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The Norwegian Application of the Contracts Act Section 36

Hilde HAUGE*

Abstract: The article presents the general clause in the Norwegian Contracts Act section 36. The background and the purpose are explained, and the article provides an overview over the relevant case law, which indicates that the general clause serves different functions in the Norwegian contract law.

Zusammenfassung: Der Artikel enthält die allgemeine Klausel des norwegischen Vertragsgesetzes, Abschnitt 36. Der Hintergrund und der Zweck werden erläutert, und der Artikel bietet einen Überblick über die einschlägige Rechtsprechung, aus der hervorgeht, dass die allgemeine Klausel im norwegischen Vertragsrecht unterschiedliche Funktionen erfüllt.

Résumé: L'article présente la clause générale de l'article 36 de la loi norvégienne sur les contrats. Le contexte et l'objectif sont expliqués et l'article donne un aperçu de la jurisprudence pertinente, ce qui indique que la clause générale remplit différentes fonctions dans le droit norvégien des contrats.

1 Introduction

1. In Norway the general clause about unreasonable contracts in the Contracts Act section 36 entered into force in 1984, following Denmark (1975), Sweden (1976) and Finland (1978).[1] Thus, the Norwegian general clause is a few years younger than the similar general clauses in our neighbouring countries. The general clause is, however, slowly coming of age also in Norwegian law. Despite moving toward forty years, the general clause has so far not been widely used by the Norwegian Supreme Court.

The wording of the Norwegian Contracts Act section 36 reads as follows:

> 1) An agreement may be wholly or partially set aside or amended if it would be unreasonable or conflict with generally accepted business practice to invoke it. The same apply to unilaterally binding dispositions.
> 2) When making a decision, account will be taken not only of the contents of the agreement, the position of the parties and the circumstances prevailing at the time of the conclusion of the agreement, but also of subsequent events and circumstances in general.

* Professor at the Faculty of Law, University of Bergen, Norway, Email: Hilde.Hauge@uib.no.

1 Lov om avslutning av avtaler, om fuldmagt og om ugyldige viljeserklæringer (avtaleloven) 31 May 1918, hereinafter referred to as the Contracts Act.

3) The rules in the first and second paragraphs apply correspondingly if it would unreasonable to uphold the usage of trade or other custom of contract law.

2. Initially, it is worth noting that the Contracts Act section 37 entered into force in 1995. This provision made some adjustments to transpose the Directive on unfair contract terms in consumer contracts (1993/13 EEC). The details in the relation between the Contracts Act section 36 and the Directive will not be further discussed in the following, but the presentation of Contracts Acts section 36 and the case law will illustrate that the general clause has a broader scope and opens for a wider range of effects than the Directive.[2]

3. In the following I will first provide a brief account of the background for the general clause in the Norwegian Contracts Act. Then I will present some cases from the Supreme Court, with the purpose of illustrating the significance, or one might say lack of significance, of the Contracts Act section 36 in Norwegian law.

2 Background and Preparatory Works

2.1 Starting Point: Consumer Protection in Standard Contracts

4. The legislative work leading up to the general clause in the Contracts Act section 36 was based on the need for stronger consumer protection in standard contracts.[3] The law committee who prepared the general clause also prepared new regulations on public control with unfair standard contract terms.[4] The general clause was repealing the so-called small general clauses in specific contract acts, e.g. in the Sale of Goods act and the Insurance Contract Act. The small general clauses made it possible to set aside unreasonable contract terms in specific contract types. In the Norwegian legal doctrine there was, however, not a common opinion that the clauses expressed a general principle which could be applied outside the specific contract acts.[5]

2.2 Preparatory Works

5. In Norway, like in the other Nordic countries, the preparatory works are an important legal source.[6] Although the application of a legal standard like

2 See further, H. Hauge: 'Unfair Contract Terms in Nordic Contract Law', in T. Håstad (ed.), *The Nordic Contracts Act, Essays in Celebration of Its One Hundredth Anniversary* (Copenhagen: DJFØ Publishing 2015), Ch. 7. pp 164–168.
3 NOU: 1979: 32 (Norwegian Official Reports) p (10).
4 NOU 1976: 61.
5 NOU 1979: 32 pp 19–22.
6 See e.g. ECJ 7 May 2002, C-478/99 *Commission* v. *Sweden.*

