

UNFAIR TERMS IN CONSUMER CONTRACTS - THE MALTESE PERSPECTIVE

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A LAW ON UNFAIR TERMS – AN OVERDUE MEASURE

The need to have a law dealing expressly with the use of unfair terms in trader – consumer contracts has been on the cards for quite some years. The Maltese Government had discussed the need for such a law in a White Paper² entitled “Rights for the Consumer” it published in 1991. The priority logically then was to have in place a functional administrative set-up to regulate consumer affairs³. This indeed was the main focus of the Consumer Affairs Act enacted in 1994. Among other things the Act provided for the powers of the Director of Consumer Affairs, for the establishment of the Consumer Affairs Council and of the Consumer Claims Tribunal and for the regulation of the role of consumer associations. This Act also empowered the Minister responsible for consumer affairs, after consulting the Consumer Affairs Council, to make regulations to “...provide for the consequences, including the right to rescind sales and contracts for the provision of services, and the nullity of particular clauses in contracts of sale or hire...”⁴.

In recent years the present administration in line with its policy of full membership within the European Union, has embarked upon a programme to enact the necessary laws to implement the various EU directives on consumer protection including the EU Council Directive on unfair terms⁵. In doing so the legislator has not limited himself to simply implementing the relevant EU directives, but have also tried to address certain consumer issues which even if not dealt with under any specific directives, are of concern in a local context. Two areas come to mind – consumer redress⁶ and the so-called pyramid or get-rich-quick schemes⁷.

In enacting the necessary legislation to implement the Unfair Terms Directive the legislator had various options. In the first instance the legislator could do so either by

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² This White Paper was published in August 1991. In this paper Government made a comprehensive appraisal of the laws which then existed relating to consumer protection. In doing so Government made various proposals for new laws on different issues relating to consumer affairs, including notably the use of unfair terms.

³ Until 1992 there was no government expressly responsible for consumer affairs.

⁴ See former art. 7(2) of the Consumer Affairs Act, 1994. This article was substituted by a new article establishing new and more wide ranging powers to make regulations on, among other things distance selling, consumer credit and price information.

⁵ Council Directive 93/13/EEC of the 5th April 1993 entitled “on unfair terms in consumer contracts”.

⁶ The establishment of the Consumer Claims Tribunal under the 1994 Act as an alternative means of redress has on the whole proved to be an effective means of resolving consumer versus trader disputes.

⁷ See Consumer Affairs Act, art.50.

primary legislation or by regulation in virtue of the powers granted to the Minister under article 7(2) of the Consumer Affairs Act⁸. In implementing the Directive by primary legislation the legislator could do so by:

- amending the Civil Code, or
- enacting an ad hoc law on unfair terms, or
- including specific provisions as part of a series of comprehensive amendments to the Consumer Affairs Act.

The legislator chose the last option and in October 2000 Parliament approved various amendments to the Consumer Affairs Act, including a new Part entitled “Unfair Practices” which Part⁹ also regulates the use of unfair terms in consumer contracts. This approach makes sense on various counts. In the first instance that the legislator chose to regulate the use of unfair terms by primary legislation, demonstrates the level of importance that this law has. The various articles regulating the use of unfair terms are not simply norms of technical detail but must be considered as norms introducing novel principles in the Maltese legal system, notably the assessment of the fairness of terms in trader and consumer transactions and the validity of such terms at law. It is only logical and appropriate that such principles should be enshrined as part of the principal law ensuring that if any change is contemplated this must be discussed and approved by Parliament.

That the legislator chose to incorporate these norms as part of a fairly comprehensive consumer code also makes sense. In the short history of consumer legislation in Malta one evident shortcoming was the disjointed fashion in which various consumer protection related laws were being enacted, with specific issues initially being addressed by ad hoc legislation¹⁰ with no apparent link between the various laws. Conversely a consumer code which is periodically updated, has the merit of providing some uniformity with regard to the interpretation of the law and the measures used to curb malpractices, whilst providing a clear focal point for consumer legislation in the form of a code on consumer law.

It is pertinent to note that there is a general political consensus with regard to the amendments made in October 2000 to the Consumer Affairs Act of 1994¹¹. This abodes well for future measures in consumer affairs. If anything the criticism leveled at Government was that it should not limit itself to the enactment of laws simply to implement the various EU consumer policy directives¹², but should look beyond the

⁸ A difficulty that possibly would have arisen had Government decided to make regulations as result of the powers granted to the Minister under article 7(2), was whether this article was phrased in terms broad enough as to enable the Minister to regulate unfair terms comprehensively in line with the requirements of the Directive.

⁹ See Consumer Affairs Act, articles 44 to 47.

