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Proposal for a

COUNCIL DIRECTIVE

on unfair terms in consumer contracts

(presented by the Commission)

COMMISSION OF THE EUROPEAN COMMUNITIES

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CORRIGENDUM

Il y a lieu d'insérer les pages ci-jointes (63 à 63 ter) dans le document COM(90)322final-SYN285 du 3.9.1990

(ne concerne que la version anglaise)

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Brussels, 19 September 1990

Proposal for a

COUNCIL DIRECTIVE

on unfair terms in consumer contracts

(presented by the Commission)

Pages inserted in the text.

EXPLANATORY MEMORANDUM

In all Member States the law of contract is consensual. It is presumed that the parties understand the terms of their agreement, particularly if it has been put in writing and signed. This rule is something of a fiction even at the national level and it must be reviewed if the Common Market is to operate satisfactorily. Within the Common Market there are currently twelve Member States with more than twelve distinct legal systems and nine official languages. It cannot be assumed that consumers who cross frontiers to buy goods or services, or to invest or acquire property in other Member States, have understood and agreed the terms of a contract they have made, if they do not speak the local language or are unfamiliar with the local law, especially if it is complex - for example standard terms and conditions for the sale of a motor vehicle. Unless there is some assurance that they will not be seriously disadvantaged by unfair contracts, consumers will lack the confidence to use the new possibilities opened up by the completion of the internal market, for example the opportunity to buy goods and services at more favourable prices in other Member States than their country of residence.

The problem of unfair contracts has already been recognised at the national level by a number of Member States. Since 1974 nine out of twelve have adopted laws designed to establish a better balance between consumers and suppliers. Only Belgium, Greece and Italy do not have any law specifically relating to unfair contracts. However, there are many important differences between the Member States which have legislated, in terms of the approach, scope and substance of their laws. For example, the law of the Federal Republic of Germany states in great detail a list of terms which are void, and another list of terms which may be declared void in certain circumstances. The British law contains a short blacklist, but otherwise avoids details and leaves it to the courts to decide which terms of contract are unfair, and therefore void, by applying a test of reasonableness. France, on the other hand, has adopted an administrative law approach. A striking example of difference in scope is provided by the contrast between British law and that of

other Member States. British law excludes contracts of insurance from the application of the Unfair Contract Terms Act, whereas insurance is not excluded by the law of other countries.

It has been recognised by a succession of Council Resolutions(1) that consumers have the right to be protected against unfair terms of contract by Community law and in 1984 the Commission published a consultation paper with a view to the preparation of a proposal for an EEC Council Directive(2). In 1985 and 1986 two committees of the European Parliament discussed the matter, namely the Legal Affairs Committee and the Public Health, Environment and Consumer Protection Committee. Both accepted the need for consumer protection and for Community-wide rules on the subject.

Following these and other consultations the Commission has drawn up a proposal for a directive which is intended, by harmonising the law and practice of the Member States, to eliminate unfair terms in contracts concluded with consumers.

Some contract terms are unfair because they unreasonably impose an obligation on the consumer. Others are unfair because they deprive him of certain rights. Exclusion of liability for failure to perform a contract falls within this latter category. However, a contract may also be unfair because of the omission of certain basic assurances : for example, that the goods are free from hidden defects.

Turning to the substance of the proposal, Article 1 defines its scope as including every contract between a consumer and a party

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(1) OJ No C 92, 25.4.1975, p.1; OJ No C 133, 3.6.1981, p.1; OJ No C 167, 5.7.1986, p.1.

(2) Supplement 1/84, Bulletin of the European Communities.

acting in the course of his trade, business or profession, whether the contract is a "take or leave it" contract, or is in standard form or is negotiated individually.

Article 2 defines "unfair terms" and "consumer", while Article 3 prohibits the use of unfair terms, which are to be void if used in contravention of the prohibition. A list of types of unfair terms is annexed to the proposal.

The control of unfair terms by the Member States is provided for in Article 4 and extends beyond judicial means to administrative forms of control and self-regulation.

By Article 5 of the proposal the Commission undertakes to report to the Council on experience of the directive in operation. Article 6 sets the implementation date for the directive as 31 December 1992, so as to contribute to the completion of the internal Market, with a high level of consumer protection as foreseen by Article 100A of the EEC Treaty, the legal basis of the proposal. Article 7 formally addresses the proposed directive to the Member States.

A technical annex is attached to this proposal by way of backgroung information, in particular dealing in detail with the law of all of the Member States and of some non-Member States.

TECHNICAL ANNEX

In all the Community Member States, in both civil law and common law systems, the fundamental principle of contract law is that the parties to a contract are free to negotiate its terms. In those countries with a codified civil law system (Belgium, Denmark, France, Greece, Italy, Luxembourg, the Netherlands, the Federal Republic of Germany, Portugal and Spain), the civil codes devised and drafted in the nineteenth century allow the contracting parties much freedom of negotiation. Generally, the rules they lay down form a framework which leaves the contracting parties considerable scope to derogate from or supplement its provisions.

The position is very similar in the common law countries (Ireland and United Kingdom, except Scotland). The contracting parties are normally free to negotiate the terms of a contract, and each party, particularly the consumer purchaser of goods and services, is responsible for ensuring that the contract concluded is not to his disadvantage (caveat emptor).

The emergence of a society of mass production, distribution and consumption has resulted in the increasing formalisation of contracts and, particularly, in an increased use of pre-prepared contracts containing standard terms. The use of standard terms is now widespread throughout the Community. For example, contracts for the sale of consumer durables or for the supply of electricity, gas or water are, as a rule, concluded on the basis of standard terms which have been drawn up in advance by the supplier. Many other examples could be cited.

In practice, there are essentially two types of transaction in which contract terms are not formulated in advance :

- *atypical or "one-off" transactions relating to situations so far removed from the norm that standard terms are inappropriate;*

- *the millions of transactions of every type imaginable which take place "on the spot" each day, including over-the-counter retail sales. In these cases the terms other than those specifically agreed by the parties are implied under the law of contract. Terms specifically agreed between the parties are usually few in number.*

Although many of the details of today's consumer contracts - such as price, time of delivery and description of the goods - vary from contract to contract, the underlying legal framework - so often supplied by the national law itself or by the seller's standard terms of contract - does not. The application of these standard terms may seriously prejudice the consumer's interests, and often it is found that the terms supplied by the law (eg in an over-the-counter sale of consumer goods, where the parties do not discuss the terms of contract) are divergent from one Member State to the next.

Standard terms of contract may provide, for example, that stipulations as to time of delivery are purely indicative in character and have no binding force, with the result that the consumer is left without a remedy if the goods are not delivered within the time agreed. Furthermore, the very fact that the consumer is permitted to stipulate a time for delivery may actually work to his detriment in such cases, for it may give him the impression that his stipulation is a term of the contract. If he had been told unequivocally that delivery times were not guaranteed and that there was, therefore, no point in his choosing a date, he might well have decided either not to make the contract with that supplier, or to try to negotiate on the basis that the standard term in question should not apply.

Standard terms often exclude, or attempt to exclude, the consumer's rights under the general law, sometimes offering more limited rights in exchange. This abuse of the principle of freedom of contract has led many Member States to adopt legislation to redress the balance in favour of consumers.

The consumer may try to make the contract on terms other than those proposed by the supplier. However, very few consumers are sufficiently well informed to do so; and those who try to strike out terms to which they object, and stipulate that the general provisions of the law shall apply, may well find that the supplier refuses to do business except on his own standard terms. A consumer who then decides to try another supplier will almost inevitably find himself faced with that supplier's standard terms.

There appear to be two main types of standard term contract which may cause problems for consumers. First, standard term contracts prepared and printed in advance: only the name and address of the purchaser and details identifying the goods or services in question need be added in each individual case. The use of standard term contracts effectively excludes the possibility of real negotiation between the parties on the terms governing the subject-matter of the contract (although there may be negotiation on such matters as the price and the specifications of the goods). These are, in reality, "take it or leave it" contracts. Secondly, contracts other than the above, whether or not in writing, made subject to the supplier's standard conditions of business. Typical examples are contracts for services such as dry-cleaning or transport, where a ticket or a receipt acknowledging full or partial payment, or some other voucher, is generally given; also written contracts for structural work on buildings or for the installation of double-glazing.

As standard terms are drawn up without the consumer's participation, he is unable to assert his interests and ensure that they are reflected in the terms. Most consumers who enter into contracts made on standard terms do so in ignorance of their precise meaning. Frequently, even if the contract stipulates that signature by the consumer indicates that he understands and accepts all its terms, the consumer has in practice no real opportunity to study the terms, either because they have not been communicated to him in advance or because he has simply been advised that they are available on request or are to be found elsewhere. Even if the consumer does have the opportunity to study the terms, he will probably be unaware of the precise legal significance of the language used, and may therefore be misled as to the contract's true meaning. The widespread use of standard terms thus calls into question the consensual basis of the law of contract.

Indeed, in the context of the common market the consumer's situation is worse than as described above, especially as the twelve national markets become more integrated under the 1992 programme. Even if consumers are expected to understand the legal significance of contracts written in their own language, they cannot be expected to understand contracts written in the language of another Member State where they have bought goods or services, nor the application of the law of that Member State. The Community dimension of the problem is obvious. To put the matter in general terms, there are 320 million consumers on the demand side of the common market. Their interests need to be safeguarded in the market place. The many national laws passed on this topic between 1974 (Denmark(1)) and 1987 (Luxembourg(2) and the Netherlands(3)) attest to its importance. Given the impetus towards a single market from 1 January 1993, it becomes urgent to seek and find answers to the problem of unfair terms of contract at Community level, otherwise consumers will not be able to shop across frontiers with confidence, which will have a negative effect on the operation of the internal market.

