals to adhesion contracts from financial service providers, the “*Sello Sernac*” (in what follows, “Sernac Seal”). Nevertheless, the Sernac Seal has never been applied since its entry into force and therefore, in this case, the rule is completely ineffective.⁴³

On the other hand, the Sernac has so far been using the so-called “*mediaciones colectivas*” (in what follows, collective mediations), which even though are not regulated in the LPDC, it has been interpreted that the agency may instigate such procedures based on its broader authority to ensure the protection of consumer rights, which includes safeguarding collective or broad interests of consumers.⁴⁴

The object of these collective mediations is that suppliers cease those actions regarded as infractions by the Sernac. That very agency has defended them, by stating that it is a voluntary procedure, which purpose is:

to make known and inform suppliers about situations of non-compliance with the Act N°19.496 (...) in order to ensure that they carry out the necessary adjustments and propose the adequate solutions that are relevant (...). After reviewing the referred proposals and in those cases in which they comply with the aforementioned Act N°19.496, SERNAC validates them, manifesting that the proposal in question is deemed sufficient.⁴⁵

40 NIGLIA (2003), p. 184.

41 See: article 58 LPDC.

42 Regarding the topic of adhesion contracts and its regulation in the Chilean legal system, see TAPIA and VALDIVIA (1999).

43 Since its entry into force in 2012 and until November 6th, 2017, the Sernac Seal has not even been applied once. Servicio Nacional del Consumidor. Information request N° AH009T0000782 [online] En:<elisa.moralesortiz@gmail.com> 06 nov. <no-responder@portaltransparencia.cl> [query: December 4th, 2017].

44 Contraloría General de la República. División de Coordinación e Información Jurídica. Dictamen número 94206N14, 04-12-2014.

45 “*dar a conocer e informar a los proveedores respecto de situaciones de incumplimiento a la Ley N° 19.496, (...), a fin de que éstos realicen los ajustes pertinentes y formulen las propuestas de solución que sean pertinentes (...). Tras la revisión de las referidas propuestas y en aquellos casos en que las mismas se ajusten a la citada Ley N°19.496,*

The ways or means through which Sernac takes notice of situations regarded as infractions of consumer rights are: complaints issued by consumers; the analysis of information provided by suppliers upon request from the Sernac; or as a result of actions carried out by the service itself according to its strategic plans for intervening in markets.⁴⁶

The procedure begins with a communication sent by the Sernac to the supplier, in order to reach an integral extrajudicial settlement regarding the situation which the former regards as a breach of consumer protection regulation. The idea is that, as a consequence of this action the supplier makes the necessary adjustments, thus avoiding or ceasing its infringement of consumer rights.⁴⁷

This procedure has been used as a mechanisms for monitoring unfair terms on several occasions. Indeed, from 2014 to November 2017, the Sernac concluded 91 collective mediations concerning unfair terms and in 35 of those cases, the suppliers agreed to completely or partially modify the terms whose unfair character was previously established by the Sernac. In these cases, the potentially unfair terms⁴⁸

are revoked after exhaustive analysis by the SERNAC, fact that is informed to the respective supplier, so that it, voluntarily and in the context of the mediation, makes the necessary adjustments, either through the suppression of the term in question or its modification or complementation, so that the redraft of the term complies with the Consumer Protection Act.⁴⁹

After the favourable completion of a collective mediation, the Sernac verifies the implementation of the agreement on part of the supplier, for example, through external auditing or other measures, such as requesting the exhibition of the modified contracts. If the mediation ends unfavourably, either the matter is filed or the judicial avenue is prepared, depending on the case.⁵⁰

Based on the website of the Sernac,⁵¹ the agency publishes as news both the beginning and the end of a collective mediation, without giving further details.

SERNAC las valida, manifestando que la propuesta de que se trate se estima suficiente.” Servicio Nacional del Consumidor. January 20th, 2016. Information request N° AH009T0000102 [online] In:<elisa.moralesortiz@gmail.com> 20 ene. <no-responder@portaltransparencia.cl> [query: May 20th, 2016].

46 Id.

47 Id.

48 The expression “potentially unfair” is used, because in our system, for a term to be considered unfair, it is necessary that a judge declares it to be so.

49 “*son levantadas previo análisis exhaustivo efectuado por SERNAC, hecho que es informado al respectivo proveedor, a fin de que éste, voluntariamente y en el contexto de tal mediación, realice los ajustes pertinentes, sea a través de la eliminación de la respectiva cláusula, o mediante su modificación o complementación de manera tal que la nueva redacción de ella se ajuste a lo señalado en la Ley del Consumidor*” Servicio Nacional del Consumidor. January 20th, 2016. Information query N° AH009T0000102 [online] In:<elisa.moralesortiz@gmail.com> 20 ene. <no-responder@portaltransparencia.cl> [query: May 20th, 2016].