¹⁰ Hence in 1981 the Consumer Protection Act was enacted expressly to protect consumer associations when making public statements. Subsequently in 1986 and 1987 two laws were enacted to deal with false or misleading trade descriptions and door-to-door sales.

¹¹ Indeed there was political consensus on all the amendments to the Consumer Affairs Act of 1994.

¹² Most of the EU consumer related directives including that on unfair terms are minimum directives, which means that EU member States can go beyond the minimum stated in the Directives provided the variations give more protection to the consumers.

minimum measures required by the EU with a view to introducing beneficial measures for consumers in Malta. The principal difference between the two main political parties would appear to focus more on the structure of the public agency responsible for regulating consumer affairs, with the present administration opting for a ‘normal’ government departmental set-up¹³ whereas the opposition would appear to prefer an autonomous agency¹⁴.

PREPARING TO DEAL WITH THE LAW ON THE USE OF UNFAIR TERMS?

Even on a non-political front the overall reaction to the amendments to the Consumer Affairs Act introduced in October 2000 was positive, with the Consumer Affairs Council, the Consumer Association and the private sector welcoming these amendments as a step in the right direction. More specifically however the comments from the private sector with regard to the articles on unfair terms included with these amendments have been rather muted, with the various business lobby groups focusing their attention on the legislative measures introduced on product liability¹⁵ and product safety¹⁶. This is some concern. Whilst there is no doubt that the new laws on product liability and product safety are important, the law on unfair terms is if not more important at least equally so¹⁷.

Little attention seems to have been given to the fact that traders – and these includes 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. Lack of adequate preparation may be conducive to a last minute panic stations scenario with many traders caught on a wrong footing and claiming that they were not aware of the implications of the new law on unfair terms, possibly pressing Government for more time to adjust themselves to their new obligations at law.

THE PROPOSALS IN 1991 WHITE PAPER

One of the proposals in the White Paper¹⁸ “Rights for the Consumer” published by the Maltese Government in 1991 was the need to tackle the use of unfair terms in contracts

¹³ Earlier this year the Department of Consumer Affairs and the Office of Fair Competition were merged into one office called the Consumer and Competition Division.

¹⁴ A few weeks prior to the 1998 general elections the Labour Party then in government had circulated among the constituted bodies a draft law proposing the establishment of a consumer and competition authority.

¹⁵ See Consumer Affairs Act, Part VII. This Part has not at the time of writing come into force.

¹⁶ Product Safety was dealt with under a separate law – the Product Safety Act, 2001 – which Act came into force on the 1st March 2001.

¹⁷ The same applies with regard to Part VIII entitled “Sale of goods to consumers” which was enacted concurrently with the amendments implementing the unfair terms directives. Part VIII of a particular importance as it substantially changes the rights and remedies that consumers have when buying a product whilst regulating the content of voluntary guarantees.

¹⁸ The White Paper was published in August 1991. In this White Paper Government undertook a comprehensive review of the relevant laws then existing which related to consumer protection whilst suggesting a regulatory set-up and new laws on different issues of concern to consumers.

made between traders and consumers. The White Paper suggested that this issue be dealt with at two different levels:

- That the Civil Code be amended to stipulate that certain “unfair contract terms unduly detrimental to a consumer’s legitimate interest”¹⁹ be considered as null and without effect at law. In this context it was proposed that the Code would define clearly the type of terms covered by such a provision.
- That the Consumer Protection Council²⁰ would be empowered to prohibit the use of standard contracts deemed unfair and unduly detrimental to the consumer’s legitimate interests²¹.

It is interesting to note that while Government did in the White Paper advocate the importance of having a consumer code²², yet in the case of unfair terms Government preferred that the measures (at least in part) relating to the regulation of such terms be included as amendments to the Civil Code rather than as part of a consumer code of laws. Including measures to curb unfair terms in the Civil Code would have led to certain practical difficulties. The legislator would have been confronted with the dilemma of introducing measures to protect only consumers²³ in a law in where the concept of the consumer is unknown. Moreover it is not clear how the enforcement measures envisaged for the Consumer Protection Council would have been implemented. Logically these would have had to be included in the law setting up the Council which then would have meant some cross reference to the measures on unfair terms implemented under the Civil Code.

It is relevant to note that these proposals were made at a time when the EU itself had not as yet enacted the Directive on unfair terms²⁴. The legislative measures on unfair terms enacted in October 2000 had the advantage of being based on a Directive which had been in place for seven years and of referring to the experience of various EU Member States which had after 1993 enacted laws to implement the Directive. Therefore the delay in enacting a law on unfair terms had at least the side benefit that the Maltese legislator could learn from the experience of other countries which had already implemented the Directive, thereby avoiding some pitfalls in the process.