Differences between the laws of the Member States - even where they have adopted laws on unfair contract terms - have led and are likely to lead even more to unequal treatment of the Community's citizens. For example, in its decision of 20 January 1983(4) in the case of Lufthansa v Verbraucherschutzverein, the Bundesgerichtshof declared a number of terms in passenger tickets issued by Lufthansa invalid under German law: the terms involved were part of the standard terms of carriage and covered limitation of liability, reservation of the right for Lufthansa to rescind the contract, the right to alter flights, and onus of proof. It is striking that some of the terms condemned are derived from international agreements within IATA, an international association of airlines. The Court considered that Lufthansa's argument to the effect that the use of such terms is worldwide was irrelevant, because the national interest in effectively protecting the consumer is more important than international uniformity. The Court took the view that

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(1) The Marketing Practices Act, No 297 of 14 June 1974.
(2) Loi relative à la protection juridique du consommateur, 25 August 1983, Mémorial 1983, 1494, amended on 27 March 1986, Mémorial 1986, 1145 and again (this time amending the Civil Code) on 15 May 1987, Mémorial 1987, 1987.
(3) Law on Algemene voorwarden (General Conditions), 18 June 1987.
(4) Case VII 2R 105/81.

limitation of liability could not be upheld even though derived from the Warsaw Convention, which had been ratified by the Federal Republic. The origin of the limitation did not alter its character as a standard term of contract which was governed by the German Act (the AGB Gesetz of 1976[1]). The terms judged invalid by the Bundesgerichtshof have not been adjudicated upon in other Member States. Thus the situation could arise where a passenger who bought his ticket in Düsseldorf under German law would be carried under more favourable terms of contract than the person in an adjacent seat on the same flight who had bought his ticket in London under English law. This is an unacceptable situation in an aspiring common market.

Situation at Community Level

The first consumer action programme of the European Community[2] listed as a priority action:

> "protection of the consumer against unfair commercial practices, including terms of contract, guarantee/warranty terms, door to door sales (point 24)"

The aim was to safeguard the consumer who purchases goods and services :

> "against the abuse of power by the seller, in particular against one-sided contracts, the unfair exclusion of essential rights in contracts, harsh conditions of credit ... and against high-pressure selling methods."

This action is included in the programme as part of the protection of the economic interests of consumers, which may be damaged by defective products or unsatisfactory services. Other proposals included under the same heading, and with priority status, related to consumer credit, unfair and misleading advertising, product liability and the improvement of the range and quality of services provided for consumers. Each of these topics involves some aspect of unfair terms of contract. The current proposal is, therefore, integral to work already done, since Directives on consumer credit[3], misleading

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(1) Gesetz zur Regelung des Rechts der Allgemeinen Geschäftsbedingungen (AGB Gesetz) dated 19 December 1976.
(2) OJ No C92, 25.4.1975, p. 1.
(3) Council Directive 87/102/EEC of 22 December 1986, OJ No L42, 12.2.1987, p. 48.

advertising(1) and product liability(2) have already been adopted by the Council. It also relates to other measures such as the Recommendation on electronic payment(3) and the proposed directive on package travel(4). While those measures are specific in their scope, the proposal on unfair terms of contract covers a wider field and is very much more general in approach.

The second EC consumer programme adopted by a resolution of the Council on 19 May 1981(5) stated at point 30 that :

> *"The Commission will pursue the action already begun under the 1975 programme which it has not been able to bring to a conclusion, particularly as regards certain unfair commercial practices"*

and continued as follows :

> *"The Commission has already started work on unfair terms in contracts, with the help of government experts, as a basis for a Community measure. Meanwhile, legislation has been adopted in several Member States, and the Commission will submit, as a first step, a discussion paper in which it will set out all the problems which this subject involves and the various options open with a view to harmonizing those aspects of competition which may be affected by disparities in this area. After wide-ranging consultations on this discussion paper, the Commission will put forward suitable proposals, where necessary."*

In fact, as early as 1975 the Commission had already prepared draft proposals, which were discussed with government experts. However, the discussions were halted because of an intense burst of legislative activity on the part of the Member States. In 1976 the Federal Republic adopted a statute on unfair contract terms(6), in 1977 the United Kingdom did so too(7), and

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(1) Council Directive 84/450/EEC of 10 September 1984, OJ No L250, 19.9.1984, p. 17.
(2) Council Directive 85/374/EEC of 25 July 1985, OJ No L210, 7.8.1985, p. 29.
(3) OJ No L317, 24.11.1988, p. 55.
(4) OJ No C190, 27.7.1989, p. 10.
(5) OJ No C133, 3.6.1981, p. 1.
(6) See footnote (1), p. 5.
(7) Unfair Contract Terms Act 1977.

France followed in 1978[1]. Each adopted a completely different approach. The Federal Republic's law sets forth in great detail a blacklist of terms which are void, and a grey list of terms which are voidable (ie may be declared void) in certain circumstances. The British Act contains a short blacklist, for example outlawing the use of terms excluding liability for causing the death of or personal injury to a person. Otherwise it avoids details and leaves to the courts the task of deciding which terms of contract are unfair, and therefore void, by applying a test of reasonableness. France, on the other hand, has adopted an administrative law approach. The courts pronounce judgments but then a committee makes recommendations to the competent Minister, and this may lead to legislative action to outlaw the use of the terms of contract in question. These national initiatives having preempted the Community's proposals for the time being, the Commission had to allow time for the dust to settle.

In 1984 the Commission duly published a consultation paper entitled "Unfair Terms in Contracts concluded with Consumers"[2] which circulated widely and led to much discussion between the Commission's departments and commerce and industry, public utility suppliers, the liberal professions and consumer representatives. A variety of views was expressed but, as was entirely predictable, the authors of standard terms of contract opposed any notion of a Community measure limiting their freedom to draft unilaterally whatever standard terms of contract, geared to the promotion of <u>their</u> interests rather than those of the consumer, they thought fit. For obvious reasons their opposition was not couched in such terms, but it was nonetheless real.

However, in 1985 and 1986 the European Parliament expressed a much more positive attitude. The Commission's 1984 consultative paper was considered by two Parliamentary committees, namely the Legal Affairs Committee, and the Public Health, Environment and Consumer Protection Committee. Both accepted the need for protection of consumers against unfair terms of contract and for

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(1) Loi sur la protection et l'information des consommateurs des produits et des services, No 78-23, 10.1.1978.

(2) Supplement 1/84, Bulletin of the European Communities.

EC rules on the subject. Indeed the Legal Affairs Committee went so far as to resolve that a directive in this field should not be confined to the protection of consumers(1).

In response to the Commission's initiative in launching "A New Impetus for Consumer Policy" in May 1986 the Council adopted a Resolution(2) calling for proposals from the Commission under the programme for the new impetus, which included a proposed directive on unfair terms of contract.

The present proposal is the culmination of many years' work, announced in the Commission's consumer action programmes and called for by the European Parliament and the Council. In the meantime, most of the Member States which had not already adopted laws regulating unfair terms of contract have either done so or have prepared legislative proposals. Thus it is obvious that problems exist at national level which have had to be resolved by legislation. From the Community's point of view, the pity is that the solutions adopted vary considerably from one Member State to another and experience shows that some of the solutions have not produced the best results.

Situation in the Member States

National laws of Member States on these matters are divergent. In an internal market which avowedly is intended to operate as a single market, the law on such matters should be the same in all Member States. If it is not, commerce and industry, including particularly sellers of goods and services (credit, banking, insurance, transport, travel packages, repairs, maintenance, professional advice from lawyers, accountants, investment advisers, architects, builders of dwellings, painters, decorators, funeral directors ...

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(1) HOON Report in PE100.931/fin. Given the extreme difficulties which would be involved in obtaining acceptance of common rules applicable to (literally) ALL contracts, the Commission has decided that for the present its work should be confined to consumer contracts.

(2) OJ No C167, 5.7.1986, p. 1.

etc) as well as consumers, have to operate in circumstances of doubt, often of difficulty, but certainly of disparity when they (commerce and industry) sell goods or provide services in another Member State from their own, or when they (consumers) buy goods or take them on hire-purchase or on hire or rental, or receive other services, when they are abroad in another Member State than their own for reasons of work, study, tourism, health, combined leisure and work ... etc.

But we are very far away from large-scale harmonisation. The time is not ripe for approximating or unifying the national laws relating to the whole field of contractual and quasi-contractual obligations or even to the limited sphere of the sale of goods and provision of services. The most positive step that the European Community can at present take in this important branch of law, for the purpose of bringing us nearer to a solution of the problem described in the foregoing paragraph, is:

- *to eliminate unfair terms in contracts concluded with consumers, by specifically identifying certain terms which should never be used in such contracts, and*

- *to fix the basic minimum obligations which in every Member State the consumer should reasonably be able to require the seller of goods or services to satisfy when selling to the consumer.*

The Law

The national laws are as follows :

Belgium

Belgium is one of the few Member States in which no specific legislation on unfair contract terms has been adopted. On 23 July 1985 the Belgian government proposed to Parliament that the Trading Practices Act of 14 July 1971 should be amended by the insertion of two special rules on general conditions of contract presented in standard form. The two proposed provisions resemble those contained in a draft law of 1977, which never reached Parliament, but they are of a less comprehensive nature.

On 20 March 1987 a revised text was approved of by the Senate and was sent to the House of Representatives. It contains proposed rules on unfair terms in consumer contracts. It also contains a "black list" of terms which will in all circumstances be void if used in consumer contracts.

The Trading Practices Act of 14 July 1971 empowers consumer organisations to bring civil proceedings in court for an injunction requiring certain practices to cease. The plaintiff does not have to show a "personal interest" in order to justify its claims; on the contrary, the interest of consumers as a whole is sufficient. This is not so, however, where a criminal sanction applies; in such cases the consumer organisation must have an interest of its own.

On 29 April 1987 a Royal Commission was established to consider the reform of Belgian consumer law. One of the subjects which the Belgian Royal Commission is now studying is unfair terms of contract. As the members have been appointed for a three-year term and their work is complex, their report will presumably not be published before the early 1990s.

Belgian legal writers have since 1966 been recommending a re-codification of the civil law, but Belgian politicians have not as yet taken up this idea.

Denmark

The Danish legislation on unfair contract terms is contained in two Acts: the Marketing Practices Act, No 297 of 14 June 1974, which came into force on 1 May 1975, and the Contracts Act, No 242 of 8 May 1917, as amended.

A consumer who has a complaint about goods, work or services supplied is entitled to bring it to the Consumer Complaints Board established by the Act of that name, No 305 of 14 June 1974.

Also, a Consumer Ombudsman has been appointed whose duty it is to ensure that the provisions of the Act and the regulations made under it are not contravened. One of his tasks is to negotiate with suppliers of goods and services, if he considers this appropriate, so that they do not use unfair terms of contract. If he does not succeed in persuading them he may issue legal proceedings against them which will be heard in the Marketing Practices

Division of the Copenhagen Maritime and Commercial Court. This is a court of first instance with a number of special functions. It has power to issue an injunction preventing any further use of the unfair term or terms involved. A supplier who is found to be in breach of an injunction issued by the court may be fined or imprisoned for a term not exceeding six months. The Act also gives the Ombudsman powers to enable him to obtain information that he needs for the performance of his duties.

