

ARTICLES

INADEQUACY AND INEFFECTUALITY: HONG KONG'S CONSUMER PROTECTION REGIME AGAINST UNFAIR TERMS IN STANDARD FORM CONTRACTS



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This article examines the current Hong Kong consumer protection regime relevant to unfair terms in standard form consumer contracts and attempts to demonstrate the deficiency in this protection framework and the need for urgent reform. In particular, the article takes a closer look at the seemingly ineffectual Unconscionable Contracts Ordinance (Cap 458), as compared with its UK legislative equivalent, as well as other factors possibly affecting the pursuance of claims by consumers. To this end, the article attempts to explain why the current protection regime in Hong Kong is not being effectively utilised and suggests how this might be rectified in the interests of local consumers.

1. Introduction

1.1. *The Use and Abuse of Standard Form Contracts*

The written terms of consumer contracts are seldom individually negotiated between the business entity (the supplier of goods or services) and the consumer; rather, other than those terms which relate to the price and subject matter, the terms will most usually be set out in standard form on a “take it or leave it” basis. Although such standard form contracts are convenient (reducing the time and cost for suppliers and consumers to enter into agreements, thereby facilitating more efficient commerce), they often contain one-sided terms which are unfavourable to the consumer since they are drafted by the suppliers (ie business parties, with superior bargaining power).

Such terms may be in small print or written in legal language which is difficult for consumers to understand. Furthermore, consumers often sign contracts “there and then” without having read or understood the terms, perhaps even feeling pressured to conclude the contract quickly without perusing or questioning its contents. Even where consumers *are* aware of

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any unfavourable terms, they may feel (perhaps justifiably so) that they have no bargaining power to negotiate the terms, especially where such terms are standard across the industry.

2. Legislative Protection

There is no power at common law to strike down a term for being unfair or “unreasonable”; rather, at common law, a consumer who thinks that a term is unfair and should not bind him, would have to resort to arguments that the term was either not properly incorporated into the contract¹ or that the term was ambiguous and therefore should be interpreted *contra proferentem*.² However, where such terms are clearly incorporated and their meaning is unambiguous, a consumer would have to resort to statutory protection in order to avoid being bound by the unfair terms.

In the context of exemption clauses, where the supplier seeks to limit or exclude its liability for breach of contract (including breach of express or implied terms), negligence or misrepresentation, the Control of Exemption Clauses Ordinance (Cap 71), the Supply of Services (Implied Terms) Ordinance (Cap 457), and the Misrepresentation Ordinance (Cap 284) may be utilised to hold such terms ineffective.

However, these statutes only afford protection from unfair *exemption* clauses (and *indemnity* clauses); they do not address unfair terms which seek to serve *other* purposes. Therefore, the only statutory recourse against such other unfair terms is the Unconscionable Contracts Ordinance (Cap 458) (UCO), which allows the court to hold such terms to be unconscionable and therefore unenforceable or even (somewhat controversially) subject them to judicial amendment.³ The UCO, however, is of seemingly very limited use for protecting consumers from unfair terms.

2.1. The UCO: An Ineffectual Statute?

Section 5(1) of the UCO provides that a consumer contract, or part thereof, may be held unenforceable or subject to amendment

¹ Such as being due to a lack of reasonable notice, as in *Olley v Marlborough Court Ltd* [1949] 1 KB 532, for example.

² As in *Andrews Bros (Bournemouth) Ltd v Singer and Co Ltd* [1934] 1 KB 17, for example.

³ See s 5(1). Such terms could include, for example, those allowing for unilateral contractual modification by the supplier, those detailing cancellation of service fees payable by the consumer and those permitting automatic renewal of contractually expired services.

by the court where such contract, or part thereof, is found to be “unconscionable”:

“If, with respect to a contract for the sale of goods or supply of services in which one of the parties deals as consumer, the court finds the contract or any part of the contract to have been unconscionable in the circumstances relating to the contract at the time it was made, the court may:

- (a) refuse to enforce the contract;
- (b) enforce the remainder of the contract without the unconscionable part;
- (c) limit the application of, or revise or alter, any unconscionable part so as to avoid any unconscionable result”.