'unreasonable' may change over time, the preparatory works among other things provide information about the legislators' purpose of the general clause. A main purpose stated in the preparatory works is protection of the weaker party against abuse of bargaining power.[7] This purpose is not limited to consumers, but also includes other weaker parties.[8] The preparatory works make it clear that the general clause in principle may be applied on all kind of contractual relationships, independent of the parties' status as consumer or business. Opposite to the Swedish Contracts Act section 36, the impact of consumer protection is not expressly stated in the wording of the Norwegian Contracts Act section 36. The preparatory works, however, clearly indicate that consumer protection is of importance.[9]

6. The preparatory works contain a so-called «grey list», presenting contract terms which normally will be considered unreasonable.[10] The list is shorter, but has similarities to the 'grey list' found as an appendix to the Directive on unfair terms in consumer contracts (1993/13 EEC). The list, however, has never been cited by the Supreme Court.

7. The preparatory works also contain some statements regarding the threshold for modifying a contract or a contract term. Especially one of these statements has regularly been cited in decisions from the Supreme Court. It states that a contract term must be positively unreasonable for it to be modified and that it is not enough that fairer solutions can be considered. It also states that unreasonable is a pretty strict criterion which would not be easy to invoke.[11] The preparatory works, however, also provide some statements which may indicate a lower threshold for applying the general clause. The Norwegian law professor Kai Krüger has pointed out that the preparatory works 'provide support for almost any view on the interpretation: Liberal, conservative, far-reaching or cautious'.[12]

3 Case Law from the Norwegian Supreme Court

3.1 Choice of Categories

8. As already indicated, case law from the Supreme Court regarding the Contracts Acts section 36 is relatively sparse. The existing cases may be classified in different ways. In the following I will divide the cases into three different categories: The

7 See e.g. NOU 1979: 32 p (39).
8 See NOU 1979: 32 p (59).
9 See e.g. NOU 1979 pp 47–48.
10 NOU 1979: 32 p (52).
11 Ot.prp. nr. 5 (1982–1983) p (30) (Draft bill). From the Supreme Court, see e.g. Rt. 2013 p (388), Rt. 2012 p (355), Rt. 2011 p (1359), Rt. 2011 p (1304).
12 See K. Krüger, «Avtaleloven § 36 – vital tenåring», *LoR (Lov og Rett)* 1996 p (65) at 66: «I lovmotivene finner man støtte for nær sagt et hvilket som helst tolkningssynspunkt: Liberalt, konservativt, vidtgående eller forsiktig.».

first category is where a contract is potentially unreasonable due to change of circumstances. The second category is where the general clause may serve as a supplement to the traditional reasons for invalidity. The third category is the situation where a specific contract term is potentially unreasonable. There are not necessarily clear boundaries between the different categories, but the categories indicate that the general clause may serve different functions in Norwegian contract law. A general impression is that the general clause mainly has served as a supplement to the traditional doctrine of frustrated assumptions and as a supplement to the traditional reasons for invalidity.[13] As an instrument for controlling unreasonable contract terms the general clause have so far had no significant impact.

3.2 Change of Circumstances

3.2.1 General Remarks

9. When assessing the possible unreasonableness of a contract, the Contracts Acts section 36 (2) states that 'subsequent events and circumstances' should be considered. Change of circumstances is also an important field of application of the doctrine of frustrated assumptions. This doctrine was, inspired by German law, established in Norwegian law a long time before the Contracts Act section 36 entered into force.[14] Although the existence of the doctrine is not disputed, it must be emphasized that the doctrine has not often been applied by the Supreme Court. The Supreme Court has, however, made it clear that the Contracts Act section 36 has not assumed the traditional doctrine of frustrated assumptions.[15]

3.2.2 Changes in the Monetary Value

10. Change in the monetary value in long term contracts led up to the first two cases about Contracts Act section 36 for the Norwegian Supreme Court.