Section 1 in Part 1 of the Marketing Practices Act reads as follows (in the Danish official translation in the English language) :

> *"This Act shall apply to private business activities and to similar activities undertaken by public bodies. Such activities shall be carried on in accordance with proper marketing practices."*

Although the meaning of this provision is not entirely clear, the explanatory memorandum is very clear in its view that the use of unfair terms in contracts, and especially in consumer contracts, is to be considered an unfair marketing practice. Unfairness will readily be presumed in circumstances where the supplier has imposed his terms on a consumer.

Among the other substantive provisions of the Marketing Practices Act, Section 4 in Part 1 is of interest with regard to contract terms. It reads as follows:

> *"A guarantee, warranty or declaration of a similar nature shall be given only when such guarantee, warranty or declaration affords the consumer a better legal position than otherwise provided by existing legislation."*

Very important in providing practical support for the rules set out in the Marketing Practices Act has been the introduction into the Danish Sale of Goods Act, by Act No 147 of 4 April 1979, of a Chapter on Consumer Sales. The following statutes have given similar support : Act No 150 of 10 April 1979 which established a travel guarantee fund to protect travellers in the event of the bankruptcy of travel agents; Act No 275 of 9 June 1982 on consumer credit and Act No 284 of 6 June 1984 on payment cards both contain provisions which are relevant for consumer contract terms.

(3)

The Marketing Practices Act has been supplemented by a general clause on contract terms which was inserted into the Contracts Act of 8 May 1917 by Act No 250 of 12 June 1975, in consequence of Nordic inter-State cooperation. The general clause (paragraph 36) reads as follows :

> *"1. An agreement may be set aside, in whole or in part, if its enforcement would be unreasonable or contrary to practices of fair conduct. The same applies to other legal transactions.*
>
> *2. In applying section 1 of this provision, consideration shall be given to the circumstances at the time of the conclusion of the agreement, the content of the agreement, and later developments."*

Once again, the text itself does not make it clear that standard contract terms, and more particularly standard terms in consumer contracts are a prime target of the law. It was not thought necessary to state this in the Act itself; nor was it thought necessary to provide a black list of unfair clauses.

The Marketing Practices Act applies not only to contracts made with consumers but to all contracts in general.

France

The French legislation on unfair contract terms is quite different in structure from that in other Member States. It is mostly contained in Articles 35 to 38 of Act No 78-23 of 10 January 1978 on the protection and information of consumers of products and services (Loi sur la protection et l'information des consommateurs de produits et de services). These rules apply only to contracts concluded with "non-professionals" or consumers. These have been supplemented by Act No 88-14 of 5 January 1988 relating to legal proceedings brought by approved associations of consumers and to information to be given to consumers.

Article 35 of the 1978 Act provides as follows :

> *"In contracts concluded between persons carrying on a trade, business or profession ¦on the one hand¦ and those who do not or who are consumers ¦on the other hand¦, the following terms may be prohibited, restricted or regulated by the Council of State by decree issued after consultation with the Committee created by article 36, making distinctions if necessary according to the character of the relevant goods or services, namely terms which covering the fixed or determinable nature of the price or the payment of it, conformity of the goods or delivery of them, risk, liability and warranty, performance, resiliation, termination or renewal of agreements, where these terms appear to be imposed upon the persons who are not carrying on a trade, business or profession, or who are not consumers, by an abuse of the economic strength of the party imposing them and the terms confer on the latter party an excessive advantage."*

This same Article declares that "abusive" terms, which conflict with these provisions, shall be "deemed not to have been written", ie deemed not to be incorporated in the contract.

Article 36 created the Unfair Terms Committee, whose task (see Article 37) is as follows :

- *to examine model contracts as usually offered in the above-mentioned circumstances;*
- *to enquire whether these documents contain terms which might be unfair.*

The Committee may be seised to this end by the Minister responsible for consumer affairs or by recognised consumer protection organisations or by persons who carry on a trade, business or profession. The Committee may also act on its own motion.

The action which it can take is to recommend suppression or amendment of terms which it finds unfair. The Minister responsible for consumer affairs may on his own motion, or at the Committee's request, publish its recommendations.

The Committee has to issue an annual report concerning its activities and make such proposals for law reform as it considers desirable.

Under the 1978 Act, however, the courts had virtually no discretion. They applied the letter of the law but could do little more. This has to some considerable extent been counteracted by Act No 88-14 of 5 January 1988, mentioned above, which confers authority on recognised consumer associations (widely defined, see Article 1) to apply to the court for the purpose of obtaining the deletion of an unlawful term from a contract, or from standard terms of contract, offered to consumers and also the deletion of unfair terms from model forms of contract usually offered to consumers by persons carrying on a trade, business or profession.

The Federal Republic of Germany

One of the most interesting developments in the area of unfair contract terms in the 1970s was the Federal Republic's adoption on 9 December 1976 of its Act to regulate the law relating to General Conditions of Business (Gesetz zur Regelung des Rechts der Allgemeinen Geschäftsbedingungen (abbreviated to AGB-Gesetz)) which entered into force on 1 April 1977.

Traditional civil code provisions relating to offer and acceptance, the practice of construing contractual terms "contra proferentem" and the application of the principle of good faith had enabled the Federal Republic's courts to extend consumer protection against unfair terms in standard form general conditions of contract to its near-maximum. Yet this was considered insufficient by many legal writers, some of whom argued in favour of administrative control of standard contract terms. The law does not provide for this, however, and as the government dropped at the end of 1975 its idea of establishing a Consumer Ombudsman or government agency to control unfair terms in standard form general terms of contract, the task of control is left to the courts.

There has been some discussion of the question whether the AGB-Gesetz, dealing as it does with a central part of the Law of Obligations, should be incorporated into the Civil Code rather than stand in isolation as a separate Act. However, there is no active move at present in this direction.

Chapter 1, Section 1 of the Act defines "general conditions of contract" as :

> *"contract terms which have been established in advance for use in an unlimited number of contracts and which one of the parties requires the other to accept when concluding the agreement. It does not matter whether the terms are contained in a separate document or in the contract document itself, nor what their scope is, nor in what form of writing they appear, nor what form the contract takes."*

The definition clause then goes on to provide that :

> *"In so far as the terms of contract are individually negotiated between the parties to the contract, they do not constitute general conditions of contract."*

The basic principle of this highly detailed piece of legislation is stated in Section 2, paragraph 9(1) as follows :

> *"Terms contained in general conditions of contract are void if the person who contracts with the person whose terms they are is thereby placed at such a disadvantage as to be incompatible with the requirements of good faith."*

There follows, in paragraph 10, a "grey list" of terms which if used in general conditions of contract are voidable : the party on whom they are imposed is entitled to apply to the court for an order/declaration that in the circumstances of his/her contract the term is void.

Paragraph 11 contains a "black list" of absolutely prohibited terms, ie terms which in general conditions of contract are always void.

The scope of application of the Act is not confined to contracts concluded with consumers. However, the grey and black lists do not apply in relation to contracts concluded between businesses in the course of their business, or in relation to contracts concluded with public-law corporations and foundations; and the technical rules set out in paragraph 2 on the subject of "Incorporation of Terms" (Einbeziehung in den Vertrag) and those set out in

paragraph 12 on the subject of conflict of laws (Kollisionsrecht) do not apply to those contracts either. Nevertheless, the above-stated basic principle laid down in Section 2, paragraph 9(1), does apply to those contracts.

Special rules apply to :

- *railway tariffs and conditions;*
- *conditions of carriage of tramway, omnibus and public motor vehicle transport;*
- *electricity and gas suppliers.*

Certain contracts are excluded entirely from the scope of application of the Act, namely those relating to matters falling within :

- *Employment law*
- *The law of succession (inheritance)*
- *Family law*
- *Company law.*

Recent research shows that while much of the Act is operating effectively, the courts are having difficulty in adhering to its rigid distinction between black list terms and grey list terms.

Greece

Like Belgium, Greece has not passed any specific legislation on unfair terms in consumer contracts.

Whenever a case concerning unfair contract terms arises, the courts inevitably have recourse to the general provisions of the Civil Code, for there are no others. An administrative control procedure has been instituted for a very limited number of specific contracts, such as insurance contracts.

This position may change, however, particularly in relation to unfair contract terms, for this subject features among the first group of topics examined by the Consumer Protection Bureau after its formation in 1982. At present, the Ministry of Commerce, under which the Bureau operates, is considering

introducing a consumer protection bill to Parliament. It is the Ministry's intention that the bill shall include a general provision on unfair terms of contract.

Ireland

In the 1970s the doctrine of fundamental breach of contract and the contra proferentem rule served as means of protecting consumers. By the end of the decade this situation had changed. Substantive rules now contained in the Sale of Goods and Supply of Services Act 1980 reflect the Sale of Goods Act 1979 enacted in the United Kingdom.

The 1980 Act contains mandatory provisions relating to consumer transactions. It also lays down a number of requirements for guarantees : they must be clearly legible, state their duration and the terms applicable, and indicate the costs, if any, payable by the buyer. In certain circumstances the exclusion of liability is prohibited by the Act; in others it is allowed only if this would be fair and reasonable. Fairness and reasonableness are viewed in the same way as in the United Kingdom.

The 1980 Act also contains some novelties. It enables the Minister to require that written contract terms, or notices, shall include specified particulars, and to compel suppliers who use standard forms to give such notice to the public as the Minister's order may specify concerning their use of those standard forms and as to whether they are willing, or not, to contract on any other terms. The Minister may fix the size of type to be used in printed contracts and other documents, and require that certain contracts be made in writing.

The Office of Director of Consumer Affairs (established by the Consumer Information Act 1978) has certain functions in relation to contract terms under the Sale of Goods and Supply of Services Act 1980. The Director may take action by way of prosecution, or otherwise, in respect of contracts (or notices in shops) containing terms which are contrary to those which are mandatory under the Act.

Under the Sale of Goods Act 1893 to 1980 it is an implied term in all contracts for the sale of goods that the goods are of merchantable quality, that they are fit for their purpose and that they correspond with their description if sold by description.