However, the Ordinance does not define exactly what constitutes unconscionability; rather, s 6(1) provides a non-exhaustive list of factors which the court may have regard to when determining whether the contract, or part thereof, is unconscionable, such as the relative bargaining strengths of the parties and the possibility of the consumer having acquired the same goods or services from another party on terms different to the terms in question.⁴

Furthermore, in *Shum Kit Ching v Caesar Beauty Centre Ltd*,⁵ the court held that, in determining whether a contract is unconscionable for the purpose of s 5 of the UCO, the court must have regard to “all circumstances” relevant to that issue, *as well as* the factors listed in s 6(1) as appropriate.⁶ According to the Hong Kong Consumer Council, this means that:

“...the court would tend to focus on the *totality* of the circumstances and conduct that give rise to unfairness in the bargaining *process* rather than the meaning and effect of the term alone”.⁷

If this is correct, such a “totality-approach” means that, when assessing unconscionability under the UCO, the court will not allow a single unfair term, by itself, to render the contract, or part thereof, unconscionable and *ipso facto* capable of being set aside or amended by the court pursuant to s 5(1) of the UCO.⁸ Rather, it would seem that, so long as there is *procedural* fairness in the way the contract has

⁴ See ss 6(1)(a) and 6(1)(e), respectively.

⁵ [2003] 3 HKLRD 422

⁶ *Ibid.*, [12].

⁷ See “Report on Unfair Terms in Standard Form Consumer Contract” (April 2012), available at http://www.consumer.org.hk/website/ws_en/competition_issues/model_code/2012040301Full.pdf, p 5, para 15 (emphasis added).

⁸ This totality-approach was also taken in *Hang Seng Credit Card Ltd v Tsang Nga Lee* [2000] 3 HKLRD 33.

been formed,⁹ then any *substantive* unfairness would be over-looked and not considered sufficient to be unconscionable under the UCO. This is apparent no less than by the sheer dearth of successful claims brought under the UCO since coming into force in 1995.¹⁰ Accordingly, it might be argued that there is no effective legal framework in Hong Kong which protects consumers from unfair terms other than exemption clauses and indemnity clauses.

2.2. Comparative UK Legislation

In contrast to the apparently deficient consumer protection law in Hong Kong, the UK appears to have a comparatively more effective legal framework protecting consumers from unfair terms. In particular, the UK has the Unfair Terms in Consumer Contracts Regulations 1999 (UTCCR)¹¹ which has been clarified and supplemented through a solid body of case law.

Under the UTCCR, reg 5(1) states:

“A contractual term which has not been individually negotiated¹² shall be regarded as unfair if, contrary to the requirement of good faith, it causes a significant imbalance in the parties’ rights and obligations arising under the contract, to the detriment of the consumer”.

Further, reg 6(1) states:

“... the unfairness of a contractual term shall be assessed, taking into account the nature of the goods or services for which the contract was concluded and by referring, at the time of conclusion of the contract, to all the 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”.

Schedule 2 of the Regulations sets out an indicative and non-exhaustive list of terms which may be regarded as unfair, such as excluding a consumer’s legal rights in the event of non-performance by the supplier

⁹ In this context, procedural unfairness in contract formation could be established if the consumer suffered from a special disability which was known – actually or constructively – to the business entity, which then unconscientiously took advantage of it (see *Ming Shiu Chung v Ming Shiu Sum* (2006) 9 HKCFAR 334, [100]).

¹⁰ Since coming into force, there have to date been 27 cases involving the UCO, in which only four have resulted in a finding of unconscionable terms.

¹¹ These regulations were originally enacted in 1994, pursuant to a European Union Directive, and replaced with a slightly wider version in 1999.

