

## **UNFAIR CONTRACT TERMS**

The general rule of contract law is that the parties are bound by whatever they agree. In the past, sellers were entitled to impose whatever conditions they wanted in small print which could be deemed to be accepted and binding on the consumer, no matter how unfair their content. This approach did not recognise that in reality, standard contracts are not negotiated by consumers and given on a take it or leave it basis.

### **Unfair Contract Act**

The Unfair Contract Terms Act was introduced in 1977 to render void so called “unfair” contract terms”. The legislation applies between contracting parties where one party deals as consumer on the other’s written standard terms of business. Under the legislation, businesses cannot exclude liability for death or personal injury caused by negligence. In cases of other types of potential loss, liability can only be restricted insofar as notice is given and the exclusion is reasonable.

In contracts between businesses and consumer, the business cannot use contract terms to restrict their liability where they provide something substantially different to that reasonably expected by the consumer in respect of the whole or part of the businesses obligations except in so far as the terms are reasonable. Clauses which restrict liability for the business include clauses that impose time limits on bringing claims, limiting claims to particular amounts or that completely remove or restrict the right to make claims for failures of performance.

There are guidelines for the application of the reasonableness test. Courts must take account of the bargaining position of the parties and any alternative means by which the customer’s requirements could have been met. They must have regard to whether there are inducements or whether the customer knew or ought to have known about the existence or the extent of the term, particularly having regard to previous dealings or customs in the trade. The Courts must consider whether the term excludes or restricts

liabilities if some condition is complied with, whether the exclusion is reasonable in terms of time and whether the goods were specifically manufactured or processed to the order of the customers.

If a business buyer which is large enough to have bargaining power on its own and has a choice of potential suppliers, enters into a disadvantageous contract with its eyes open the Court is unlikely to assist it. In contrast, where a small business dealing with a monopoly supplier who has adopted standard terms, it is more likely the Court will strike down the supplier's standard terms, if it finds them unfair. The size of print can be relevant and the attempts to bring it to the attention of purchasers.

Businesses often wish to limit the extent of their liability to particular sums of money to avoid the possibility of large uninsured claims. Where a contract seeks to restrict liability to a specified sum, the question of reasonableness is to be decided having regard to the resources available to the business for meeting the liability and how far it is open to him to cover by insurance.

### **EU Unfair Contract Regulations**

Separate from the Unfair Contracts Acts (which has no direct equivalent in Ireland), the Unfair Contract Terms Regulations (UCTR) were introduced in 1994 on an EU wide basis. The Regulations apply to contracts between a supplier and a consumer. A consumer is an individual acting outside of his business. A supplier is a trade or business acting in the course of the business.

The UCTR do not apply to individually negotiated contracts. The contract is not individually negotiated if it has been prepared in advance by the business supplier and the consumer does not have an opportunity to influence its terms. Even if aspects of the contract have been individually negotiated, the UCTR still apply if the overall assessment indicates that it is a pre-formulated standard contract. The onus is on the business to show the contract was individually negotiated.

There is an obligation in businesses to ensure that any written terms of contract are expressed in plain intelligible language. If there is any doubt about the meaning of a term, the interpretation most favourable to the consumer shall prevail.

A contract term is deemed to be unfair if it causes an insignificant imbalance on the parties' rights and obligations to the detriment of the consumer. The Regulations set out a list of indicative and non exhaustive terms which are potentially unfair. The Office of Fair Trading (OFT) and certain other bodies have enforcement powers under the Regulations. Consumer associations are active in this field.

If a person complains that a term in a contract in general use is unfair, a complaint can be made to the Office of Fair Trading or one of the other relevant consumer bodies. The bodies have power to obtain certain information. The OFT is obliged to consider complaints and consider whether it will take action to enforce the use of the clause. The OFT and certain other bodies have powers to apply to Court for an injunction against a business using the unfair contract term.

Many thousands of clauses have been considered by the OFT. Many clauses have been modified under pressure from the Office.

### **Potentially Unfair Clauses**

The following are categories of clauses are potentially unfair. Whether they are in fact unfair and thereby void and have no effect under the legislation would depend on the circumstances.

- (a) Clauses which limit or exclude liability on the seller or supplier in the event of death or personal injury. This is broader than the Unfair Contract Terms Act and there are greater enforcement powers
- (b) Clauses which exclude the legal rights of consumers as regards to seller or supplier in the event of total or partial non performance or inadequate performance

- (c) The clause makes the agreement binding on consumer but obligations on the seller are subject to its discretion
- (d) Clauses permitting the seller or supplier to retain sums where the latter decides not to conclude to perform the contract without providing for the consumer to receive compensation of an equivalent amount where the latter party cancels the contract
- (e) Clauses requiring any consumer who fails to fulfil an obligation to pay a disproportionately high amount in compensation
- (f) Authorising the seller to dissolve the contract on a discretionary basis where the same facility is not granted to the consumer
- (g) Permitting the seller or supplier to retain sums paid for services not yet supplied by the supplier
- (h) Enabling the supplier to terminate a contract of indeterminate duration without reasonable notice except where there are serious grounds
- (i) Automatically extending a contract or fixed term where the consumer does not indicate otherwise.
- (j) Irrevocably binding the consumer to terms which he had no real opportunity to become acquainted with before the conclusion of contract
- (k) Enabling the seller to alter the terms of the contract unilaterally without a valid reason specified in the contract
- (l) Enabling the seller and supplier to alter unilaterally without a valid reason, any characteristic of the product or service to be provided.

- (m) Giving the seller and supplier the right to decide whether the goods or services conform to the contract or give him an exclusive right to interpret the contract
- (n) Limiting seller or suppliers liability to respect commitments undertaken by agents
- (o) Obliging the consumer to fulfil his obligations where the seller or supplier does not perform his
- (p) Giving the supplier or seller the ability of transferring his rights or obligations under the contract where this might reduce the guarantee to the consumer
- (q) Preventing or hindering the customer's right to take legal action or exercise legal remedy

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This Guide is intended as an overview and broad outline of the matters covered in it. Its purpose is to inform and raise awareness. We are happy to offer specific legal advice on particular circumstances.

This Guide should not be relied on as a substitute for comprehensive legal advice with reference to the particular circumstances.

While we have taken due care in the preparation of this publication, we do not accept legal liability as a result of any reliance placed on anything in this Guide. The reader should rely only on specific legal or taxation advice.