In consumer contracts these implied terms must not be excluded under any circumstances. They are thus mandatory. It is a prosecutable offence to include in a consumer contract (or in a notice in a shop) a term which is in conflict with these mandatory terms. For example, a notice saying "No Refunds" would be prohibited (unless it also said clearly and conspicuously something like "This does not affect your legal rights"). It is the Director of Consumer Affairs' task, under the Sale of Goods and Supply of Services Act 1980, to take action in respect of such terms.

In non-consumer contracts for the sale of goods (eg contracts made between businesses) the said "implied" terms may be excluded or restricted but only to the extent that it is fair and reasonable to do so. Certain criteria for assessing what is fair and reasonable are set out in the 1980 Act, but in the final analysis it is for the court to decide this in the context of a specific dispute between parties to a specific contract.

Under the Sale of Goods and Supply of Services Act 1980, it is implied in all contracts for the supply of services that the supplier has the requisite skill to supply the service, that the service will be provided with due skill, care and diligence and that goods or materials supplied with the service will be of merchantable or reasonable quality.

In contracts for the supply of services to consumers these "implied" terms may be excluded but the exclusion is not valid unless it is shown that it is fair and reasonable and that it was specifically brought to the consumer's attention. A decision on the validity or otherwise of a clause excluding the implied terms can only be made by a court in an individual case. In practice the Director of Consumer Affairs cannot require the removal of exclusion clauses in contracts for services.

In non-consumer contracts for the supply of a service (eg contracts made between businesses) the parties are at liberty to exclude or vary the terms which the 1980 Act would import.

The functions of the Director of Consumer Affairs under the Consumer Information Act 1978 relate only to misleading practices and have nothing to do with contract terms as such. Under the Sale of Goods and Supply of Services Act 1980 the Director has certain functions in relation to contract terms, as described above. The Director also has a general, if vague, monitoring function in this area but strictly speaking he can only intervene in specific cases along the lines described above.

The Unfair Contract Terms Act 1977, in English law, is more general and more extensive in scope than the Irish Sale of Goods and Supply of Services Act 1980. There is no generalised concept of "unfair" or "unfairness" in Irish Law. Certain terms are implied in certain contracts. These implied terms may not be excluded unless the exclusion can be shown to be fair and reasonable. In other words the concept of fairness has no general application - it is applied only in the context of exclusions of terms that would otherwise be implied by law.

Italy

The "new" Civil code adopted by Italy in 1942 contains three provisions which deal with General Conditions of Contract (or General Conditions of Business) and also with model or standard terms of contract, as follows:

> *"Article 1341*
>
> *1. General conditions of contract prepared in advance by one of the parties to the contract are binding upon the other party if, at the time of concluding the contract, the latter knew of them or by using ordinary care should have known of them.*
>
> *2. In any event the following terms shall be of no effect unless they have been specifically approved in writing : terms which in favour of the party who drafted them :*
>
> *- limit his liability;*

(4)

- *allow him to withdraw from the contract or defer performance of it;*
- *fix expiry dates which are detrimental to the other party;*
- *restrict the other party's right to raise defences;*
- *restrict the other party's freedom to conclude contracts with third persons;*
- *involve tacit prolongation or renewal of the contract;*
- *impose arbitration clauses or terms which derogate from the competence of the judicial authorities."*

"Article 1342

1. In contracts concluded by the signing of models or forms prepared in advance for the purpose of regulating in a uniform manner certain contractual relationships, terms which have been added to the model or form shall in the event of conflict prevail over those in the model or form, even if the latter have not been struck out.

2. Also, paragraph 2 of the foregoing Article shall apply."

"Article 1370

Terms which have been inserted in general conditions of contract or in models or forms prepared in advance by one of the parties shall be interpreted, in cases of doubt, in favour of the other party."

The Italian treatment of the subject implicitly recognised that freedom of contract must be preserved, but that the inroad made into that very principle by the increasing use of pre-prepared and usually pre-printed, or at least pre-typed, general terms of contract (or general conditions of contract, or general conditions of business) in such manner that the consumer has no possibility of discussing (let alone negotiating) any of the terms, constitutes so great a denial of the principle of freedom of contract (looked at from the consumer's point of view) that the legislator was justified in entering the arena for the purpose of rectifying the imbalance between the parties, ie the imbalance stemming from the fact that the consumer, faced with such a contract, has no possibility of negotiating any of the terms: the consumer either "takes it or leaves it".

Luxembourg

The Consumer Protection Act (Loi relative à la protection juridique du consommateur) of 25 August 1983, Mémorial 1983, 1494, contains provisions relating to unfair contract terms. The Act was amended by the Act of 27 March 1986 (Mémorial 1986, 1145) whereby Luxembourg transposed the Rome Convention of 19 June 1980 on the Law applicable to contractual obligations; but this amendment did not touch unfair contract terms.

The Consumer Protection Act's scope of application is restricted to consumer transactions. The Act of 15 May 1987, Mémorial 1987, goes much further and indeed amended the Civil Code (in no less than twelve different provisions). The amendment which had the most direct bearing on unfair terms of contract consisted of the insertion into the Civil Code of a new article, number 1135-1, as follows:

> *"General conditions of contract established in advance by one of the parties are not binding on the other party unless he had the opportunity to be aware of them at the time when he signed the contract and must, in the circumstances, be held to have accepted them.*
>
> *Save where specially accepted in writing, the following terms shall always have no binding effect: terms which, in favour of the person who drew up the general conditions, limit his liability, (or) enable him to withdraw from the contract or defer his performance of it, (or) provide for compulsory recourse to arbitration, and also those which confer jurisdiction on other courts than those which are normally competent."*

There is a noticeable similarity between this amendment of the Civil Code and Article 1341 of the Italian Civil Code.

The 1987 amendments provide for the establishment of a Luxembourg Consumer Council (Article 13), but it has been given consultative status only.

The 1983 Act's provisions on unfair terms of contract are as follows:

"Article 1

In contracts concluded between a person carrying on a trade, business or profession who in the course thereof supplies consumer goods, whether durable or not, or services, and a private end-consumer, any term or combination of terms which brings about in the contract an imbalance between the rights and obligations to the detriment of the consumer is unfair and as such held to be null and void.

Article 2

The following, in particular, are unfair:

(1) Terms excluding or restricting the warranty implied by law in respect of hidden defects.

(2) Any (contract) term providing for an increase in the amount of the sum owed in the event of legal proceedings via the courts.

(3) Terms prohibiting the consumer from suspending, in whole or in part, the payment of amounts due if the supplier fails to fulfil his obligations.

(4) Terms whereunder the supplier reserves the right to alter or terminate the contract unilaterally and without specific or legitimate grounds specified in the contract."

.... and so on, up to :

"(19) Terms whereby the consumer, vis-à-vis a repairer or other person working on an object, renounces the right to invoke the warranty which a person who sells in the course of his trade, business or profession must give with regard to the work or new parts which he supplies.

(20) *Terms whereby a private end-consumer agrees that his debt be assigned to a third party and also renounces his right to invoke as against that third party the rights and defences which he (consumer) could plead vis-à-vis the person with whom he contracted."*

The first paragraph of Article 5 then provides that :

> *"The President of the district court of the plaintiff's domicile, upon the request of any individual or person, or of any suppliers' organisation or consumers' organisation, who or which is represented on the Prices Board, may declare a term or combination of terms unfair within the meaning of Articles 1 and 2 and pronounce such term or combination of terms null and void."*

By virtue of Article 6 a supplier as above described who vis-à-vis a private end-consumer invokes a term or combination of terms which has been declared unfair and, as such, null and void by a judicial decision which has become irrevocable so far as the supplier is concerned, will be fined up to 100.000 francs, but not less than 3.000 francs. Further, the second paragraph of Article 6 enables the individuals or persons, and the suppliers' organisations and consumers' organisations referred to in the foregoing Article to appear as civil parties before the criminal courts, in cases touching damage to their individual or collective interests.

The Netherlands

The Netherlands' legislation is contained in the Act dated 18 June 1987 on general conditions of contract.

By Article 6.5.2A.1. "general conditions" are defined as :

> *"one or more written terms which have been prepared for the purpose of being incorporated in a number of contracts, with the exception of terms pertaining to the fundamental core of the performance required under the contract".*

The "user" means : the person who uses general conditions in a contract, and "the other party" means : the person who, by signing a document or otherwise, has accepted that general conditions apply.

Under Article 6.5.2A.2. :

> *"The other party is also bound by general conditions even where, at the time the contract is concluded, the user knows or should know that the other party does not know the content of them".*

The Act then provides (Article 6.5.2A.2a) two "reasonableness" tests, alternatively, for the purpose of determining whether a term contained in general conditions is voidable or not. Such a term is voidable :

(a) If, having regard to the nature and content of the contract, to the manner in which the conditions have been prepared, to the ascertainable interests of the parties and the surrounding circumstances of the case, it is unreasonably onerous for the other party; or

(b) If the user has not offered the other party a reasonable opportunity to become aware of the general conditions.

This "reasonable opportunity" is constituted either by handing a copy of the general conditions to the other party, before or at the moment of conclusion of the contract, or, "if this is not reasonably possible", by giving notice to the other party, before the contract is concluded, that the general conditions may be inspected at the user's office or have been deposited with a Chamber of Commerce specified by the user or in a court registry, and that they will be sent upon request. If the general conditions have not been disclosed to the other party before or at the moment of conclusion of the contract, they are voidable if the user does not, at his own expense, send them forthwith to the other party who has requested them. However, the obligation to send them is displaced if the general conditions should not reasonably be required to be sent by the user (see Article 6.5.2A.2b.3).

In a contract made between a user and another party who is a natural person and is not acting in the course of a profession, trade or business, a term contained in general conditions is to be regarded as unreasonably onerous if it :

(a) wholly and unconditionally deprives the other party of the right to claim the performance promised by the user;

(b) excludes or limits the other party's right of cancellation ...;

(c) excludes or limits the other party's statutory right to defer his performance, or confers on the user a more far-reaching right to defer his performance than the law allows him;

(d) leaves it to the user himself to determine whether in performing his part of the contract he has failed to fulfil one or more of his obligations, or makes the exercise of the other party's statutory rights, in the event of such failure of performance, conditional upon the other party's taking legal action against a third party;

... and so on up to letter (n), as follows:

(n) provides for the resolution of a dispute otherwise than by the court which according to the law would have jurisdiction, or by one or more arbitrators, unless it allows the other party a period of not less than one month after the user has in writing invoked the term against him, to choose for the purpose of resolving such dispute the court which according to the law has jurisdiction.

