

UNFAIR TERMS IN CONSUMER CONTRACTS BILL, 2003

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Session: 2002
Bill No. 27

Hon. Perry G. Christie
or a member of government
23 January, 2003

A BILL

for

AN ACT FOR THE REGULATION OF UNFAIR TERMS
IN CONSUMER CONTRACTS AND RELATED MATTERS

Enacted by the Parliament of The Bahamas.

Short title
and com-
mencement.

1. (1) This Act may be cited as the Unfair Terms in
Consumer Contracts Act, 2003.

(2) This Act shall come operation into on such
day as the Minister may, by notice published in the
Gazette, appoint.

Interpre-
tation.

2. (1) In this Act -

"business" includes a trade or profession and the
activities of any government department or local
or public authority;

"consumer" means a natural person who, in making a
contract to which this Act applies, is acting for
purposes which are outside his business;

"court" means the Supreme Court;

"Minister" means the Minister responsible for Consumer
Protection;

"seller" means a person who sells goods and who, in
making a contract to which this Act applies, is
acting for purposes relating to his business;

"supplier" means a person who supplies goods or services and who, in making a contract to which this Act applies, is acting for purposes relating to his business.

Terms to
which this
Act applies.
First
Schedule.

3. (1) Subject to the provisions of the First Schedule, this Act applies to any term in a contract concluded between a seller or supplier and a consumer where such term has not been individually negotiated.

(2) In so far as it is in plain, intelligible language, no assessment shall be made of the fairness of any term which -

(a) defines the main subject matter of the contract, or

(b) concerns the adequacy of the price or remuneration, as against the goods or services sold or supplied.

(3) For the purposes of this Act, a term shall always be regarded as not having been individually negotiated where it has been drafted in advance and the consumer has not been able to influence the substance of the term.

(4) Notwithstanding that a specific term or certain aspects of it in a contract has been individually negotiated, this Act shall apply to the rest of a contract if an overall assessment of the contract indicates that it is a pre-formulated standard contract.

(5) It shall be for any seller or supplier who claims that a term was individually negotiated to show that it was so negotiated.

Unfair
terms.

4. (1) In this Act, subject to subsections (2) and (3), "unfair term" means any term which contrary to the requirement of good faith causes a significant imbalance in the parties' rights and obligations under the contract to the detriment of the consumer.

(2) An assessment of the unfair nature of a term shall be made taking into account the nature of the goods or services for which the contract was concluded and referring, as at the time of the conclusion of the contract, to all 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.

(3) In determining whether a term satisfies the requirement of good faith, regard shall be had in particular to the matters specified in the Second Schedule.

Second
Schedule.

(4) The Third Schedule contains an indicative and non-exhaustive list of the terms which may be regarded as unfair.

Third
Schedule.

Consequence
of inclusion
of unfair
terms in
contracts.

5. (1) An unfair term in a contract concluded with a consumer by a seller or supplier shall not be binding on the consumer.

(2) The contract shall continue to bind the parties if it is capable of continuing in existence without the unfair term.

Construc-
tion of
written
contracts.

6. A seller or supplier shall ensure that any written term of a contract is expressed in plain, intelligible language, and if there is doubt about the meaning of a written term, the interpretation most favourable to the consumer shall prevail.

Prevention
of con-
tinued
use of
unfair
terms.

7. (1) The Minister may consider any complaint made to him that any contract term drawn up for general use is unfair, unless the complaint appears to the Minister to be frivolous or vexatious.

(2) If having considered a complaint about any contract term pursuant to paragraph (1) the Minister considers that the contract term is unfair he may, if he considers it appropriate to do so, refer the matter to the Attorney-General to bring proceedings for an injunction (in which proceedings

the Attorney-General may also apply for an interlocutory injunction) against any person appearing to him to be using or recommending use of such a term in contracts concluded with consumers.

(3) The Minister may, if he considers it appropriate to do so, have regard to any undertakings given to him by or on behalf of any person as to the continued use of such a term in contracts concluded with consumers.

(4) The Minister shall give reasons for his decision to apply or not to apply, as the case may be, for an injunction in relation to any complaint which this Act require him to consider.

(5) The court may, on an application by the Attorney-General grant an injunction on such terms as it thinks fit.

(6) An injunction may relate not only to use of a particular contract term drawn up for general use but to any similar term, or a term having like effect, used or recommended for use by any party to the proceedings.

(7) The Minister may arrange for the dissemination in such form and manner as he considers appropriate of such information and advice concerning the operation of this Act as may appear to him to be expedient to give to the public and to all persons likely to be affected by this Act.

Application.

8. This Act shall apply to contracts entered into before, on or after this Act comes into operation.

**Contracts and Particular Terms Excluded
from the Scope of this Act**

This Act does not apply to -

- (a) any contract relating to employment;
- (b) any contract relating to succession rights;
- (c) any contract relating to rights under family law;
- (d) any contract relating to the incorporation and organisation of companies or partnerships;
- (e) any term incorporated in order to comply with or which reflects -
 - (i) statutory or regulatory provisions of The Bahamas; or
 - (ii) the provisions or principles of international conventions to which The Bahamas is party.