THE 2000 AMENDMENTS TO THE CONSUMER AFFAIRS ACT

In Maltese law the provisions dealing with the regulation of unfair terms are not limited to Part VI of the Consumer Affairs Act. In addition to the articles introduced in October 2000 as a result of the amendments to the Consumer Affairs Act, there are some isolated

¹⁹ “Rights of the Consumer” White Paper 1991 at para. 91.

²⁰ The White Paper proposed the establishment of a “Consumer Protection Council” composed of government officials and consumers, which Council would have executive powers to curb unfair practices.

²¹ White paper 1991 at para. 91

²² Ibid. para 144 et seq.

²³ In this context a valid point raised by certain sectors of the business community is that the protection given to consumers under the unfair terms provisions should not also be extended to small business.

²⁴ The internal debate within the EU on unfair terms was a fairly protracted one stretching quite some years.

instances in other laws prohibiting the use of unfair terms. These latter provisions are intended to curb the use of unfair terms within a particular sector and go no further than that. Conversely the provisions under Part VI of the Consumer Affairs Act regulate the use of unfair terms generally, providing a definition as to what constitutes an unfair term and establishing the criteria to be taken into account in assessing whether a term is unfair or not. The only limitation as to the applicability of these provisions is that they apply only to terms or conditions in trader and consumer contracts and are therefore not applicable for other type of contracts were for example both contracting parties are traders.

The principal articles of Part VI of the Consumer Affairs Act dealing with unfair terms are articles 44 to 47. In addition however these are complimented by other provisions of the Act of direct relevance to the regulation of unfair terms namely:

- the definitions of “consumer” and “trader” under the Act once articles 44 to 47 deal solely with consumer contracts offered by a trader to a consumer and therefore it is imperative that there is a clear understanding as to who are the “consumer” and the “trader” under the Consumer Affairs Act; and
- Part IX on Compliance Orders establishing the main enforcement tools to curb the use of such terms²⁵.

WHO ARE THE “CONSUMER” AND THE “TRADER” UNDER THE CONSUMER AFFAIRS ACT

The 2000 Amendments to the Consumer Affairs Act revised substantially the definitions of “consumer” and “trader”. The Consumer Affairs Act as enacted in 1994 defined a “consumer” as being “any individual who not in the course of a business, trade or profession, buys or hires goods from a trader or engages the services of a trader for a fee or reward”²⁶. This definition was criticized as being too narrow. On the one hand the business community argued that the definition of a “consumer” should be extended to all end users to include persons in business who buy or hire products or services for the needs of their business. On the other hand the consumer lobby advocated that the definition of a “consumer” be rephrased to cater for situations where the consumer needed to be protected even if he is not buying or hiring goods or services. Hence for example the former definition of “consumer” did not necessarily protect a consumer who during the pre-contractual stage was on the receiving end of hard sell techniques or similar malpractices. In this respect the former definition of a “consumer” was clearly deficient.

The definition of a “consumer” introduced under the 2000 Amendments rectifies the shortcomings of the former definition. The new definition²⁷ considers as a “consumer” any individual who in transactions and other matters covered by consumer legislation “is

²⁵ The Consumer Affairs Act also establishes other tools that can be used to curb the use of such terms, including the use of public warning statements under art.8 of the Act.

²⁶ See Consumer Affairs Act, 1994 art.2. This definition has now been amended following the amendments made to the Act last October.

²⁷ See Consumer Affairs Act, art. 2.

acting for purposes which are not related to his trade, business, craft or profession". The new definition is in part similar to that adopted in various EU consumer policy directives²⁸. Rather than stating who the consumer is, thereby limiting the protection and remedies available to those consumers who buys or hires goods or services, the new definition states that a "consumer" is any individual who is not acting for purposes relating to his business, craft, trade or profession.

Significantly the new definition of "consumer" has also been extended to include any individual who though not the immediate purchaser or beneficiary, have been authorised by the consumer to use or benefit from the goods or services provided to the consumer by the trader. Furthermore the Minister responsible for consumer affairs after consulting the Consumer Affairs Council, is empowered to designate as "consumers" any other class or category of persons. This leaves the door open for the Minister to extend the definition of a "consumer" even to certain end-users who are not traditionally considered to be consumers such as traders who purchase products they need in the course of their business.

The definition of "trader" has also been substantially revised²⁹. Under the former definition "trader" included any person who in the course of a trade or business³⁰ sold or hired, or offered to sell or hire goods or services to consumers. The former definition of "trader" however did not automatically include public owned or public controlled commercial entities. It was only the Prime Minister who could by notice in the Government Gazette, designate which government department, public corporation, authority or organisation providing goods or services for a fee, should be considered as a "trader" for the purposes of the Consumer Affairs Act³¹. This meant that the Prime Minister had the discretion of deciding if and when the Consumer Affairs Act would apply to public owned commercial entities, giving such entities a substantial advantage over their rivals in the private commercial sector.