A term appearing in the general conditions of a contract between a user and a natural person not acting in the course of a profession, trade or business is presumed to be unreasonably onerous if it :

(a) stipulates for the user an usually long period of time or an insufficiently precise period of time (having regard to the circumstances) within which to react to an offer made, or other act done by, the other party;

(b) restricts the content of the user's obligations, by comparison with what the other party, having regard to the rules of law applicable to the contract, could reasonably expect without that term;

(c) entitles the user to perform his part of the contract in a substantially different manner from what he promised, and the other party is not entitled to rescind the contract in such event;

(d) ....

(e) allows the user an unusually long period of time, or an insufficiently precise period of time, within which to perform his part of the contract;

(f) exempts the user or a third party, in whole or in part, from a legal obligation to pay compensation;

(g) excludes or restricts the other party's legal right of set-off, or allows the user a more extensive right of set-off than the law confers on him;

... and so on up to letter (j) :

(j) requires the other party to conclude a contract with the user or with a third person; but the presumption shall not apply where, having regard to the connection between such contract and the agreement at which this Article aims, it is reasonable that the other party be required to conclude such contract with the user or with a third person;

... and so on, further, up to letter (n) :

(n) provides that a power of attorney given by the other party is irrevocable or does not cease upon his death or upon this passing of his affairs under the control of a trustee or liquidator; but the presumption shall not apply where the power of attorney relates to registered property.

***Where a person uses in general conditions a term which he has been ordered not to use, that term is voidable** (see Article 6.5.2A.9).*

The foregoing rules do not apply to contracts of employment nor to collective labour agreements.

It is not permissible to exclude by contract the application of these rules.

Portugal

On 22 February 1986 new rules on general conditions of contract entered into force in Portugal. Decree-Law no 446/85 of 25 October 1985 codifies earlier case law, but it also lays down a number of new provisions, some of which were inspired by the Council of Europe's Resolution (76)47 of 16 November 1976 or by legislation already in force in other European countries. Portugal's new rules form one of the world's most comprehensive pieces of national legislation on unfair terms of contract.

Although the 1985 Decree-Law does not state the fact explicitly, it is a detailed development of Articles 81 and 110 of the Portuguese Constitution of 1976. These Articles declare that both the protection of consumers and the repression of abuse of economic power are State priorities. On the basis of Articles 81 and 110, the Consumer Protection Law No 29/81 of 22 August 1981 was passed, Article 7 whereof reads reads as follows:

> *"The consumer is entitled to equal and fair treatment when entering into a contract, in particular with regard to :*
> *(a) protection against abuses arising out of the use of general conditions of contract and aggressive marketing practices which reduce the consumer's opportunity of evaluating the contract terms and of taking a free decision whether or not to enter into a contract;*
> *(b) clear and precise drafting, in legible wording, in the absence of which the contract terms as to the supply of goods or services shall be considered null and void:*
> *(...)"*

However, until Decree-Law No 446/85 of 25 October 1985 was passed, this latter provision had not been implemented.

(5)

Portuguese legislation contains regulations of certain specific contracts, such as Decree-Law No 405/78 of 15 December 1978 on the supply of goods and services by public agencies, Decree-Law No 449/85 of 25 October 1985 on private contracts for the supply of gas.

Portugal's modern Civil Code of 1966 entered into force a short time before the consumer movement gained momentum. Save in so far as it has been amended, it does not contain provisions on the protection of consumers. Decree-Law No 446/85 of 25 October 1985, however, covers this ground extensively and in detail. It may be regarded as a model of its kind.

The actual textual provisions are as follows :

CHAPTER I
GENERAL PROVISIONS

Article 1
(General conditions of contract)

This decree applies to general conditions of contract which have been drafted in advance and which the parties proposing or receiving them agree to sign or accept.

Article 2
(Form, length, content and authorship)

The preceding article covers all general conditions of contract, unless otherwise stated, irrespective of the form in which they are communicated to the public, their scope in contracts for which they are intended, their content, or whether drafted by the proposing or receiving party, or by a third party.

Article 3
(Exceptions)

1. This decree does not apply to :

(a) standard conditions approved by the legislator;

(b) conditions arising from international treaties or conventions in force in Portugal;

(c) conditions imposed or expressly approved by public bodies with authority to limit private freedom of action;

(d) contract subject to the provisions of public law;

(e) legal acts in the areas of family law and the law of inheritance;

(f) conditions contained in collective labour agreements.

2. When, pursuant to (c) of the preceding paragraph, general conditions of contract of a type prohibited in this decree are used, consumer associations with representative functions, trade associations, professional associations and legally formed associations of economic interests, acting within their respective prerogatives, or the Ombudsman, may ask the competent bodies to make the necessary amendments.

CHAPTER II

INCORPORATION OF GENERAL CONDITIONS OF CONTRACT IN INDIVIDUAL CONTRACTS

Article 4

(Incorporation in individual contracts)

General conditions of contract inserted in draft individual contracts shall be incorporated in such contracts with all the consequences thereof, after acceptance, on the basis of the provisions of this chapter.

Article 5

(Communication)

1. General conditions of contract shall be communicated in their entirety to the contracting parties who agree to sign or accept them.

2. They shall be communicated in due manner and at sufficient notice to allow, according to the importance of the contract and length and complexity of the conditions, any person of normal circumspection to take full and effective cognizance of them.

3. The onus of proof of adequate and effective communication lies with the contracting party proposing the general conditions of contract.

Article 6
(Obligation to inform)

1. Contractors who use general conditions of contract shall inform the other party, according to circumstances, of any aspects in them which may warrant clarification.

2. Any reasonable clarification that is requested shall be provided.

Article 7
(Prevailing conditions)

Specifically agreed conditions shall have precedence over any general conditions of contract even when mentioned in documents signed by both parties.

Article 8
(Conditions excluded from individual contracts)

The following conditions shall be excluded from individual contracts:

(a) conditions which have not been communicated in accordance with Article 5;
(b) conditions communicated in violation of the duty to inform so that the party concerned cannot be expected to have taken effective cognizance of them;
(c) conditions which, as a result of the context in which they occur, the heading preceding them and the way in which they are presented in writing, remain unnoticed by a normal contracting party in the position of actually signing a contract;
(d) conditions inserted in forms after they have been signed by one of the parties.

Article 9

(Continued validity of individual contracts)

1. In the cases provided for in the preceding Article, individual contracts shall remain valid, with appropriate supplementary rules applied in the part of the contract concerned, and recourse shall be made, if necessary, to the rules for interpreting legal transactions.

2. The above-mentioned contracts, however, shall be null and void if, in spite of the use of the elements indicated in the previous paragraph, essential aspects remain unavoidably unclear or an imbalance is created in the benefits to be derived from the contract which poses a serious threat to good faith.

CHAPTER III

INTERPRETATION OF GENERAL CONDITIONS OF CONTRACT

Article 10

(General principle)

General conditions of contract shall be interpreted in accordance with the rules for interpreting legal transactions but always within the context of each individual contract in which they occur.

Article 11

(Ambiguous conditions)

1. Ambiguous general conditions of contract shall have the meaning given to them by the normal contractor who agrees to sign or accept them when placed in the position of the actual acceptor of the contract.

2. In cases of doubt, the meaning which is the most favourable for the accepting party shall have precedence.

CHAPTER IV
INVALIDITY OF GENERAL CONDITIONS OF CONTRACT

Article 12
(Prohibited conditions)

General conditions of contract which are prohibited under this decree shall be null and void in accordance with the provisions thereof.

Article 13
(Continued validity of individual contracts)

1. The accepting party who signs or accepts general conditions of contract may choose to maintain the validity of individual contracts when some of their conditions are invalid.

2. Maintenance of such contracts implies the application, in the section concerned, of the appropriate supplementary rules, with recourse, if necessary, to the rules for interpreting legal transactions.

Article 14
(Restriction)

If the possibility provided for in the preceding Article is not utilized, or if it is, and this results in an imbalance in contractual benefits which poses a serious threat to good faith, the rules for restricting legal transactions shall be applied.

CHAPTER V
PROHIBITED GENERAL CONDITIONS OF CONTRACT

SECTION I
RELATIONS BETWEEN ENTREPRENEURS OR COMPARABLE BODIES

Article 15

(Scope of prohibitive provisions)

The prohibitive provisions stipulated in this section shall apply to relationships between entrepreneurs or persons exercising liberal professions in an individual or collective capacity or to relationships between different parties when acting only in this capacity and within the scope of their specific activities.

Article 16

(General principles)

General conditions of contract which are contrary to good faith shall be prohibited.

Article 17

(Implementation)

In the application of the preceding provision, priority shall be given to the fundamental values of law according to the situation under consideration, and in particular to:

(a) the importance attached by the parties to the overall meaning of the contractual conditions concerned, the process of forming the individual contract in question, its content, as well as any other elements which may merit consideration;

(b) the objective which the parties aim to achieve commercially, and in particular on the basis of the type of contract used.

Article 18

(Absolutely prohibited conditions)

Terms contained in general conditions of contract shall be absolutely prohibited if they :

(a) preclude or limit, directly or indirectly, responsibility for damage caused to life or limb, moral or physical integrity or to a person's health;

(b) preclude or limit, directly or indirectly, responsibility for extra-contractual property damage caused within the sphere of interest of the other party or third parties;

(c) preclude or limit, directly or indirectly, responsibility for non-performance or incomplete performance or delay in the event of fraud or grave culpability;

(d) preclude or limit, directly or indirectly, responsibility for acts by representatives or assistants in the event of fraud or grave culpability;

(e) confer directly or indirectly to the person drawing up the conditions the exclusive right to interpret any condition in the contract;

(f) preclude the exceptional case of non-fulfilment of the contract or its cancellation for non-fulfilment;

(g) exclude or limit the right of retention;

(h) exclude the possibility of compensation when allowed by law;

(i) limit in any way the possibility of consignment in the cases and under the conditions provided by law;

(j) establish permanent long-term obligations, the length of which depends solely on the will of the person drawing up the conditions;

(k) allow the person drawing up the conditions the possibility of abandoning his/her contractual position, transferring liabilities or sub-contracting, without the agreement of the other party, unless the identity of the third party is indicated in the initial contract.

