



Do you treat your customers fairly? “Unfair Terms” in Consumer Contracts

Dr. Frank Chetcuti Dimech

This new column will look at new laws and regulations which will have an impact on your business.

This is the first of a series of articles which will review the recent amendments to the Consumer Affairs Act. Certain amendments came into force on the 1st January 2001, whilst the provisions regulating unfair terms, liability for defective products, and sale guarantees are expected to come into force in mid-2002, as part of the Government’s commitment to align Maltese law with the EU *acquis communautaire*. In this article the author will be looking at the new concept of “unfair terms” in consumer contracts.

Introduction

Over the years, the Maltese Parliament and the Law Courts have frequently intervened to redress the imbalance in the trader-consumer relationship. Consumers have progressively been given more and more protection and consequently traders have become increasingly burdened with the corresponding obligations. The most recent Parliamentary intervention, intended to align Maltese law with various EU Directives on consumer protection, is by far the most comprehensive.

Writing about the new concept of “unfair terms” in “The Times” of 22 November 2001, Dr. Paul Edgar Micallef has rightly pointed out that “Little attention seems to have been given to the fact that traders — and these include public controlled or owned companies and public corporations — must review the fairness of the terms of the contracts they have with their customers in the light of the norms governing unfair terms. **I trust that we will not be suddenly faced with a last minute panic stations scenario with many traders caught on a wrong footing and claiming they were not aware of the new law on unfair terms**” (emphasis added).

Being caught unprepared is not as simple as it sounds, as the Consumer Affairs Act has now equipped both public authorities as well as consumers with a formidable arsenal to combat non-compliant traders. So what should traders be looking out for in order to make their contracts “fair”?

Unfair Terms

The source of the new Part VI of the Consumer Affairs Act is the EU Directive 93/13 on Unfair Terms in Consumer Contracts. The scope of this Directive, and hence of its local counterpart, is to protect acquirers of goods and services against the abuse of power by the seller or supplier, in particular against one-sided standard contracts and the unfair exclusion of essential rights in contracts.

The law defines an unfair term and regulates the manner in which an unfair term would be assessed. An unfair term means any term in a consumer contract, which on its own or in conjunction with one or more other terms:

1. creates a significant imbalance between the rights and obligations of the contracting parties to the detriment of the consumer; or

2. causes the performance of the contract to be unduly detrimental to the consumer; or
3. causes the performance of the contract to be significantly different from what the consumer could reasonably expect; or
4. is incompatible with the requirements of good faith.

The unfairness of a term is assessed, taking into account the following:

- (a) the nature of the services for which the contract was concluded;
- (b) the time of conclusion of the contract; and
- (c) all the circumstances attending the conclusion of the contract and all the other terms of the contract or of another contract on which it is dependent. Such circumstances may also include:
 - (d) the bargaining power of the parties;
 - (e) whether a consumer was subjected to undue pressure; and
 - (f) whether the lack of knowledge or skill of a consumer was improperly taken advantage of.

Indeed, the law provides a detailed list of prohibited terms in contracts, the inclusion of which is regarded as being unfair by definition and is deemed to have never been inserted in the contract. It is beyond the scope of this article to delve into detail to each of the 24 unfair terms which have been singled out by the law. However it is important to stress that the list is merely indicative and there may be other “unfair terms” which are not listed but still fail to pass the test of fairness. This list incorporates most of the contractual terms which may be regarded as unfair under the EU Directive. Besides it also provides other prohibited terms which do not appear under the EU Directive. Furthermore certain exemp-

tions granted to financial services operators under the EU Directive have not been transposed into Maltese law.