The new definition of a "trader" makes no exception for public owned or public controlled entities³². A "trader" is defined as being "any person, including any body corporate or incorporate who in relation to any transactions or other matters covered by this Act or regulations made thereunder is acting for purposes relating to his trade, business, craft or profession". One other notable difference from the former definition is that "trader" now includes also the professions and therefore claims under the Consumer Affairs Act can now also be filed against members of the different professions such as

²⁸ This is similar to the definition under the European Union Council Directive 93/13/EEC on unfair terms. Art.2(b) of the Directive defines a "consumer" as "any natural person who, in contracts covered by this Directive, is acting for purposes which are outside his trade, business or profession".

²⁹ See Consumer Affairs Act, art.2.

³⁰ The former definition made no reference to those who exercised a profession. The reasoning then was that each profession was regulated by a specific law and therefore should be exempt from the applicability of the Consumer Affairs Act.

³¹ In 1997 the Prime Minister did in fact designate the then principal utilities as being "traders" for the purposes of the Consumer Affairs Act.

³² See Consumer Affairs Act, art.2 as amended.

lawyers, accountants, medical practitioners and architects with regard to any service rendered in the exercise of their respective professions³³.

THE MEASURES AVAILABLE IF AN UNFAIR TERM IS USED

The Consumer Affairs Act provides various measures to effectively curb the use of an unfair term in a consumer contract. These measures range from provisions nullifying the effect of any terms deemed to be unfair to the tools by virtue of which the Director of Consumer Affairs may require the deletion or amendment of such terms.

Article 44(1) of the Act states that it is “...unlawful in consumer contracts to use unfair terms, or terms or combination of terms which are unfair in that they have as an object or effect any of the objects and effects referred to in subarticle (2) hereof and any term prohibited as aforesaid inserted in any consumer contract shall be deemed never to have been so inserted.”³⁴.

This means that if an unfair term is included in a consumer contract then that term will be considered as not having been inserted in the contract. In this context article 46 of the Act further states that if a consumer contract includes a prohibited or unfair term then the contract will not be binding on the consumer “unless the contract is capable of continuing in existence without the unfair term.” Effectively therefore a trader will not be able to enforce against the consumer a term or condition deemed to be unfair and the contract if it is able to stand without the unfair term, will continue to be operative.

The Act does not limit itself to rendering null and void, terms deemed to be unfair, but significantly also empowers the Director of Consumer Affairs to issue orders to curb the use of such terms. Article 94(1) of the Act provides that the Director may, of his own initiative or on a written application by a qualifying body³⁵, issue a compliance order -

- “(a) on any person requiring:
 - (i) the deletion or alternation of terms in a consumer contract which the Director considers to be unfair to consumers in accordance with the provisions of Part VI of this Act; and

³³ The fact that under the previous definition of “trader” professions were not included, raised some doubts as to whether claims before the Tribunal could be made against members of the professions.

³⁴ Art.44(2) is a so-called black list of terms considered to be unfair.

³⁵ Art.2 of the Act defines a “qualifying body” as being a registered consumer association and “any other body whether constituted in Malta or otherwise as the Minister may, after consulting the Council, designate by notice in the Gazette.”

(ii) the incorporation of terms in a consumer contract which the Director considers to be necessary for the better information of consumers, or for preventing a significant imbalance between the rights and obligations of the parties, and this to the benefit of consumers;”³⁶.

The Director when issuing a compliance order³⁷ must serve a copy of the order on each person against whom the order is made, stating briefly the reasons for the issue of the order³⁸. A person against whom an order has been made, has 15 days from the notification of the order on him, in which to contest the order by initiating proceedings for the revocation of the order before the Court of Magistrates in its civil jurisdiction. In such an instance the court may confirm, change or cancel the compliance order on any terms or conditions it considers appropriate. However such proceedings may only be commenced:

- on a material point of law; or
- if the making of the compliance order is grossly unreasonable or unjustified³⁹.

It is relevant to note that a compliance order comes into force with immediate effect unless the order is contested before the Court, in which case the order will be stayed pending the outcome of the court proceedings. This notwithstanding, the Director if he “considers it appropriate or necessary in the public interest”⁴⁰ may request the Court to issue an “interim compliance order” ordering that the compliance order continue in force pending the final outcome of the court proceedings. In doing so the Court may order those modifications to the order as it may deem appropriate⁴¹. Article 106 of the Act provides that if a person does not comply with a compliance order, he will be guilty of an offence and liable to a fine of not less than Lm100⁴² and not more than Lm10,000. The Court may furthermore inflict a fine of not more than Lm50 for each day of non-compliance with the order.

