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Unfair contract terms and e-commerce under Italian law: an issue on the way to a solution?

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1. Background: unfair contract terms in B2B contracts in general under Italian law

Companies doing business in Italy have to face the peculiarities of Italian law on B2B contracts regulated by general terms and conditions drafted by one of the parties: the relevant provisions of law date back to 1942, the year in which the Italian Civil Code came into force.
Indeed, in our day-to-day practice it is sometimes not easy to explain the functioning and the rationale of the formalities imposed by our domestic law.
Here follows a condensed illustration of the relevant framework under Italian law.

General rule
General terms and conditions ("GTC") drafted by one contractual party are effective subject to the condition that the same were known (or should and could have been known using normal diligence) by the counterparty at the latest by the moment in which the contract was entered into.

Unfair contract terms and conditions
Amongst GTC, there are certain specific terms and conditions that by presumption of law are deemed unfair and burdensome for the non-drafting party (in Italian, "*clausole vessatorie*"). These clauses are, by way of example, clauses establishing in favor of the drafting party limitations of liability, rights of withdrawal, rights to suspend the performance of the agreement; and in general choice of law and jurisdiction clauses, implied renewal clauses, etc.
In order to protect the non-drafting party, that is assumed to be the weaker party, Italian law has provided that the latter must specifically accept the burdensome clauses in writing, by means of a second and separate signature; failing that, the clauses in question are invalid and unenforceable.
This is indeed a merely formal attempt to achieve enhanced protection for a presumably weaker contractual party, which in the real world is scarcely effective. As a matter of fact, leaving aside situations in which the non-drafting party simply signs the second signature without even looking at the clauses in question, the following happens:

- when the non-drafting party is indeed weak, it is de facto "forced" to affix the second signature;
- in situations where the contractual strength of the parties is more similar or equal, it happens that – in order for the "battle of forms" not to jeopardize the business – the GTCs are simply left unsigned (this often happens when the buyer has its own GTCs for purchases and the seller has its own GTCs for sales).

It is not a matter or chance that the legislation on unfair contract terms and conditions in B2C contracts (deriving from EU directive 93/13, as amended) has a completely different approach.
The B2C legislation, instead of going for a formal approach, states that the unenforceability of unfair contract terms and conditions in GTCs does not depend on their formal approval by the consumer. An attempt to extend the above approach also to certain B2B contracts (subject to certain conditions) was made

in a proposal of Regulation by the EU Commission in 2011 (COM(2011) 635), which was not approved and therefore never implemented.

2. Impact of Italian unfair contract terms rules in B2B contracts in e-commerce.

The negative impact of the Italian unfair contract terms rules in B2B e-commerce contracts is clear.
The above general rule requiring that the customer knows the GCG can be easily complied with by way of displaying them or - subject to certain conditions - making them available through a link during the order process.
The difficult issue is: how to get a specific written second signature of the unfair contract terms in e-commerce transactions through a web site?
Indeed a signature in "written form" under Italian law is primarily a signature in handwriting and in hard copy. However, obviously, the customer cannot be asked to print out the unfair terms and conditions, have the same signed and returned: this is unlikely to happen in real life.
The alternatives to the above are not straightforward and are represented by certified electronic signatures with different technical characteristics (advanced electronic signature "*Firma elettronica avanzata*", qualified electronic signature "*Firma elettronica qualificata*", and digital signature ,"*Firma digitale*").
In other words, the common practice of requiring the accepting party to simply *click* on the approval of the on-line GTC (so called, "*point-and-click*" system) would not comply with Italian requirements (this principle has been clearly established in Italian case-law, most recently by the decision of the Court of Catanzaro on April 30th 2012).

3. New EU Regulation on electronic transactions and recent Italian legal developments on this matter.

Legislative Decree no. 179 of August 26th 2016 (the "**Decree**"), introduced certain amendments to Italian provisions of law on electronic documents aimed at harmonizing the Italian legal framework with the provisions of the UE Regulation 910/2014/UE (so-called EIDAS Regulation) entered into force as from July 1st 2016.
Amongst other things, it introduced the principle that "*…an electronic document signed by means of an electronic signature shall be deemed as fulfilling the requirement of "written form" and, as to its value as evidence, this can be freely evaluated in proceedings taking into consideration its objective characteristics of quality, security, integrity and immutability*…." (see article 21 subparagraph 1 of Legislative Decree no. 82 of 2005, entitled "Code of Digital Administration", hereinafter "**CAD**", as amended by the Decree).
Of course, the provision of law in question is very recent and therefore no case law is yet available on the matter.
However, the scope of the innovation seems unfortunately limited to the evidential aspects: in fact, the same article 21, subparagraph 2 bis of CAD still re-affirms the principle that the acts and deeds which by law must be entered into in writing must be signed with certified electronic signatures.

In the light of the above, in our opinion the above-mentioned principles on the specific signature of unfair contract terms – *rebus sic stantibus* – seems not to have been affected.
Nevertheless, it cannot be excluded that Italian law and/or Italian case law will in the future adopt a different and more "permissive" approach, recognizing as valid the approval of unfair contract terms by the "*point-and-click*" system.
Needless to say, it is essential to monitor the issue and its legal and case law developments.