La Protección Contractual al Consumidor Financiero, Aspectos Teóricos y Actualidad Jurisprudencial *

The Contractual Protection of the Financial Consumer, Theoretical Aspects and Current Jurisprudence

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Resumen

Las relaciones de consumo en el ámbito financiero tienen particularidades debido a la marcada asimetría entre las partes y la debilidad acentuada de los consumidores financieros. Esto ha justificado

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un marco de intervención normativa amplio tendiente a proteger a los consumidores financieros, el cual cada vez es mayor. Además, los jueces han desplegado su poder decisorio para buscar el equilibrio y la justicia en este tipo de contratos.

Este artículo tiene como objetivo analizar la actualidad normativa en cuanto a las obligaciones de información en materia financiera, así como el control al contenido y la eficacia de los contratos de consumo desde una perspectiva teórica y jurisprudencial.

Abstract

Consumer relations in the financial sphere have particularities due to the marked asymmetry between the parties and the accentuated weakness of financial consumers. It has justified a broad framework of regulatory intervention aimed at protecting financial consumers, which is growing. In addition, judges have deployed their decision-making power to seek balance and justice in this type of contract.

The purpose of this article is to analyze the current regulatory situation regarding information obligations in financial matters, as well as the control of the content and effectiveness of consumer contracts from a theoretical and jurisprudential perspective.

Palabras clave

Protección, consumidor financiero, información, contratos, equilibrio.

Keywords

Protection, financial consumer, information, contracts, balance.

Introduction

The financial sector is of paramount importance in the economy of a state since the stability of the system for managing the resources collected from the public depends, in turn, on the economic stability of the nation. The financial sector leverages the credit of individuals, which allows the realization of investments and the advancement of short, medium and long term projects. Banking penetration and access to credit are the driving force of the economy in the consumer society; for this reason, citizens are compelled to acquire financial products in order to enter the system and survive in it, even at the risk of being excluded from access to means of payment or being left with bad credit due to lack of financial experience. To such an extent, its importance is highlighted by the fact that this activity goes beyond the mere interest of the parties, typical of private law legal relations, and transcends the sphere of being considered of public interest, which has often merited its constitutionalization. The growing use of plastic money, the appearance of virtual wallets and the increase of financial intermediaries in digital platforms have increased the presence of financial consumer relations. Bankarization

of the population has increased substantially in recent years, and business relationships with the financial system have become necessary for most citizens in their role as economic agents and consumers.

In the Colombian context, this sector includes financial, banking, stock market, insurance, trust, leasing and other activities regulated and supervised by the Financial Superintendency of Colombia. All these entities maintain business relationships with individuals, most of them natural or legal persons, who need their services to carry out daily money transactions, as well as credit support and support in obtaining resources to carry out their business activities. However, consumer legal relations in the financial sphere have special nuances; their regulation is largely outside the scope of the consumer statute, and a special regulation applies to them. Financial consumers have a higher degree of vulnerability given the complexity of the products and services they contract, which, to a great extent, they are unable to understand, added to the fact that financial sector entities have a position of contractual dominance over their clients and users and, at times, are indifferent to improving the degree of understanding that their clients achieve when they use their services. It highlights the importance of consumer protection in the financial sector and the problems that can arise in financial consumer relationships, most of them linked to information problems and contractual imbalances. Consequently, this paper will focus on analyzing the scope of consumer protection regulation in the financial sector from these two perspectives.

In order to delimit its scope, the aim is to provide a normative analysis approach but also to review the largest possible number of judicial decisions issued on the subject, seeking to use the state of the art of the matter in Colombian law to generate an updated point of view. To this end, first, the control prior to the execution of the contract will be addressed, in which the information to the financial consumer will be the protagonist, and secondly, the control of the content of financial contracts will be analyzed, in general, and focused on abusive clauses. The methodology used is legal dogmatic, with elements of normative, doctrinal and jurisprudential analysis, with an analytical and propositional component.

Precontractual Control and Information to the Financial Consumer

Consumer information is the mechanism par excellence to correct the asymmetries that exist between consumers and producers and suppliers in the market, especially in financial consumer relations, in which the imbalance factor is more accentuated given the dominant position of the companies that provide services in this sector. The financial consumer or user, understood as the potential client, customer or user, according to Law 1328 of 2009, a notion clearly broader than the one contained in Law 1480 of 2011, is not fixed in the purposes of use or destination of the financial service and contemplates as a mechanism par excellence of protection to the weak and accentuated obligation of information (Woolcoot et al., 2017, p. 42). The doctrine, when referring to the economic analysis of the information obligation, has pointed out that the duty to inform is even more demandable and necessary in legal relationships that involve a high degree of risk, and the dominant party is prone to obtain greater opportunism in the negotiation (Monsalve & Rodado, 2010).

The Constitutional Court has said that: "*The financial producer and supplier, because he usually has greater professional and technical knowledge about the products or services he offers, is in conditions of asymmetry over the financial consumer, who, although he may have specific*

knowledge, does not cease to be a financial consumer. Thus, it would be necessary for the legislator to establish principles and rules of information and transparency (e.g., prohibition of abusive clauses and practices, procedures, and sanctions) in order to counteract, based on the asymmetry, the inequalities experienced by the consumer relationship". (Corte Constitucional, Sentencia C- 909 de 2012).

In a recent ruling, the Court stated that "Effective access to information is a right of financial consumers, a duty of financial institutions and a principle that governs the relations between them, which is based on the constitutional principle of good faith" (Corte Constitucional, Sentencia T302/ 2020). Adding that "Information then is a central element in the relations between citizens and the entities of the financial system, both in the pre-contractual, contractual and post-contractual stage, as it prevents abuses of the exercise of contractual freedom. That is why any unjustified restriction to the access to information must be understood as an abusive practice, favoured by the dominant power enjoyed by insurance and banking entities" (Corte Constitucional, Sentencia T-302/ 2020).

