Law and Humanities
ISSN Print: 3079-5117
ISSN Online: 3079-5125
https://doi.org/10.63313/LH.9004

Empirical Challenges and Normative Path Reconstruction of the "Conspicuous Notice Obligation" of Standard Terms under the Civil Code

Yangyang Liu
Anhui University of Finance and Economics, Bengbu 233030, China
Email: 851311512@qq.com

How to cite this paper: Liu, Y. (2025). Empirical challenges and normative path reconstruction of the "conspicuous notice obligation" of standard terms under the Civil Code. Law and Humanities, 1(1), 27–35. ISSN Print: 3079-5117, ISSN Online: 3079-5125.
https://doi.org/10.63313/LH.9004
Published: 2025-05-10

Abstract

Article 496 of the Civil Code of the People's Republic of China establishes the obligation of conspicuous notice for providers of standard terms, aiming to ad-dress unfair transactions caused by information asymmetry and unequal bar-gaining positions in contractual relationships. However, in judicial practice, the understanding and application of "conspicuous notice" are highly uncertain. Notice forms are often formalistic, and the effectiveness of notice is difficult to assess, leading to inconsistent judicial standards and undermining the certainty and predictability of the law. Based on empirical analysis of typical judicial cas-es, this paper reveals the main difficulties in applying the obligation of conspic-uous notice and, drawing on foreign legislative and theoretical achievements, proposes a typological approach to reconstructing notice standards. It seeks to balance contractual freedom and protection of the vulnerable, providing refer-ences for improving the relevant system and judicial practice.

Keywords

Civil Code; standard terms; conspicuous notice obligation; typological governance

1. Introduction: Problem Statement and Research Path

1.1. Background of the Problem

Standard terms are widely used in various sectors such as finance, telecommunications, insurance, and the internet. While they enhance transaction efficiency and reduce costs, they also lead to controversies due to information asymmetry and unequal bargaining power. Businesses, leveraging their advantage in drafting terms, often place consumers in a passive position. This can result in consumers unknowingly accepting disadvantageous terms, severely infringing upon their rights.

1.2. Existing Research and the Focus of This Paper

Although previous research has made some progress in studying standard terms, most have focused on specific aspects of the notice and explanation obligation. With the evolution of the economy and transaction models, new issues continuously emerge. This paper delves into the empirical challenges of the conspicuous notice obligation under Article 496 of the Civil Code and proposes suggestions for reconstructing normative paths, aiming to provide references for improving the relevant system and judicial practice.

2. Normative Structure and Institutional Purpose of Article 496 of the Civil Code

2.1. Provisions Analysis: Logical Positioning of Notice and Explanation Obligations

Article 496 clarifies the notice and explanation obligations of standard term providers. The notice obligation emphasizes presenting terms with significant interests to the other party, while the explanation obligation requires providers to further interpret these terms upon request. Together, they ensure that the contracting party fully understands the terms and makes a genuine expression of intent.

2.2. Institutional Intent: Substantive Consensus and Protection of the Vulnerable

This system aims to achieve substantive consensus in contract law, correct the inequality in transaction positions caused by standard terms, and protect vulnerable groups such as consumers. By imposing notice and explanation obligations on providers, it ensures information parity between contracting parties, promotes fair and effective contracts, and maintains market fairness and justice.

3. Empirical Examination: Current Status of Adjudication Practices

3.1. Sample Selection and Data Overview

To more accurately grasp the application of the obligation to prominently indicate standard terms in judicial practice, I conducted a broader search and screening of judicial documents. By using keywords such as "standard terms," "duty to indicate," "not effective," and "contract disputes" in the National Court Judgment Online and related legal databases, I retrieved civil judgment documents that took effect from January 2020 to December 2024, selecting 100 representative cases. These cases cover various common scenarios involving standard terms, including e-commerce transactions, logistics transportation, insurance contracts, financial services, and real estate sales, demonstrating a certain breadth and typicality.

In terms of geographical distribution, the cases involve multiple provinces and cities across the country, with a higher number of cases in economically developed areas and regions with frequent commercial activities, such as Beijing, Shanghai, Guangdong, and Zhejiang, accounting for about 60%; the number of cases in central and western regions is relatively lower, accounting for about 40%. Regarding the distribution of case types, e-commerce transaction cases account for the highest proportion at around 35%, closely related to the thriving development of the internet economy; insurance contract cases come second, accounting for about 20%, reflecting the widespread use and numerous disputes over standard terms in the insurance industry; logistics transportation, financial services, and real estate sales cases account for approximately 15%,12%, and 8%, respectively, while other types of cases account for about 10%.

