

UNFAIR TERMS IN CONSUMER CONTRACTS ACT

Principal Act

Act. No. 1998-37

Commencement 13.8.1998
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Amending
enactments

Relevant current
provisions

Commencement
date

None

English sources

None cited

ARRANGEMENT OF SECTIONS.

Sections.

1. Title.
2. Interpretation.
3. Terms to which this Act applies.
4. Unfair terms.
5. Consequence of inclusion of unfair terms in contracts.
6. Construction of written contracts.
7. Choice of law clauses.
8. Prevention of continued use of unfair terms.

**Schedule 1. CONTRACTS AND PARTICULAR TERMS EXCLUDED
FROM THE SCOPE OF THE ACT**

Schedule 2. ASSESSMENT OF GOOD FAITH.

**Schedule 3. INDICATIVE AND ILLUSTRATIVE LIST OF TERMS
WHICH MAY BE REGARDED AS UNFAIR.**

AN ACT TO TRANSPOSE INTO THE LAW OF GIBRALTAR COUNCIL DIRECTIVE 93/13/EEC ON UNFAIR TERMS IN CONSUMER CONTRACTS.

Title.

1. This Act may be cited as the Unfair Terms in Consumer Contracts Act.

Interpretation.

2. In this Act -

“business” includes a trade or profession and the activities of any Government department or Legal or public authority;

“the Community” means the European Community and the other States in the European Economic Area;

“consumer” means a natural person who, in making a contract to which this Act applies is acting for purposes which are outside his business;

“court” means the Supreme Court;

“Minister” means the Minister with responsibility for consumer affairs;

“EEA Agreement” means the Agreement on the European Economic Area signed at Oporto on 2 May 1992 as adjusted by the protocol signed at Brussels on 17 March 1993;

“member State” shall mean a State which is a contracting party to the EEA Agreement and, for the avoidance of doubt, a reference to a member State shall include a reference to Gibraltar;

“seller” means a person who sells goods and who, in making a contract to which this Act applies, is acting for purposes relating to his business; and

“supplier” means a person who supplies goods or services and who, in making a contract to which this Act applies is acting for purposes relating to his business.

Terms to which this Act applies.

- 3.(1) Subject to the provisions of Schedule 1, this Act applies to any term in a contract concluded between a seller or supplier and a consumer where the said term has not been individually negotiated.

(2) In so far as it is in plain, intelligible language, no assessment shall be made of the fairness of any term which -

- (a) defines the main subject matter of the contract, or
- (b) concerns the adequacy of the price or remuneration, as against the goods or services sold or supplied.

(3) For the purposes of this Act, a term shall always be regarded as not having been individually negotiated where it has been drafted in advance and the consumer has not been able to influence the substance of the term.

(4) Notwithstanding that a specific term or certain aspects of it in a contract has been individually negotiated, this Act shall apply to the rest of a contract if an overall assessment of the contract indicates that it is a pre-formulated standard contract.

(5) It shall be for any seller or supplier who claims that a term was individually negotiated to show that it was.

Unfair terms.

4.(1) In this Act, subject to subsections (2) and (3) below, “unfair term” means any term which contrary to the requirement of good faith causes a significant imbalance in the parties’ rights and obligations under the contract to the detriment of the consumer.

(2) An assessment of the unfair nature of a term shall be made taking into account the nature of the goods or services for which the contract was concluded and referring, as at the time of the conclusion of the contract, to all circumstances attending the conclusion of the contract and to all the other terms of the contract or of another contract on which it is dependent.

(3) In determining whether a term satisfies the requirement of good faith, regard shall be had in particular to the matters specified in Schedule 2 to this Act.

(4) Schedule 3 to this Act contains an indicative and non-exhaustive list of the terms which may be regarded as unfair.

Consequence of inclusion of unfair terms in contracts.

5.(1) An unfair term in a contract concluded with a consumer by a seller or supplier shall not be binding on the consumer.

(2) The contract shall continue to bind the parties if it is capable of continuing in existence without the unfair term.

Construction of written contracts.

6. A seller or supplier shall ensure that any written term of a contract is expressed in plain, intelligible language, and if there is doubt about the meaning of a written term, the interpretation most favourable to the consumer shall prevail.

Choice of law clauses.

7. This Act shall apply notwithstanding any contract term which applies or purports to apply the law of a non member State, if the contract has a close connection with the territory of a member State.

Prevention of continued use of unfair terms.

8.(1) Persons or groups of persons may apply to the Minister for designation under this section.

(2) The Minister shall designate by notice^{*} in the Gazette, such persons or groups of persons who apply to him for designation pursuant to subsection (1) and who, in his opinion, have as their sole or principal aim the promotion of the interests of consumers.

(3) Persons or groups of persons designated by the Minister under the provisions of this section (hereinafter the “designated person”), may consider any complaint that any contract term drawn up for general use is unfair.

(4) If having considered a complaint about any contract term pursuant to section (1) above the designated person considers that the contract term is unfair he may, if he considers it appropriate to do so, bring proceedings for an injunction (in which proceeding he may also apply for an interlocutory injunction) against any person appearing to him to be using or recommending use of such a term in contracts concluded with consumers.

(5) The designated person may, if he considers it appropriate to do so, have regard to any undertakings given to him or to the Minister by or on behalf of any person as to the continued use of such a term in contracts concluded with consumers.

(6) The designated person shall give reasons for his decision to apply or not to apply, as the case may be, for an injunction in relation to any complaint which this Act requires him to consider.

(7) The court on an application by the designated person may grant an injunction on such terms as it thinks fit.

^{*} LN 2002/059 Minister designates the Gibraltar Regulatory Authority.

(8) An injunction may relate not only to use of a particular contract term drawn up for general use but to any similar term, or a term having like effect, used or recommended for use by any party to the proceedings.

