

Unfair contract terms, and the effect of The Consumer Rights Act 2015 on financial services contracts

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We are all well aware of the need to comply with the Unfair Terms in Consumer Contract Regulations 1999 in respect of standard form contracts, and the specific provisions relating to financial services contracts these Regulations contain. These Regulations will be repealed by the Consumer Rights Act 2015, most of which is expected to come into force on 1 October 2015. This Briefing Paper explains the new provisions. In most respects they update the old provisions for relatively few new areas, but these changes ought to be considered.

To address concerns that existing UK consumer law is unnecessarily complex and fragmented, the Consumer Rights Act 2015 consolidates the law relating to unfair terms in consumer contracts and key consumer rights relating to contracts for goods and services and digital content. To date, statutory consumer rights have been scattered across numerous different pieces of legislation, such as the Supply of Goods and Services Act 1982 and the Unfair Terms in Consumer Contract Regulations 1999.

Replacement provisions regarding unfair terms are set out in Part 2 of the new Act and are designed to go beyond the minimum requirements of the 1993 EU Directive 93/13/EEC on Unfair Terms in Consumer Contracts which are implemented in the UK by the 1999 Unfair Terms in Consumer Contract Regulations.

Of note:

- **Applicable to all standard consumer contracts**

It applies to all consumer contract terms whether or not they are individually negotiated.

In practice, mostly in financial services contract terms, firms will have had regard to fairness when negotiating departures from their standard terms and in negotiating individual contracts, so the formal application of the provisions may not have much impact.

- **Main subject matter and price exemption**

Section 64(1) of the new Act provides that terms on the main subject matter and price are exempt from an assessment of fairness, but only if the term is transparent and fair and prominent:

- A term is "**transparent**" if it is expressed in plain and intelligible language and (in the case of a written term) legible.
- A term is "**prominent**" if it is brought to the consumer's attention in such a way that an average consumer would be aware of the term. (An average consumer is defined to mean a consumer who is reasonably well informed, observant and circumspect.)

- **Revised grey list**

The Section 64(1) provision does not though apply to items on what is currently known as "the grey list" – the non-exhaustive list of terms that may be regarded as unfair which is now included in Schedule 2 Part 1 of the new Act. For each of the items listed on the grey list, there must be an assessment of fairness.

There are some changes in this list from the current grey list in Schedule 2 to the 1999 Regulations. Three new items are added:

- Paragraph 5: a term which has the object or effect of requiring that, where the consumer decides not to conclude or perform the contract, the consumer must pay the trader a disproportionately high sum in compensation or for services which have not been supplied.
- Paragraph 12: a term which has the object or effect of permitting the trader to determine the characteristics of the subject matter of the contract after the consumer has become bound by it (subject to paragraph 23 for contracts which last indefinitely, which allow traders to reserve the right to alter unilaterally such contracts if there is reasonable notice and the consumer is free to dissolve the contracts).

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- Paragraph 14: a term which has the object or effect of giving the trader the discretion to decide the price payable under the contract after the consumer has become bound by it, where no price or method of determining the price is agreed when the consumer becomes bound. (This is subject to paragraph 23 (contracts which last indefinitely), paragraph 24 (for sale of securities, foreign currency etc.) and paragraph 25 (for price index clauses).)

The carve-outs for financial services contracts remain - and are set out in Part 2 of Schedule 2 to the new Act. (There are some slight amendments to the wording and some refer to some of the new grey list terms mentioned above.)

A copy of the new grey list Schedule 2 terms is set out in the attachment to this briefing paper with the altered provisions black-lined, so that you can easily see the changes.

• New statutory rights

Various statutory rights are brought together in Chapter 4 of the new Act. It applies to all contracts (except contracts of employment or apprenticeship) unless disapplied by a statutory instrument and we await details of any which might be made.