Regarding the purpose of the obligation of information in financial matters, the high court pointed out that "the requirement to the entities that make up the financial system to provide consumers with clear and timely data is none other than to balance the situation of defenselessness in which the latter find themselves before them, so that they recognize and exercise their rights as users, allowing them to make better decisions, facilitating them the adequate comparison of the different options offered in the market, tending because they know both their rights and the obligations acquired" (Corte Constitucional, Sentencia T 227/2016), and it should be noted that in that same judgment, the Court stated that due to its nature, the duty to inform and the right to receive information in the framework of the financial activity constitutes a guarantee with an unequivocal constitutional basis and is not subject to the will of the parties.

In a 2016 judgment, the entity made a link between good faith and the duty of information based on the theory of secondary duties of conduct (Solarte, 2004), where it said that "these secondary duties may manifest themselves more intensely in those cases in which the contractual relationship can also be qualified as a consumer relationship. In that sense and by way of example, the conclusion of banking contracts imposes by its nature - a circumstance that is also usually recognized by law - special duties of accompaniment, advice and information" (Corte Constitucional, Sentencia T-676 of 2016). All of the above indicates that the obligation of information in financial matters, in the eyes of the Constitutional Court, acquires nuances of constitutional law, which gives it prevalence in its compliance and reinforces the framework of what is dictated by the special rules of consumer law on the matter, in order to protect the weak party in consumer relations that are essentially asymmetrical, as is the case of financial relations.

Likewise, the doctrine has highlighted the important role of information in these consumer relations, including its relationship with the right to financial education, since "*it is not enough to provide information, but it is required that the financial consumer assumes, processes and uses it in an adequate manner. Greater complexity of financial products could also be implied since it is necessary for the consumer to study and understand the clauses with the conditions of the contracts to be signed, among others*". (Blanco Barón, C., 2014). Information asymmetry can reach such a point that a study revealed that these are not eliminated with the legal obligations of information and persist even during legal actions initiated by consumers (Devis Cantillo, J., Gómez Quiñones, M. del P. & López Pontón, E. 2019).

The Supreme Court of Justice, on its part, in a case related to the securities market, emphasized that "Asymmetry and insufficiency or lack of information is the main failure of the markets. It derives from the a priori imbalance between the investor and the other participants with respect to the knowledge of the particularities surrounding the securities transaction. The anomaly affects the financial consumer's understanding of the risks inherent to the investment and thus the trading decision". (Corte Suprema de Justicia, Sentencia del 22 de febrero de 2021). The above shows the importance that the Colombian high courts have given to the issue of information to the financial consumer.

By focusing the analysis on the scope of the regulations that cover the obligation of information in financial matters, we find that Law 1328 of 2009, in its article 3, establishes some principles that govern the relations between financial consumers and the supervised entities, among them, the due diligence, so that these entities provide the necessary information, due attention and satisfaction of the needs according to the services offered and contracted. This article also defines as a principle "transparency and true, sufficient and timely information" so that financial consumers receive true, sufficient, clear and timely information, allowing them to adequately know their rights, obligations and costs in the relations they establish with the supervised entities (art. 3, paragraph c). In relation to information, the principle of financial education stands out, which implies that financial consumers have the right to receive education from the supervised entities and the authorities in order to make proper use of financial services and products. The three principles are clearly related to the extent that they all seek for the financial consumer to make reasoned, duly informed decisions, which it is evident that he/she cannot make by him/herself given the complexity of financial products so that only a combination of factors can help to mitigate the structural weakness he/she suffers from.

The Basic Legal Circular of the Superintendency of Finance contemplates the duty of information from four different facets: as a right of financial consumers, a special obligation of supervised entities, a guiding principle that must govern the relationships established between financial consumers and entities and a constituent element of the Financial Consumer Service System (SAC) (Basic Legal Circular, Title III, Chapter I, numeral 3). For its part, Circular 038 of September 2011 of the Superintendency of Finance reinforced the content of the Basic Legal Circular of the same entity and stipulated that the information disclosed or supplied by supervised entities to financial consumers must: a) Provide financial consumers with sufficient elements and tools for decision making, b) Facilitate adequate comparison of the different options offered in the market, and c) Ensure that financial consumers are aware of the rights and obligations agreed upon (Superintendency of Finance, External Circular No. 038 of 211). 038 of 211). According to the same regulation, the information provided to the financial consumer must be true, sufficient and correspond to what was offered or previously advertised, in addition to being clear, understandable, timely, current, available and accessible on the websites of the supervised entities and in their offices. Likewise, information on rates, interest rates, collection expenses, tax charges, and additional charges, among others, must be duly informed to consumers. All these rules apply in a prevalent manner, as they derive from a special rule, but in accordance with the information obligations established by Law 1480 of 2011, which are more generic.

Decreto 4809 of 2011, in turn, established rules on the setting, dissemination and advertising of rates and prices of financial products and services, among which the following stand

out prior information on charges for ATM transactions, equal rates for services provided over the Internet, prior notice to the consumer on rate increases with the possibility for the consumer to terminate the contract. This regulation made a contribution to transparency and price information on financial services.

Returning to the content of Law 1328 of 2009, article 9 of the law establishes the content and scope of the information to be provided to the financial consumer and establishes as a minimum that the characteristics of the products or services, the rights and obligations, the conditions, the rates or prices and the way to determine them, the measures for the safe handling of the product or service, the consequences derived from the breach of the contract and other convenient information for the consumer to understand the content and operation of the agreed services, so that the previous information allows the adequate comparison of the different options offered in the market. In addition, it imposes the obligation to inform all charges and costs and also highlights the obligation of advertising the proformas of the contracts that must be available to the public on the web page of the supervised entities, according to paragraph two of this article. Unfortunately, this obligation of publicity of contracts is only half complied with by these entities and there are few controls or sanctions by the Superintendence of Finance in this respect. In general, practice shows that the entity does not exercise administrative control over omissions to the obligation of information to financial consumers, so that only through the courts and in a few cases are these types of infractions discussed. A review of the report of sanctions imposed by the Superintendence of Finance carried out within this investigation allowed verification that in the last five years, only one administrative sanction has been imposed, consisting of a fine for violation of information obligations to consumers, and in the same year another sanction for not attending to consumers' appeals or consultations, for a total of six sanctions in five years.[1]

