

# Parallel consumer worlds

Following the introduction of the Consumer Rights Act, **Francesca Kaye** and **Megan Read** advise on how the consumer law regimes, both new and old, apply to client contracts



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**T**he Consumer Rights Act 2015 (CRA) creates a one-stop shop of rights and remedies for consumers, including a new regime for consumers, and those dealing with consumers, in respect of the 'fairness' of contract terms.

These rights and remedies apply whether or not they were part of the contract the consumer entered into, and remove or disapply contractual terms that do not meet the new fairness test.

This introduces an additional level of complication for businesses. In business-to-business contracts, the existing statutory regime still applies with only minor amendments. But businesses contracting with consumers, as defined in the CRA, must have CRA-compliant contracts or have those rights and remedies imposed on them.

The CRA defines a consumer as someone contracting 'wholly

or mainly outside of their trade, business, craft or profession'. It applies to any contract for any item or service, whatever the value. A Mars bar or a Monet could equally be caught.

An individual could be a CRA consumer when purchasing a sofa for their personal use, but not when purchasing a laptop or computer programme from the same retailer for home business use.

## Fairness test

The CRA introduces a fairness test to determine whether a contract clause is enforceable. A term in any consumer contract will fail the test if 'contrary to the requirement of good faith, it causes a significant imbalance in the parties' rights and obligations under the contract to the detriment of the consumer'. The court must consider whether a term is fair even if this is not raised by the parties.

The CRA guidance on fairness considers the contract's nature, subject matter, surrounding circumstances, and other terms



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in this or any related contract.

There is a list of terms that 'may be unfair'. Contract terms with the same purpose or that produce the same result as those listed will also come 'under suspicion of unfairness'.

For non-consumer contracts, the reasonableness test remains set out in section 11 and schedule 2 of the Unfair Contract Terms Act 1977 (UCTA). The UCTA test scrutinises 'the circumstances which were, or ought reasonably to have been, known' or contemplated by the parties when the contract was entered into. The reasonableness test recognises that a contract term may be reasonable even if it is not balanced: a clause that is unfair under the CRA could be reasonable under UCTA in a business-to-business contract.

## New exemption

Terms that 'specify the subject matter of the contract', such as price, must be 'transparent' and 'prominent' to avoid the CRA fairness test. Simply highlighting core terms visually will not meet the prominence requirement. Where terms are ambiguous, the court will now interpret their meaning in the consumer's favour.

The onus is on businesses to ensure core contract terms are transparent and prominent to a hypothetical 'average' consumer, rather than to the individual with whom they are contracting.

Where terms are oral this will be difficult. Services contracts

may be particularly affected since anything said to the consumer by or on behalf of the trader will be incorporated as a contract term if the consumer takes it into account when contracting.

This apparently objective test is at odds with the subjective test in UCTA, which recognises that a consumer's experience of the customs of the trade and of previous dealings between the parties will mean they expect certain terms and the ability to choose to agree to them or not.

Lawyers advising a business in a dispute with a consumer should check whether the CRA applies and advise the client about its impact on any existing business-friendly contract terms with exclusion clauses.

## Where to start?

- There are two parallel, at times overlapping, consumer law regimes – do either or both apply to client contracts?
- Does the business client have or need revised terms of business?
- If a business was contracting with a CRA consumer, is the contract CRA-compliant? Do exclusion clauses meet the fairness test? Are they at risk on claims?
- Are terms transparent and prominent? and
- Did the business's sales team provide any oral assurances or representations that the consumer may have relied on, which might now form a term of the contract? **SJ**

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