50 Id.

51 <<http://www.sernac.cl/category/noticias/mediacionescolectivas/>> [query: October 15th, 2017].

Furthermore, consideration should be given to the fact that collective mediations with regard to unfair terms are carried out between the referred agency and individually considered suppliers, not with suppliers associations. On the referred web site appear several cases in which “collective mediation” has been used as a preventive and abstract mechanism, since it has been directed to general conditions for contracting. For instance, in the case *Sernac v. ABCdin*, the supplier modified the terms and conditions of its website by eliminating general terms which were not in accordance with the law.⁵²

Another case, where the procedure involved several suppliers, was the “collective mediation” on pre-contract terms of mandate contracts and promissory notes of 14 clinics, which resulted in the suppression of the terms that were unfair according to the agency.⁵³ This was not a single negotiation carried out with a suppliers association, but rather 14 different mediations on the same issue.

The fact that it is an informal and unregulated mechanism adds greater flexibility and is thus able to fulfil a repressive function when it monitors terms of adhesion contracts that are in force, requiring also compensation for the affected consumers, or a preventive one, if it controls general conditions for contracting, which essential element is pre-formulation.⁵⁴ It can even generate both effects simultaneously, if it affects contractual terms currently in force as well as general terms.

Regarding its nature, it has been argued that the denomination “collective mediation” is inappropriate, since the intervention of a third party is of the essence of mediation, element lacking in this procedure.⁵⁵ As mechanism for controlling unfair terms, it has administrative and mixed character, because the Sernac intervenes directly and the supplier complies voluntarily. Furthermore, it is a form of control by negotiating, since the Sernac endeavours to influence the incorporation and/or effect of terms that it considers unfair, by means of direct contact with the suppliers.

As discussed later in this paper, the way in which this mechanism operates bears a striking resemblance to the work of the OFT in English law, agency which seeks to “(...) persuade businesses to comply with the Regulations and use their powers to seek an injunction only where negotiations are unsuccessful”.⁵⁶

52 [Online] < <http://www.sernac.cl/mediacion-colectiva-sernac-abcdin-ajusto-terminos-condiciones-sitio-web/>>[query: [December 4th, 2017].

53 [Online] <<http://www.sernac.cl/tras-mediacion-colectiva-con-el-sernac-14-clinicas-eliminacion-de-sus-pagares-y-mandatos-clausulas-abus/>> [query: December 4th, 2017].

54 REZZONICO, Juan Carlos. (1987). *Contratos con cláusulas predispuestas. Condiciones negociales generales*, (Astrea, Buenos Aires), p. 123.

55 Other critical opinion argues that it would be more adequate to speak of “*conciliación colectiva*” (“collective settlement”) View: AGUIRREZABAL (2015).

56 “The OFT seek to persuade businesses to comply with the Regulations and use their powers to seek an injunction only where negotiations are unsuccessful.” National Audit Office Report by the Comptroller and Auditor General, *Office of Fair Trading: Protecting the Consumer from Unfair Trading Practices* (HC 57 1999/00).

4. “CONTROL BY NEGOTIATING” IN THE ENGLISH LEGAL SYSTEM

Since the implementation of Directive 93/13 in the United Kingdom, three different organisms have had competence for monitoring unfair terms: the Director General of Fair Trading (DGFT); the Office of Fair Trading (OFT); and the Competition and Markets Authority (CMA). After the OFT was abolished on April 1st, 2014, its functions were turned over to different agencies. Among them, to the Financial Conduct Authority (FCA) and to the CMA. The function of monitoring unfair terms was transferred to the latter with competencies very similar to that of the former OFT.

In this part, this investigation focuses on reviewing and analysing the preventive control exercised by the OFT. The reasons for this choice are that the OFT performed this function for approximately forty years⁵⁷ and there are no significant differences regarding the form and faculties concerning this matter which were transferred to the CMA, institution that has been exercising them for less than three years.

The main faculties of the OFT were informing consumers, acting as a coordinating organism, overseeing business practices so that they remain fair and competitive, promoting the adoption of codes of good practice, as well as a series of specific powers to confront suppliers infringing consumer law, monitoring unfair terms being one of them.⁵⁸

The authority of the OFT to control unfair terms was established by the Unfair Terms in Consumer Contracts Regulations 1999 (UTCCR)⁵⁹ and by Part 8 of the Enterprise Act 2002 (EA),⁶⁰ referred to the enforcement of consumer legislation.