Application of the test of unfairness

The unfairness test is rather complex and it seems best to break the problem into its component parts, namely:-

- (1) examine whether there is, objectively, any significant imbalance — for example is the seller's right to increase the prices (in isolation obviously unfair) coupled with a realistic counterbalancing right for the consumer to get out of the contract without penalty?
- (2) examine whether the terms which do show a significant imbalance are detrimental to the consumer. The list of unfair terms set out in the law — although not exhaustive — provides influential and helpful guidance in assessing the unfairness of contract terms.
- (3) examine whether the contract embodies "good faith" taking into account the strength of the bargaining position of the parties, and the extent to which the seller or supplier has a record of dealing fairly and equitably with consumers. Those suppliers who trade according to benchmarks of good industry practice, including codes of practice, may also have cause to be more confident that they are acting in good faith towards consumers.

When assessing a supplier's good faith, the availability and use of explanatory pre-contractual brochures and leaflets may be taken into consideration since they often provide useful background information that allows consumers to evaluate a contract. Consideration should also be given to whether after having signed a contract, consumers are given a reasonable 'cooling-off' period in which they may cancel the deal without penalty.

The way that terms are disclosed and explained to consumers is a key factor in assessing unfairness and good faith. Most common unfair terms are:

1. *Entire agreement clauses* — these exclude from the contract anything said or promised by an agent of the

company.

2. *Hidden clauses* — consumers are not bound by terms they could not get to know before signing a contract.
3. *Penalty clauses* — a number of consumer contracts have one-sided clauses which penalise consumers with no counterbalancing penalties on the party providing the service.
4. *Exclusion clauses* — these exclude liability for every possible eventuality, and are very common.
5. *Variation clauses* — typically these clauses give the supplier the right to put up prices with no realistic right for the consumer to withdraw without penalty.

Plain and Intelligible Language

Apart from requiring fairness in consumer contracts, the law also requires contracts that are in writing to contain plain and intelligible language which must be understood by the consumer to whom the contract is directed.

The standard of "plainness" and "intelligibility" of contract terms must normally be within the understanding of ordinary consumers *without legal advice*. Therefore, as far as possible, legal (and other) jargon must be avoided in contracts. What is required is every day words, used in their familiar sense. Foreign words and phrases (such as Latin legal phrases) should not be used.

Contract terms can be made easier to read and understand by:

1. Using short sentences whenever possible and — where lengthy clauses are unavoidable — trying to itemise them by dealing with one issue at a time;
2. Minimising the number of cross-references and the use of terms that are defined elsewhere;
3. Organising the contract so that related terms are brought together under explicit sub-headings, enabling consumers to focus on what is relevant to them; and
4. Excluding statements which do not clearly impose or define the extent of the supplier's and consumer's contractual obligations.

The use of unreadable small print can, by itself, make terms unenforceable because the consumer should be given the opportunity to examine all the

terms before he is bound by them. Furthermore, putting written terms in plain language is quite pointless unless the consumers are given sufficient time and the opportunity to read them. In effect, the EU Directive imposes a single requirement which is that, before entering into any contract, consumers must be able to read and understand all its written terms.

Conclusion

There can be no doubt that all traders must therefore have a very close look at the contracts, agreements, forms and terms and conditions which they use in their relationships with their consumers, existing and future, in order to ensure compatibility with the new law governing unfair terms. When the relative provisions come into force, and this is expected in mid-2002, traders will be faced with three significant issues:

1. a consumer contract which includes a prohibited or unfair term **shall not be binding on the consumer** unless the contract is capable of continuing in existence without the unfair term;
2. consumer associations will have the right to **sue traders for having contracts which are not compliant with the new rules**, and;
3. the Director of Consumer Affairs will have the power to issue a **"compliance order" requesting deletion or alteration of unfair terms** or the incorporation of terms which are considered necessary for the benefit of consumers.

Dr. Frank Chetcuti Dimech is a Partner with CDF Advocates who specialise in commercial law, company law, financial services, taxation, telecommunications and alignment with EU law. This article is for information purposes and must not be relied upon as advice. CDF Advocates may be contacted on Telephone 21223334, Mobile 79223334, Fax 21248594, e-mail: fcd@cdf.com.mt, URL: <http://www.cdf.com.mt>