These measures though inspired by EU Directive on injunctions⁴³, go much further than the norms stated in that Directive⁴⁴. Article 2 paragraph 1(a) of the Directive requires that Member States designate the courts or administrative authorities competent to rule on

³⁶ See Consumer Affairs Act, art.94(1)(a). At the time of writing this paragraph has not come into force. The provision is directly tied to articles 44 to 47 dealing with unfair terms and will come into force concurrently with these provisions.

³⁷ This irrespective of whether the order is issued by the Director of his own initiative or after an application by a qualifying body.

³⁸ Such reasons must also be notified to the person against whom the order has been issued. See Consumer Affairs Act, art.94(2)(c).

³⁹ Ibid. art.97(1).

⁴⁰ Ibid. art.97(3).

⁴¹ Ibid. art.97(3).

⁴² One Maltese Lira is circa 2.3 US Dollars.

⁴³ Directive 98/27/EC of the European Parliament and of the Council of the 19th May 1998 on injunctions for the protection of consumers’ interest.

⁴⁴ The Injunctions Directive is a minimum directive. Art. 7 of the Directive states that Member States are not prevented from adopting provisions designed to grant qualified entities more extensive rights to bring action at a national level.

proceedings commenced by qualified entities⁴⁵ seeking an order “...requiring the cessation or prohibition of any infringement”. The Directive defines an “infringement” as being any act contrary to the Directives listed in the Annex to the Directive. Listed among these directives is that on unfair terms.

The principal difference between the measures provided for under the Injunctions Directive and those under article 94(1)(a) of the Consumer Affairs Act is that whereas under the Directive a Member State is only required to have in place a mechanism requiring the cessation or prohibition of an unfair term, under the Maltese law the Director may also require the “incorporation” of terms “for the better information of consumers, or for preventing a significant imbalance between the rights and obligations of the parties”⁴⁶. The role of the Director therefore is a pro-active one in that he can actually require the inclusion of terms to rectify any significant imbalance that adversely affects consumers.

This of course is a tool to be used with caution and only in extreme cases where circumstances dictate such an intervention. It will be interesting to see how and to what extent this tool will be used. Though the possibilities appear to be quite far reaching, there are practical considerations to be taken into account such as the time-consuming proceedings that may forestall the effectiveness of this tool. The obvious question is to query to the extent and in what circumstances would the Director be justified in requiring the inclusion of other terms devised by him to protect the consumer’s interest. The exercise of such a role by the Director can be viewed from different angles. On the one hand one may ask whether the intervention by the Director to require the inclusion of a term is not in breach of the contractual freedom of the parties – in this case the trader and the consumer. On the other hand the inclusion of additional terms required by the Director may be seen as a means of saving the contract whilst ensuring that the interests of the consumer are adequately safeguarded.

Other jurisdictions have limited themselves to implementing the EU directive on the use of unfair terms. Hence in the United Kingdom the Director General of Fair Trading may under the Unfair Terms in Consumer Contracts Regulations⁴⁷, apply for an injunction against any person appearing to the Director General to be using or recommending the use of an unfair term for general use in consumer contracts. The court⁴⁸ may then grant the injunction on such terms as it thinks fit⁴⁹.

⁴⁵ Art.3 of the Injunctions Directive defines such an entity as “any body or organisation which, being properly constituted according to the law of a Member State, has a legitimate interest in ensuring that the provisions referred to in Article 1 are complied with...”. Article 1 requires Member States to have laws on actions for an injunction to protect the collective interests of consumers.

⁴⁶ See Consumer Affairs Act, art.94(1)(a)(ii).

⁴⁷ UK – The Unfair Terms in Consumer Contracts Regulations 1999 which also repealed the previous 1994 regulations on unfair terms.

⁴⁸ In England and Wales the Court would be either a county court or the High Court, and in Scotland the Sheriff or the Court of Session.

⁴⁹ Qualifying bodies as defined in the UK Unfair Terms Regulations may also apply for an injunction.

The position is quite similar in Sweden even if the procedure and the regulatory set-up is different from that in the United Kingdom. The Swedish Consumer Contract Terms Act provides that the Consumer Ombudsman⁵⁰ may apply to the Market Court⁵¹ for a prohibition order. In cases which are not of major importance⁵² the Consumer Ombudsman may provisionally issue a prohibition order which if approved applies as if it is an order issued by the Market Court.

WHAT IS AN UNFAIR TERM?

Article 45(1) of the Consumer Affairs Act defines an unfair term as a term in a consumer contract which either on its own or in conjunction with one or more other terms:

- Creates a significant imbalance between the rights and obligations of the parties to the contract (that is the trader and the consumer) to the detriment of the consumer; or
- Causes the performance of the contract to be unduly detrimental to the consumer; or
- Causes the performance of the contract to be significantly different from what the consumer could reasonably expect; or
- Is incompatible with the requirements of good faith.