The OFT was responsible for considering claims about unfair terms in contract terms drawn up for general use, except if they were excessive or unmeritorious. Control could be exercised over terms currently included in a contract –repressive control– or being considered to be incorporated –preventive control–.

If the OFT considered that a claim was based on a potentially unfair term, it could adopt one of the following strategies:⁶¹ to open a dialog with the supplier, requesting him to modify or suppress the term in question; if necessary, an undertaking was sought;⁶² taking judicial proceedings was the last resort. In any case, it should have to state the basis for its decision to exercise judicial actions or abstaining from doing so.

57 Referred to the DGFT within the department of the OFT (1973-2014).

58 HOWELLS and WEATHERILL (2005), pp. 574-575.

59 UNITED KINGDOM. *The Unfair Terms in Consumer Contracts Regulations*. October 1st, 1999. The current legislation regulating this matter is *The Consumer Rights Act* of March 26th, 2015.

60 UNITED KINGDOM. *Enterprise Act*. November 7th, 2002.

61 WOODROFFE and LOWE (2013), p. 202.

62 Also included in the Enterprise Act 2002, section 219. They are compromises offered by the infringer which may include cessation of conduct, compensation, implementation of a programme, etc. RAMSAY (2012), p. 253.

In this context, it is possible to identify three different ways to enforce the regulation or enforcement remedies:⁶³ informal agreements achieved through negotiation; administrative orders, including undertakings or compromises of voluntary compliance; and lastly judicial decisions.

The law did not regulate informal negotiations, but they were based on the broader powers that the OFT had for protecting consumers from the use of unfair terms. That is to say, it was an informal mechanism that sought to encourage voluntary compliance. An informal negotiation could end up in a compromise, but not necessarily. A compromise or undertaking was preceded by an informal negotiation directed to rectify or prevent some specific problem,⁶⁴ in this case the use of unfair terms.

The OFT had the duty to monitor the fulfilment of the agreement⁶⁵ and to take legal action in case of non-compliance. Regardless of the possibility of activating judicial control, the agency continued along the same path of the DGFT, considering judicial proceedings as the ultima ratio. The purpose was to persuade suppliers to suppress or modify those terms regarded as unfair, leaving open the possibility of applying to the courts in case of breach of the undertaking. This model induces regulatory compliance without needing to formally bring court proceedings.⁶⁶

In fact, English consumer law adopts a model of enforcement through voluntary compliance whose objective is not to detect and judicially prosecute infringements, but attaining the objectives of the legislation,⁶⁷ in this case protecting consumers through achieving regulation compliance by preventing the use of unfair terms.

According to Ayres and Braithwaite, achieving compliance is more likely if agencies organise their mechanisms in a pyramid structure, most of them placed at its base, aimed at obtaining compliance through persuasion.⁶⁸ The model is dynamic, and for it to work it is necessary that the agency has various mechanisms at its disposal (varying from informal negotiation to sanction) as well as the latitude to strategically move through the different levels of the pyramid, seeking compliance as prime objective. This “enforcement pyramid” gives priority to preventive mechanisms over repressive ones. This model was the one adopted by the OFT.⁶⁹

As stated above, negotiation was the first step and could result in an undertaking. If the supplier was part of an association, contact was made with it, in order to

63 RAMSAY (2012), pp. 220-221.

64 RAMSAY (2012), p. 253.

65 Section 92, Enterprise Act 2002.

66 HOWELLS and WEATHERILL (2005), p. 293.

67 RAMSAY (2012), pp. 218-219.

68 AYRES and BRAITHWAITE (1992), pp. 35-36.

69 RAMSAY (2012), p. 219.

achieve a greater impact.⁷⁰ Example of this is the famous case of the OFT and the British Vehicle Rental and Leasing Association in which a standard contract for that entire branch of industry was established through a negotiation process,⁷¹ thus achieving great impact, for the association in question represented 85% of the automobile rental sector in the United Kingdom and, since the object of the undertaking was the general conditions for contracting, a highly effective preventive control of unfair terms was achieved.

Another example of undertaking is the *Carcraft Automotive Group Limited* case.⁷² Based on a series of consumer complaints the OFT decided to investigate this supplier and other businesses associated to it,⁷³ detecting several infringements, including infractions of UTCCRs. The agency considered that Carcraft included potentially unfair clauses in the general terms and conditions of its after sales service contract. The agency warned Carcraft that it would consider the possibility of taking judicial action in case satisfactory undertakings were not reached. Finally, the company carried out the required modifications and offered the OFT a compromise. According to the agreed undertakings, the company committed itself not to utilize terms that burdened consumers with the responsibility for reviewing the vehicle history prior to the sale; those refusing to make known the mileage of the vehicle; as well as those which gave the company absolute discretion regarding the decision of granting the guarantee.