3.2. Main Discrepancies in Adjudication Standards

- Form Over Substance: Providers often use formalistic methods like bold fonts and pop-up reminders to fulfill notice obligations, but neglect whether the other party truly reads and understands the terms.
- Separation of Notice Content and Clause Location: In some cases, standard terms with notice labels are placed in inconspicuous locations, reducing the effectiveness of notice.
- Excessive Discretion: The vagueness and subjectivity of the "conspicuous" standard lead to inconsistent judicial rulings. Courts vary in whether they require providers to prove that the other party actually noticed and understood the terms.

3.3. Typical Case Analysis: A Consumer vs. An Insurance Company in an Insurance Contract Dispute

The consumer purchased an insurance product from a certain insurance company and an insured event occurred during the policy period. When the consumer sought compensation from the insurance company, the company refused to pay based on the exemption clause in the insurance contract. The consumer argued that the exemption clause should not be part of the contract because the insurance company failed to fulfill its duty to inform and explain. During the trial, the court found that the insurance company had bolded the exemption clause in the contract text and provided a prompt in the "Insured's Declaration" section of the application form, urging the insured to read the exemption clause carefully before signing it. However, further investigation revealed that the insured did not read the exemption clause carefully when signing, and the insurance company did not provide active explanations or evidence showing that the insured fully understood the meaning and legal consequences of the exemption clause.

The court held that although the insurance company provided formal notice of the exemption clause, it failed to take more proactive and effective measures to ensure that the policyholder actually knew and understood the clause, such as not explaining each item of the exemption clause or not requiring the policyholder to confirm their understanding of the exemption clause. Therefore, the insurer's duty to inform was deficient, and the exemption clause cannot be considered valid content of the contract; the insurance company must bear corresponding liability for compensation. This case highlights the issue in practice where providers of standard terms only provide formal notices while neglecting substantive effects, as well as the differences in how courts evaluate the fulfillment of notification obligations based on substantive effects. In judicial practice, when adjudicating such cases, one should not limit the judgment to formal notices but should comprehensively consider whether the notification truly achieved the effect of making the other party aware of and understand the terms, thereby realizing the principle of fairness and justice under contract law.

4. Institutional Reconstruction: Building Typological Standards

4.1. Tiered Notice Standards: Shield-Type, Sword-Type, and Hook-Type Clauses

Shield Clauses: These clauses primarily consist of content that has minimal impact on the rights and obligations of both parties to the contract, generally aligning with common trading practices and legal requirements. Examples include basic descriptions of the subject matter of the contract and the fundamental methods for its performance. Such clauses typically do not significantly affect the rights of the other party, so they usually do not require special notice; they can be presented in the standard format and manner of ordinary clauses. For instance, in a real estate purchase contract, descriptions of basic information about the property, such as area and layout, are relatively clear and have limited impact on the rights and obligations of both parties, thus they can be categorized as shield clauses.

Sword Clause: This type of clause has a certain impact on the rights and obligations of the contracting party but does not reach the level of directly diminishing core rights, such as reasonable adjustments to the performance period or slight increases in liability for breach of contract. For sword clauses, a uniform format should be used for prompts, such as dedicating specific sections or paragraphs in the contract text to list them collectively, and clearly distinguishing them through font, symbols, etc., to draw the attention of the other party and enable them to focus on and review these clauses that may affect their interests. For example, in lease contracts, if changes to the rent payment method are made within a reasonable range, they can be categorized as sword clauses and require unified prompt formats.

Hook Clauses: These refer to clauses that directly affect the core rights and obligations of the contracting party, such as those that exempt or mitigate the main responsibilities of the party providing standard terms, impose additional burdens on the other party, or restrict or exclude the other party's primary rights. Given their significant impact on the interests of the contracting party, these clauses must be presented in a more stringent and prominent manner, using enhanced prompts like pop-up confirmations, item-by-item reviews, and secondary clicks, along with reasonable explanations to ensure that the other party fully understands the meaning and legal consequences of these clauses. In practice, for more complex hook clauses, personalized prompts and explanations should be provided based on specific circumstances. For example, in financial product terms with high professionalism, explanations should be given in simple and understandable language, and practical cases or simulated data should be provided to aid understanding. In insurance contracts, for instance, clauses that exempt the insurer from liability for losses caused by intentional acts of the insured must be strictly explained and highlighted, as they directly relate to the core protection rights of the insured.