Section 50 is entirely new. This concerns information about the trader or the service being binding if it is taken into account by the consumer when deciding to enter into the contract or it is taken into account by the consumer when making a decision about the service after entering into the contract. This, if applicable in relation to financial services contracts, would have significant impact as it would include all manner of marketing and sales type information.

Section 54 provides for two new remedies if services are not performed with reasonable care and skill, or if a provision is included pursuant to the new Section 50. These concern the right to require repeat performance under Section 55 or the right to a price reduction under Section 56.

• Enforcement powers

The FCA will retain its enforcement powers – being a regulator which can take action on unfair terms in many types of financial services contracts and in parallel will of course have its powers under the Financial Services and Markets Act (FSMA) and may choose to act under FSMA rather than under the unfair contract terms provisions, as the FCA have always emphasised there is an overlap between the unfair contract terms provisions and the FCA's Principles, and firms must treat customers fairly and not rely on narrow interpretations of the Unfair Terms in Consumer Contract Regulations to justify a contract term that may actually be unfair in the wider context.

This will remain a fundamental point to bear in mind. One assumes that their Unfair Contract Terms Regulatory Guide will be updated to reflect the provisions of the 2015 Act but that the overall approach will remain the same.

If you have any questions regarding the impact of the Consumer Rights Act 2015 in relation to financial services contracts, please do not hesitate to contact Kirstene Baillie, Nicholas Thompsell or John Dooley or your usual contact at Fieldfisher.

Comparison of new grey list terms with current grey list provisions (now in Schedule 2 of the Consumer Rights Act 2015)

Part 1:

(a1) A term which has the object or effect of excluding or limiting the legal trader's liability of a seller or supplier in the event of the death of a consumer or personal injury to the latter consumer resulting from an act or omission of that seller or supplier; the trader. This does not include a term which is of no effect by virtue of section 65 (exclusion for negligence liability).
(b2) A term which has the object or effect of inappropriately excluding or limiting the legal rights of the consumer vis-à-vis in relation to the seller or supplier trader or another party in the event of total or partial non-performance or inadequate performance by the seller or supplier trader of any of the contractual obligations, including the option of offsetting a debt owed to the seller or supplier trader against any claim which the consumer may have against him; the trader.
(c3) A term which has the object or effect of making an agreement binding on the consumer whereas in a case where the provision of services by the seller or supplier trader is subject to a condition whose realisation depends on his own the trader's will alone.
(d4) A term which has the object or effect of permitting the seller or supplier trader to retain sums paid by the consumer where the latter consumer 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 trader where the latter trader is the party cancelling the contract.

