

Unfair Contract Terms:

What You Should Know

Question: What is meant by a 'term' in a contract?

Answer: A contract usually has a number of terms. 'Term' refers to the conditions upon which a good or service is offered and the conditions on which the consumer has agreed to accept. For example, if you purchase new tiles from a hardware which provides delivery service, an important term of the contract would be that they should be delivered in the same condition in which they were bought at the store.

Question: Where are the terms usually found?

Answer: The terms are usually contained in the contract document itself. It may be a formal contract where both parties sign a document, thus showing their agreement to all the provisions stated in it. On the other hand, it may be less formal, for example a receipt given to the consumer, representing evidence of purchase of a good or service. In commercial activities in Jamaica, most receipts and invoices contain brief statements on the rights of the provider.

Question: How do I identify an unfair term?

Answer: A term is considered to be unfair when it causes a significant imbalance in your rights (under the contract), to your disadvantage. If there is reason to believe that the provider is taking advantage of your weaker bargaining power, or lack of experience or understanding, the term is likely to be unfair. This is so whether or not actual harm is being caused to you.

Using the example of the tiles above, it would be unfair for the seller to stipulate (on the receipt/invoice or any other document relating to the sale) that it is not responsible for tiles broken during delivery, as a result of poor handling by delivery men. This term would be considered unfair.

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Question: What protects me as a consumer from an unfair term being imposed upon me?

Answer: Firstly, your knowledge of your rights protects you from an unfair term being imposed upon you. When you know that the term is unfair and puts you at a disadvantage, you should object to it. This is why it is important for you to be informed.

Secondly, the law contains in it provisions which prevent a provider from imposing unfair terms upon you.

Question: What are some examples of the law preventing the imposition of unfair terms?

Answer:



If as a result of a provider's negligence (i.e., its own fault or carelessness) death or personal injury results, the provider cannot exclude or restrict his liability to you. No such term in a contract can stand; if the contract does contain it, the term will be treated as if it had never existed in the first place. This, in legal language, is called a term which is 'null and void'.



A provider is prevented from denying you the right to full compensation where the item purchased is damaged through no fault of your own. If the item you purchased is damaged, the provider is responsible for repairing or replacing it at no cost to you. This is because the law implies that even before the goods are purchased they must be fit for the purpose for which goods of that kind are commonly bought. You may also insist on a refund if

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the item is defective, particularly electrical goods such as washing machines, hair dryers, electrical drills etc.



A provider cannot deny you the right to full compensation if the goods were not correctly described, or if he delivers something different from what you actually agreed to buy, and what he agreed to supply.



Any term depriving you a route of redress will be considered unfair. A widespread sign posted in establishments across Jamaica states 'No Exchange, No Refund'. The presence of the sign itself is not a violation of the law. However, if the provider insists on relying on this term when a reasonable claim is made, this response will amount to a breach of the law.



It is your right to get what you contracted for. Therefore a provider is prevented from making material statements (about goods/services) which are untrue and which he knows to be untrue.

Question: *Do unfair terms also apply to services provided?*

Answer: *Yes they do. The terms agreed to for a service contract must also pass the test of fairness. Generally, the following terms in service contracts upset the balance of equality between you and the provider:*



Delay - *Terms allowing for long periods for delivery or completion of work. If the contract says nothing on the time for delivery, delivery should be carried out within a reasonable timeframe. Since reasonableness*

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depends on the facts of each case, no general timeframe can be given concerning what is considered reasonable.



Cancellation -

- a. Terms of the contract which allow the provider to cancel without refunding your deposit. Cancellation charges which represent a real and fair estimate of the costs that the provider is likely to suffer will be considered reasonable, but overstated sums can be challenged as unfair.*
- b. Excessive rights of the provider (with you having over-restricted rights) to end or withdraw from the contract.*
- c. Excessive notice period for contract cancellation by the consumer, especially in contracts which do not have a fixed term (ie contracts which start and finish at a particular time).*



Non-Performance - *Terms creating no liability for the provider should he refuse to carry out his end of the contract.*



Binding -

- a. Terms binding the consumer to continue payment when services are not provided as agreed, and the provision of the service is solely in the provider's control.*
- b. Terms demanding acceptance of obligations which the consumer could not have been aware of at the time of entering the contract.*

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Consumers

Consumers, here are some tips for you:

- ✓ Only a court order (or special law passed by Parliament) can give the right to enter your private property without your consent. Therefore, any term containing this (whether to repossess goods or to evict you) and which you did not agree to is not only unfair, but unconstitutional.*
- ✓ In instances where your assets are placed in the possession of the provider as security, you have a right to know the circumstances surrounding the sale of these assets by the provider. Look to see whether the terms allow the provider to sell the items:*
 - i. immediately; or*
 - ii. without sufficient notice to you of the date and place of sale; or*
 - iii. with no duty to obtain the best price that can be reasonably obtained; and*
 - iv. without refunding any surplus to you.*

Contracts having these terms cannot be considered fair.

- ✓ Know what you are agreeing and signing to. If a term is unclear, ask for guidance from someone independent of the person/company with which you are doing business. Know how the terms affect you and what will be required of you in all circumstances.*

Providers

Providers, remember that in most market situations, consumers have less information about products and services than you. Therefore, you can help by ensuring that your contracts contain plain and simple language.

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Ensure that:

- *major terms are not hidden away in small print; and*
- *significant terms are highlighted.*

Before the consumer signs a declaration (stating for example that he has read and understood the terms), you should allow them the opportunity to read all the terms. A better approach would be a prominent warning that they should read and understand the terms before signing them.

Fairness is not a matter of inflexible requirements. Fairness requires that consumers are given a real chance to learn about the terms of the contract before the contract becomes binding.