According to Woodroffe and Lowe,⁷⁴ this is where the great impact that the UTCCR had rest, which was measured by the amount of extrajudicial activity applying the regulation, rather than by the level of litigation, and it is on that base that it is stated that consumer are in a better position in comparison to their previous situation. As a point of fact, even though very few cases ended up in court, thousands of terms were subjected to review by the OFT. The mentioned authors give, by way of example the reports contained in the bulletins no. 21 and 22 of the OFT, that reveal that between July and December 2002 approximately 765 terms were either modified or suppressed as a result of the work carried out by the OFT. Besides, this way of proceeding on the part of the OFT was economically efficient, saving millions of pounds in litigation costs.⁷⁵

70 OFT, Unfair Contract Terms Bulletin N° 1 (1996).

71 McKENDRICK (2012), p. 488.

72 CC Automotive Group Limited: Investigation into alleged unfair practices by a national second hand car dealer Case Reference: *Carcraft - CRE-E//25462*. Case opened: May 2009. Case closed: October 2011. [Online]<<http://webarchive.nationalarchives.gov.uk/20140525130048/http://www.of.gov.uk/OFTwork/consumer-enforcement/consumer-enforcement-completed/cc-automotive/>> [query: January 21st, 2015]

73 All in One Finance Limited, UK Car Group Limited, Pennine Metals A Limited y Pennine Metals C Limited.

74 WOODROFFE and LOWE (2013), p. 202.

75 LAW COMMISSION. "Unfair Terms in Consumer Contracts: A New Approach?" Summary of the Issues Paper. July 25th, 2012. p. 21.

Always within the framework of a pyramid enforcement model, the work of the OFT developed continually.⁷⁶ During a first stage (until 2002) it took judicial action only once (OFT v First National Bank⁷⁷), notoriously favouring negotiations and undertakings, thus achieving distinction within the European context due to the intensive administrative action carried out by it⁷⁸. Since 2002 it is possible to mention some judicial cases.⁷⁹

Continuing with its development, in second stage (approximately from the year 2000 onwards), the OFT started focussing its work on “high- impact cases”⁸⁰ involving large business groups or associations of retailers and “super complaints”.⁸¹ As a consequence of this “sector-wide approach” the OFT reviewed fewer cases, even though the impact of its intervention was not affected. This was the trend followed by the OFT until its closure.

In fact, after the amendments to the consumer protection regime introduced in 2013, the Local Authority Trading Standards Services started to play a more important role in the application of consumer protection legislation at a national level, whereas the OFT focussed its action on infractions which indicated systemic market failures. That is to say, its actions were no longer directed against individual businesses, but it targeted business groups or sectors, at least that targeting individual suppliers were convenient in order to establish precedent or if it were to make an impact on the market.⁸² In order to achieve more clarity, it is useful to draw a comparison of the compromises reached in different periods: between April 2003 and March 2004, 116,⁸³ whereas between April 2012 and March 2013, the OFT had concluded only 20.⁸⁴

76 RAMSAY (2012), pp. 317 and ff.

77 *DGFT v First National Bank* (2001).

78 “The CLAB database highlights the importance of the cases addressed in the United Kingdom by administrative procedures since the time limit for transposition of the Directive: 625 of the 865 administrative measures listed up to now in the database hail from this Member State.”; “The CLAB project (unfair terms) was launched by the Commission immediately after the adoption of Directive 93/13. The idea was to create an instrument for monitoring the practical enforcement of the Directive in the form of a database on “national jurisprudence” governing unfair terms.” COMMISSION OF THE EUROPEAN COMMUNITIES. 2000, pp. 34 and 12.

79 Among them: *Office of Fair Trading v Abbey National plc and Others* (2009); *Office of Fair Trading v Foxtons Ltd* (2009); *The Office of Fair Trading v Ashbourne Management Services Ltd &ors* (2011). RAMSAY (2012), pp. 326 and ff.

80 RAMSAY (2012), p. 326.

81 These are complaints submitted by consumer rights protection organisms concerning a market that is or seems to be significantly damaging to consumer interests. See: Section 11 Enterprise Act 2002.