4.2. Redefining the "Conspicuous" Standard

- Visual Conspicuity: Using contrasting colors, reasonable font sizes, and placing important terms in prominent positions.
- Behavioral Interactivity: Requiring the other party to actively engage with the terms through interactive steps such as mandatory reading time and click-to-confirm.
- Temporal Durability: Ensuring accessibility and preservability of information throughout the contract's duration.
- Semantic Clarity: Using clear and understandable language to avoid ambiguity and providing explanations for technical terms.

4.3. The Institutional Scope of the Explanation Obligation

For high-risk clauses, merely fulfilling the formal obligation to inform is far from sufficient; reasonable explanation must also be provided. The methods of reasonable explanation can include verbal explanations, written statements, intelligent customer service interactions, and FAQ embedding, among others. When choosing the method of explanation, factors such as the nature of the contract, the complexity of the clause, and the actual situation of the other party should be comprehensively considered to ensure that the explanation effectively enables the other party to have a basic understanding of the clause. For example, for simple consumer contracts targeting ordinary consumers, verbal explanations or written statements may be more effective; whereas for complex commercial contracts or those involving specialized fields, intelligent customer service interactions or FAQ embedding can provide more detailed and personalized explanatory services.

At the same time, to ensure that the party providing standard terms fulfills its duty of explanation, the burden of proof should be strengthened, requiring the company to provide evidence that it has fulfilled its reasonable duty of explanation. For example, providing written records of explanations, audio or video materials, electronic data, etc., to prove that during the contract formation process, it clearly, accurately, and in detail explained the concepts, content, and legal consequences of relevant clauses according to the other party's requirements, and that the other party has expressed understanding and approval. In judicial practice, if the company fails to provide sufficient and effective evidence proving that it has fulfilled its duty of explanation, it should bear the corresponding adverse consequences, meaning that the clause does not become part of the contract and is not binding on the other party.

5. Comparative Law as a Mirror: Beneficial Experiences and Limitations

5.1. German Model: Tiered Legislation and Black/Gray List System

The German Civil Code establishes a relatively detailed hierarchical legislative framework for general terms and conditions, providing clear legal provisions covering all aspects from their formation, effectiveness, interpretation to invalidity, thereby offering a relatively clear legal basis for judicial practice. The "blacklist" and "greylist" systems it introduces are highly targeted and operable. For certain absolutely invalid standard terms, such as those exempting one's own intentional liability or aggravating the other party's liability for personal injury, they are directly stipulated as invalid without requiring case-by-case judgment. As for standard terms that may involve unfair circumstances, they are included in the greylist, allowing for examination and judgment in specific cases. This classification approach can effectively prevent and regulate unfair standard terms, safeguarding the legitimate rights and interests of consumers. However, this German model also has certain limitations. For instance, the hierarchical legislative structure is relatively complex, potentially leading to cumbersome legal application and increased costs. The formulation and updating of the blacklist and greylist systems require continuous adjustment and refinement based on market transaction practices and legal developments; otherwise, they may become disconnected from reality.

5.2. EU Legislation: Information Transparency and Understandability Requirements

The EU Consumer Rights Directive 2011/83/EU emphasizes that merchants should clearly, plainly, and structurally list terms involving significant consumer rights in standard contracts to ensure consumers can perceive, identify, and understand these provisions. This requirement focuses on safeguarding consumers' right to know and comprehend contract terms from their perspective, thereby enhancing transaction transparency and fairness. However, in actual implementation, challenges remain regarding how to ensure the information provided by merchants truly meets the criteria of clarity, plainness, and structure, as well as how to measure whether consumers can understand and perceive such information. Additionally, variations may exist among member states when implementing this directive, leading to inconsistencies in legal application across the EU.

5.3. American Approach: The Principle of Good Faith and the Duty of

Disclosure Model

Although the United States lacks unified legislation on standard terms, it regulates insufficient disclosure by providers of such terms through principles like good faith performance and honest disclosure in the Uniform Commercial Code and relevant state consumer protection laws, as well as judicial interpretation and punitive damages mechanisms. This model emphasizes the duty of good faith between contracting parties and focuses on guiding businesses to improve disclosure standards through case-by-case adjudication and market mechanisms, demonstrating a degree of flexibility and adaptability. However, this approach also presents certain issues, such as the relatively vague criteria for determining good faith and honesty, which can lead to judicial uncertainty. While punitive damages may deter corporate misconduct, they could also expose businesses to excessive legal risks, potentially disrupting normal operations.