11. The first case, *Rt. 1988 page 276* (Røstad) was about a contract for lease of agricultural property. The contract was dating back to 1899. The yearly rent stipulated in the contract was 200 NOK, which at the time of the Supreme Courts` decision would be equal to 5000 NOK. The majority of the Supreme Court pointed out that the contract was irrevocable for the landowner, and that

13 See e.g. G. Woxholth, «Utviklingen i rettspraksis vedrørende anvendelsen av avtaleloven § 36», *JV (Jussens Venner)* 2013 p (259) at 259-262.

14 See further on the relation between the doctrine of frustrated assumptions and the Contracts Acts, H. Bruserud, 'Changed Circumstances', in T. Håstad (ed.), *The Nordic Contracts Act, Essays in Celebration of Its One Hundredth Anniversary* (Copenhagen: DJFØ Publishing 2015), Ch. 3. p (59).

15 See Rt. 1999 p (922) and Rt. 2010 p (1345).

the change in the monetary value had led to an 'extreme imbalance'. The decision deviated from the principle of nominalism, which had been settled in a Supreme Court decision from 1958.[16]

The second case, *Rt.1988 page 295* (Skjelsvik), was about a ground lease contract dating back to 1955. This contract was also irrevocable. Due to change in the monetary value the real value of the rent was reduced to 1/7. The Supreme Court pointed out that there had been a 'drastic and unforeseen change in the balance of the contract'. It was also underlined that there was no such business relationship where there can be reason to let each party bear the risk of their own assumptions.

The result in both cases was that the rent was adjusted according to change in the consumer price index. The contracts were also supplied with an index clause for the future. Similar cases followed the next years, leading to similar results.[17]

12. It is also worth mentioning an example of a case where the general clause was *not* applied: The case *Rt. 1990 page 500* (Periscopus) was about tenancy contracts dating back to 1955. The contracts stipulated a fixed rent for 60 years. The lessor claimed the rent adjusted to market value. The Supreme Court pointed out that the contracts were limited in time. It was also emphasized that the lessor was a professional and that he knew about the tenancy contracts when he bought the estate.

I3. In the cases where the rent was adjusted, the adjustment was in favour of non-professional parties. It was about long-term contracts and the change in monetary value had led to significant imbalance. Today change in the monetary value is well-known, and considered in the legislation, therefore one may not expect that the courts would provide support if a contract concluded the later years lack an appropriate regulation.

3.2.3 Other Changes of Circumstances

14. There seem to be only case from the Supreme Court, where the general clause has been applied due to other change of circumstances than change in the monetary value.[18]

The case, *Rt. 2013 page 769,* was about an insurance settlement agreement after the policyholder had been injured in a traffic accident. The agreement stated that it was a «Final settlement» and that «Everything [was] included». The settlement did not include future loss of income. The policyholder`s earning capacity was reduced to 50 % a few years after the settlement. The Supreme Court stated that the settlement agreement did not prevent a claim for compensation for reduced earning capacity. It is of interest to notice that in this case the Supreme

16 Rt. 1958 p (529) (Madla).

17 Rt. 1992 p (1387), Rt. 1992 p (1397) and Rt. 1995 p (674).

18 But see also Rt. 2001 p (603) (OFS) regarding withdrawal from a labour union.

Court established some more specific guidelines for the assessment of unreasonableness regarding these types of agreements. The guidelines were originally formulated by a lower court. One of the guidelines stated that the changes must had been unpredictable for both the parties at the conclusion of the agreement. The other guidelines were that there must be a fundamental change of the consequences of the injury and that the settled agreement due to this was unreasonable and imbalanced.

15. The list of cases where the general clause was invoked, but not applied, due to change of circumstances is considerably longer. A couple of examples may be mentioned.[19] The case in *Rt. 2000 page 806* (Oslo Energi) was about a contract dating back to 1984 on selling concessionary power to a municipality. The energy company claimed in 1994 a higher price due to a fee introduced by statutory. The Supreme Court pointed out that the threshold for applying the Contracts Act section 36 in contracts between professional parts was high and the contract was not adjusted.

