Consumer Rights Act 2015
Unfair contract terms

Why was reform necessary?

There is general agreement between consumer and businesses alike that the existing consumer law in the UK required reform. The Unfair Contract Terms Act 1977 (UCTA) and the Unfair Terms in Consumer Contract Regulations 1999 (UTCCR) were often described by both consumers and businesses as inconsistent, unnecessarily complex and difficult to apply in practice. Case law has also led to confusion regarding the scope of the test for fairness provided in the legislation.

Therefore the Consumer Rights Act 2015 ('the Act') merges the consumer protection rules under UCTA 1977 and UTCCR 1999 with the aim of providing increased protection for consumers against unfair terms in a contract.

Key changes introduced by the Act?

Updates to consumer notices

A consumer notice is defined broadly in the Act as a notice that relates to rights or obligations between a trader and a consumer, or a notice which appears to exclude or restrict a trader's liability to a consumer. Anything that is said or written to a consumer about a service or trader, whether by or on behalf of the trader, will be treated as a term of the contract if the consumer takes it into account when deciding whether to enter into the contract, and when making any decision about the services after the contract is entered into.

The Act treats consumer notices in much the same way as contract terms in that they are now subject to the test of fairness and those which are subsequently found to be unfair cannot be enforced against the consumer. Written notices must be transparent and intelligible to the consumer.

Test for fairness

1. How is a term deemed fair?

A term is unfair if "*contrary to the requirement of good faith it causes a significant imbalance in the parties' rights and obligations under the contract to the detriment of the consumer*".

The fairness test takes account of the subject matter of the contract, all the circumstances existing when the term was agreed, and all the other terms of the contract or any other relevant contract. The Act also applies substantially the same test of fairness to consumer notices. The overall requirement of these provisions is that such terms and notices should be fair.

A term or notice that is unfair is not legally binding on consumers. This does not prevent consumers from relying on it if they wish. The Act enables consumers to challenge wording if they consider it unfair and do not wish it to be relied upon as against them.

2. Duty of the court to review contract terms for fairness

The court is now under a duty to consider whether all contract terms are fair even if neither party to the proceedings raise the fairness of a term as an issue.

All written terms will be subject to the fairness test. However, under an exemption commonly called 'the core exemption', terms that specify either the main subject matter of the contract or relate to the price payable under the contract will be exempt from the fairness test. These terms will only be exempt provided they are transparent and prominent.

Requirement for prominent and transparent terms

As above, all contract terms that deal with price or a specific subject matter must be transparent and prominent. If these terms do not satisfy this criteria then they cannot be exempt from the fairness test.

The requirement for a term to be prominent necessitates that a trader brings the term to the consumer's attention in such a way as to make the average consumer (a consumer who is reasonably well-informed, observant and prudent) aware of the term.

It is also a separate and distinct requirement that a written term of a consumer contract or a consumer notice is transparent. The primary requirement of transparency is that a term should be intelligible to consumers.

Further 'grey list' additions

The grey list is a non-exhaustive list of the types of terms present in consumer contracts which the court may regard as being unfair without the need to provide any justification. The Act adds the following additional three types of terms to the grey list:

- Terms which allow the trader to determine the price after the consumer is bound by the term;
- Terms that allowing the trader to decide the characteristics of the subject matter after the consumer is bound by the term; and
- Terms that result in disproportionately high charges where the consumer decides not to finish or perform or the contract or for services which have not been supplied.

Secondary contracts

Under the Act, the rules on contract terms will now also apply to any secondary contracts made subsequently to a main contract. Please note that settlement agreements are not classed as secondary contracts for this purpose.

Have the reforms gone far enough?

The reforms have made the law clearer and easier to understand which will allow consumers and businesses to carry out business transactions with increased confidence.

Impact of the Act

Consumers have been afforded increased protection and can buy from businesses in confidence knowing that the court will subject contract terms to greater scrutiny.

Businesses will need to ensure that all contract terms are carefully drafted as they will now be open to increased scrutiny, particularly as the Act introduces a duty of the court to establish whether a term is fair even if it has been negotiated between a business and consumer and the consumer has not complained about the fairness of the term. Businesses will need to ensure that all notices are drafted in a way that will comply with the fairness test and that all relevant terms are brought to a consumer attention in the appropriate manner.

We recommend that businesses review their terms and conditions in light of these changes.

The following link provides useful guidance in respect of unfair terms in contracts https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/450440/Unfair_Terms_Main_Guidance.pdf.

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