



Unfair terms – a review of recent developments

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Overview

1. What has changed recently?
2. UCTA 1997: dealing on another's standard terms
3. Changes to unfair terms in consumer contracts

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Part 1: What has changed recently?

Unfair Contract Terms Act 1977

- African Export-Import Bank v. Shebah Exploration & Production Co Ltd [2017] EWCA Civ 845, [2017] 2 Lloyd's Rep 111 – when are you dealing on another's standard terms of business?

Unfair Terms in Consumer Contracts

- Consumer Rights Act 2015: a single, unified scheme
- applying the "significant imbalance" test; C-186/16 Andriuciu v. Banca Românească SA (CJEU, 20 September 2017)

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Part 2: UCTA 1977 – dealing on standard terms

- "deal[ing] on the other's written standard terms of business" is the trigger that activates section 3
- subjects certain terms to the requirement of reasonableness
- applies to attempts to (i) exclude liability for breach, or (ii) render a contractual performance that is substantially different from that which was reasonably expected
- separate provision (under section 2) for attempts to exclude liability for negligence

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UCTA 1977 – dealing on standard terms

"deal[ing] on the other's written standard terms of business" requires that:

- the term is written;
- the term is a term of business;
- the term is part of the other party's standard terms of business; and
- that the other is dealing on those written standard terms of business.

African Import-Export Bank, at [18]. (The case concerned elements 3 and 4.)

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UCTA 1977 – dealing on standard terms

- recall that the section applies only to “business liability”: s.1(3)
- liability arising “in the course of a business” requires that the thing done is an integral part of the business carried on, or that there is sufficient regularity in the doing of that thing
- see R & B Customs Brokers Co Ltd v United Dominions Trust Ltd [1988] 1 WLR 321 (CA)

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UCTA 1977 – African Export-Import Bank

Limb 3—standard terms of business:

- means that it has to be shown that that other party *habitually* uses those terms of business; it is not enough that he sometimes does and sometimes does not (see at [20])
- a standard form contract (e.g. JCT contract) could be standard terms of business if it passes that test

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UCTA 1977 – African Export-Import Bank

Limb 4—dealing on those standard terms:

- not satisfied where “there have been more than *insubstantial variations to the terms which may otherwise have been habitually used*” (at [25])
- so the fact that there has been *some, slight* negotiation does not exclude the Act
- the fact that those negotiations do not relate to the *challenged* terms makes no difference (the Act will still not apply), see at [36]

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UCTA 1977 – African Export-Import Bank

How does this apply to standard form contracts?

- the banks' contract was based on the Loan Market Association syndicated facility agreement terms
- CoA doubts (without deciding) banks' submission that those can never satisfy limb 4
- in practice it will be more difficult to show that a standard form contract fails to satisfy the requirement of reasonableness

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Part 3: Unfair Terms in Consumer Contracts

- Consumer Rights Act 2015 applies to consumer contracts entered into after 1 October 2015 (and consumer notices)
- a consumer can **no longer** rely on UCTA 1977: ss.2(4) and 3(3)
- CRA 2015, Part 2 introduces rights beyond those required by 1993 Directive
- European law has moved on since Director General of Fair Trading v First National Bank plc [2002] 1 AC 481 (HL) and Office of Fair Trading v Abbey National plc [2010] 1 AC 696 (SC)
- first instance courts will need to give "indirect effect" to EU Directive

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The scheme of the 1993 Directive

a minimum harmonisation measure; Member States can provide additional protection

- the basic test of unfairness
- the indicative list of unfair terms
- the terms excluded from assessment

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Implementing the 1993 Directive: the new law

- 1994 UK Regulations strayed too far from wording of Directive; 1999 UK Regulations adopted a "copy out" approach
- because CRA 2015 unifies all consumer law in one chapter (domestic and European), its effect is fundamentally different
- protection under CRA 2015 is wider, at least because:
 - "consumer" test is broader (s.2(3), 76(2)); includes individuals acting for purposes *mainly* outside their trade
 - the fact that a term has been "*individually negotiated*" does not exclude it from a fairness review

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The basic test of unfairness

Meaning

- "it causes a significant imbalance in the parties' rights and obligations under the contract to the detriment of the consumer": s.62(4)
- is the consumer being deprived of an advantage which he would enjoy under national law in the absence of the challenged contract term? Aziz v Caixa d'Estalvis de Catalunya (Case C-415/11, CJEU)
- could the seller, dealing fairly and equitably, reasonably assume that the consumer would have agreed to such a term in individual contract negotiations? Aziz; Andriuc v. Banca Românească SA (CJEU, 20 September 2017)

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The basic test of unfairness

Application: the relevance of derogation from national law

- the *main* factor in the assessment of unfairness (per majority in ParkingEye Ltd v. Beavis [2016] 2 All ER 519 (SC), at [105])?
- or simply a *relevant* factor (per Lord Mance, at [208])?
- Andriuc suggests the latter is correct (so a provision enshrined in national law may still fail the test)
- a court may therefore consider the meaning and impact of the clause itself, as part of the assessment of fairness

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Unfairness: the relevance of derogation

“ There can be no one single test of this. It is obviously useful to assess the impact of an impugned term on the parties' rights and obligations by comparing the effect of the contract with the term and the effect it would have without it. But the inquiry cannot stop there. – Lord Millett in *First National Bank plc* (cited by Lord Mance in *ParkingEye*) ”