The case in *HR-2019-1153-A* was again about a settlement agreement between an insurance company and the policyholder after a traffic accident. Some time after the settlement her earning capacity was reduced by 100 %. Due to this, the policyholder claimed that the settlement should be adjusted based on the Contracts Act section 36. The Supreme Court, however, found that the change of earning capacity was predictable at the conclusion of the agreement. The Court also pointed out that at the time of signing the contract, it must have appeared very uncertain what would be the result of a potential dispute if the loss of earning capacity turned out to be permanent. In this case the Supreme Court referred to the guidelines in the case from 2013, mentioned above.

16. The existing case law indicates that there is little room for application of the general clause due to change of circumstances in contracts between professionals. In other contracts it will be of high importance whether the changes were predictable at the time entering into the contract and that the imbalance is sufficient to consider the contract unreasonable.

3.3 Replacement Of, or Supplement To, the Traditional Reasons for Invalidity

3.3.1 General Remarks

17. Traditional reasons for invalidity in the Norwegian Contracts Act and case law are such as fraud, duress mistake and breach of the principle of loyalty (procedural

19 Other examples are Rt. 2010 p 1345, Rt. 2011 p 1359. Rt. 2011 p 1641, Rt. 2012 p 1537, Rt. 2013 p 769, Rt. 2013 p 1316.

unfairness).[20] The assessment of the potential unreasonableness based on the Contracts Act section 36 primarily relates to the content and the effects of the contract or the contract term (substantial unfairness). However, the circumstances prevailing at the time of the conclusion of the agreement should also be considered. Due to the wide wording of the Contracts Act section 36, the general clause may, in principle, replace the traditional reasons for invalidity. This was, however, not the intention of the legislator.[21] An important difference between the general clause in the Contracts Act section 36 and the traditional reasons for invalidity is that the general clause provides a clear legal basis for modifying a contract. If a contract is declared invalid after the traditional reasons for invalidity it implies that the contract is totally invalid. Another difference between the traditional reasons for invalidity and the general clause in the Contracts Act section 36 is that the general clause provides basis for a broader assessment of the fairness. Whether the contract party has been negligent or not is not decisive according to the Contracts Act section 36, but it will normally be decisive under the traditional reasons for invalidity.

3.3.2 Mistake, Lack of Adequate Information and Misleading Information

18. There are some cases from the Supreme Court which relates to the traditional reasons for invalidity. In these cases, the adjustment of the contracts mainly was related to mistakes caused by lack of adequate information, or misleading information, at the time the agreement was concluded.

19. The case *Rt. 1993 page 1178* was about a forced sale of real estate. The Supreme Court found that there was lack of information to the bidder about the impact of a high bid: If the price got to high, the bidder would not be able to get a concession from the agricultural authorities to buy the property. The bid was set aside. The case might be considered a rather classical case of 'mistake'.

20. The case *Rt. 1993 page 1497* (Halvorsen) was about sale of an apartment. Both the seller and the buyer were non-professionals, but the seller was assisted by a real estate agent. The Supreme Court found that there was provided misleading information about public debt in the valuation document. The Supreme Court found that due to this, the price stipulated in the contract was unreasonable. The price was reduced to the presumed market price at the time the buyer entered the contract. This case illustrates that the general clause may be used to modify a contract, rather than setting it totally aside.

21. In the case *Rt. 1995 page 1540* a mentally ill woman had mortgaged her apartment as guarantee for her son`s debt. The Supreme Court set the contract

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20 See the Contracts Act, Ch. 3, §§ 28–33.

21 See Ot.prp. nr. 5 (1982–1983) pp 10–11.

aside, taking into consideration the illness, insufficient information from the bank and the fact that the apartment was of special importance for the woman due to her illness. This case may illustrate the broad evaluation of the possible unreasonableness. The decision has, however, been criticized for providing too little predictability.[22]

22. In the case *Rt. 2013 page 388* (Røeggen) a non-professional investor had bought so-called granted saving products from a bank. The investment was made by borrowing the money for the investment from the bank. The investor had a loss of approximately 270 000 NOK. The contract was set aside, mainly due to insufficient information at the time entering the contract. This case was the first decision where the Supreme Court recognized the idea that the consumer has a stronger protection by virtue of being a consumer, not depending on being weaker than the average consumer.