Article 19

(Relatively prohibited terms)

General conditions of contract shall be prohibited in accordance with standard commercial rules if they :

(a) establish, for the party drawing up the conditions, excessive periods for acceptance or rejection of proposals;

(b) establish, for the party drawing up the conditions, excessive periods for performance, without postponement, of the contracted obligations;

(c) include penalty clauses which are disproportionate to the damage to be made good;

(d) call for false statements of receipt, acceptance or other indications of will based on insufficient facts;

(e) without justification make the guarantee of quality of the goods supplied or services rendered depend on non-recourse to third parties;

(f) allow one of the parties to renounce the contract immediately or at very short notice, without adequate compensation, when according to the contract the other party is required to make investments or other major expenditure;

(g) make a court of justice competent which creates serious inconvenience for one of the parties without the interests of the other party justifying it;

(h) refer to international law when the inconvenience caused to one of the parties is not counterbalanced by the serious and objective interests of the other party;

(i) allow the party drawing up the conditions the possibility of altering contractual benefits without compensation commensurate with the resulting changes in value;

(j) without justification limit the possibility of appeal.

SECTION II
RELATIONS WITH FINAL CONSUMERS

Article 20
(Scope of prohibitive provisions)

The prohibitive provisions of the preceding section and this section shall be applicable to all relations with final consumers and generally all cases not included in Article 15.

Article 21
(Absolutely prohibited conditions)

All general conditions of contracts shall be absolutely prohibited which :

(a) limit or change in any way obligations which have been directly assumed in the contract by the party drawing up the conditions or by his/her representatives;

(b) confer directly or indirectly on the party drawing up the conditions the exclusive right to verify and assess the quality of the goods or services provided;

(c) allow no link to be established between the goods or services to be provided and the indications and specifications made or samples shown during the contracting process;

(d) certify knowledge on the part of the relative parties to the contract either in legal or material aspects;

(e) alter rules regarding onus of proof;

(f) alter rules regarding the spreading of risk.

Article 22
(Relatively prohibited conditions)

General conditions of contract shall be prohibited in accordance with standard commercial rules if they :

(a) make provision for excessive periods for the validity or cancellation of the contract;

(b) allow the party drawing up the conditions freely to cancel the contract without sufficient notice or to cancel it without just motive on the basis of law or convention;

(c) limit the responsibility of the party drawing up the conditions, for default of performance, repairs or previously determined financial compensation;

(d) allow increases in price in contracts for successive supplies or services within manifestly short periods, or beyond this limit, excessive increases, without prejudice to the provisions of Article 437 of the Civil Code;

(e) prevent immediate cancellation of the contract when justified by increases in prices;

(f) eliminate, without justification, rules relating to incomplete performance or periods for claiming default of performance;

(g) prevent, without justification, repairs or supplies by third parties;

(h) impose the excessive shortening of deadlines;

(i) establish excessively high or onerous guarantees compared with the value to be secured;

(j) set unreasonable or inconvenient places, times or methods of performance;

(k) require, for the performance of acts under the contract, formalities which are not provided for by law or which commit parties to undertake unreasonable action in order to exercise contractual rights.

Spain

Spain has a comprehensive General Law on Consumer Protection (Ley general para la defensa de los consumidores y usuarios), Law No 26/1984 and which contains detailed rules concerning terms of contract "drawn up in advance, unilaterally, by an undertaking or group of undertakings ("Empresa o grupo de Empresas") for the purpose of applying them to all contracts which it concludes, the application whereof the consumer ... cannot avoid if he/she wishes to obtain the goods or services in question".

This Law was enacted in pursuance of Article 51 of the Spanish Constitution of 1978, which reads as follows :

> *"1. The public authorities shall guarantee the protection of consumers and users, by protecting, through efficient procedures, their security, their health and their legitimate economic interests.*
>
> *2. The public authorities shall promote consumers' and users' information and education, shall promote consumers' and users' organisations and shall hear these organisations concerning the questions which may affect consumers and users, in such manner as the law shall prescribe.*
>
> *3. Within the scope of the foregoing paragraphs, the law shall regulate internal commerce and the regime for authorising commercial products."*

The immediate cause of the enactment of the General Law on Consumer Protection was the 1981 oil scandal. The denatured oil cost the lives of several hundred persons. Thousands of others were injured, sometimes for life. The scandal

resulted in heavy popular pressure for consumer protection through legislation. The General Law on Consumer Protection covers many aspects of consumer protection. It deals with general conditions of contract as follows.

Article 8, relating to the offer, promotion and advertising of goods, activities and services, provides that :

> *"1. The offer, promotion and advertising of products, activities or services shall adjust to the nature, characteristics, terms, use or purpose thereof, (but) without prejudice to the (specific) rules on advertising; ¦consumers or users shall be entitled to insist that¦ the contents ¦of the offer, promotion and advertising¦, the representations made therein concerning each product or service, and the terms and guarantees offered, are actually complied with, even when they are not expressly contained in the contract concluded or in the document or voucher received.*
>
> *2. Notwithstanding the foregoing, if the contract concluded contains terms which are more advantageous, these shall prevail over the contents of the offer, promotion or advertising.*
>
> *3. False or misleading offering, promotion (or) advertising of products, activities or services shall be pursued at law and sanctioned as fraud. Consumers' and users' organisations duly constituted under the provisions of this Law shall be empowered to initiate and take part in administrative proceedings aimed at the cessation thereof."*

Article 10 provides that :

> *1. Clauses, conditions or stipulations usually applied to the offer, promotion or sale of goods or services, including those used by public authorities and their dependent bodies and undertakings, shall meet the following requirements :*

(a) precise, clear and simple wording allowing instant comprehension, but with no references to texts or documents not supplied prior to or at the time of conclusion of the contract, which texts or documents shall in any event be mentioned expressly in the contractual document;

(b) presentation, unless waived by the interested party, of a receipt, evidence, copy or other document providing proof of the transaction or, where appropriate, a sufficiently detailed estimate;

(c) good faith and proper balance in the terms, thereby precluding, among other things :

1° in cases of deferred payment in sales contracts, the omission of the sum deferred, of the annual rate of interest on outstanding balances and clauses which, in any form, empower the vendor to increase the deferred price of the goods during the validity of the contract;

2° clauses granting one of the parties the right to cancel the contract at his/her discretion, except, where applicable, those allowing cancellation by the purchaser under the terms of mail order sales, door-step selling and sale by sample;

3° unfair clauses, namely clauses which are disproportionately or inequitably prejudicial to the consumer, or which give rise in the contract to an imbalance between the rights and obligations of the parties to the detriment of the consumer or user;

4° unfair credit terms;

5° increases in the price of services, accessories, financing, deferred payment, surcharges, indemnities or penalties that do not correspond to extra services, which may be accepted or rejected ¦by the consumer¦ in each case and which are stated and itemised with appropriate clarity;

6° total limitation of liability vis-à-vis the consumer or user, and also total limitation as regards liability for the basic use or purpose of the product or service;

7° the effect, on consumers, or users, of faults, defects or errors in the fields of administration, banking or domiciliation of payments, where not directly attributable to the consumer or user, and also the cost of services which from time to time are offered for a certain period free of charge;

8° reversal of the burden of proof to the detriment of the consumer or user;

9° express refusal to meet obligations or provide the contractual performance required of the producer or supplier with automatic referral to administrative or legal claims procedures;

10° waiver of the consumer's or user's rights accorded by this Law;

11° in first home sales, the stipulation that the purchaser must bear the costs relating to the preparation of the title deeds, being costs which by their nature should be borne by the seller (new construction, horizontal property rights, mortgages to finance the construction, division or cancellation);

12° the enforced purchase of unsolicited additional or accessory goods or merchandise.

2. For the purposes of this Law (the words) "usually applied", in relation to clauses, conditions or stipulations, mean the combination of terms drawn up in advance, unilaterally, by an undertaking or group of undertakings for the purpose of applying them to all contracts which it concludes, the application whereof the consumer or user cannot avoid if he/she wishes to obtain the goods or services in question. Doubts as regards interpretation shall be resolved contra proferentem, and specific clauses shall prevail over general clauses, provided the former are more favourable than the latter.

3. Clauses, conditions or stipulations which are usually applied by public sector undertakings or public service concession holders in monopoly conditions shall be subject to the approval, supervision and control of the competent public authorities, independently of the consultations provided for in Article 22 hereof. The foregoing shall be without prejudice to the fact that those bodies are subject to the general provisions of this Law.

4. Clauses, conditions or stipulations which fail to meet the above requirements shall be considered entirely null and void. However, where the remaining clauses create an unfair situation as between the parties to the contract, the contract itself shall be invalid.

5. The public authorities shall ensure the accuracy of weights and measures of goods and products, price transparency and after-sales service terms for durable products.

Article 20, paragraph 1, reads as follows :

"Consumers' and users' organisations shall be incorporated in conformity with the Associations Law, and shall have as their purpose the defence of the interests of consumers and users, including information and education thereof, both in a general sense and in relation to particular products or services."

Article 22 provides that :

1. The consumers' and users' organisations shall be heard on a consultative basis during the preparation of terms which are usually applied in fields which directly affect consumers or users.

2. Such hearing shall be obligatory in the following cases:
(...)
(e) general conditions of contract (used by) undertakings which provide public services in monopoly conditions.
(...)

United Kingdom

The principal statutes relating to contract terms are :

The Misrepresentation Act 1967
The Supply of Goods (Implied Terms) Act 1973
The Fair Trading Act 1973
The Consumer Credit Act 1974
The Unfair Contract Terms Act 1977
The Sale of Goods Act 1979
The Supply of Goods and Services Act 1982

Professor P D James[1] says of the Unfair Contract Terms Act 1977 that "This statute does not abrogate the major premise of the common law that people are free to contract out of their obligations[2], because its scope is not universal and in many respects its application is limited; but in a practical sense it goes a long way towards it."

The statute applies only to "business liability"; that is to say "liability for breach of obligations or duties done or to be done by a person in the course of a business (whether his own business or another's), or from the occupation of premises used for business purposes of the occupier; and references to liability are to be read accordingly" (see Section 1(3) of the Act). Unfortunately the definition of "business" is vague: thus in Section 14 (which amends the law for England and Wales and also for Northern Ireland) and Section 25(1) (which amends the law for Scotland) the word "business" is stated to include "a profession and the activities of any government department or local or public authority". No other definition of "business" is given. No doubt it is to be interpreted very broadly.

However, the Act does not have the great breadth of approach which characterises the legislation passed by many of the continental Member States in the field of unfair terms of contract, eg Luxembourg, Portugal and Spain.