82 [Online] <<http://webarchive.nationalarchives.gov.uk/20140525130048/http://www.offt.gov.uk/OFTwork/consumer-enforcement/internet-enforcement/?jsessionid=EC4FCAA88551E13CB-267FB12B074179F>> [query; January 21st 2017]

83 OFT. *Annual Report and Resource Accounts 2003-2004. SUMMARY OF OFT CONSUMER LAW CASEWORK 2003 TO 2004 EXCLUDING CONSUMER CREDIT.*

84 OFT. *Consumer protection casework*, 1 April 2012 to 31 March 2013.

What was sought were changes in the general conditions applicable to a large part of a sector, thus maximizing the impact of its work. Concretely, negotiations with organisations of suppliers that represented sectors with relevant problems of unfair terms, were conducted in order to provide them with models of generally applicable contracts. With this strategy it was more likely to influence a larger number of suppliers than by negotiating with each one of them individually.⁸⁵ For instance, in the sector of used cars dealerships, 300 dealers adopted general conditions for contracting which were undertaken as a result of the action of the OFT. In the ticketing sector, fairer conditions for consumers were achieved as a result of a negotiation with the Society of Ticket Agents and Retailers (STAR), whereby several of its members, among them Lastminute.com, Ticketmaster, the Big Bus Company, agreed on implementing a contract model reviewed by the OFT.⁸⁶

The OFT published guidelines⁸⁷ aimed at specific trade sectors which, based on the number of consumer claims, were regarded as particularly risky to consumer interests, in order to potentiate the impact of unfair terms prevention. For instance: “Guidance on unfair terms in tenancy agreement”⁸⁸ and “Guidance on unfair terms in health and fitness club agreements”.⁸⁹ Through periodical publications of guides and reports, the OFT endeavoured to maximize the impact of its intervention by levelling consumer education with that of suppliers. Thereby, the agency published in detail business commitments and court decisions on unfair terms.⁹⁰

In practice, the dissemination of information was carried out via periodical gazettes containing detailed reports of cases,⁹¹ as well as press reports about significant “victories” of the agency.⁹² According to the OFT, the periodical publication of its

85 OFT. *Annual Report and Resource Accounts 2003-2004. Objective 1: enforcing consumer protection legislation*, p. 30.

86 OFT. *Annual Report and Resource Accounts 2009-10*, p. 26.

87 National Audit Office. 2003. *The Office of Fair Trading Progress in Protecting Consumers' Interests. REPORT BY THE COMPTROLLER AND AUDITOR GENERAL HC 430 Session 2002-2003: 6 March 2003*, pp. 31-33.

88 [Online] <<https://www.gov.uk/government/publications/unfair-terms-in-tenancy-agreements-2>> [query: January 17th, 2017]

89 [Online] <<https://www.gov.uk/government/publications/unfair-terms-in-health-and-fitness-club-agreements>> [query: January 17th, 2017].

90 *Regulation 15, UTCCR 1999*.

91 During its last stage, the OFT ceased to publish bulletins, but produced annual reports of its work. Currently it is possible to consult the cases in detail (undertakings as well as court actions) [online] <<http://webarchive.nationalarchives.gov.uk/20140525130048/http://oft.gov.uk/OFTwork/consumer-enforcement/>> [query: January 3rd, 2017]; the annual reports from 2000 to 2013, [online] <<http://webarchive.nationalarchives.gov.uk/20140402142426/http://www.oft.gov.uk/OFTwork/publications/publication-categories/corporate/annual-report/>> [query: January 4th, 2017]; and all bulletins and guidances [online] <<http://webarchive.nationalarchives.gov.uk/20140525130048/http://www.oft.gov.uk/OFTwork/publications/publication-categories/guidance/unfair-terms-consumer/>> [query: January 4th, 2017].

92 BRIGHT (2000), p. 337.

work also allowed coordination with the other *enforcers* (regulatory bodies that applied consumer law), facilitated complaints about new infringements and educated other suppliers.⁹³ According to the OFT:

Publicising our work allows us to promote consumers’ awareness of their rights, as well as allowing other enforcers easily to search the website for recent or current action which the OFT or other designated enforcers may be taking forward. This helps to prevent multiple approaches to business by different enforcers, as well as promoting consistency of approach by sharing such outcomes and other case details with other enforcers.⁹⁴

Thus, the OFT used the dissemination of information concerning its results for producing an effect of spontaneous coordination among agencies (horizontal coordination) as well as among suppliers and consumers (vertical coordination), thereby reinforcing the coordinating role specifically assigned to the agency. In this way, suppliers as well as consumers were made aware of the terms which were considered unfair.

As stated, the faculty of monitoring unfair terms did not fall within the exclusive competence of the OFT, but several bodies coordinated by the OFT⁹⁵ were responsible for it. They were called “qualifying bodies”.⁹⁶ In fact, the qualifying bodies had the power to accept undertakings proposed by businesses, as well as the faculty of taking judicial action if a term was considered unfair, but with the limitation of necessarily having to notify the OFT at least 14 days in advance.⁹⁷ They also had the duty of informing that agency about the results of their endeavours.⁹⁸ This coordination was strengthened by means of several agreements reached among the OFT and

93 OFT. *The retention of Undertakings on the Consumer Regulations Website* [online] http://webarchive.nationalarchives.gov.uk/20140525130048/http://oft.gov.uk/crw/445520/630922/retention_policy [online: December 21st, 2016].

