

Unfair contract terms guidance

Annexes

Guidance for the Unfair Terms in Consumer
Contracts Regulations 1999

September 2008

OFT311annexes

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A EXAMPLES OF FAIR AND UNFAIR TERMS

A.1 This annexe comprises examples of standard terms actually used by businesses in consumer contracts. It is not a list of terms that will always be found fair or unfair (see below), but it is intended to illustrate, in a practical way, how the OFT interprets the Unfair Terms in Consumer Contracts Regulations, and so help businesses to ensure their terms are fair and enforceable. The examples have been selected from cases where OFT took action under the Regulations. They include:

- terms which the OFT successfully challenged as unfair under the Regulations, and
- revised terms that businesses undertook to substitute – if any.

A.2 Examples of fair and unfair terms were published in OFT bulletins until February 2005 and can be found at www.oft.gov.uk. Individual case summaries can now be found on the Consumer Regulations Website (CRW) by going to: www.oft.gov.uk/advice_and_resources/publications/guidance/unfair-terms-consumer/

Organisation of the list

A.3 Like the main text of the Trader Guidance, this annexe is arranged on the basis of 19 main headings. The first 17 groups of terms correspond to the 17 types of unfairness listed in Schedule 2 to the Regulations. Group 18 consists of a number of terms that are unfair in ways comparable to, but not directly covered by, Schedule 2 (see the introduction of Part III above). Group 19 illustrates how the plain language requirement in Regulation 7 applies.

A.4 Some of the 19 main groups of terms are subdivided. For instance, Group 2, which relates to paragraph 1(b) of Schedule, is broken down into eight subgroups – 2(a) to 2(h). This reflects the fact that exemption and limitation clauses come in many different forms. Group 18 similarly has several subgroups. Some other subsidiary

headings are used purely for editorial purposes, and are not numbered.

- A.5 The index of types of term at the end of this publication includes references to all the headings and subheadings.

Status of the terms listed

- A.6 This annexe illustrates the Office's current view derived from enforcing the Regulations of contractual drafting that is, and is not, likely to fall foul of the Regulations. But the terms quoted in it are not included as being necessarily fair or unfair in all cases. This reflects the indicative nature of Schedule 2, which has been described as a grey rather than a black list. Only the courts can give a final ruling on what is definitely fair and unfair in any circumstances.
- A.7 In particular, the revised terms listed in this annexe are not recommended as being definitely fair. The OFT cannot 'clear' terms for the purposes of the Regulations. The terms included were all considered, on the evidence available at the time, to be sufficiently improved to require no further action. None of the revised terms is considered to breach the plain and intelligible language requirement, but (except for examples in Group 19) they are not to be regarded as necessarily illustrating best practice in terms of clarity of usage.
- A.8 Though it rarely happens in practice, a term shown as having been revised could in principle be found unfair. New complaints and other evidence can and do shed new light on the potential for unfairness of terms which formerly seemed acceptable. The assessment of 'fairness', for the purposes of the Regulations, requires consideration of all the circumstances of each individual case, and of the effect of other terms in the contract – Regulation 6(1). A form of words which is considered acceptable in one agreement is not necessarily fair in another.

A.9 Also, as noted in Part I, the OFT is not the sole authority with powers to enforce the Regulations. Measures are in place⁴⁶ aimed at ensuring co-ordination and consistency of view as between enforcement bodies. But the Qualifying Bodies are legally entitled to form their own views on what is fair and unfair, and to take action accordingly.

Editing of the terms listed

A.10 The listing of terms is highly selective. The OFT keeps a record of the wording of all terms successfully challenged, and also of revised terms introduced after challenge, but the number now runs into thousands and it would be wholly impractical to publish them all in printed form. For a summary account of all the terms challenged and revised under the Regulations, please see the case reports in the OFT's *Unfair contract terms bulletins*. To facilitate cross-reference, for each term quoted the name of the business and the number of the bulletin in which the case report was published are given.

A.11 The text of terms included has also been edited in order to help readers see more easily what the OFT considers to be fair or unfair. In particular, unnecessary wording is frequently omitted. Terms challenged by the OFT commonly contain redundant verbiage, as would be expected, since unclarity often causes or contributes to contractual unfairness. Or wording may be left out because what the supplier printed as a single term in fact deals with several issues, of which only one is relevant to any particular aspect of fairness. Where there are omissions within the text of a term quoted in this annexe, the usual symbol for ellipsis ('...') is used.

A.12 Because a single term may consist of different elements that are unfair in different ways, parts of the same term may be found quoted in different places in the listing. Conversely, wording that

⁴⁶ The co-ordination framework, partly based on voluntary concordats, is described in *Bulletin 8*, issued in December 1999.
The enforcement agencies are listed in Schedule 1 to the Regulations.

covers a single issue for the purposes of the Regulations may be, for the supplier's own reasons, broken up into different clauses or sub-clauses. In these cases, extracts from different parts of a contract may be quoted alongside one another in the listing.

A.13 Finally, the terms have also been edited to correct spelling and grammar to improve readability. In a few cases where a point might otherwise be missed, bold print is used to highlight significant wording.