23. The case *Rt. 2014 page 351* was about an agreement between an energy company and a landowner from 2005 about water rights, stating that the landowner should have 50 % of the outcome of the energy production. It turned out that the energy company already possessed the actual water rights, based on a contract from 1935. The contract from 2005 was set aside. This case is an example of a mutual mistake between the contract parties.

24. Under this category there are also quite a few cases where the general clause was invoked, but not applied. Some of the cases involved contracts between a bank and a consumer.[23] The case from Rt. 2013 page 388, however, may indicate a move towards stronger consumer protection.

3.3.3. The Fraudulent Contract Parties

25. The two cases I will present here, are also relating to the traditional reasons for invalidity. They are, however, two quite extraordinary cases, where the behaviour of one of the contract parties may be described as qualified fraudulent.

26. In the first case, *Rt. 2008 page 1365* ('The Munch-painting'), there was an agreement between a dentist and an art specialist to buy a Munch-painting together, on the purpose of reselling it for a higher price. The agreement settled how they should share the gain. It turned out that the art specialist had provided intentionally wrong information about the buying price and the sales price. The

22 See J. Giertsen, *Avtaler* (Oslo: Universitetsforlaget 2014) p 228.

23 See e.g. Rt. 1994 p (1288) (Siblings taking over their mother`s debt to the bank), Rt. 1995 p (245) (Mother mortgaging her apartment as guarantee for her son`s debt) Rt. 2003 p (1252) (Loan agreement between a bank and a consumer) Rt. 2012 p (355) (Financial products), Rt. 2012 p (1926) (Financial products).

contract was set aside, and the dentist was considered the owner of the painting, which meant that he could keep the sales price for the painting on his own.

In the second case, *Rt. 2012 page 393* (Ugland), a manager of a company bought shares from the company with the right to sell them back to the company at market value. This was part of an incentive agreement between the manager and the company. It followed from the agreement that if the manager was dismissed ('fired'), then the price would be reduced by 10 %. The manager was later convicted, and was punished for, financial crimes against the company. The contract clause giving the manager the right of selling the shares back at market value was set aside, and the manager only got the buying price back, reduced for dividend received.

3.4. Unreasonable Contract Terms

3.4.1. General Remarks

27. As indicated above, the starting point for the legislative work leading up to the general clause was the need for stronger consumer protection in standard contracts. A contract term may be considered unreasonable if it deviates from mandatory regulations in similar areas of law and therefore makes an unfair imbalance between the parties. Although a contract term is not unfair 'as such', it may also be set aside if the effect of the contract term is considered unreasonable under the individual circumstances. Case law from the Supreme Court, so far, does not provide any examples where a contract term has been set aside as unfair 'as such'. Considering the purpose of the general clause, and the directive on unfair contract terms in consumer contracts, one may hold this to be quite surprising.

3.4.2. Unreasonable Contract Terms under the Individual Circumstances

28. There are only a couple of cases where a contract term has been set aside based primarily on individual circumstances. The case in *Rt. 1991 page 147* was about a limited duration tenancy. The tenant did not bring proceedings to prolong the contract within the deadline laid down in the Tenancy Act and in the contract. The Supreme Court found that the tenant due to the individual circumstances had «qualified expectations» regarding prolonging the contract. The contract term about limited duration was set aside.

29. The case in *Rt. 2007 page 862* was about a construction contract between a business and a consumer. According to the agreement the Business should pay liquidated damages due to late fulfillment of work on a fireplace. The Supreme Court modified the Contract in favour of the Business, even though the Business had been negligent. The agreement on liquidated damages was not unreasonable 'as such', but as the time went by, the damages reached an amount that was considered unreasonable. The formal basis for the assessment was a section in

the Housing Construction Act from 1997.[24] but the Supreme Court pointed out that the evaluation would have been equal under the Contracts Act section 36.