94 OFT. *The retention of Undertakings on the Consumer Regulations Website* [online] http://webarchive.nationalarchives.gov.uk/20140525130048/http://oft.gov.uk/crw/445520/630922/retention_policy [query: December 21st, 2016].

95 The coordinating role of the OFT is also prescribed in section 214 of the EA.

96 They are some sectorial regulators and consumer associations that, taken together, have been denominated qualifying bodies (the regulators are also called enforcers), namely: The Data Protection Registrar, The Director General of Electricity Supply, The Director General of Gas Supply, The Director General of Electricity Supply for Northern Ireland, The Director General of Gas for Northern Ireland, The Director General of Telecommunications, The Director General of Water Services, The Rail Regulator, Every weights and measures authority in Great Britain, The Department of Economic Development in Northern Ireland, y Consumers’ Association. Schedule 1, Regulation 3, Part One and Two, UTCCR.

97 Regulation 12(2), UTCCR.

98 Regulation 14, UTCCR.

the qualifying bodies. The scenario just described has been characterized by Howells and Weatherill⁹⁹ as a “reinvigorated pattern of enforcement” which emphasizes monitoring by public bodies, which seems quite appropriate, since it corrects not only economical asymmetries, but also technical ones.

5. UNDERTAKINGS VS *MEDIACIONES COLECTIVAS*

This section provides a contrast between the results of the Chilean and English systems of control by negotiating, as outlined in sections 3 and 4 of this paper, respectively. It must be kept in mind that this investigation conducts a comparison limited to a very specific problem:¹⁰⁰ the preventive control by negotiating in the case of unfair terms. The following comparison focusses on the control exercised by the two main agencies in charge of consumer protection in the legal systems currently under scrutiny, that is, the Sernac in the Chilean system, and the OFT in the English one.

The analysis will be presented as a contrast. As argued by Ancel, every comparative law study is to be conceived in these terms and, from a subjective standpoint, differences are the first thing that the comparatist notices when studying the rules of a foreign legal system.¹⁰¹

Nevertheless, the comparative law perspective does not ignore the existence of commonalities. Following Dannemann,¹⁰² this analysis will consider both similarities and differences between the compared systems and, according to the recommendation from the aforementioned author, taking into account that the purpose of this investigation is learning from a system in order to solve a specific problem within the national legal system—in this paper, to learn from the English system for solving a problem within the Chilean legal system—the analysis must be centred on the differences between them.

5.1. Similarities without prejudice to the differences

Even though preventive mechanisms for controlling unfair terms are to be found in both systems, these are diversely structured and operate differently. That is apparently the reason why one of the models works ostensibly better than the other.

Indeed, the preventive control exercised by the OFT was directed to contract terms drawn up for general use,¹⁰³ from the implementation of Directive 93/13 onwards, and it was structured in such broad terms, that it could also extend to any other similar clause, or to one that had the same effect, or that was being recom-

99 HOWELLS and WEATHERILL (2005), p. 294.

100 ZWEIGERT & KÖTZ (2000), p. 6.

101 ANCEL (1971), p. 65.

102 DANNEMANN (2006), p. 406.

103 In the terminology used by the UTCCR. The current legislation, the CRA, also applies to contractual terms as well as to general terms for contracting. See CRA, SCHEDULE 3. Section 70.1.

mended, notwithstanding the possibility of exercising repressive control. In the case of the Chilean system, that flexibility is a result of the lack of regulation, which even though it is virtuous from that perspective, affects legal certainty.

On the other hand, in the previously outlined context, the OFT had sufficiently extensive powers for choosing among different mechanisms for controlling unfair terms, namely urging voluntary compliance; or exercising mixed administrative control via negotiation culminating in an undertaking; or taking judicial action. The virtue of this system lies in the combination of mechanisms operating as “pyramid enforcement”, which privileged regulation compliance.

Nonetheless, control by negotiating functions in both systems as a way of preventing the use of unfair terms. Indeed, both systems are aimed at influencing contractual terms, either being formed or already in force, by going through procedures –collective mediations and undertaking, respectively– in which the corresponding administrative agencies –Sernac and OFT– deal with suppliers in order to avoid the inclusion or continuity of unfair terms. However, at least five differences can be seen.