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Contrary to good faith

- good faith has elements of *form* (open dealing, transparency and intelligibility) and *substance* (fair dealing with a consumer); *First National Bank plc*, per Lord Bingham
- not all imbalances will be unfair. Good faith is therefore the supplemental “*means of making an overall evaluation of the different interests involved*” (see recital 16)
- factors include: strength of parties' bargaining positions; whether the consumer had an inducement to agree to the term; whether the goods or services were sold or supplied to the special order of the consumer; whereas the requirement of good faith;
- illustrated in *ParkingEye*

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Plain intelligible language

- more than a requirement of form
- thus, if the contract is a complex one (e.g. a loan agreement), it requires the trader to provide the consumer with “*sufficient information to enable them to take prudent and well-informed decisions*” so that the contract can “*be understood by the consumer both at the formal and grammatical level, and also in terms of its actual effects*”; *Andricuic*, at [51]
- judged objectively – the reasonably well informed and reasonably observant and circumspect consumer

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The core exclusions

- CRA 2015, s.64
- significant difference in approach between Supreme Court (look at the overall package of rights given to the consumer) and CJEU (identify the 'essential obligations of the contract' and the remuneration supplied *in exchange* for that)
- both jurisdictions recognise that the exclusions are to be restrictively interpreted
- if the term falls within the grey list in Sch.2, it cannot be an excluded term: CRA 2015, s.64(6)
- Abbey National decided that it is not the entire *term* that is excluded from assessment, only that the assessment cannot be *based* on that characteristic; questionable whether that represents EU law (e.g. Kásler v. OTP Jelzálogbank Zrt (C-26/13))

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Selected provisions of the Consumer Rights Act 2015

62 Requirement for contract terms and notices to be fair

- (1) An unfair term of a consumer contract is not binding on the consumer.
- (2) An unfair consumer notice is not binding on the consumer.
- (3) This does not prevent the consumer from relying on the term or notice if the consumer chooses to do so.
- (4) *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.*
- (5) Whether a term is fair is to be determined—
 - (a) taking into account the nature of the subject matter of the contract, and
 - (b) by reference to all the circumstances existing when the term was agreed and to all of the other terms of the contract or of any other contract on which it depends.
- (6) A notice is unfair if, contrary to the requirement of good faith, it causes a significant imbalance in the parties' rights and obligations to the detriment of the consumer.
- (7) Whether a notice is fair is to be determined—
 - (a) taking into account the nature of the subject matter of the notice, and
 - (b) by reference to all the circumstances existing when the rights or obligations to which it relates arose and to the terms of any contract on which it depends.
- (8) [Preserves the operation of certain statutory provisions restricting contracting out.]

64 Exclusion from assessment of fairness

- (1) A term of a consumer contract may not be assessed for fairness under section 62 to the extent that—
 - (a) it specifies the main subject matter of the contract, or
 - (b) the assessment is of the appropriateness of the price payable under the contract by comparison with the goods, digital content or services supplied under it.
- (2) Subsection (1) excludes a term from an assessment under section 62 only if it is transparent and prominent.

- (3) A term is transparent for the purposes of this Part if it is **expressed in plain and intelligible language** and (in the case of a written term) is legible.
- (4) A term is prominent for the purposes of this section if it is brought to the consumer's attention in such a way that an average consumer would be aware of the term.
- (5) In subsection (4) “average consumer” means a consumer who is reasonably well-informed, observant and circumspect.
- (6) This section does not apply to a term of a contract listed in Part 1 of Schedule 2.

68 Requirement for transparency

- (1) A trader must ensure that a written term of a consumer contract, or a consumer notice in writing, is transparent.
- (2) A consumer notice is transparent for the purposes of subsection (1) if it is **expressed in plain and intelligible language** and it is legible.

69 Contract terms that may have different meanings

- (1) If a term in a consumer contract, or a consumer notice, could have different meanings, the meaning that is most favourable to the consumer is to prevail.

...

Selected provisions of the Unfair Terms Directive 1993¹

Article 3

1. A contractual **term which 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 parties' rights and obligations arising under the contract, to the detriment of the consumer.**
2. A term shall always be regarded as not individually negotiated where it has been drafted in advance and the consumer has therefore not been able to influence the substance of the term, particularly in the context of a pre-formulated standard contract.

The fact that certain aspects of a term or one specific term have been individually negotiated shall not exclude the application of this Article to the rest of a contract if an overall assessment of the contract indicates that it is nevertheless a pre-formulated standard contract.

Where any seller or supplier claims that a standard term has been individually negotiated, the burden of proof in this respect shall be incumbent on him.
3. The Annex shall contain an indicative and non-exhaustive list of the terms which may be regarded as unfair.

¹ Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts

Article 4

1. Without prejudice to Article 7, the unfairness of a contractual term shall be assessed, taking into account the nature of the goods or services for which the contract was concluded and by referring, at the time of conclusion of the contract, to all the 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.
2. **Assessment of the unfair nature of the terms shall relate neither** to the definition of the main subject matter of the contract nor to the adequacy of the price and remuneration, on the one hand, as against the services or goods supplied in exchange, on the other, **in so far as these terms are in plain intelligible language.**

Article 5

In the case of contracts where all or certain terms offered to the consumer are in **writing**, these **terms must always be drafted in plain, intelligible language**. Where there is doubt about the meaning of a term, the interpretation most favourable to the consumer shall prevail....

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