The Basic Legal Circular of the Superintendency of Finance refers to the conditions for advertising of financial products, from which it is sought to be objectively true and in case it includes figures that correspond to reality. To this end, practices such as offering characteristics that do not correspond to reality are prohibited (article 2.2.1); presenting or supporting the soundness of products and services, aspects unrelated to the true technical, legal or economic support of the advertising, using statements that allow considering as definitive temporary situations of the financial market (article 2.2.2.3); using or insisting on the soundness of products and services, aspects unrelated to the true technical, legal or economic support of the advertising, using statements that allow considering as definitive temporary situations of the financial market (article 2. 2.3); use or insinuate, weightings or abstract superlatives that do not reflect an exact situation, as would happen with expressions such as "we are the first", "the best", "the indicated", among others, without saying in what, in relation to what or with whom (article 2.2.5). Likewise, it regulates the advertising of trust products, insurance intermediaries, and pension fund management companies, among others. Regarding information, the Circular, in its articles, develops the obligations arising from general rules such as Law 1328 of 2009 and details the information that must be provided to consumers, on a case-by-case basis, in the different financial products.

The foregoing, without prejudice to other regulations that establish special information obligations in financial matters, for example, Law 546 of 1999 in its article 21, establishes that

1 https://www.superfinanciera.gov.co/SiriWeb/publico/sancion/rep_sanciones_general.jsf

credit institutions must provide true, sufficient, timely and easily understandable information to the public and debtors regarding the conditions of their credits. In insurance matters, the Basic Legal Circular contemplates a series of information obligations without prejudice that special rules establish additional duties; for example, Decree 1084 of 2021 modified and added Decree 2555 of 2010 and established that in the insurance taken out by financial institutions on behalf of debtors, must "provide the debtor, at the time of origination (sic) of the loan or lease, and periodically, information on the insured amount, the coverage included in the policy and the costs associated with the insurance contracted, distinguishing the insurance premium rate received by the insurers from other costs" (Decreto 2555 of 2010, Article 2. 36.2.1.1).

Note that in contracts such as insurance, the consumer also must inform the state of the risk under penalty of incurring reticence as a cause of nullity of the contract according to article 1058 of the Code of Commerce. This situation, nevertheless, must be accompanied by the demonstration by the insurer that the silence of the policyholder by not declaring his state of health aggravated the state of the risk, that is to say, that the fraud was decisive (Tribunal Superior de Bogotá, Sala Civil, 30 de septiembre de 2021).

The complexity of financial products and services increases the imbalance between the parties, given that financial consumers have little understanding of the scope of the obligations they acquire in the contracts entered into with financial entities because, in effect, knowing how to liquidate interest, apply monetary correction, understand certain modalities of trust schemes or the nature of the ownership of trust rights, among other financial topics, is complex for an ordinary citizen (Acosta & Gual, 2021; Acosta & Guarnizo, 2020). Added to this is the fact that consumers, not only financial consumers, do not usually read the contracts to which they adhere, and this does not imply a real reproach to their behaviour for several reasons, first, because the average consumer is careless, a behaviour fully proven by behavioural economics; second, because the consumer knows that even if he reads the contract he will not be able to do anything to modify it; third, because if the consumer reads the contract he will understand very little of its content since it is in legal terms. Even if there are more sophisticated consumers in financial matters, these are the exception to the rule; the consumerist norm is designed so that the supervised entities form as if the consumer were a layman, profane or totally ignorant in the matter, this conduct of the financial entities is part of the due diligence that the financial norms impose on them. To that extent, the greater the complexity and imbalance between the parties, the greater the information burden imposed by the regulation on the strong party of the legal relationship, hence the tendency for information to be so important in this area (Restrepo & Ruiz, 2019; Lorie, 2017).

Regarding the state of affairs in terms of financial consumer information, Colombian consumer law in financial matters is currently at an intermediate stage since there are multiple information obligations on the supervised entities, which are largely fulfilled, although what is at stake is the effectiveness of the application of the norm, since despite this information, consumers still do not understand the content of the obligations they are acquiring (Oyola & Blanco, 2022; Echeverri & Blanco, 2020). In addition, there is sometimes talk of responsible consumption or responsible credit in financial matters, which is undoubtedly a desire and would imply a duty of self-care of the consumer when acquiring credit or certain financial products, but talk of responsible credit implies in part a paradox since in reality, a person with a high degree of rationality and

> who is responsible would not acquire a credit under the conditions that are contracted in the financial system, since it is extremely costly.
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> But beyond this reflection, credit must be seen from its positive perspective since it allows for mobilizing the economy and dynamizing the market. It also gives welfare to people who can acquire goods and services that otherwise they could not enjoy, even if in the long run it is expensive, but the facility of having something immediately has a monetary cost for the consumer, and he must assume it. However, it is clear that the levels of information provided to the consumer must be optimized, especially the way in which it is presented, to avoid situations of non-payment, over-indebtedness and other types of contractual inconveniences that may arise between the consumer and the financial entity (Velasco, 2016).

In our opinion, the obligation of information in some specific cases of financial law may become an obligation of advice, understanding this the one in which the professional must help the consumer to make the decision that best suits his interests, the one that best suits him, regardless of the interest of the professional to enter into the business, so that the consumer's decision may even be not to contract or to contract with a third party, there is expressed the high degree of loyalty and honesty with which the advisor must act.