The first one is that undertakings are regulated, whereas collective mediations are not. Therefore, negotiations in Chile are institutionally weaker until now and, as a consequence of it, as long as they are not regulated, the agency is neither under obligation to recourse to them, nor has the legally sanctioned power to do so, which leads to problems of legal certainty.

The second one is that in the English case, control by negotiating has been steadily operating ever since the implementation of Directive 93/13 in 1994, whereas Chilean collective mediations constitute an incipient trend, which, as far as we know, has been in operation since 2004, but with favourable results from 2015 onwards.¹⁰⁴

The third one is, that the extrajudicial activity of the OFT, during its last stage, sought to prosecute cases which generated great impact¹⁰⁵ or produced relevant effects on a specific market, negotiating with associations of suppliers. In the Chilean case this is not to be seen, since the “*mediaciones*” affect only individual suppliers, the scope of the negotiations is much more limited.

The fourth is related to the publicity given to the negotiations. In the case of the English system, it is possible to check the periodical publication of all cases prosecuted by the agency, with complete clarity regarding the terms considered unfair and the modifications agreed in extrajudicial cases. This way, a sort of warning about which terms are not to be included was generated, as well as an alert for consumers about which terms are not to be part of their contracts, which was more concrete than the

104 According to information provided by the Sernac, in the years 2015, 2016 and 2017, there have been three, 19 and 13 successful mediations, respectively. Servicio Nacional del Consumidor. Information Request N° AH009T0000782 [online] In: <elisa.moralesortiz@gmail.com> 06 nov. <no-responder@portaltransparencia.cl> [query: December 4th, 2017].

105 They are normally associated with market failures, which is one of the reasons why the agency currently in charge of monitoring unfair terms in the United Kingdom, the CMA, is also in charge of ensuring free competition.

legal rule. Besides, this information helped coordination with the other organisms in charge of monitoring unfair terms.

In the Chilean system, some information can be found in the website of the Sernac. This is not presented in a way that it is neither as clear nor as detailed as the one described in the previous paragraph, but in form of news, without providing any further details.

Lastly, there is an important point that energizes the English system even more, namely that the OFT –today CMA- was not the only agency in charge of monitoring unfair terms. Then, the system leaves unfair terms control to several state agencies and to consumer associations, although not by means of direct intervention in contracts or by seeking sanction, but preferring negotiation with suppliers, in order to obtain compliance with regulations. In this context, the OFT had an expressly outlined central coordinating role. This faculty made possible the appropriate functioning of the system, since it avoids the problems caused by overlapping mandates.

In Chile the law expressly establishes that the Sernac is the administrative organ in charge of enforcing the LPDC and protecting consumer rights,¹⁰⁶ hence the power of controlling unfair terms. Nevertheless, the agency does not have the coordinating role of the English agency and the law has not expressly and specifically given the faculty of monitoring unfair terms to other administrative bodies.¹⁰⁷

6. THE NEW “VOLUNTARY PROCEDURE FOR THE PROTECTION OF THE COLLECTIVE OR DIFFUSE INTEREST OF CONSUMERS”

The Chilean Congress recently approved a bill modifying the LPDC.¹⁰⁸ Among other amendments, a new paragraph following article 54 G was added, called “*procedimiento voluntario para la protección del interés colectivo o difuso de los consumidores*” (“on the voluntary procedure for the protection of the collective or diffuse interest of consumers”) and was comprised of twelve articles (54 H to S), thus legally regulating the procedures which until now have been known as “collective mediations”.

With the entry into force of these amendments, one of the major downsides of these procedures is being overcome, namely the problem of legal certainty. But that is not the only virtue that can be attributed to this regulation.

It has already been demonstrated through evidence provided by the comparative law method that control by negotiating works as an adequate tool for

106 Art. 58 of the LPDC.

107 Even though it can be discussed whether certain bodies, such as SVS and Subtel, have the faculties of controlling unfair terms.

108 Boletín No. 9.369-03. To the date of this article, the approved bill is being reviewed by the Constitutional Tribunal, which exercises preventive and mandatory control of constitutionality, as provided in article 93 N° 1 of the Constitution.

monitoring terms. The viability of this sort of mechanisms in our legal system has also been proven, thanks to the experience of collective mediations. The conclusion that follows from the above is self-evident.

The regulation of these procedures comes to fill a vacuum in our legal system, which is the legal regulation of a fully functional preventive mechanism for controlling unfair terms. Although the objectives pursued through this voluntary procedure are broader, namely “securing an expeditious, complete and transparent solution in case of conducts that may affect the collective of diffuse interest of consumers”, the legal concept of preventive and abstract control that was being exercised by the Sernac under the previous designation perfectly fits within the new legal framework.