¹² Note, however, that the Regulations still apply even if (as often happens) the *price* was individually negotiated. The fact that a specific term or certain aspects of it have been individually negotiated does not preclude the application of the Regulations if, on an overall assessment, the contract is a pre-formulated standard contract; it seems that the real issue is whether the *relevant* term has been individually negotiated (see *UK Housing Alliance (North West) Ltd v Francis* [2010] 3 All ER 519).

or requiring a defaulting consumer to pay disproportionately high damages.¹³

A body of case law has built up around the UTCCR, thereby providing further guidance for its application. For example, based on the House of Lords decision in *Director General of Fair Trading v First National Bank Plc*,¹⁴ it is clear that there exists an interrelationship between the notions of “good faith” and “significant imbalance” as referred to in the Regulations.¹⁵ Indeed, Lord Bingham provided an elaboration of these two notions, such that there is a “significant imbalance” if:

“... a term is so weighted in favour of the supplier as to tilt the parties’ rights and obligations under the contract significantly in his favour”.¹⁶

His Lordship then referred to the various examples of such terms listed in what was then Sch 3 of the Regulations¹⁷ and stated that, in determining whether there was such a significant imbalance, the court must look at “the contract as a whole”, and that such imbalance must be “to the detriment of the consumer”.¹⁸

Lord Bingham then discussed the concept of “good faith”, in the context of the Regulations, which his Lordship described as “fair and open dealing”.¹⁹ With regard to openness, his Lordship stated that this requires that the terms are “expressed fully, clearly and legibly, containing no concealed pitfalls or traps” and that terms which might operate disadvantageously to the consumer are given “[a]ppropriate prominence”.²⁰ As to fair dealing, his Lordship continued that this requires that a supplier should not, either consciously or unconsciously, take advantage of the consumer’s “necessity, indigence, lack of experience, unfamiliarity with the subject matter of the contract, weak bargaining position”²¹ or any other factor listed in, or similar to, those in what was then Sch 2 of the Regulations.²²

¹³ See Sch 2, ss 1(b) and 1(e), respectively.

¹⁴ [2002] 1 AC 481.

¹⁵ See *Ibid.*, [17] (Lord Bingham), (albeit referring to the 1994 version of the Regulations): “A term falling within the scope of the Regulations is unfair if it causes a significant imbalance in the parties’ rights and obligations under the contract to the detriment of the consumer in a manner or to an extent which is contrary to the requirement of good faith”.

¹⁶ *Director General of Fair Trading* (n 14 above), [17].

¹⁷ See, now, Sch 2 of the 1999 version.

¹⁸ *Director General of Fair Trading* (n 14 above), [17] (emphasis added).

¹⁹ *Ibid.*

²⁰ *Ibid.*

²¹ *Ibid.*

²² The list in Sch 2 of the 1994 version does not feature in the 1999 version but is still, nevertheless, found in recital 16 of the Unfair Contract Terms Directive 93/13/EEC.

In essence, Lord Bingham considered that good faith:

“... is not an artificial or technical concept; nor ... is it a concept wholly unfamiliar to British lawyers. It looks to good standards of commercial morality and practice”.²³

Lord Millett also shed some light on the determination of unfairness. His Lordship pointed out the usefulness of considering: (1) the effect of the contract with as compared to without the relevant term; (2) the effect of the term on the substance of the transaction; (3) whether the consumer would have likely been surprised had the term been drawn to his attention; (4) whether the term is a standard term; and (5) whether the consumer might reasonably be expected to object to the inclusion of the term.²⁴

Such elaboration and elucidation of the UTCCR has strengthened its efficacy.²⁵ Indeed, the UTCCR has been successfully employed on a number of occasions for the protection of UK consumers against unfair contract terms, prompting business parties to reconsider (and rewrite) many of their standard form contract terms.

2.3. A Difference between the UCO and the UTCCR?

If, as the Hong Kong Consumer Council suggests, the courts take a “totality-approach”, it would seemingly be difficult to have a contract, or even part thereof (ie the very term or terms in question), rendered unconscionable and unenforceable under the UCO.

However, based on the wording of reg 6(1) of the UTCCR, it is argued that the so-called “totality-approach” taken by the Hong Kong courts is no different from the position in the UK. The non-exhaustive list of factors used to determine unconscionability under the UCO, together with the requirement stated in *Shum Kit Ching v Caesar Beauty Centre Ltd*²⁶ to have regard to “all circumstances”, is no different from reg 6(1) of the UTCCR which states:

“... unfairness of a contractual term shall be assessed ... by referring ... to *all the circumstances* attending the conclusion of the contract and to *all other terms* of the contract ...”.²⁷

²³ *Director General of Fair Trading* (n 14 above), [17].