For example, by virtue of Law 1748 of 2014, Decreto 2071 de 2015 was issued, which reinforces the transparency of information to the pension consumer and in its Article 3 modifies Article 2.6.10.2.3 of Decreto 2555 of 2010 and establishes that " The administrators of the General Pension System have the duty of good advice, so they are obliged to provide financial consumers with complete information regarding the benefits, inconveniences and effects of making decisions in relation to their participation in any of the two regimes of the General Pension System.". Note that the obligation of information is transformed into a more complex obligation, of advice, in some cases. The same happens in the matter of securities operations, Decreto 2555 of 2010, in its article 7.6.1.1.1.3. Establishes as duties of the professionals that exercise as intermediaries in the securities market: "e) Professionalism: The intermediaries in the securities market always based on 'serious, complete and objective' information, in the terms that for the effect this Office provided in External Circular No. 010 of 1991 must, based on the information 'serious, complete and objective', in the terms that for the effect this Office provided in External Circular No. 010 of 1991. 010 of 1991 must, according to the client's needs, provide their advice for the best execution of the assignment. f) Compliance with the law: It points out the requirement to give appropriate compliance to all legal provisions, especially to the duties of information contained therein, stressing the importance of communicating to the client any supervening circumstance that could modify his contractual will".

> In this regulation, we find an obligation to advise, which is an obligation to provide qualified information in addition to a generic duty to provide information; that is, it goes beyond the specific obligations established by law to communicate and inform all necessary information to the client on aspects that may alter their investment interests in certain products.
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> Regarding the obligation to inform consumer investors, Barón points out that "they must be protected from manipulative behaviour or fraudulent practices, including the improper use of privileged information, among others. The full disclosure of material information is of the utmost importance for the decision-making of investors, who must be able to

evaluate their potential risks and protect their interests" (2012, p. 148).

A jurisprudential precedent on the violation of this type of information obligation is found in the judgment of February 22, 2021, in which the Supreme Court of Justice establishes the contractual civil liability of a Stock Brokerage Firm for improper information and advice to its clients regarding investments in certificates of deposit, issued by an international company with which it was linked through a correspondent agreement, which ultimately led investors to significant economic losses (Corte Suprema de Justicia, Sala Civil of Justice, judgment of February 22, 2021). Thus, the duty of advice is present as a type of information obligation in financial matters.

It should be noted that, in general, it has been pointed out by the doctrine and in particular by Gerscovich that financial and banking activity cannot be assessed with the same parameters that are applicable to an individual, average, since they are commercial entities to which a high degree of specialization must be attributed, with clear technical superiority over their clients, a circumstance that forces them to act with prudence and knowledge of their professional activity (2011, p.102).

At the same time, it should be said that the principles of due diligence and information have a close link in this matter, so beyond the specific information obligations established by the regulations, the actors in the financial market have a generic obligation of information derived from their quality as professionals, specialists in their trade, which entails a demand in their conduct that is always careful and in accordance with their quality as an expert who profits from that same quality that they hold and take advantage of in the market. This type of information requirement has to do with the due diligence that is required of these professionals. For example, trust entities have been required to act in accordance with their quality, which goes beyond providing information to clients, of course, but which is expressed primarily in transparency and the duty to inform their clients of everything related to and relevant to the management of their resources. It would be necessary to examine when these obligations also become a duty of advice since two regulations were cited that establish specific obligations of advice, and there may be more, but in some specific cases, judges could consider that a legal obligation of information becomes an obligation of advice.

Regarding the review of the rulings on issues related to the Financial Superintendence, cases of adhesion to trusts were found in which the trustee omitted relevant information to the financial consumer about the transfer of resources to the promoter of the real estate project, in disagreement with articles 3 and 31 of Law 1328 of 2009 and with article 97, paragraph one, of the Organic Statute of the Financial System. The Superior Court stated that "In addition, the defendant, with its conduct, overlooked that section 2.2.1.2 of Chapter I, Title II, Part II of External Circular 029 of 2014, issued by the Financial Superintendence, imposes on trust companies the fulfilment of the duties of information, advice, protection of trust assets, loyalty, good faith, diligence, professionalism and specificity" (Superior Court of Bogotá, July 19, 2021). A similar reproach to the omission of information would be made in the April 2022 judgment because the transfer of the resources to the promoter was not duly informed to the plaintiffs, in addition to the fact that the transfer of their contributions was made without compliance with the requirements

of the trust contract (Superior Court of Bogotá, judgment of April 2022). In addition, a Constitutional Court ruling was found on a life insurance contract to cover a mortgage loan, in which case the consumer became ill and was declared 56.60% disabled, in response to which the insurer, when required to provide coverage, denied it because the man was 74 years old and the policy set an age limit of 69 years, and the consumer considered that his fundamental rights to decent housing and the minimum living wage were being violated. Once, at the instance of the Constitutional Court, it stated that the insurer had not fulfilled its obligations to inform the insured, as indicated by the law, by making him aware of the content of the policy, and therefore considered that the omission of timely, clear and complete information about the insurance policy to the consumer "constitutes an abusive practice by financial entities and violates fundamental rights." (Corte Constitucional, Sentencia T-136 de 2013). In another similar case, in which a woman purchased two products from a bank and subsequently suffered a stroke that left her in a coma, her daughter asked the bank to enforce the insurance policies that covered said products and the bank refused on the pretext that the information on the policies was confidential and that in order to be legitimized, it had to file a process of interdiction of her mother before a judge. The daughter filed a tutela action, and the Court, with similar arguments, preserved the rights of the consumer, considering that the lack of information from the bank by omitting the duty to provide complete and timely information in relation to the procedure required to request payment of the insurance policies that covered the credits acquired by the consumer, as well as from the insurance company with which said policies had been subscribed, violated the right to information and the right to due contractual process of the plaintiff, which in turn represented a threat to her right to the minimum subsistence. (Corte Constitucional, Sentencia T-302 de 2020).

Other rulings by the Constitutional Court have maintained this line of thought. These latest cases before a constitutional judge show us the feasibility of a matter of protection of financial consumers due to information defects, in this case insurance, being constitutionalized.

Control of the Content of the Contract

Financial markets are highly concentrated markets and the number of product and service providers is few in relation to the number of users of the financial system. To this extent, the market power of financial institutions with respect to the financial consumer is extremely high, so it is a marked contractual dominant position that allows them to take advantage of contractual relationships from different angles, starting from the most basic, unilaterally predisposing the content of the contract, since in essence, the financial consumer contract is an adhesion contract. Adhesion contracts show great advantages from the point of view of reducing transaction costs, but under the rule of the postulate of private autonomy and free market play, the risks of imbalance generated by these contracts are not solved, so the intervention of the State is needed.