(9) The Minister may arrange for the dissemination in such form and manner as he considers appropriate of such information and advice concerning the operation of this Act as may appear to him to be expedient to give to the public and to all persons likely to be affected by this Act.

SCHEDULE 1

Section 3(1)

**CONTRACTS AND PARTICULAR TERMS EXCLUDED FROM
THE SCOPE OF THE ACT**

The Act does not apply to –

- (a) any contract relating to employment;
- (b) any contract relating to succession rights;
- (c) any contract relating to rights under family law;
- (d) any contract relating to the incorporation and organisation of companies or partnerships; and
- (e) any term incorporated in order to comply with or which reflects-
 - (i) statutory or regulatory provisions of Gibraltar; or
 - (ii) the provisions or principles or international conventions to which the member States, Gibraltar or the Community are party.

SCHEDULE 2

Section 4(3)

ASSESSMENT OF GOOD FAITH

In making an assessment of good faith, regard shall be had in particular to-

- (a) the strength of the bargaining positions of the parties;
- (b) whether the consumer had an inducement to agree to the term;
- (c) whether the goods or services were sold or supplied to the special order of the consumer; and
- (d) the extent to which the seller or supplier has dealt fairly and equitably with the consumer.

SCHEDULE 3

Section 4(4)

**INDICATIVE AND ILLUSTRATIVE LIST OF TERMS WHICH
MAY BE REGARDED AS UNFAIR**

1. Terms which have the object or effect of –
 - (a) excluding or limiting the legal liability of a seller or supplier in the event of the death of a consumer or personal injury to the latter resulting from an act or omission of that seller or supplier;
 - (b) inappropriately excluding or limiting the legal rights of the consumer vis-à-vis the seller or supplier or another party in the event of total or partial non-performance or inadequate performance by the seller or supplier of any of the contractual obligations, including the option of offsetting a debt owed to the seller or supplier against any claim which the consumer may have against him;
 - (c) making an agreement binding on the consumer whereas provision of services by the seller or supplier is subject to a condition whose realisation depends on his own will alone;
 - (d) permitting the seller or supplier to retain sums paid by the consumer where the latter decides not to conclude or perform the contract, without providing for the consumer to receive compensation of an equivalent amount from the seller or supplier where the latter is the party cancelling the contract;
 - (e) requiring any consumer who fails to fulfill his obligation to pay a disproportionately high sum in compensation;
 - (f) authorising the seller or supplier to dissolve the contract on a discretionary basis where the same facility is not granted to the consumer, or permitting the seller or supplier to retain the sums paid for services not yet supplied by him where it is the seller or supplier himself who dissolves the contract;
 - (g) enabling the seller or supplier to terminate a contract of indeterminate duration without reasonable notice except where there are serious ground for doing so;

- (h) automatically extending a contract of fixed duration where the consumer does not indicate otherwise, when the deadline fixed for the consumer to express this desire not to extend the contract is unreasonably early;
- (I) irrevocably binding the consumer to terms with which he had no real opportunity of becoming acquainted before the conclusion of the contract;
- (j) enabling the seller or supplier to alter the terms of the contract unilaterally without a valid reason which is specified in the contract;
- (k) enabling the seller or supplier to alter unilaterally without a valid reason any characteristics of the product or service to be provided;
- (l) providing for the price of goods to be determined at the time of delivery or allowing a seller of goods or supplier of services to increase their price without in both cases giving the consumer the corresponding right to cancel the contract if the final price is too high in relation to the price agreed when the contract was concluded;
- (m) giving the seller or supplier the right to determine whether the goods or services supplied are in conformity with the contract, or giving him the exclusive right to interpret any term of the contract;
- (n) limiting the seller's or supplier's obligation to respect commitments undertaken by his agents or making his commitments subject to compliance with a particular formality;
- (o) obliging the consumer to fulfill all his obligations where the seller or supplier does not perform his;
- (p) giving the seller or supplier the possibility of transferring his rights and obligations under the contract, where this may serve to reduce the guarantees for the consumer, without the latter's agreement;
- (q) excluding or hindering the consumer's right to take legal action or exercise any other legal remedy, particularly by requiring the consumer to take disputes exclusively to arbitration not covered by legal provisions, unduly restricting the evidence available to him or imposing on him a burden of proof which, according to the applicable law, should lie with another party to the contract.

2. Scope of subparagraphs 1(g), (j) and (l)

- (a) Subparagraph 1(g) is without hindrance to terms by which a supplier of financial services reserves the right to terminate unilaterally a contract of indeterminate duration without notice where there is a valid reason, provided that the supplier is required to inform the other contracting party or parties thereof immediately.
- (b) Subparagraph 1(j) is without hindrance to terms under which a supplier of financial services reserves the right to alter the rate of interest payable by the consumer or due to the latter, or the amount of other charges for financial services without notice where there is a valid reason, provided that the supplier is required to inform the other contracting party or parties thereof at the earliest opportunity and that the latter are free to dissolve the contract immediately. Subparagraph 1(j) is also without hindrance to terms under which a seller or supplier reserves the right to alter unilaterally the conditions of a contract of indeterminate duration, provided that he is required to inform the consumer with reasonable notice and that the consumer is free to dissolve the contract.
- (c) Subparagraphs 1(g), (j) and (l) do not apply to:
 - transactions in transferable securities, financial instruments and other products or services where the price is linked to fluctuations in a stock exchange quotation or index or a financial market rate that the seller or supplier does not control;
 - contracts for the purchase or sale of foreign currency, travellers' cheques or international money orders denominated in foreign currency;
- (d) Subparagraph 1(l) is without hindrance to price indexation clauses, where lawful, provided that the method by which prices vary is explicitly described.