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(1) Introduction to English law, 11th Edition, page 298.

(2) In this present context the words "free to contract out of their obligations" mean (semble) "free to exclude their liability".

The Unfair Contract Terms Act 1977 is principally concerned to regulate the difficult (but specific and limited) matters of how far :

- *liability for negligence can be excluded or restricted (Section 2, which applies in relation to England and Wales and to Northern Ireland, but not to Scotland);*

- *liability can be excluded or restricted where it would arise from contractual obligations (Sections 2, 3, 6 and 7, which apply in relation to England and Wales and to Northern Ireland; sections 15 to 17 and 19 to 21, which apply to Scotland);*

- *"a person dealing as a consumer" can by contract be required "to indemnify another person (whether a party to the contract or not)" (Section 4, E, W and NI; Section 18 Scotland);*

- *liability can be excluded or restricted where:*
  "(1) In the case of goods of a type ordinary supplied for private use or consumption ... loss or damage -
  (a) arises from the goods proving defective while in consumer use; and
  (b) results from the negligence of a person concerned in the manufacture or distribution of the goods ...."
  (Section 5(1), E, W and NI; compare Section 19, Scotland)

- *liability can be excluded or restricted in relation to the statutory implied terms in sales contracts, hire purchase contracts and certain other contracts for the supply of goods.*

The Unfair Contract Terms Act 1977 provides that no person may "exclude or restrict his liability for death or personal injury resulting from negligence" either "by means of a contractual term" or by means of "a notice given to persons generally or to particular persons" (Section 2(1), E, W and NI; not Scotland).

In relation to a consumer dealing (ie a transaction with a consumer) Sections 6 and 7 render invalid an exemption clause whose object is to reduce the effect of the statutory implied terms in contracts for the supply of goods.

Further, the Act applies what it describes in Section 2(2) (for E, W and NI, not Scotland) as "the requirement of reasonableness". Broadly speaking "the requirement of reasonableness" is to be interpreted to mean that the contractual term, or the notice, was "a fair and reasonable one ..." in the circumstances (Section 11(1) and (3), E, W and NI; Section 24(1), (2) and (3), Scotland).

The burden of proof that this "reasonableness test" has been satisfied lies on the person who asserts that it has (Section 11(5), E, W and NI; Section 24(4), Scotland).

In contracts in which one of the parties is (and enters into the contract in his capacity as) a consumer, and also in contracts concluded on the standard terms of business of one of the parties(1), a party who, being in breach of the contract, asserts that he has excluded or restricted his liability for breach of contract, or who asserts that he is entitled to perform the contract in a substantially different way from what was reasonably expected of him or that he is entitled :

- *not to perform at all; or*
- *not to perform in part,*

must satisfy the court that the reasonableness test is satisfied (Section 3(1) and (2), E, W and NI; Section 17(1) and (2), Scotland).

The Unfair Contract Terms Act 1977 has produced only a meagre amount of case law. Fortunately, however, the combined effect of the seven statutes mentioned at the beginning of the United Kingdom section of this Explanatory Memorandum have done much to safeguard contracting parties, including consumers. They have done much to protect, in particular, the buyer of goods or services, whether buying as a consumer or otherwise. They were greatly needed. Indeed, given the limited aims of the Unfair Contract Terms Act 1977, it may be helpful, as well as informative, to state here the law relating to sales of goods.

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(1) In the circumstances here secondly described it is irrelevant whether one of the parties is (and contracts as) a consumer; it is equally irrelevant whether both or all parties conclude the contract in the course of their trade, business or profession.

Until 16 years ago the law governing the sales of goods allowed a seller to exclude his liability to such an extent that he could avoid being answerable even if the goods actually supplied:

- *did not correspond with their description as agreed in the contract or with the sample on the basis of which they were sold; or*
- *were not of merchantable quality; or*
- *were not fit for the purpose for which they were sold.*

The fundamental rule in sales of goods was the simple "Let the buyer beware". Almost 400 years ago an English court, faced with a buyer's plea that the seller of a jewel who had told him that it was a bezoar stone (which it was not) took the view that the buyer's claim for repayment of the purchase price which he had paid to the seller would fail unless the buyer showed either that the seller knew it was not a bezoar stone or that the seller warranted (guaranteed) it to be such:

Chandelor v Lopus (1603) Cro Jac 4; 79 E.R 3; (sub nomine Lopus v Chandler, Dyer 75, n, Ex Ch)

The Sale of Goods Act 1893 did not alter the basic rule "caveat emptor", for that statute expressly permitted the parties to agree to exclude the buyer-protective terms which the statute itself imported into contracts for the sale of goods unless the parties agreed otherwise. These "implied" terms were of two kinds, namely "conditions" and "warranties". The difference between them is that a condition is a stipulation which is of the essence of the contract, and a breach of a condition gives the aggrieved party the right to rescind the contract or to obtain payment of damages, and he can choose the one remedy or the other, or both (because they are cumulative); whereas a warranty is a stipulation collateral to the contract (that is, in the present context, collateral to the contract for the sale of goods) and breach of a warranty gives rise to a claim for damages but not to a right to rescind the contract (that is, in the present context, to reject the goods).

The Sale of Goods Act 1979 (a later consolidating statute) "implies" the following conditions :

- *that the seller has, or will have, the right to sell;*

- *when goods are sold by description, that they shall correspond with the description;*
- *where goods are sold by a business seller for a particular purpose, of which the seller is aware, and reliance is placed upon the seller's skill and judgement, that the goods are reasonably fit for the purpose intended;*
- *when goods are bought from a business seller, that they are of merchantable quality.*
- *when sale is by sample :*
  (a) that the bulk shall correspond with the sample in quality;
  (b) that the buyer shall have a reasonable opportunity of comparing bulk with sample before acceptance;
  (c) that the goods are free from any defect, rendering them unmerchantable, which would not be apparent on reasonable examination of the sample.

The implied warranties are as follows :

- *that the buyer shall have and enjoy quiet possession of the goods;*
- *that the goods shall be free from any charge or encumbrance in favour of any third party, not declared or known to the buyer before or at the time when the contract is made.*

As regards the concept of "unfairness" in the present context, it is submitted that the opening words of Lord Justice Bingham's judgment in Interfoto Picture Library Ltd v Stiletto Visual Programmes Ltd [1988] 1 All England Reports, pages 352/353, are eminently worthy of note:

> *"In many civil law systems, and perhaps in most legal systems, outside the common law world, the law of obligations recognises and enforces an overriding principle that in making and carrying out contracts parties should act in good faith. This does not simply mean that they should not deceive each other, a principle which any legal system must recognise; its effect is perhaps most aptly conveyed by such metaphorical colloquialisms as 'playing fair", 'coming clean', or putting one's cards face upwards on the table'. It is in essence a principle of fair and open dealing. In such a forum it might, I think, be held on the facts of this case that the plaintiffs were under a duty*

In all fairness to draw the defendants' attention specifically to the high price payable if the transparencies were not returned in time and, when the 14 days had expired, to point out to the defendants the high cost of continued failure to return them.

English law has, characteristically, committed itself to no such overriding principle but has developed piecemeal solutions in response to demonstrated problems of unfairness. Many examples could be given. Thus equity has intervened to strike down unconscionable bargains. Parliament has stepped in to regulate the imposition of exemption clauses and the form of certain hire-purchase agreements. The common law also has made its contribution, by holding that certain classes of contract require the utmost good faith, by treating as irrecoverable what purport to be agreed estimates of damage but are in truth a disguised penalty for breach, and in many other ways."

The claimant for relief in respect of an extortionate clause in the contract was successful in obtaining judgment in this case; but there may be much to be said for making a sequel to Lord Justice Bingham's remarks, as quoted above, and for taking an initial step towards harmonised law.

Finally, in so far as the Court of Appeal's judgment in Humming Bird Motors Ltd v Hobbs [1986] may have blurred some of the consumer-friendly aspects of the Misrepresentation Act 1967, some clarification could be achieved via the Directive here proposed.

The Law relating to the warranty implied by law on the part of a seller of goods

After buying goods the consumer expects that they will remain in good working condition for a reasonable period, provided he uses them for their normal purpose and in accordance with the instructions for their use. If they "turn bad on him" he expects to have adequate remedies such as the availability of a prompt and cost-free (or at least inexpensive) repair service, replacement of the goods, reduction in price, return of purchase money, even compensation for loss or injury in certain circumstances.

Existing legislation and case law in most of our Member States, and indeed in most European countries, do not take into account the aspect of durability[1] of goods or do so only in certain respects. Most Member States' laws relating to sale of goods date from a time when the specific problems arising in relation to the durability of goods did not exist, at least not in the context of the relationship between the manufacturer/seller and the consumer. The obligations flowing from the contract of sale effectively ended with the delivery of the goods or - if the goods were defective at that time - at the end of a fairly short period of statutory warranty (ie the seller's guarantee imposed upon him by legislation). This situation is unsatisfactory for the consumer[2]

Belgium, France and Luxembourg

The rules are contained in Articles 1641 to 1648 of the Civil Code of each of these three Member States.

Under Article 1641 the seller guarantees that the goods are free from any latent defect. In France (but not in Belgium or Luxembourg) the manufacturer is under a like obligation.

Upon discovering that the goods are flawed the buyer is entitled either to set aside the sale and have his money back or to have the price reduced. In addition, whichever of these two remedies he chooses, he is entitled to be compensated by the seller for consequential loss arising in consequence of the defect if the seller was aware of it at the time when the contract for sale was made.

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(1) Durability is not the same as reliability. Durability relates to the period of time during which the thing can be used without breaking down or needing repair.

(2) These two paragraphs are taken, with some adaptation, from Reports and Opinions (September 1977-March 1984) of the European Consumer Law Group, published for the Centre de Droit de la Consommation, Faculté de Droit, Université de Louvain-la-Neuve, Belgium, by Cabay/Bruylant, 1984.

French case law, however, distinguishes between a seller who sells the goods in the course of his business and a non-business seller, and presumes that the former is aware of the latent defects in the goods he sells. This presumption is irrebuttable.

Luxembourg law is similar to that of France, whereby Article 1645 of the Luxembourg Civil Code is now to be interpreted except that a contractual term which restricts or excludes the seller's warranty as described above, is in Luxembourg law deemed unfair (Law of 23 August 1983). Moreover, consumers associations are now empowered to apply to the courts for an order striking out an unfair term from the text of a contract in which it appears.