²⁴ *Ibid.*, [54].

²⁵ For example, in *R (Khatun) v Newham London Borough Council* [2005] QB 37, the English Court of Appeal extended the scope of the Regulations to cases involving land transactions.

²⁶ See *Shum Kit Ching* (n 5 above), [12].

²⁷ Emphasis added.

The only apparent difference between the two pieces of legislation is that the UTCCR uses the term “unfairness” whereas the UCO uses the term “unconscionable”. This then raises the question as to whether there is any substantive difference between these two terms. If “unconscionability” is a higher test than “unfairness”, this would make it more difficult for standard form consumer contract terms to be found unenforceable under the UCO than as under the UTCCR.

However, it is argued that there is no substantive distinction in the terminology used by the UTCCR and the UCO since the definitional guides for the two respective terms (ie “unconscionability” and “unfairness”) are *substantively* the same. Accordingly, it is argued that there is no reason why a Hong Kong court could not find unfair standard form contract terms, similar to those found in UK contracts, as unenforceable by virtue of the UCO.

3. Why Are There So Few Claims Brought Under the UCO?

As argued above, there is no substantive difference between reg 6(1) of the UTCCR and s 6(1) of the UCO. Therefore, it has to be questioned why the UCO is so comparatively ineffectual, not only insofar as the sheer lack of successful claims of unconscionability under the UCO but also in the sheer lack of claims, at all, brought under this legislation. Perhaps one reason, as alluded to above, might be that “unconscionability” is perceived, in some way, to be a higher test than “unfairness” so that a term which is *simply* unfair would not be enough to fall within the UCO: rather it might have to be something akin to *grossly* unfair.²⁸ However, as already argued above, this would, with respect, be a misunderstanding of what constitutes an “unconscionable” term (at least under the UCO) in light of “unfairness” having substantively identical definitional guidance under the UTCCR.

Another possible reason for the sheer lack of claims brought under the UCO for unfair terms in standard form consumer contracts is the fact that there is no Hong Kong equivalent of the UK’s Office of Fair Trading (“OFT”), ie a consumer rights body that can pursue claims, bringing a representative action, on behalf of aggrieved consumers. Indeed, Hong Kong’s Consumer Council has made clear that it is not a law enforcement

²⁸ Indeed, this appeared to be a concern of the Law Reform Commission, prior to the enactment of the UCO: in its “Report on Sale of Goods and Supply of Services” (February 1990), the Commission thought that “unconscionability is a very high test and a harder test than unfairness” and, therefore, “it is envisaged that such legislation would apply only to extreme cases, which would be very rare” (p 27, para 7.1.2).

agency and has made a “conscious decision ... not to be involved in the enforcement of any specific piece of legislation”.²⁹ Although the Council is willing to assist in the mediation of consumer complaints,³⁰ it acknowledges that “aggrieved consumers ... are faced with the daunting task of taking civil action on their own as the only redress option”.³¹

To this end, with regard to taking legal action by themselves, consumers may arguably be discouraged from bringing such a claim for fear of losing and/or incurring substantial legal costs, thereby constituting another reason for the scarcity of claims brought under the UCO. Although there exists the Government-funded Consumer Legal Action Fund (CLAF),³² designed to “provide consumers easier access to legal remedies by providing them financial and legal assistance in meritorious cases, particularly those where a number of complainants have similar grievances”,³³ this fund appears to be grossly underutilised.³⁴ The reason for the underutilisation of the CLAF is arguably the result of various disincentives that an applicant must overcome in order to qualify for funding. Such disincentives include: a non-refundable application fee, even if the application is rejected;³⁵ applicants being made liable for “all losses, costs, expenses, claims, damages and liabilities” in the event that the claim is unsuccessful due to the applicant not providing true and accurate information, presumably even if such omission was committed unwittingly;³⁶ and the fact that assistance from the Fund can be terminated “at any time”.³⁷

²⁹ See “Consumer Council Ordinance Review – Submission of the Consumer Council” (February 2001), available online at <http://www.legco.gov.hk/yr00-01/english/panels/es/papers/a1046e01.pdf>, p 3, paras 4(1) and 4(2). Albeit, this does not seem possible, in any event, unless one took a perhaps too liberal a reading of s 5(1) of the Consumer Council Ordinance (Cap 216) (CCO), which allows the Consumer Council to “do such things as are reasonably necessary to enable it to carry out its functions”.