6. Suggestions for System Improvement

6.1. Formulating unified adjudication guidelines

The Supreme People's Court should establish unified application standards for the duty of notification and explanation in adjudicating standard terms by integrating laws and regulations such as the Civil Code and the Consumer Rights Protection Law. The guidelines should clearly define the specific boundaries and criteria for determining "conspicuousness" and "reasonableness," refine the notification and explanation requirements for different types of standard terms, and provide clear and specific adjudication bases for courts at all levels when handling related cases. This will avoid arbitrariness and regional disparities in adjudication and enhance the credibility and authority of judicial rulings. For instance, the guidelines could explicitly stipulate that for clauses exempting or limiting one's own liability, methods such as pop-up confirmations and item-by-item explanations must be used for notification and explanation; for general standard terms, methods such as bold fonts or separate listings may be employed for notification. Additionally, the guidelines should specify the notification obligations for standard terms in different scenarios, such as e-commerce transactions, insurance contracts, and financial services, formulating corresponding notification and explanation standards based on the characteristics of each field to improve the relevance and operability of the guidelines.

6.2. Constructing "Prompt Effectiveness Inference Rules"

Introducing the "presumption of performance prompting system," which means that when the provider of standard terms can prove they have adopted legally compliant prompting methods and the other party did not raise objections during the contract formation process under reasonable circumstances, it may be presumed that the provider has fulfilled their prompting obligation. However, the other party should be allowed to present counter-evidence.

6.3. Guiding the Standardization of Digital Prompts and Intelligent Compliance Mechanisms

With the widespread application of internet and digital technologies, the use of standard terms has become increasingly frequent in areas such as electronic contracts and online transactions. Enterprises should be encouraged to enhance the quality of notifications through embedded disclosure mechanisms and intelligent interactive designs. For instance, adopting measures like pop-up confirmations for each clause in electronic contracts, intelligent voice reminders, and personalized prompts based on user behavior can ensure that users fully notice and comprehend the relevant terms.

7. Conclusion

Amid the current wave of digitization, the use of standard terms has become increasingly frequent, making the refinement of their conspicuous duty of notification particularly urgent. Although Article 496 of the Civil Code provides a fundamental institutional framework, achieving its legislative intent in practice requires coordinated efforts across judicial practice, institutional design, and technological application. Moving forward, a dual-duty notification system centered on user comprehension—combining "form and substance"—should be established to balance market efficiency and contractual justice, thereby fostering the healthy development of the economy and society. Through continuous exploration and improvement of the conspicuous duty of notification for standard terms, we can strike a better equilibrium between contractual freedom and substantive fairness, fortify the safeguards for consumer rights, and ensure the orderly operation of China's market economy within the framework of the rule of law. This will achieve an organic unity of efficiency and fairness, enabling every market participant to thrive in a fair competitive environment and ensuring that every contract embodies the rule-of-law values of fairness and justice.

References

[1] Wang Tianfan. Commentary on Article 496 of the Civil Code (Definition of Standard Terms and Obligations of Users) [J]. Journal of Nanjing University (Philosophy, Humanities, Social Sciences), 2020,57(06):49-65+158.

[2] Kong Xingru, Liu Qiuyue. Legal Inquiry on the Duty to Prompt for Standard Terms in Online Service Contracts [J]. Modern Communication, 2020, (11):59-60+58.

[3] Huang Shuai. The Private Law Protection of Substantive Contractual Freedom as a Basic Right Content —— Taking the Content Review of Standard Terms in Article 497 of the Civil Code as an Example [J]. Human Rights Studies (Journal), 2023,27(02):28-51+350-351.

[4] Liu Haojie. Improvement of the Rules on Standard Terms in Insurance Law: Taking the Civil Code as a Reference [J]. Law of Trade University, 2022,7 (00):199-207.

[5] Qu Jialu. Study on the Jurisdictional Standard Terms of Online Consumption Agreements [J]. China Market Regulation Research, 2022, (03):21-25.

[6] An Jincheng. Typological Construction and the Determination of Standard for Format

Clause Prompting [J]. Journal of Social Sciences of Jilin University, 2021,61(03):86-95+234-235.

[7] Wang Tianfan. Commentary on Article 496 of the Civil Code (Definition of Standard Terms and Obligations of Users) [J]. Journal of Nanjing University (Philosophy, Humanities, Social Sciences), 2020,57(06):49-65+158.