Consumer Contracts: the Unfair Terms in Consumer Contracts Regulations 1999
Preliminary

If your business involves you selling direct to consumers you need to be aware of this legislation derived from EU law and aimed at protecting consumers from unfair contract terms.

The Unfair Terms in Consumer Contracts Regulations 1999 (“Regulations”) implemented the EU ‘Unfair Terms Directive’ in the UK. These Regulations impose the requirements of transparency and fairness to terms/clauses in contracts made between a consumer and a seller of goods or services.

A consumer is defined in the Regulations as any natural person who, in contracts covered by the Regulations, is acting for purposes outside of his trade, business or profession. A company, however small, does not benefit from the protection afforded by these Regulations.

Oral and Written Contracts

The Regulations are silent on whether or not they apply to oral contracts as well as written contracts. The Unfair Terms Directive, however, states that consumers should receive the same treatment under both ‘contracts concluded by word of mouth and written contracts’. When interpreting the Regulations the courts would have regard to the Directive.

Compliance with the Regulations

The Regulations require a seller to comply with the following principles when drafting the terms of a contract:

1. the transparency principle: this requires a seller to draft terms in language a consumer will understand;
2. the fairness principle: this requires that the terms are fair to the consumer.

A seller therefore not only has to comply with a requirement as to style but also a requirement as to substance.

1. The transparency test

Under Reg. 7(1), a seller must ensure that any written term of the contract is expressed using ‘plain, intelligible language’. Under Reg. 7(2), where there is any doubt about the meaning of a term the interpretation most favourable to the consumer shall prevail.

Use of legal jargon or Latin should be avoided and clauses should be carefully reviewed to check that their meaning is clear. Section headings, summaries or examples could assist in consumer understanding.

Terms which would otherwise escape the test of fairness (see below) will not do so if they do not satisfy this transparency requirement.

2. The fairness test

The Reg. 5(1) fairness test states that a contractual term that has not been individually negotiated shall be regarded as unfair if, contrary to the requirement of good faith, it causes a significant imbalance in the party’s rights and obligations arising under the contract to the detriment of the consumer.

Terms regarding the adequacy of price against goods/services and terms regarding the main subject matter of the contract are outside of the scope of the fairness test but only where they are drafted in plain and intelligible language. These are the ‘core terms’ of the agreement.

a. ‘Not individually negotiated’

Reg. 5(2) explains that a term shall always be regarded as not having been individually negotiated where it has been ‘drafted in advance’ (a term affected by a rule of law will not be considered to have been drafted in advance) and where the consumer has not been able to ‘influence the substance’ of the term.

It is the seller’s burden to prove that a term has been individually negotiated where he is arguing so (Reg. 5(4)).

b. ‘Influence the substance’

Case law on the meaning of ‘influence the substance’ indicates the following approach:

- the existence of an ability or opportunity to influence the substance of the seller’s terms does not necessarily mean individually negotiated;
- no ability or opportunity to influence the substance of the seller’s terms will, however, mean not individually negotiated; and
- where a consumer has imposed a term on the seller to suggest that the seller has failed the fairness test with regards to that term conflicts with common sense.

c. Individually negotiated terms

Where a specific term has been individually negotiated, the Regulations will still apply to the rest of the contract where an ‘overall assessment of it indicates that it is a pre-formulated standard contract’ (Reg. 5(3)).

d. What is ‘fair’?

When ascertaining fairness, the following issues should be taken into account (Reg. 6):

- the nature of the goods/services;
- the circumstances surrounding the conclusion of the contract at the time of entering into it; and
- all other terms of the contract or of another contract on which it depends.

The meaning of the fairness test was considered in detail in the House of Lords case Director General of Fair Trading v First National Bank (2001) UKHL 52. It was concluded that the ultimate determinative requirements for the test are the separate requirements of lack of good faith and significant imbalance.

The requirement of good faith is one of fair and open dealing. Openness requires that terms be expressed fully and clearly and not contain traps. Terms that might disadvantage the consumer should be appropriately prominent. Fair dealing requires that a seller should not take advantage of a consumer’s lack or experience, weak bargaining position or necessity.
e. Schedule 2 list of potentially unfair terms

The Regulations provide a list of terms in Schedule 2 that are potentially unfair. This is an indicative list only and is non exhaustive. The potentially unfair terms listed include terms that attempt to achieve the following:

- exclude or limit the liability of the seller in the event of death or personal injury to a consumer resulting from an act or omission of the seller;
- prevent a consumer from recovering prepayments on cancellation;
- tie a consumer into a contract unfairly;
- allow a seller to vary the terms of the contract unilaterally after the contract has been agreed;
- mislead a consumer about his legal rights or about the contract; and
- allow a seller not to perform its obligations.

Effect and Enforcement

Under Reg. 10, the Office of Fair Trading ("OFT") and other qualifying bodies including trading standards, have a duty to consider any complaint received about unfair terms unless the complaint seems frivolous or vexatious, or unless another body listed in Schedule 1 of the Regulations notifies the OFT that they will be considering the complaint.

The OFT can:

- require a copy of a document used or recommended for use as a standard contract with consumers (Reg. 13(3)(a));
- require information about the use or recommendation of that document or any other document in dealings with consumers, (Reg. 13(3)(b));
- seek an injunction to prevent a seller relying on or using an unfair term (Reg. 12); and
- can take enforcement action to prevent a term that has been held to be unfair from being enforced against consumers with existing contracts or any future consumers.

The OFT will normally consult with a seller about a potentially unfair term and an undertaking may be sought from the seller to amend or delete the term. Where this approach fails, an injunction will be sought.

A term that is unfair will not be binding on a consumer, (Reg. 8). The remainder of the contract will continue to bind if it is capable of existing without the unfair term.

OFT Guidance

The OFT has published general guidance about unfair terms under the Regulations. This guidance can be accessed here. It should be noted, however, that this guidance is not legally binding; it is a matter for the courts to decide how the UTCCR's should be interpreted.

For anyone needing any corporate or technical legal support, there is no-one better to work with.

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