From the point of view of economic analysis, this need has been explained: "*Over time, the market has shown its inability to solve the problem of adhesion contracts with contents that only favour the interests of the predisposing party at the expense of the adherent. Thus, this situation is no longer explained by the absence of negotiation but by a failure in the selection process and consequently by a market*

failure," to which is added that "the market cannot ensure that optimal quality is offered in adhesion contracts when a portion of adherents are uninformed about their quality." (Salazar Diego F, 2006). This asymmetry and the dominant position of financial entities has been fully recognized by the Constitutional Court, which in this regard said "*it is clear that banking entities have a dominant position vis-à-vis the users of the financial system. In effect, they are the ones who set the requirements and conditions of credits, interest rates, amortization systems, etc. They are the custodians of public trust for the service they provide, and their acts enjoy the presumption of veracity by clients. (…)*" (Corte Constitucional, Sentencia T-1085 de 2002).

Thus, the high court added in another ruling: "*Banking entities have a dominant position with respect to users of the financial system, which requires the State to control their activity and avoid any possibility of abuse (art. 333 Const.). In effect, they are the ones who set the requirements and conditions for access and operation of credits (…) being the custodians of public trust for the service they provide and enjoying their acts of credibility from clients (…).*" (Corte Constitucional, Sentencia T-173 de 2007).

Likewise, in a 2013 ruling, it broadly justified the intervention of consumer law in order to protect the weaker party: "*This Court has repeatedly and, in relation to the relations between users of the financial system and entities in charge of providing financial intermediation services, transcended the classic scheme of understanding bilateral contracts, to instead assume the consumer's own right… It is reiterated in a conclusive manner that we are facing a new type of social right, consumer law, which corresponds to the Social Rule of Law. A State that is impassive in the face of possible abuses by large economic organizations to individuals in need of goods or services would cease to fulfil an original purpose that inspired the Social Rule of Law. In short, the Corporation observes that consumer law, as an expression of a type of law proper to societies already distant from the liberalism of the late 18th century and, more specifically, of the 19th century, is very well suited to the Social Rule of Law. Since autonomy is blurred in contracts between subjects who are supposedly equal but who, in reality, are not, it is the task of the public powers to transcend this mere formal equality between economic power and user or consumer, to restore, as far as possible, equality between subjects.*" (Corte Constitucional, Sentencia, C-313 de 2013).

The Supreme Court of Justice, for its part, stated that: "The effectiveness of the mandates above for the protection of the adhering contractors, and therefore weak in the commercial consumer relationship, is guaranteed in the same regulations. Thus, it is irrefutable that both the paragraph of article 11 of Law 1328 of 2009, as well as the final paragraph of article 37 of the Consumer Statute, when they refer to certain clauses "being considered unwritten" establish a specific case of ineffectiveness due to the nonexistence not of the legal transaction in its entirety, but of the clauses that, in their order, contravene the guidelines for prohibiting abuse or the requirements of the general conditions in adhesion contracts." (Corte Suprema de Justicia, Sentencia SC1301-2022).

The Superintendencia Financiera may carry out a control of the prior or ex-ante content in some cases, such as in fiduciary matters, in accordance with the provisions of article 146 of the Organic Statute of the Financial System, a control that is carried out through an official document in which, based on a review carried out by the entity, according to Moreno, an authorization is issued, which is only a "review" and does not constitute a prior assessment, approval or conformity regarding the validity and effectiveness of the contract, so it does not eliminate the responsibilities of the fiduciary (2014, p. 342).

Regarding the control of the content of the contract, the judges have been demanding, for example, in the area of insurance, the Constitutional Court demanded a large number of mentions in accordance with financial regulations. However, it is also clear that the link between information and the content of the contract is important. It is above all about contractual obligations of information: "Therefore, the obligation to clearly state the conditions of the insurance contract includes that the entities in charge of drafting them state punctually and textually the scope of the rights and commitments of the users, without leaving aside that the doubts will be resolved in their favour because they are immersed in a situation of inferiority compared to said entities. For example, insurance companies must adjust the policy contract models so that the information contained therein does not mislead consumers. It implies, among other things, that the heading of the same indicates from the beginning the type of policy in question, even more so if one takes into account that these contracts are adhesion contracts and are often processed before entities other than the insurer, which makes it impossible for the user to clarify their doubts immediately. Likewise, it is necessary that the sections that record the rights and obligations of the parties do so in an orderly manner and are not divided throughout the agreement; that is, the personal information of the parties that related to the object of the contract, the protections granted, the general conditions of the policy and other elements, are developed in the same section, to avoid confusion or to mislead the policyholder. In short, information is a tool that empowers citizens at all contractual stages, before, during and after the execution of the contract, seeking to prevent contractual freedom from being exercised to the detriment of other fundamental rights and in an abusive manner by those who represent the dominant party, such as insurers and banking entities (Corte Constitucional, Sentencia T-227/2016).

In another ruling based on the same facts, the first instance also criticized the lack of information, and it is pointed out that, in the appeal before the Superior Court of Bogotá, which dealt with the admissibility of the insurer's claim for guarantee, the sanction falls on a rule of the Commercial Code that has to do directly with information and that according to what was stated by the Court is a protective rule, which would put it in line with consumer law. It is article 44 of Law 45 of 1990, which established the requirements for policies, including: "3. The basic protections and exclusions must appear, in bold type, on the first page of the policy", a rule inserted in turn in article 184-2 of the Organic Statute of the Financial System: "c. The basic protections and exclusions must appear, in bold type, on the first page of the policy". In this case, the judge found that "the stipulation is not on the first page, it is not in bold type, nor after the first page" but on page 6 of the general conditions, that is, separate from the first page and in a document separate from the policy, which is clearly an omission of the information obligation stipulated by the rule in favour of the insured or the policyholder (Tribunal Superior de Bogotá, 28 de marzo de 2022).