³⁰ See Consumer Council website at http://www.consumer.org.hk/website/ws_en/profile/mission/mission.html, para V(i).

³¹ See “Fairness in the Marketplace for Consumers and Business” (February 2008), available online at http://www2.consumer.org.hk/2008022501/exec_sum_e.pdf, p 3, para 7.

³² Established in 1994 by the Hong Kong Government’s Commerce and Economic Development Bureau.

³³ See Commerce and Economic Development Bureau – Legislative Council Panel on Economic Development, “The Consumer Protection Regime in Hong Kong” (June 2009) available online at <http://www.legco.gov.hk/yr08-09/english/panels/edev/papers/edev0622cb1-1939-7-e.pdf>, p 7, para 23.

³⁴ There have been, on average, only two or three successful applications per year since 1995 (see Law Reform Commission of Hong Kong, “Report on Class Actions” (May 2012), available online at http://www.hkreform.gov.hk/en/docs/rcclassactions_e.pdf, p 229, para 8.117).

³⁵ See “Consumer Legal Action Fund” (June 2003), available online at <http://www2.consumer.org.hk/claf/briefe.pdf>, p 2, paras 3(b) and 3(d).

³⁶ *Ibid.*, p 3, para 7.

³⁷ *Ibid.*, p 4, para 10.

Furthermore, an applicant must show that they have “exhausted all other means of dispute resolution”, which would include mediation, before being eligible to apply for assistance under the CLAF.³⁸ Thus, even if aggrieved consumers decided to pursue the CLAF application process by first attempting mediation, mediation is, in itself, probably another reason for the lack of claims brought under the UCO, whether pursuant to the CLAF application prerequisite or simply as being strongly encouraged by the courts, pursuant to current civil procedure rules so as to avoid cost sanctions, for claims brought independent of the Fund.³⁹ Where claims are settled out of court, “behind closed doors”, they may, at best, satisfy that individual aggrieved consumer but it means that there is no judicial precedent set for the benefit of all other consumers who are subjected to the same unfair standard form contract terms.

4. Suggestions for Reform

In light of the clear deficiencies in Hong Kong's consumer protection regime with regard to unfair terms in standard form consumer contracts, there is an urgent need for reform. Indeed, the Consumer Council has noted the inadequacy of the consumer protection framework relative to, *inter alia*, the adoption of unfair terms in standard form consumer contracts, concluding that it is “below the standards found in comparable advanced economies; and should therefore be addressed”.⁴⁰

One suggestion is for the enactment of an Unfair Terms in Consumer Contracts Ordinance, similar to the UTCCR, to replace (or supplement) the UCO.⁴¹ As the name suggests, such legislation could be directed at “unfair” terms rather than “unconscionable” terms, lest the latter inadvertently implies a higher test which requires something more than “mere” unfairness. Also, such legislation could go a step further than the UTCCR by expressly covering consumer contracts in land transactions.⁴² The UCO only covers consumer contracts for the sale of goods and supply of services,⁴³ even though land transactions

³⁸ *Ibid.*, p 2, para 2(b).

³⁹ See Rules of the High Court (Cap 4A), O 1A r 1(e) and O 62 r 5(1)(aa). See, also, Practice Direction 31.

⁴⁰ See “Fairness in the Marketplace for Consumers and Business” (n 31 above), p 2, para 3.

⁴¹ Such an introduction of new legislation was recommended by the Consumer Council in 2008, albeit without elaboration (see “Fairness in the Marketplace for Consumers and Business” (n 31 above), p 8, para 30).

⁴² Note, however, that the English Court of Appeal ruled in *R (Khatun)* (n 25 above) that there is no basis for excluding land transactions from the scope of the UTCCR and, accordingly, that such transactions are covered by the UTCCR.