SECOND SCHEDULE

(Section 4 (3))

Assessment of Good Faith

In making an assessment of good faith, regard shall be had in particular to -

- (a) the strength of the bargaining positions of the parties;
- (b) whether the consumer had an inducement to agree to the term;
- (c) whether the goods or services were sold or supplied to the special order of the consumer; and
- (d) the extent to which the seller or supplier has dealt fairly and equitably with the consumer.

THIRD SCHEDULE

(Section 4 (4))

**Indicative and Illustrative List of Terms
which may be Regarded as Unfair**

1. Terms which 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 a consumer or personal injury to the latter resulting from an act or omission of that seller or supplier;
 - (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 or inadequate performance by the seller or supplier of any of the contractual obligations, including the option of offsetting a debt owed to the seller or supplier against any claim which the consumer may have against him;
 - (c) making an agreement binding on the consumer whereas provision of services by the seller or supplier is subject to a condition whose realisation depends on his own will alone;
 - (d) permitting the seller or supplier to retain sums paid by the consumer where the latter 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 where the latter is the party cancelling the contract;
 - (e) requiring any consumer who fails to fulfil his obligation to pay a disproportionately high sum in compensation;
 - (f) authorising the seller or supplier to dissolve the contract on a discretionary basis where the same

facility is not granted to the consumer, or permitting the seller or supplier to retain the sums paid for services not yet supplied by him where it is the seller or supplier himself who dissolves the contract;

- (g) enabling the seller or supplier to terminate a contract of indeterminate duration without reasonable notice except where there are serious grounds for doing so;
- (h) automatically extending a contract of fixed duration where the consumer does not indicate otherwise, when the deadline fixed for the consumer to express this desire not to extend the contract is unreasonably early;
- (i) irrevocably binding the consumer to terms with which he had no real opportunity of becoming acquainted before the conclusion of the contract;
- (j) enabling the seller or supplier to alter the terms of the contract unilaterally without a valid reason which is specified in the contract;
- (k) enabling the seller or supplier to alter unilaterally without a valid reason any characteristics of the product or service to be provided;
- (l) 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 price 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;
- (m) giving the seller or supplier the right to determine whether the goods or services supplied are in

conformity with the contract, or giving him the exclusive right to interpret any term of the contract;

- (n) limiting the seller's or supplier's obligation to respect commitments undertaken by his agents or making his commitments subject to compliance with a particular formality;
- (o) obliging the consumer to fulfil all his obligations where the seller or supplier does not perform his;
- (p) giving the seller or supplier the possibility of transferring his rights and obligations under the contract, where this may serve to reduce the guarantees for the consumer, without the latter's agreement;
- (q) excluding or hindering the consumer's right to take legal action or exercise any other legal remedy, particularly by requiring the consumer to take disputes exclusively to arbitration not covered by legal provisions, unduly restricting the evidence available to him or imposing on him a burden of proof which, according to the applicable law, should lie with another party to the contract.

2. Scope of sub-paragraphs (g), (j) and (l) of paragraph 1.

- (a) Sub-paragraph (g) is without hindrance to terms 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 the supplier is required to inform the other contracting party or parties thereof immediately.
- (b) Sub-paragraph (j) is without hindrance to terms under which a supplier of financial services reserves the right to alter the rate of interest

payable by 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 the supplier is required to inform the other contracting party or parties thereof at the earliest opportunity and that the latter are free to dissolve the contract immediately.

Sub-paragraph (j) is also without hindrance to terms under which a seller or supplier reserves the right to alter unilaterally the conditions of a contract of indeterminate duration, provided that he is required to inform the consumer with reasonable notice and that the consumer is free to dissolve the contract.

- (c) Sub-paragraphs (g), (j) and (l) do not apply to -
 - (i) 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 does not control; and
 - (ii) contracts for the purchase or sale of foreign currency, traveller's cheques or international money orders denominated in foreign currency.
- (d) Sub-paragraph (l) is without hindrance to price indexation clauses, where lawful, provided that the method by which prices vary is explicitly described.

OBJECTS AND REASONS

This Bill seeks to update the laws relative to consumer protection in relation to the supply of goods and services. The Bill takes into account international standards of fundamental principles for consumer protection existing in other leading markets.

Clause 1 contains the short title and commencement provisions.

Clause 2 defines terms used in the Act.

Clause 3 provides the scope of the Act.

Clause 4 provides for those terms which may be regarded as unfair.

Clause 5 addresses the consequences of inclusion of unfair terms in a contract.

Clause 6 gives direction on the construction of written contracts.

Clause 7 makes provision for the procedure to be followed by the Minister of Consumer Affairs to prevent the continued use of unfair terms.

Clause 8 applies the provisions of the Bill to contracts entered into before as well as after the Act comes into force.