If one or more of these circumstances does arise, then the term in the consumer contract is considered as being unfair and therefore invalid. The *raison d'être* of this provision is obvious, namely to provide a comprehensive definition to cater for all those possible instances whereby the legitimate interests of the consumer may be unfairly prejudiced as a result of the inclusion in the contract of an unfair term.

Furthermore in order to determine if a term is unfair, article 45(2) lists various factors which must be taken into account namely:

- The nature of the goods or services being provided for under the contract;
- The time when the contract was concluded;
- All the circumstances attending the conclusion of the contract and all the other terms of the contract or of another contract on which the contract is dependent. These circumstances may include –
 - ◆ The bargaining power of the parties⁵³;
 - ◆ Whether a consumer was subjected to undue pressure⁵⁴; and
 - ◆ Whether the lack of knowledge or skill of a consumer was improperly taken advantage of⁵⁵.

⁵⁰ If the Consumer Ombudsman decides in a particular case not to apply then the application may be made by a consumer associations or other interested bodies.

⁵¹ The Market Court is a special tribunal which deals with among other matters, issues arising under consumer law.

⁵² See Consumer Contracts Terms Act, section 7.

⁵³ On the one hand we may have a large company backed by in-house lawyers who may have drafted the terms in advance and on the other hand an individual who perhaps on the spur of the moment is persuaded to sign on the dotted line with no chance of reflection or of influencing the content of the contract.

⁵⁴ The high pressure tactics used by certain categories of salespersons – such as in doorstep selling or timeshare are examples.

⁵⁵ For example whether the consumer was an inexperienced youngster.

To complement the definition of an unfair term article 44(2) of the Act establishes a black list of terms considered unfair. Therefore in establishing what an unfair term is the Act provides both a general definition and a checklist of terms which the Act considers as unfair. Article 44(3) further enables the Minister after having consulted the Consumer Affairs Council to amend, substitute or revoke any of the terms listed in article 44(2).

The black list of terms may be divided into three main categories namely:

- ◆ Terms which exclude or limit a trader's liability to a consumer or conversely which exclude or limit the rights of a consumer. Article 44(2)(a) provides a classical example of such a term in listing as unfair those terms whereby the liability of a trader is excluded or limited because of the trader's own fraud or negligence or that of his own employees or agents⁵⁶.
- ◆ Terms that place a disproportionate burden on the consumer. Article 44(2) lists quite of a few of these terms. Paragraph (i) for example prohibits terms that limit the means of proof that a consumer can use, whereas paragraph (j) prohibits terms whereby the consumer waives any ground of claim against the trader in case of a dispute.
- ◆ Terms that give a trader an unlimited 'right' to vary the conditions agreed to in the contract. Paragraph (n) provides for one of the more blatant terms falling under this category namely a term which enables the trader to alter the clauses of a contract unilaterally, without a valid reason which is specified in the contract⁵⁷.

The relevant articles on unfair terms in the Consumer Affairs Act differentiate from the EU unfair terms Directive on two counts. In the first instance article 44 establishes a black list of terms that are considered as unfair. This is in contrast to the grey list of indicative terms in the Annex to the Directive. Hence whereas the Directive lists those terms that may possibly be considered as being unfair, article 45(2) of Act goes much further and expressly prohibits the use of the terms stated therein.

However even more far-reaching is that article 45 of the Act in defining what constitutes an unfair term does away with the exclusion from the applicability of the provisions of the Directive with regard to those terms which have been individually negotiated with the consumer. The approach taken by the Maltese legislator is to simply to determine what is an unfair term, this irrespective of whether any individual negotiations may have been undertaken between the trader and consumer. The reason for this approach was to avoid disputes as to whether individual negotiation took place or not. It was felt that a different approach would leave room for certain traders to argue that the norms of unfair terms do not apply to them. Though the Directive does place the burden of proof on the trader in establishing that a term has been individually negotiated with the consumer, the need remains even in such instances to protect certain categories of inarticulate consumers from the inclusion of unfair terms in contracts they are party to. In many instances there

⁵⁶ Other instances include paragraph (c) which prohibits terms that exclude or limit the legal rights of a consumer against a trader in the event of total or partial non-performance by the trader of his contractual obligations.

⁵⁷ Similarly paragraph (x) prohibits a term which permits the trader to establish or alter unilaterally the period for delivering goods or supplying services.

is an inequality of skills and lack of knowledge that ultimately favours the trader. It is with this in mind that the legislator has opted to go beyond the minimum measures established in the Directive.