⁴³ See s 5(1) of the UCO.

are perhaps where consumer protection is needed the most, given the large sums of money involved. Either way, Hong Kong legislators would have a ready-made statutory framework, in the form of the UTCCR, which they could adopt or adapt and, further, the courts would have a ready-available body of UK case precedent to help guide local judges on the application of such a statute.

Another suggested reform would be for the government to set up an enforcement body that could take representative action on behalf of aggrieved consumers, as does the OFT in the UK. Alternatively, perhaps the Consumer Council's remit could be widened, through legislation,⁴⁴ to give it enforcement powers to more directly realise its function "to protect and promote the interests of consumers".⁴⁵

However, if such an enforcement body is not to be established, there should at least be amendments to the current CLAF. Such amendments could include: free or nominal application fees;⁴⁶ an assurance that, once assistance has been approved, it will not be withdrawn "at any time"; making clear that successful applicants will only be liable for "all losses, costs, expenses, claims, damages and liabilities" where an unsuccessful claim is due to the *fraudulent* failure to provide true and accurate information; and not requiring consumers to have "exhausted all other means of dispute resolution", first, given the likelihood of there being a wider consumer public interest in challenging a term which appears in standard form and, as such, affects a large group of people *beyond* the individual CLAF applicant.

It is noteworthy that no representative action under O 15 r 12 of the Rules of the High Court has ever been brought under the CLAF. According to the Law Reform Commission's Report on Class Actions (May 2012), this is because of "uncertainties with interpretation of the present rules".⁴⁷ The Commission then cites "scarce" resources as the justification for the CLAF not pursuing representative litigation in "uncertain ... waters"⁴⁸ and goes on to recommend increasing the CLAF's resources to make funding available for such representative action on behalf of aggrieved consumers.⁴⁹ If, indeed, a lack of financial resources is the reason for no such representative action being taken, it is argued that such extra Government funding is a very reasonable first step.

⁴⁴ For example, by amending the CCO or the UCO.

⁴⁵ See s 4(1) of the CCO.

⁴⁶ Currently, although cases to be tried in the Small Claims Tribunal attract a relatively nominal application fee of \$100, cases to be tried in the District Court and higher are charged at \$1,000 (see "Consumer Legal Action Fund" (n 33 above), p 2, para 3(b)).

⁴⁷ See "Report on Class Actions" (n 32 above), p 21, para 1.30.

⁴⁸ *Ibid.*, p 23, para 1.37.

⁴⁹ *Ibid.*, p 242, recommendation 8(3).

5. Conclusion

Despite the widespread practice of adopting unfair terms in standard form consumer contracts, the only local legislation which could catch such terms other than exemption clauses and indemnity clauses is the UCO, which, for various suggested reasons, is underutilised and therefore ineffective in protecting consumers from unfair terms in standard form contracts.

The whole consumer protection regime against unfair terms in standard form contracts looks nothing short of window dressing. Ineffectual legislation, lack of a specific enforcement body and restrictions on and disincentives in accessing legal aid, all infringe upon an aggrieved consumer's ability (or willingness) to take action against unfair terms in their standard form contracts.

Reforming this area of law to facilitate the effective pursuance of consumer claims against unfair standard form terms would surely reduce the exploitation of consumers in Hong Kong and go some way to redressing the imbalance in bargaining strengths between consumers and business entities. This would, arguably, create a win-win situation for both consumers and businesses, whereby consumer confidence levels are elevated which, in turn, leads to more fluid consumer spending to the benefit of businesses. Indeed, as acknowledged by the Consumer Council:

“... consumer contracts drafted in a fair manner and in good faith is the prerequisite of a fair marketplace which would provide a sound basis for a prosperous development of [the] economy, and therefore both consumers and businesses will be benefited ultimately”.⁵⁰

Either way, as an advanced economy and distinguished Asian commercial centre, it is argued that Hong Kong must be mindful not to lag behind in any aspect of consumer protection law but, rather, serve as a leading example, at the very least to the rest of China.

⁵⁰ See “Report on Unfair Terms in Standard Form Consumer Contract” (n 7 above), p 42, para 45.1.