In a 2019 ruling referring to the Financial Superintendence in jurisdictional functions in the case of an unemployment insurance contract in which the insurer denied coverage for the claim, the judge considered that the insurer omitted the obligation to provide information by not providing true, understandable, clear and timely information on the product acquired by the financial institution, not evidencing the existence of a waiting period in the event of a claim as occurred in the specific case (Superintendencia Financiera, Acción de Protección al Consumidor, Sentencia del 7 de febrero de 2019). In this case, the judge reproached the insurer for restricting access to

information by not disclosing the clauses of the contract and, therefore, the term of the waiting period, which was 60 days, as an abusive practice and that, in addition, the defendant did not demonstrate that it had delivered the general conditions of the contract.

In a similar case of unemployment insurance, the judge of the Financial Superintendence stated that, according to the law, the defendant entity must provide complete information on the coverage and the conditions of the contract within the obligations arising from Law 1328 of 2009, in its article 7, it is relevant for the specific case that of providing understandable information and transparent, clear, truthful, and timely advertising about the products and services offered in the market. Therefore, since the insurer did not prove that it had delivered at the time of the contract the documents that would allow it to know the content of the general conditions, it was not required that the consumer knew the duration of the waiting period and it was not compatible that the two-year prescription terms should run (Superintendencia Financiera, Acción de Protección al Consumidor, Sentencia del 13 de diciembre de 2018).

The above allows us to see that the control of the content of the contract is closely linked to the fulfilment of the information obligations and the content of the contract in financial matters.

The Financial Superintendence has applied the pro consumatore principle in the case of a contradiction between what is stipulated in the policy cover, which is offered to the plaintiff, and the clauses contained in the document, particular conditions. The judge analyzes, in accordance with the provisions of Law 1480 of 2011, article 34, the most favourable interpretation for the financial consumer, to take into account the policy cover which is more favourable for the protection of the plaintiff, which gave rise to recognizing the compensation to the victim by making the insurance effective (Superintendencia Financiera, Acción de Protección al Consumidor, Sentencia del 27 de abril de 2017).

In a ruling of that same year regarding the refusal to provide insurance coverage for the mental incapacity of the policyholder and beneficiary in which the defendant entity alleged reluctance, the judge highlights the importance of the obligation of clear, sufficient and timely information that the insurer must provide since it is evident that within the clauses given by the insurer to the insured at no time was payment of the policy excluded in the event of mental incapacity (Superintendencia Financiera, Acción de Protección al Consumidor, Sentencia del 14 de marzo de 2017).

In another ruling concerning the enforceability of an insurance contract, the judge stated that when the insurer makes changes to the terms of the contracts, those changes must be made known to consumers or those who are beneficiaries of the same, be clearly expressed and be favourable to consumers. Therefore, adding documents to the policy that restrict or limit the exercise of the insurance or policy breaks the consumer's confidence in the face of restrictions that may occur after the acquisition. The subsequent inclusion of restrictive clauses puts the consumer at a disadvantage, and those clauses must be easily accessible in order to guarantee the transparency of the contractual relationship by virtue of the obligations of information and access to it and its modifications.

Under the pro-consumer principle, these modifications must always be favourable to the consumer and cannot put him or her at a disadvantage (Superintendencia Financiera, Acción de Protección al Consumidor, Sentencia del 22 de febrero de 2018). However, in the judgments studied, the contractual information does not only play in favour of the consumer

since there are cases in which coverages have been requested that were expressly excluded in the insurance, and the judge denies the claims to the plaintiff consumers(Superintendencia Financiera, Acción de Protección al Consumidor, Sentencia del 5 de noviembre de 2019).

Another aspect that is seen as important in this type of consumer relations is the security obligation of financial entities.

Partial Control of Effectiveness, Abusive Clauses

The contractual asymmetry referred to and the dominant position that financial institutions hold par excellence made it imperative not only to have prior control over the content of the contract but also to have partial control over the content of the same through the sanction of abusive clauses. The contractual dominant position in some legal relationships as asymmetrical, such as that held by financial institutions with their clients, has been recognized by Colombian doctrine for some time, which highlights the risk of abuse, considered from the Theory of Abuse of Law (Arrubla, 2007), as well as a factor of imbalance, unfair, contrary to good faith (Suescún, 2005, p. 212), to be based on a more specific imbalance control regime in terms of consumer protection.

It was first in comparative law and then in domestic law that these types of controls were created that seek to preserve contractual balance; thus, the imbalance can be economic or normative, the first referring to the economic equation of the contract and the second well explained by Acosta and Jiménez who say that: "The interpretation of contractual balance must be examined in light of the proportionality of the rights and obligations of the parties" (Acosta Rodríguez, Joaquín & Jiménez Valderrama; Fernando, 2015). For Gual Acosta, an abusive clause is predisposed by one of the parties in the exercise of the contractual power derived from the dominant position, and that is imposed on the other party that is in a state of dependence or weakness, not only economic but also due to lack of contractual expertise or knowledge, which generates a normative imbalance between the parties (2016, p.120). According to Montenegro and Coronado, "the Constitutional Court and the Supreme Court of Justice were the pioneers in using the term 'abusive clause' in the Colombian legal system, assigning such nature to those clauses whose effects derive from the abuse of rights and the exercise of the dominant position of companies" (2019, p. 253).

Law 1480 of 2011 introduced a definition of abusive clause in article 42, according to which they are those that produce an unjustified imbalance to the detriment of the consumer and those that similarly affect the time, manner and place in which the consumer can exercise his rights. This definition serves as a general prohibition clause so that any clause that conforms to it can be considered abusive under the abusiveness test provided by the law. In addition, the law includes a blocklist of clauses that are considered ineffective by law.