Group 1: Excluding or restricting liability for death or personal injury

Schedule 2, paragraph 1, states that terms may be unfair if they have the object or effect of

- (a) excluding or limiting the legal liability of a seller or supplier in the event of the death of the consumer or personal injury to the latter resulting from the act or omission of that seller or supplier.

Original term

All Star Soccer Schools ... franchisees, their agents and their employees are not under any liability whatsoever in respect of personal injury, loss or damage howsoever caused whilst attending an All Star Soccer Schools' course.

Action taken

New term: All Star Soccer Schools franchisees, their agents and their employees are insured against loss or injury through their negligence.

Original term

The use by the Member of any of the Company's equipment or machinery or the facilities of any gymnasium owned by or occupied by the Company is entirely at the Member's own risk.

Action taken

New term: In the absence of any negligence or other breach of duty by the Company the use by the Member of any of the Company's equipment or machinery or the facilities of any gymnasium owned or occupied by the Company is entirely at the Member's own risk.

Original term

We cannot accept any responsibility for the outcome of any contacts or meetings made through us, or for the accuracy of information supplied to us by members.

Action taken

New term: Initial Approach shall be under no obligation to provide Profiles which comply with all stated requirements of age, location, smoking preferences, etc, nor can it guarantee the outcome of any contacts or meetings.

Original term

Throughout the course of treatment ... I will report any problems encountered to the clinic and make myself readily available to undergo such medical examination as shall be deemed necessary from the Physician. In the event of my failure to do this I shall fully and completely absolve the Physician and LST Clinic from all liability whatsoever.

Action taken

Term deleted.

Excessively broad general exclusions

Original term

This car wash is used entirely at owner's risk.

Action taken

Term deleted.

Original term

The company does not accept responsibility for the failure of any fire protection equipment in the event of a fire.

Action taken

Term deleted.

Original term

The Company's Information Leaflet is provided from advice received from technical and professional sources in order to assist buyers. However, it is expressly agreed that the Company provides this information without charge and the Company assumes no liability in any event whatsoever for the information given.

Action taken

Term deleted.

Original term

All conditions and warranties, express or implied, as to quality, description, fitness for purpose of the vehicle or otherwise are hereby expressly excluded and the lessor shall not be liable to the hirer or any driver or any third party for any loss howsoever caused.

Action taken

New term: You will be responsible for ... all loss or damage to the vehicle

(unless caused as a result of our negligence or our breach of this agreement) ... plus the loss of rental income incurred by us as a result.

Original term

Neither we nor our servants or agents will be under any liability in respect of defects in goods delivered or for any injury, damage or loss resulting from such defects, whatsoever and however caused and whether such injury, loss or damage be by direct or consequential means and notwithstanding that the same may be due to the negligence act or omission of ourselves, our servants or agents, and our liability under this clause shall be in lieu of any warranty or conditions implied by law as to the quality or fitness for any particular purpose of such goods.

Action taken

Term deleted.

Original term

SH Cottages ... act as agents for the cottage owners. The contract being between the owner and the guest, SH Cottages can never be held responsible for the actions of either parties or any consequences resulting there from.

Action taken

Term deleted.

Original term

Hot Air Balloon Adventures will not be responsible for injuries or consequences for passengers who are pregnant or have any physical or mental infirmity.

Action taken

New term: We are not qualified to express an opinion confirming that you are fit to fly and you must ensure that you are fit to fly. You must not fly if you are suffering from any serious medical condition, or have recently undergone surgery unless you have a certificate of your fitness to fly from

your doctor. You must not fly if you are pregnant or under the influence of alcohol or drugs.

Group 2: Excluding or restricting liability for breaches of contract

Schedule 2, paragraph 1, states that terms may be unfair if they have the object or effect of:

- (b) inappropriately excluding or limiting the legal rights of the consumer vis-à-vis the seller or supplier or another party in the event of total or partial non-performance ... by the seller or supplier of any of the contractual obligations ...

Group 2(a): Exclusion of liability for faulty or misdescribed goods

Original term

No guarantee is given as to the age, make, date of manufacture or mileage of any vehicle, these are sold strictly as seen and approved. Any age, make, date of manufacture or mileage quoted, is given without prejudice to the Seller.

Action taken

Term deleted.

Original term

Unless expressly stated in writing to be accurate no representation or warranty is given as to the accuracy of any instrument purporting to record the vehicle's mileage or any record or other statement as to such mileage.

Action taken

Term deleted.

Original term

The Seller will assume no responsibility that the Goods concerned herein are fit for any particular purpose for which they are bought other than for the purpose set forth and specified in the User manual supplied therewith.

Action taken

New term: All hardware is sold in accordance with the manufacturer's specification subject to any qualification or representation contained in the brochures, advertisements or other documentation.

Original term

All conditions and warranties whatsoever (whether expressed or implied and whether arising at common law or statute) ... are hereby excluded to the extent permitted by law.

Action taken

Term deleted.

Original term

The support provided hereunder shall be substantially as described. This warranty is exclusive and is in lieu of all other warranties and Microsoft disclaims all other warranties, express or implied, including but not limited to warranties of merchantability and fitness for a particular purpose.

Action taken

New term: Microsoft warrants that it will provide Support with reasonable care and skill, within a reasonable time, and substantially as described in this Agreement. Microsoft does not make any other promises or warranties about Support service.