3.4.3. Contract Terms and Conditions Not Found Unreasonable

30. There are some cases where the Contracts Act section 36 has been invoked, but not applied on potential unreasonable contract terms. Some of them may be mentioned. The case in *Rt. 1994 page 626* (Wasa) was about an exclusion clause in a standard freight contract. The Supreme Court found that the exemption clause was applicable although the damage was caused by gross negligence from a dock inspector hired by the freight company. The Supreme Court pointed out that the standard contract was negotiated by organizations representing the interested parties.

31. In the case *Rt. 2000 page 1800* a manager when hired as manager for a bank had accepted as a condition that he should settle in the municipality where the Bank was located. He moved from the municipality later the same year and was dismissed. The obligation to settle in the municipality was not found unreasonable. The Supreme Court pointed out that the obligation was objectively justified.

32. The case in *Rt 2005 page 1112* was about an insurance contract. Due to serious illness the policyholder holder had not renewed the insurance contract within the deadline following from the contract and the Insurance Contracts Act. After the policyholder had died his cohabitant claimed that the deadline for renewal of the contract should be modified. The Supreme Court did not modify the contract, considering among other things that it was a mass agreement.

33. The case Rt 2007 page 431 was about an exclusion clause in a contract about water delivery between a municipality and a consumer. A drainage pipe had caused damage on the consumers property. Due to the exclusion clause the consumer had no claim for damages. The Supreme Court did not find the clause unreasonable and pointed out among other things that the owners of the properties were closest to take necessary measures to secure their own properties.

4. Closing Remarks

34. The case law from the Norwegian Supreme Court indicates that the general clause in the Contracts Acts section 36 so far has not challenged the basic principle of *pacta sunt servanda*.

As a major rule a contract party still bear the risk of changed circumstances and the general clause has still not been applied in contracts between businesses

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24 Lov om avtalar med forbrukar om oppføring av ny bustad m.m. (bustadoppføringslova) 13 June 1997 § 23.

due to change of circumstances. The case law regarding contracts between businesses is sparse but indicates that the threshold for modifying a contract between professional parties is very high. In other contracts it will normally be crucial whether the changes were predictable when entering the contract. The changes must also be so fundamental that the contract can be considered unreasonable due to imbalance or other circumstances.

35. The general clause has in some cases served as a replacement of, or supplement to, the traditional reasons for invalidity. A couple of general points may be worth noting: The general clause has made it possible to modify a contract rather than to set it totally aside. One may hold that this option provides more flexibility than the traditional rules of invalidity. The general clause has also opened for a broader assessment of the agreement, like in the decision in *Rt. 1995 page 1540.* A problem with such a broad assessment is that it might challenge the predictability for the contract parties too much. In my opinion, it is not a good solution to allow the general clause to totally replace the traditional rules of invalidity. A last point to be noted is that the assessment of negligence may be of less importance regarding misleading and insufficient information in consumer contracts.

36. Although the starting point for the regulation in the Contracts Act section 36 was the need for stronger consumer protection, there are still no decision from the Supreme Court that modifies a contract term in favour of the consumer in a contract between a business and a consumer. The idea of consumer protection, except from the case in Rt. 2013 page 368 (Røeggen), has left few traces in the decisions from the Supreme Court. There are no clear answers to why the general clause has not been applied on contract terms in consumer contracts, but some possible reasons may be pointed out: For some important contracts, like e.g. sales and construction contracts, the consumer already has a rather strong protection through mandatory regulations in the legislation. This does, however, not give a full explanation as there are still several consumer contracts which are not regulated. Another point is that disputes about possible unreasonable contract terms in consumer contracts often will be about 'small' contracts not involving a lot of money, so that it will be risky for the consumer to bring the dispute to the courts. The competence of the Norwegian Consumer Disputes Commission is as a rule limited to disputes regulated in the legislation.[25]

37. Although the decision in Rt. 2013 page 368 was not about modifying a contract term but setting the contract totally aside, the case indicated a greater emphasis on the idea of consumer protection. The decision is, however, soon seven years old, and it has not been followed by other cases from the Supreme Court regarding the Contracts Act section 36 and consumer protection.

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25 Lov om forbrukerklageutvalget (The Consumer Dispute Act) 17 February 2017.