The Colombian Constitutional Court, in a 2012 ruling, also shed light on the nature of abusive clauses in financial matters: "*Without undermining the principle of contractual freedom, an abusive clause or practice will be one that, based on its content, in general conditions or as an adhesion, that is, by not being debated and agreed upon, contravenes good faith to the detriment of the consumer, by generating a notable imbalance between the rights and obligations of the parties, a legal expression that should be understood not only in a formal sense, as a paragraph or section but in a material sense, as containing a rule, a guideline or an inequitable pattern of behaviour. Thus, the abusive nature will be determined by the unfair conduct of the supervised entity in relation to the set of reasonable expectations of the financial consumer*

in accordance with the negotiation instrument, such that the conduct displayed by the latter is the cause of the imbalance and damage... Finally, good faith, legitimate trust, public interest, negotiation possibilities, attention to asymmetry and overcoming inequalities in the consumer relationship constitute principles and substantial elements that the Colombian Financial Superintendence must evaluate for what would constitute abuse through a clause or practice in adhesion contracts in the financial market" (Corte Constitucional, Sentencia C-909 de 2012). Note that the high court here equates the abusive clause with the abusive practice, notions that are not equivalent in their physiognomy but pursue a common purpose, to prevent contractual abuse, in order to express its conditions and effects in the financial consumer relationship in addition to the fact that the Court outlines some guiding criteria for the Financial Superintendence to assess abuse in financial matters.

In Colombian law, this control had its first antecedent in financial matters in article 24 of Decreto 2179 of 1992, which was later incorporated into article 98, paragraph 4 of Decreto 663 of 1993, Organic Statute of the Financial System, and then modified by article 24 of Law 795 of 2003, paragraph 41, according to Gómez (2015), which established a general prohibition, specifically a mandate to "refrain from agreeing to clauses that due to their exorbitant nature may affect the balance of the contract or give rise to an abuse of a dominant position." Subsequently, Law 1328 of 2009 repealed these regulations and established a list of abusive clauses that was first supplemented by External Circular 039 of 2011 and, subsequently, through External Circular 018 of 2016, included in the entity's Basic Legal Circular, which currently contains 54 stipulations considered abusive in financial contracts. The list of abusive clauses in financial matters is characterized by being an open list; that is, it is susceptible to being completed by the Financial Superintendence gradually, unlike the list in Law 1480, which is a closed list. It should be noted that this control is limited to adhesion contracts in financial matters according to the special regulations that govern the matter (Moreno, 2017), which is also consistent with what is regulated in the Consumer Statute.

With regard to the compatibility of the control established by the Consumer Statute, which was established through the general prohibition clause included in Article 42 and in a complementary manner with a blocklist of clauses in Article 43, it must be noted that the financial regulation has prevailing application because it is a special regulation, although this is not an obstacle for the general prohibition clause to shed light on other types of abusive stipulations in financial matters that may be considered in particular cases. It is a position that, although open to discussion, allows the judge to apply contractual justice in financial contracts beyond lists that may fall short of practice.

Regarding the forms of control of abusive clauses in the financial sector, there are various forms of control, one control by consumers who detect this type of stipulation in contracts, another through prior or subsequent administrative control (Echeverri, 2011) that the Financial Superintendence can carry out on the content of the contracts; a third way consisting of judicial control by judges in the claims that are within their jurisdiction and, a final control, by other agents involved in the system such as financial consumer advocates, consumer leagues and associations or even agents of the Public Prosecutor's Office, university legal counsels, mainly. However, these last actors in the system have yet to play an important role in the control of abusive clauses; it is a pending task in Colombian law.

Consumer leagues and associations could carry out this control through popular actions in which a judge would order their elimination.

Unfortunately, the transaction costs in the assembly and follow-up of this type of legal action, which lack economic incentives, discourage their exercise, unlike what happens in other latitudes where they are pursued through collective actions.

Through administrative means, the Financial Superintendence carries out control of this type of clauses in consumer financial contracts. Let us remember that by legal mandate, financial entities must send the contract proformas that they use with their clients to the supervision of this entity, a control established for some financial contracts, but then a subsequent control is possible through administrative investigations through which the entity orders the elimination of this type of clauses and may even impose sanctions on the offending entities.

The subsequent control has yet to be made public by the Financial Superintendence and it is unknown if it is carried out continuously. In 2014, this entity issued an order to the financial consumer advocates to prepare a report on abusive clauses in the contracts of the entities and from the report they submitted an additional list emerged that would give rise to External Circular 108 of 2016. However, there were no investigations, sanctions or peremptory orders to the supervised entities to withdraw these clauses, and it seems that in the end, an almost pedagogical control was carried out, that is, non-coercive, on the abusive clauses in the financial contracts detected in the proformas that are imposed on financial consumers. It shows that there is a need for a more active intervention by the authority that exercises inspection, surveillance and control over the content of the contracts since this is the fastest way to control abusive clauses. Consumers cannot be expected to demand them because, in the eyes of an average consumer it is very rarely clear that they are facing a clause of this type.

A review of the record of final sanctions on the website of the Financial Superintendence allowed us to verify that there are no administrative sanctions derived from non-compliance with the regime of abusive clauses from 2010 to date. The lack of knowledge or exercise of administrative functions in this matter condemns the evolution of the control system to contractual imbalance to the detriment of the collective interests of consumers because it must be remembered that this is the essence of Colombian consumer law in the Political Constitution, which treats it as a collective right, in addition to leveraging, according to what is heard from public officials close to the subject, false fears of systemic risks that can put the stability of the financial system at risk.

Regarding the control of abusive clauses in financial matters by judges, when they become aware of these in the proceedings that they carry out in their offices, they must decree the ineffectiveness of the clause. The exercise carried out within the investigation that led to this writing involved reviewing the content of hundreds of hearings of the Financial Superintendence in jurisdictional functions. The result in the finding of rulings in actions for the protection of financial consumers that sanctioned or at least discussed abusive clauses in financial matters was disappointing. There are very few rulings on the subject. It may lead to the belief that the matter is rarely discussed in court, and the reason still needs to be clarified. It may be because financial consumers are unaware of them, but given that the current list has 54 clauses classified as such, it is strange that they are not discussed.

In this regard, the Financial Superintendency is also missing a reporting effort on its decisions, which, although they are accessible to the public in its information dissemination system, the entity tells us little about its line of thinking on different financial issues, including abusive clauses.