According to the results of the previously drawn comparison, two elements are to be taken into consideration in order to maximize the success of this control mechanism: coordination and impact. With regard to the former aspect, the bill originally included a rule establishing a coordination committee.¹⁰⁹ This article was suppressed by the Executive, since the Act N° 21.000, which instituted the “*Comisión de valores y seguros*” (“Securities and Insurance Commission”),¹¹⁰ introduced article 37 bis to the “*Ley 19.880 de procedimientos administrativos*” (“Act N° 19.880 on Administrative Procedures”),¹¹¹ establishing a general regulatory coordination system.¹¹²

Nevertheless, in terms of coordination, it is considered that the current scenario is not very different from the previous one, since the state administration bodies are governed by the principle of coordination established in article 5 of the Organic Constitutional Act of General Bases of State Administration¹¹³ (“*Ley Orgánica*

109 Article 4th of the bill approved in general by the Senate and subsequently modified by the Executive. In what matters it provided the following: “*Para el cumplimiento del fin señalado en el inciso anterior, existirá un comité de coordinación integrado por las autoridades que determine un reglamento del Ministerio de Economía, Fomento y Turismo. Asimismo, dicho reglamento, que deberá llevar la firma de los Ministros de Hacienda y de la Secretaría General de la Presidencia, determinará las normas que sean necesarias para el funcionamiento del comité.*” (“For accomplishing the purpose stated in the previous section, there shall be a committee of coordination integrated by the authorities determined by a regulation from the Ministry of Economy, Promotion and Tourism. Moreover, that regulation, which shall be signed by the Ministry of Finance and of the Ministry Secretary-General of the Presidency, will establish the appropriate regulation for the functioning of the committee”)

110 Ley N° 21.000: Crea la Comisión para el Mercado Financiero.

111 Ley N° 19.880: Establece Bases de los Procedimientos Administrativos que Rigen los Actos de los Órganos de la Administración del Estado.

112 “*Artículo 37 bis.- Cuando un órgano de la Administración del Estado deba evacuar un acto administrativo de carácter general que tenga claros efectos en los ámbitos de competencia de otro órgano, le remitirá todos los antecedentes y requerirá de éste un informe para efectos de evitar o precaver conflictos de normas, con el objeto de resguardar la coordinación, cooperación y colaboración entre los órganos involucrados en su dictación.*” (“Article 37 bis.- If an organ of the State Administration is to take a general administrative act which clearly affects the spheres of competence of another body, the former shall render all the administrative antecedents to the latter and it shall require from it a report for avoiding or preventing conflicts of norms, in order to ensure coordination, cooperation and collaboration among the bodies involved in its enacting”)

113 D.F.L. 1-19653: Fija texto refundido, coordinado y sistematizado de la ley N° 18.575, orgánica constitucional de las bases generales de la administración del Estado.

Constitucional de Bases Generales de la Administración del Estado”), which requires them to perform their functions in a coordinated manner and avoiding duplication of functions and mutual interference.

Regarding the latter aspect, the Sernac should take into account the impact of the cases which it intends to prosecute via this voluntary procedure, as a matter of efficiency and maximization of the number of protected consumers. The agency should therefore endeavour to accomplish the broader effect possible through the reached agreements, for instance suppressing general conditions and negotiating with groups of suppliers or suppliers associations, as long as such flexibility is considered permitted by regulation.

CONCLUSIONS

In closing, the comparison exercise shows a clear superiority of the English system over the Chilean one. The English system seems stronger at preventing unfair terms, prioritizing regulation compliance over sanction by resorting to negotiation as the main control mechanism. This operation scheme is permitted by both regulation and institutional structure. In contrast, the Chilean system is characterized by weakness due to the ineffectiveness of the Sernac seal and the lack of regulation of collective mediations, as well as the limited scope of the effects of the latter.

Considering this scenario, it is concluded that the Chilean system could learn much from the English one in this area. When confronted with results like these, it is possible that the comparatist “may be able to fashion a new solution, superior to all others, out of parts of the different national solutions”.¹¹⁴ In our legal system, this solution is being provided by a regulation of control by negotiating, which allows the state agency to choose negotiation as one of the instruments for monitoring unfair terms with enough flexibility, so that it is able to take up highly impactful cases in coordination with the other competent bodies

The recently approved bill, bulletin N° 9.369-03, which amends the LPDC, partly comes to fill this gap by enacting a “voluntary procedure for the protection of the collective or diffuse interest of consumers”. If we agree that this is an instrument for exercising preventive control of unfair terms via negotiating, then the Sernac should use it for that purpose, concerning itself with coordination and the impact of the agreements reached.

114 ZWEIFERT and KÖTZ (2000), p. 52.

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