THE USE OF PLAIN AND INTELLIGIBLE LANGUAGE

Article 47(1) of the Act introduces a long overdue measure in Maltese law namely the requirement that the terms in any consumer contract are “... written in plain and intelligible language which can be understood by the consumer to whom the contract is directed.”. It is important to emphasize the qualification in this provision. Not only must the terms in a consumer contract be written in plain and intelligible language, but the terms must be written in such a manner that they can be understood by the consumer to whom the contract is being directed. Article 47(2) further provides that if a term is ambivalent or if there is any doubt as to its meaning, then the interpretation most favourable to the consumer shall prevail.

The use of plain language in consumer contracts, indeed in all types of contracts, has been an issue for quite some years. I have come across contracts that when read time and again still remain unintelligible. Some jurisdictions notably some of the Canadian provinces such as Alberta have over the years taken some interesting initiatives in promoting the use of plain language even going to the extent of drafting a law in plain language⁵⁸. In the United Kingdom there is even an organization – Clarity - that actively promotes the use of plain language.

OTHER POINTS TO BEAR IN MIND

There certain points that should be taken note of in the context of the provisions in the Consumer Affairs Act relating to the use of unfair terms in consumer contracts:

- ◆ An evident lacuna is that the provisions on unfair terms do not establish any norms with regard to the use of small print. Such factors as the size of the words, the colour background on which the words are written should be considered as relevant circumstances in assessing whether the trader is in good faith. I remember one particular instance where the consumer was handed a contract written in black type, in Italian⁵⁹ and over a purple background with the evident result that he had considerable difficulty in reading (let alone understanding) the terms and conditions of the contract.
- ◆ Articles 44 to 47 apply only to those contracts concluded or executed after the coming into force of these articles. Therefore the articles will not apply to contracts which pre-date the coming into force of these articles.

⁵⁸ One of the best examples of such an initiative is the Financial Consumers Act enacted by the Province of Alberta in 1990.

⁵⁹ Most many Maltese comprehend to some extent spoken Italian though not that many are familiar with written Italian and certainly not with the contractual Italian.

- ◆ In contrast to the rest of the provisions under the Consumer Affairs Act, the term “goods” in Part VI – and therefore in relation to articles 44 to 47 – also includes immovable property.

THE REGULATION OF UNFAIR TERMS OTHER THAN UNDER PART VI OF THE CONSUMER AFFAIRS ACT

Apart from the 2000 Amendments to the Consumer Affairs Act the Maltese legislator has introduced norms to curb the use of unfair terms within the context of specific areas, without however dealing with the issue in a comprehensive manner. The main thrust of these provisions is to protect the consumer as it were from himself, by ensuring that the consumer is not prejudiced by any contractual renunciation he may unwittingly make to his rights at law.

The Consumer Affairs Act of 1994 itself provides an example. Article 24(2) of the Act provides that it shall not be lawful for the trader and the consumer to agree to a term which effectively derogates from the right of the consumer to seek redress before the Consumer Claims Tribunal.

More recently the 2000 Amendments to the Consumer Affairs Act introduced another specific provision aimed at safeguarding the rights of consumers. Article 85 of the Act states that any commercial guarantee granted to a consumer may not in any way exclude or limit the rights that the consumer has under the Act or any other law. Any clause providing for such an exclusion is considered as null and ineffective.

Article 30 of the **Telecommunications (Regulation) Act**⁶⁰ provides that:

“A term or condition for the provision of a telecommunications service, even if agreed to by the subscriber or user, shall be null and without effect to the extent that it is inconsistent with any of provision of this Act or of any regulations made thereunder or with the terms and conditions of the authorisation on the strength of which the service is provided.”⁶¹

It is worth noting in this regard that the protection is extended not only to consumers but, in contrast to other laws, to all subscribers or users of the telecommunications services irrespective of whether the user is a domestic consumer or indeed a business user.

The **Doorstep Contracts Act** (Cap. 317) if anything provides even more extensive measures to safeguard the unwary. Article 11 of this Act provides that any clause in a private writing shall be void if the clause:

⁶⁰ Chapter 399 of the Laws of Malta

⁶¹ “Authorisation” refers to the authorisation or licence granted by the Malta Communications Authority to provide a telecommunications service or to operate a telecommunications system.

- requires the consumer ⁶² to pay any form of compensation if he exercises his right to cancel the doorstep contract, or
- provides that any dispute arising therefrom be settled otherwise than by the competent court in Malta, or
- purports to remove or reduce any of the rights given to the consumer by any of the provisions under the Act, or to limit or remove the competence of the Maltese courts or tribunals.

Similarly regulation 12.1. of the **Time Sharing Regulations**⁶³ provides that any clause of a timeshare contract whereby the buyer renounces to his rights under the Timeshare Regulations or whereby the seller is freed from his responsibilities under the Regulations, shall not be binding on the buyer.