The analysis of judgments by the Financial Superintendency and the Superior Court of Bogotá allowed us to identify several rulings related to abusive clauses. In one ruling, the Court determined that "the defendant, in the tenth clause that it called "special statement," showed that it acted as a "simple fiduciary administrator of the project" and that it was exempt from "any liability derived directly or indirectly" from its "execution," which it described as an abusive clause that was contrary to articles 11 of Law 1328 of 2009 and 43 of Law 1480 of 2011." As regards another stipulation according to which the signatories "state that they compromise and desist from any breach arising on the occasion of the original fiduciary contract signed by the parties" on May 12 and 13, 2014, "and its subsequent additions", the first instance judge considered that it was part of the free play of the wills of the parties, but the Court denied it effectiveness arguing that "it must be perceived as an abusive statement derived from the dominant position held by the trust company in the contract, since it places it in a privileged position vis-à-vis the adherent, to the extent that its contractual position is excessively or disproportionately favored, to the detriment of that held by investors interested in acquiring the premises resulting from the development of the construction project." For the Court, the paragraph of the first clause of the other agreements signed by the parties on November 28, 2016, must be considered ineffective, not only because it was not proven that "the new conditions and terms of the object of the fiduciary assignment", in particular, those relating to the requirements for the transfer of resources to the promoter, had been duly informed to the plaintiffs prior to the signing of the transaction, but also because by preventing them from claiming "any breach arising on the occasion of the fiduciary assignment contract", citing a 2001 ruling of the Supreme Court of Justice, the Court stated that "a significant imbalance was generated in relation to the rights and obligations contracted by the parties"; Furthermore, because "included… in a contract with predetermined content [as here], [said stipulation] establishes, without serious explanation, proportion or reasonableness, excessive advantages or prerogatives for the predisposing party, or unjustified burdens, obligations or liens for the adherent, all to the detriment of the principle of celebration and execution of contractual good faith and of the normal and reasonable contractual balance." What is striking is that the Court sanctions the clause based on article 43, literal a) of Law 1480 of 2011 and article 11, literals a) and d) of Law 1328 of 2009. It could go against what a certain sector of the doctrine defends in relation to exclusively applying the financial rule as a special rule to matters of this subject, in this case, a fiduciary matter (Tribunal Superior de Bogotá, 25 de febrero de 2021).

In another second instance ruling by the Financial Superintendency for a fiduciary matter based on similar facts, the Superior Court, the clause that stated that the adherents "…compromise and desist from any breach arising on the occasion of the original fiduciary assignment contract signed by the parties…" stated, "that the official was right to consider it ineffective by law pursuant to articles 11, literal a) of Law 1328 of 2009 and 43 of Law 1480 of 2011, because it implies a waiver of the rights of financial consumers and limits the liability of the supervised entity." (Tribunal Superior de Bogotá, 19 de julio de 2021).

Another abusive clause that has been the subject of controversy is the arbitration clause. In an order dated August 13, 2014, the Superior Court of Bogotá, when resolving an appeal against an order rejecting the claim of a financial consumer protection action in which one of the parties alleged the existence of the arbitration clause and the judge decreed the lack of jurisdiction to hear the contractual controversy, the court recalled the consecration of this in Law 1329

of 2009 and Circular 039 of 2011 in which this type of stipulation is deprived of effects for being abusive and to such extent "it will be considered not written for the financial consumer who is the plaintiff", the reason why it revoked the decision of the contested order (Tribunal Superior de Bogotá, auto de 13 de agosto de 2014).

Furthermore, the clause above is a clear abusive manifestation since it is a stipulation predisposed or predesigned unilaterally, with no room for individual negotiation, derived from the dominant position that the trustee has in the agreement entered into, which places it in a position of preeminence over the adherent, given that it disproportionately disadvantages its contractual status, to the detriment of that of the investor.

Conclusions

Financial consumer protection is a special regime in consumer law that takes on special relevance due to the asymmetry between the parties: on the one hand, an entity specialized in credit or financial operations with special behavioural burdens and, on the other hand, a more vulnerable consumer due to the complexity of the products and services they acquire.

The obligation to provide information, therefore, is accentuated by the general and special consumer protection regulations, which impose high information burdens of a binding nature on entities in the financial sector in the pre-contractual and contractual relationships they establish with financial consumers. It has even led to the eventual constitutionalization of these legal relationships, so the constitutional judge has been categorical in that the dominant contractual position held by these entities imposes on them a qualified behaviour when informing. This obligation can reach such a point that, for the judges, the omission of information has made certain contractual obligations unenforceable that should have been duly informed to consumers. It has also happened with terms or periods of claims in insurance contracts, which, due to having been poorly informed, the judges need to begin to take into account in the interest of protecting the consumer. The constitutionalization of some financial consumer relations seems to yield good returns for consumers in this context.

As for contractual protection, a clear relationship was evident between information and control of the content of financial contracts, which are highly intervened in their content.

The judges have been constant in demanding that the content of the contract be known to consumers and that it be clear to them, since any ambiguity will be interpreted in favor of the consumer. The pro-consumatore principle operates broadly in the control of these contracts.

In the area of abusive clauses, there was evidence of broad regulatory control in the regulations that regulate the protection of financial consumers, although its judicial practice seems less frequent, according to what could be seen in the sample of reviewed sentences. Abusive clauses in financial matters are curiously little demanded and discussed before judges, a fact that does not agree with the extensive list of clauses stated as abusive in financial regulations, which was also the result of the control carried out on adhesion contracts of the supervised entities.

Unfortunately, the administrative control of compliance with information obligations and abusive clauses in the matter leaves doubts about its effectiveness. The Financial Superintendence does not exercise permanent controls and this can lead to the perpetuation of omissions of information to consumers, as well as contractual abuses. There needs to be more than jurisdictional control since the collective nature of consumer law requires

that surveillance, inspection and control be exercised effectively.

In this regard, it can be said that financial consumer protection has made progress in Colombian law because the regulations that govern the system in general seem adequate, although its effectiveness is still a pending task.

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