

Regulating unfair contract terms in other countries

A number of countries prohibit unfair contract terms. This note focuses on regimes that provide consumer remedies when contract terms are unfair in their content (substantive unfairness). (Many countries also have protections against procedural unfairness in consumer contracts. These are not discussed here.)

European Community

In April 1993, the Council of the European Communities adopted a Directive on *Unfair Terms in Consumer Contracts*. This required the Member States to pass laws to ensure that unfair terms in consumer contracts will not bind consumers. Members must also establish measures to prevent the continued use of unfair terms.

A contract term that has not been individually negotiated is regarded as unfair if, contrary to the requirement of good faith, it causes a significant imbalance in the parties' rights and obligations arising under the contract, to the detriment of the consumer. However, the question of whether the price is fair cannot be reviewed under the Directive.

The Directive includes an indicative and non-exhaustive list of the terms that may be regarded as unfair (see box), and requires written contracts to be in plain, intelligible language. It also allows states to provide greater consumer protections – for example, in some countries, the issue of price is *not* excluded from the relevant regulations.

The indicative and non-exclusive list of terms that **may be considered to be unfair** includes terms which have the object or effect of:

- 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.
- Permitting the seller or supplier to retain sums paid by the consumer whether the latter decides not to conclude or perform the contract, without providing for the consumer to receive compensation.
- Requiring any consumer who fails to fulfil his obligation to pay a disproportionately high sum in compensation.
- Enabling the seller or supplier to alter the terms of the contract unilaterally without a valid reason, which is specified in the contract.

The European Community has recently expanded, and now has 25 member countries. In 2007, when two more countries join, nearly half a billion consumers will have protection against unfair contract terms.

United Kingdom

To give effect to the EC Directive, the United Kingdom has implemented the *Unfair Terms in Consumer Contracts Regulation 1999*. This mirrors the terminology and the “black list” of unfair terms that is found in the Directive.

The Director of the Office of Fair Trading (OFT) is obliged to examine complaints that a contract term drawn up for general use is unfair. If the Director agrees, he or she can take legal action to stop the use of the term in consumer contracts. However, cases are normally resolved informally, when the OFT accepts an undertaking in lieu of court proceedings.

During the 2002-2003 financial year, the OFT received more than 1,000 complaints about unfair contract terms, and 1,477 contract terms were abandoned or amended as a result of OFT enforcement action. Sectors that featured high in consumer complaints included financial services, tenancy contracts, package holidays, and fitness clubs. Details of key cases are included in the OFT’s quarterly *Unfair Contract Terms Bulletin*.

The OFT’s jurisdiction to take action is shared with “qualifying bodies”, including other regulators (eg, the Director General of Gas Supply) and the Consumers’ Association.

The UK also has an *Unfair Contract Terms Act 1977*, which applies to both consumer and business contracts, and to both standard form terms and individually negotiated terms. The Act relies on aggrieved individuals to take action, and does not contain any process for dealing with unfair terms in a systemic manner.

Law reform agencies in the UK are considering whether a single unified regime could replace both pieces of legislation.

Canada

In Canada, many provincial governments prohibit unfair practices in consumer transactions.

For example, in Saskatchewan, the *Consumer Protection Act 1996* prohibits a supplier from committing an unfair practice. An unfair practice includes “taking advantage of a consumer by including in a consumer agreement terms or conditions that are harsh, oppressive or excessively one-sided.”

A consumer who has suffered loss because of an unfair practice can commence action against the supplier. Alternatively, the Director of Fair Trading can take action on behalf of an affected consumer if it is in the public interest.

If a court finds that the supplier has engaged in unfair practices, it can order the supplier to pay damages (including punitive or exemplary damages), to restrain the supplier from continuing the unfair practice, or make other orders.

Similarly, the Alberta *Fair Trading Act* prohibits unfair practices, and provides that “It is an unfair practice for a supplier to include in a consumer transaction terms or conditions that are harsh, oppressive or excessively one-sided”.

United States

The Uniform Commercial Code – adopted in the majority of states – enables a court to make various orders (including refusing to enforce the contract) if it finds a contract, or any clause of a contract, to be unconscionable at the time it was made. Case law suggests that unconscionability under the Uniform Commercial Code has both procedural and substantive components, and decisions will depend on the individual circumstances of each case.