



A Quick Guide to Unfair Contract Terms

Business to consumer contracts are highly regulated and are approached very differently to B2B contracts. In particular, consumer contracts must be presented in the correct way, at the correct time, and must not contain any blacklisted, grey-listed, or otherwise unfair terms.

Unfair contract terms are not legally binding on consumers and businesses that use them are vulnerable to a host of negative consequences.

To help navigate the consumer protection framework, it's useful for businesses to consider some key tests when drafting consumer contract terms.

Firstly: is the term "blacklisted" by law?

Blacklisted terms include those that exclude or restrict liability for death or personal injury resulting from negligence, and terms seeking to exclude or restrict consumers' statutory rights and any associated remedies.

Blacklisted terms are never enforceable against a consumer.

Secondly: Is the term included in the "grey list"?

Examples of certain contract terms are set out in Schedule 2 of the Consumer Rights Act 2015. These terms are referred to as the "grey list" and they're unlikely to be fair or are under a strong suspicion of being unfair, and so should be approached with particular caution.

Thirdly: does the term pass the "fairness test"?

The so-called fairness test is also set out in the Consumer Rights Act. The test is whether the term creates a significant imbalance, contrary to the requirements of good faith, to the detriment of consumers. If the answer to this is yes, the term will fail the fairness test and will not be enforceable.

Finally: is the term is transparent?

In other words, is it in plain and intelligible language, and is it sufficiently prominent? Failing the transparency test alone, independently of the fairness test, doesn't make a term unenforceable against a consumer. But, importantly, if a term is unclear or ambiguous, it will always be given the meaning that is most favourable to the consumer. So drafting and presentational clarity is key.

In addition to keeping these key tests in mind, it's useful for businesses to avoid certain common pitfalls when drafting consumer contracts.

Firstly, businesses mustn't prevent or restrict consumers from seeking any form of redress that would otherwise be available to them by law. Contract terms that attempt to do this are specifically blacklisted. Businesses must also avoid terms which exclude or limit their own liability to consumers when the business itself is at fault, and businesses should be transparent about the circumstances in which they *will* be liable to consumers.

Terms that entitle businesses to make unilateral contractual changes without a valid, stated reason should also be approached with caution as they're specifically grey-listed under the Consumer Rights Act. This doesn't mean that so-called "variation clauses" are completely off the table, but to



improve the chances of enforceability businesses must be clear about how, when, and why the contract may change. They must also give the consumer reasonable notice of any contract changes - particularly any changes which are to the consumer's detriment - and must offer consumers the opportunity to exit the contract without penalty if they do not accept the amended terms.

When it comes to automatically renewing contracts, businesses must make clear to consumers at the point of sale how much they will be charged on renewal, the length of the renewed contract period, and how auto-renewal works in practice. Consumers should be sent reminders before their contract is due to be renewed and must be able to switch off auto-renewal if they wish. Businesses should also offer consumers an ongoing right to a pro-rata refund, particularly if auto-renewal was the default position when the consumer signed up, and they should provide a simple – preferably online – method for consumers to request a refund and receive their money back in good time.

A final pitfall that we see is the deliberate use of contractual terms which a business knows are likely to be unfair but which it uses anyway to either send a message to the consumer, or because it's relying on the consumer not knowing their rights. This practice should be avoided. Not only are unfair contract terms unenforceable and at risk of attracting the unwanted attention of regulators, but the practice may amount to a misleading commercial practice, which carries potential criminal sanctions.