THE REGULATION OF UNFAIR TERMS – THE WAY FORWARD

It is premature to start discussing at this stage the effectiveness of the provisions regulating unfair terms. There are however some matters which may be considered even now both in ensuring that the public is made aware of these new norms and in improving the means of settling disputes that may arise which regard to the compliance with the provisions on unfair terms.

Extending the definition of “consumers” to business

One issue brought up by the business community when this law was being prepared was that the definition of “consumer” should be extended to members of the business community, so that members of the business community could enjoy the same rights that consumers have. There is some validity in this argument and at least in the context of articles regulating the use of unfair terms one should consider extending the definition of a consumer to include other customers including businesses. After all in some instances some businesses especially small retailers, may be as vulnerable as the domestic consumers when confronted with certain types of standard contracts. One must however consider carefully the consequences of such a change in law, in particular whether the core articles defining what an unfair term is, would in such new circumstances remain valid.

Informing consumers and traders

⁶² Art.2 of the Doorstep Contracts Act defines “consumer” as a person who in transactions covered by the Doorstep Contracts Act acts otherwise than in a commercial or professional capacity.

⁶³ The full citation of these Regulations is the “Protection of Buyers in Contracts for Time Sharing of Immovable Property Regulations, 2000”. The Regulations were enacted by Legal Notice 269 of 2000 as amended by Legal Notice 151 of 2001.

There at least two measures which must be taken in this regard. It would appear that more effort for example should be made in alerting the business community as to the true import of these new provisions and what businesses have to do to ensure that they are in compliance with these new legal obligations. Current efforts in this regard could be complemented by innovative measures to encourage business to comply with the new norms. One measure that comes to mind is the launching of a national competition possibly in unison with the local chamber of commerce to encourage firms to use plain language in the standard contracts they prepare. After all is it not in the interest of a business to ensure that its client knows and understands what he is agreeing to?

Ancillary to this a person within the Consumer and Competition Division⁶⁴ could be appointed specifically to monitor the use of unfair terms and if need be to activate remedial action. In the United Kingdom when the unfair terms regulations⁶⁵ came into force, the Office of Fair Trading created a unit with the express task of monitoring the use of unfair terms. Deciding whether a term is unfair is no small task. The assessment of such terms may vary according to the nature and complexity of the contract and the parties to the contract. The applicability of the provisions knows no boundaries, in that the provisions apply equally to terms in a contract made with a financial institution or with a travel agency or even with a small household retailer. The gravity too may vary from one case to another. There is therefore an onus both on the competent government agency and on the representatives of the business community to ensure that these provisions take no one by surprise.

New tools to ensure compliance

As we seen the Director of Consumer Affairs has fairly wide powers to ensure compliance. There are however two potential pitfalls. The first relates to the forum that determines any disputes that may arise because of the issue of compliance order. Under the Consumer Affairs Act such disputes are referred to the Court of Magistrates. This may not necessarily be the most ideal forum to determine such disputes. In an area that is increasingly becoming more complex, the presence of lay experts on the competent adjudicative tribunal to determine such disputes must be seriously considered as an option to the existing set-up. In most of the Scandinavian jurisdictions such disputes are determined by the Market Court – a specialized tribunal composed of judges together with lay experts. One feasible option is to consider referring such disputes to the Commission of Fair Trading in lieu of the ordinary courts. The Commission at present determines competition issues and is composed of a magistrate and two lay experts well-versed in accounts and economics. Possibly in the case of disputes relating to unfair terms the composition of the Commission may be varied accordingly.

⁶⁴ In early 2001 the Department of Consumer Affairs and the Office of Fair Trading were merged into one office – the Consumer and Competition Division. This Office is now the competent government agency responsible for administering and enforcing consumer legislation in Malta.

⁶⁵ See The Unfair Terms in Consumer Contracts Regulations 1999. There replaced the 1994 regulations.

Another matter that may eventually have to be addressed is that relating to the actual sanctions that may be imposed if there is non-compliance with a compliance order. Article 106 of the Consumer Affairs Act provides that non-compliance of an order is an offence. On conviction the person found guilty may be fined up to Lm10,000 and a daily fine of up to Lm50 for each day of non-compliance. This means that criminal proceedings would have to be taken against the person in question to recover the penalties. I would prefer to decriminalize such offences and in process revise the amounts that may be inflicted substantially whilst providing for their recovery as an executive title thereby avoiding the need of proceedings before the courts of criminal jurisdiction. My proposal would be to give the faculty to the Director of Consumer Affairs to impose an administrative fine which may then be contested before the Commission of Fair Trading. If there is no contestation of the Director's decision, the fine would then recoverable as an executive title in accordance with Code of Organisation and Civil Procedure.

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