(5) A term which has the object or effect of requiring that, where the consumer decides not to conclude or perform the contract, the consumer must pay the trader a disproportionately high sum in compensation or for services which have not been supplied.
(e6) A term which has the object or effect of requiring any a consumer who fails to fulfil his obligation obligations under the contract to pay a disproportionately high sum in compensation;₂
(f7) A term which has the object or effect of authorising the seller or supplier trader to dissolve the contract on a discretionary basis where the same facility is not granted to the consumer, or permitting the seller or supplier trader to retain the sums paid for services not yet supplied by him the trader where it is the seller or supplier himself trader who dissolves the contract;₂
(g8) A term which has the object or effect of enabling the seller or supplier trader to terminate a contract of indeterminate duration without reasonable notice except where there are serious grounds for doing so;₃. This is subject to paragraphs 21 (financial services) and 24 (sale of securities, foreign currency etc).
(h9) A term which has the object or effect of automatically extending a contract of fixed duration where the consumer does not indicate otherwise, when the deadline fixed for the consumer to express his a desire not to extend the contract is unreasonably early;₂
(i10) A term which has the object or effect of irrevocably binding the consumer to terms with which he the consumer has had no real opportunity of becoming acquainted before the conclusion of the contract;₂
(j11) A term which has the object or effect of enabling the seller or supplier trader to alter the terms of the contract unilaterally without a valid reason which is specified in the contract;₂ This is subject to paragraphs 22 (financial services), 23 (contracts which last indefinitely) and 24 (sale of securities, foreign currency etc).
(12) A term which has the object or effect of permitting the trader to determine the characteristics of the subject matter of the contract after the consumer has become bound by it. This is subject to paragraph 23 (contracts which last indefinitely).
(k13) A term which has the object or effect of enabling the seller or supplier trader to alter unilaterally without a valid reason any characteristics of the product or service goods, digital content or services to be provided;₂
(14) A term which has the object or effect of giving the trader the discretion to decide the price payable under the contract after the consumer has become bound by it, where no price or method of determining the price is agreed when the consumer becomes bound. This is subject to paragraphs 23 (contracts which last indefinitely), 24 (sale of securities, foreign currency etc) and 25 (price index clauses).
(l15) A term which has the object or effect of 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 permitting a trader to increase the price of goods, digital content or services 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;₂ This is subject to paragraphs 24 (sale of securities, foreign currency etc) and 25 (price index clauses).
(m16) A term which has the object or effect of giving the seller or supplier trader the right to determine whether the goods, <u>digital content</u> or services supplied are in conformity with the contract, or giving him the trader the exclusive right to interpret any term of the contract;₂
(n17) A term which has the object or effect of limiting the seller's or supplier's trader's obligation to respect commitments undertaken by his the trader's agents or making his the trader's commitments subject to compliance with a particular formality;₂
(o18) A term which has the object or effect of obliging the consumer to fulfil all his of the consumer's obligations where the seller or supplier trader does not perform his the trader's obligations.
(p19) A term which has the object or effect of giving the seller or supplier the possibility of transferring his allowing the trader to transfer the trader's rights and obligations under the contract, where this may serve to reduce the guarantees for the consumer, without the latter consumer's agreement;₂
(q20) A term which has the object or effect of excluding or hindering the consumer's right to take legal action or exercise any other legal remedy, particularly in particular by= <ul style="list-style-type: none"> (a) requiring the consumer to take disputes exclusively to arbitration not covered by legal provisions, (b) unduly restricting the evidence available to him the consumer, or (c) imposing on him the consumer a burden of proof which, according to the applicable law, should lie with another party to the contract.

Part 2:

~~(a21) Paragraph 1(g) is 8 (cancellation without hindrance to terms reasonable notice) does not include a term 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 if the supplier is required to inform the other contracting party or parties thereof consumer of the cancellation immediately.~~

~~(b22) Paragraph 1(j) is without hindrance to terms under 11 (variation of contract without valid reason) does not include a term by which a supplier of financial services reserves the right to alter the rate of interest payable by or due to 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 if—~~

~~(a) the supplier is required to inform the other contracting party or parties thereof consumer of the alteration at the earliest opportunity, and that the latter are~~

~~(b) the consumer is free to dissolve the contract immediately.~~

~~(23) Paragraph 1(j) is also without hindrance to terms under which a seller or supplier Paragraphs 11 (variation of contract without valid reason), 12 (determination of characteristics of goods etc after consumer bound) and 14 (determination of price after consumer bound) do not include a term under which a trader reserves the right to alter unilaterally the conditions of a contract of indeterminate duration, provided that he if—~~

~~(a) the trader is required to inform the consumer with reasonable notice, and that~~

~~(b) the consumer is free to dissolve the contract.~~

~~(e24) Paragraphs 1(g), (j) and (k) (cancellation without reasonable notice), 11 (variation of contract without valid reason), 14 (determination of price after consumer bound) and 15 (increase in price) do not apply to:—~~

~~(a) 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 trader does not control; and~~

~~(b) contracts for the purchase or sale of foreign currency, traveller's cheques or international money orders denominated in foreign currency;~~

~~(e25) Paragraph 1(l) is without hindrance to Paragraphs 14 (determination of price after consumer bound) and 15 (increase in price) do not include a term which is a price indexation clauses, clause (where otherwise lawful), provided that if the method by which prices vary is explicitly described.~~

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