Belgian law is largely similar to the French. However, the case law in Belgium, although distinguishing between a business seller and a non-business seller, and making a presumption that the former is aware of latent defects in the goods he sells, allows the presumption to be rebutted. For example, where the seller demonstrates to the court's satisfaction that he acted in good faith, the presumption is rebutted. Consequently, in such a case, the seller would escape liability and would thus not have to reimburse the purchase price or allow a price reduction or have to pay compensation for consequential loss. Moreover it is possible for the seller to restrict the warranty, except where he acts fraudulently.

<u>Denmark</u>

The law is contained in the Sale of Goods Act 1906, as amended in 1979. Various remedies (eg replacement, cancellation of contract, refund or reduction of price) are open to the buyer and cannot be refused him, ie the seller is not permitted to exclude any of the buyer's rights.

The buyer must, within a reasonable time after discovering it, notify the seller that the goods are flawed, and the notification must be effected not more than one year after delivery of the goods. The buyer is allowed one year after delivery in which to commence action in court against the seller.

Danish case law resembles very closely the modern statutory law of Ireland (see below) which, in the matter of durability of goods, is unique: indeed a fine example which needs to be followed.

Federal Republic of Germany

The law is contained in the Civil Code, Article 459 and following Articles, for example :

"Article 459 (Liability for defect of quality)

(1) The seller of a thing warrants the purchaser that, at the time when the risk passes to the purchaser, it is free from defects which diminish or destroy its value or fitness for its ordinary use, or the use provided for in the contract. An insignificant diminution in value or fitness is not taken into consideration.

(2) The seller also warrants that, at the time the risks passes, the thing has the promised qualities.

Article 460 (Knowledge of the purchaser)

A seller is not responsible for a defect in the thing sold if the purchaser knew of the defect at the time of entering into the contract. If a defect of the kind specified in Article 459(1) has remained unknown to the purchaser in consequence of gross negligence, the seller is responsible only if he has fraudulently concealed it, unless he has guaranteed that the thing is free from defect.

Article 462 (Cancellation; reduction)

On account of a defect for which the seller is responsible under the provisions of Articles 459, 460, the purchaser may demand annulment of the sale (cancellation), or reduction of the purchase price (reduction).

Article 463 (Compensation for non-performance)

If a promised quality in the thing sold was absent at the time of the purchase, the purchaser may demand compensation for non-performance, instead of cancellation or reduction. The same applies if the seller has fraudulently concealed a defect.

Article 464 (Reservation on acceptance)

If the purchaser accepts a defective thing although he knows of the defect, he is entitled to the claims specified in Articles 462, 463, only if on acceptance he reserves his rights on account of the defect.

Article 466 (Expiration of period for cancellation)

If the purchaser asserts against the seller a defect of quality, the seller may offer cancellation and require him to declare within a fixed reasonable period whether he demands cancellation. In such a case cancellation may be demanded only before the expiration of the period.

Article 472 (Calculation of the reduction)

(1) In case of reduction, the purchase price shall be reduced in the proportion which at the time of the sale the value of the thing in a condition free from defect would have borne to the actual value.

(2) If, in the case of a sale of several things for an aggregate price, reduction is effected only in respect of some of them, then in reducing the price the aggregate value of all the things shall be taken as a basis.

Article 476 (Contractual exclusion of warranties)

An agreement, whereby the obligation of the seller for warranty against defects in the object is released or limited, is void, if the seller fraudulently conceals the defect.

Article 477 (Prescription of claims on warranties)

(1) The claim for cancellation or reduction and the claim for compensation on account of the absence of a promised quality are barred by prescription, unless the seller has fraudulently concealed the defect, in the case of movables, in six months after delivery; in the case of land, in one year after the transfer. The prescriptive period may be extended by contract.

(2) If the purchaser makes a motion for judicial taking of evidence in order to preserve the evidence, the prescription is thereby interrupted. The interruption continues until the termination of the proceedings. The provisions Articles 211(2) and 212 apply mutatis mutandis.

(3) The suspension or interruption of the prescription of one of the claims specified in (1) results also in the suspension or interruption of prescription of the other claims.

Article 478 (Retention of plea of defects)

(1) If a purchaser has notified the seller of the defect or forwarded notice thereof to him before the claim for cancellation or reduction is barred by prescription, he may, even after the expiration of the period of prescription, refuse to pay the purchase price, insofar as he would be entitled to do so by reason of cancellation or reduction. The same applies if the purchaser makes a motion for judicial taking of evidence in order to preserve the evidence before the expiration of the period of prescription, or, in an action commenced between him and a subsequent acquirer of the thing on account of the efect, has given notice of the action to the seller.

(2) If the seller has fraudulently concealed the defect, notice or an act which according to (1) is equivalent to notice is not necessary."

The seller is liable for latent defents. He is also liable for other flaws if they cannot be discovered upon normal examination. If the seller acted in bad faith and concealed the defect he is liable, even if the flaw is a minor one and even though the failure to discover it was the result of the buyer's own negligence.

The seller is permitted to restrict the guarantee. However, the law of 9 December 1976 on general conditions of business (AGB Gesetz) prohibits the seller from excluding his warranty if he does not allow the buyer the contractual right to have the defective goods repaired or to have them replaced.

The buyer's action on the warranty is barred after six months; but his claim for damages on the ground of fraudulent concealment of a defect is subject to a limitation period of thirty years. These periods begin to run from the time of delivery. They will be interrupted by the commencement of judicial proceedings.

Greece

The law is contained in Articles 531 to 535 of the Civil Code. In order to determine whether the seller is liable, regard is had to:

- *the intention of the parties;*
- *the circumstances in which the contract was made; and*
- *usage.*

The seller is free to exclude or restrict his liability. The buyer's action against the seller, on the ground of defect in the goods, must be brought within six months after delivery.

Ireland

Irish law is similar to English law, and uses the method of statutory implication of terms in every contract for the sale of goods and services. The Sale of Goods and Supply of Services Act 1980 modifies the Sale of Goods Act 1893 and has effect to prohibit the seller from excluding the statutory terms. Irish law is in some respects more explicit than English law, eg on the interpretation of "merchantable quality"; and Irish law provides in effect for a seller's warranty in the matter of durability of goods. Thus the result of the two Acts together is that "goods are of merchantable quality if they are ... as durable as it is reasonable to expect having regard to any description applied to them, the price (if relevant), and all other relevant circumstances".

The seller of goods thus warrants:

- *that they are of merchantable quality, and*
- *that they are fit for their intended purpose.*

not only at the time of sale (or, to speak with greater exactitude, at the time when the obligation arises) but for a reasonable period of time thereafter.

Irish law imposes upon the seller an obligation to guarantee the provision of spare parts and an after-sales service.

Italy

The law is contained in the Civil Code, Article 1490 and following articles. It is similar to French law.

The seller is free to exclude or restrict his obligation, but this will be of no effect if he acts fraudulently.

The buyer must notify the defect to the seller within 8 days after becoming aware of it; but he need not do this if the seller was already aware of the defect or concealed it. The buyer must commence proceedings within one year after delivery.

Netherlands

Articles 1540 to 1547 of the Civil Code, which contain the relevant law, closely resemble Articles 1641 et seq of the French Civil Code.

Dutch case law has however reduced the scope of application of these Articles by adapting them to dealings between a "professional" (or "business") seller and a consumer.

The seller is free to give guarantees which exclude his liability under the Civil Code (ie the provisions on the seller's warranty). However, the modern law of 1986 on general conditions of contract, which amends the Civil Code, restricts the seller's right to exclude his liability.

The buyer must notify the defect to the seller within a reasonable time after becoming aware of it. The buyer then has two years within which to commence proceedings against the seller.

Portugal

The law is contained in Article 913 of the Civil Code which makes the seller liable not only for defects in the goods but also for the absence of qualities or attributes which he promised the buyer that they would have. Bad faith on the part of the seller affects only the amount of the buyer's damages, not the scope of the seller's warranty.

Decree-Law No 446/85 of 25 October 1985 on unfair terms of contract prohibits any restriction on the relevant rules contained in the Civil Code. It also prohibits any reduction in the periods of time prescribed for the commencement of action by the buyer. It further requires that the terms of contract be clear and appropriate, on pain of their nullity.

The Civil Code provides that the buyer must notify the defect to the seller within 30 days after becoming aware of it or within six months after delivery.

Spain

The law is contained in the Civil Code, Articles 1484 and following Articles. The seller is liable for defects in the goods, irrespective of whether he knew of them at the time of sale, or delivery, if the defects exist at the time of delivery.

These provisions are supplemented by law No 26/1984 dated 19 July 1984 which is summarised above and which requires the seller to guarantee certain qualities in durable goods. Moreover this law of 1984 enables the buyer to proceed against both the seller and the manufacturer. The rules of interpretation favour the consumer.

The buyer must commence his action against the seller within six months of delivery.

United Kingdom

The greater part of the law is stated above. The buyer's right of action against the seller is barred after six years following the date of conclusion of the contract or of delivery of the goods, according to the circumstances.

Note on the Law in parts of the Common Law World

For at least 200 years equity courts in the Common Law world, applying English principles of equity, have refused to grant specific performance of contracts so unconscionable "as no man in his senses and not under delusion would make on the one hand, and as no honest and fair man would accept on the other"(1).

Thus, for example, there are precedents in Australia for legislative protection against unconscionable contracts. For example, in New South Wales there is s.88F of the Industrial Arbitration Act 1940 (unfair, harsh and unconscionable arrangements relating to the performance of work in an industry) and the Contracts Review Act 1980 (unconscionable, harsh or oppressive contracts other than those entered into in the course of a trade, business or profession except farming). The Uniform Credit Acts in the States and Territories contain provisions covering unconscionable, harsh or oppressive provisions in certain credit contracts.

Some States (namely New South Wales, Victoria, South Australia and Western Australia) have also passed fair trading laws. This now means that the unconscionable conduct of non-corporate, intrastate operators (typically a provider of services or an individual salesman) who may be outside the constitutional reach of the federal Trade Practices Act 1974 will be caught under the State Fair Trading Acts.

There is also the general law covering unconscionable conduct. The 1983 decision in Commercial Bank of Australia v Amadio (1983) 141 CLR.447, is one

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(1) See the judgment in the English case: Earl of Chesterfield v Janssen (1751) 1 Atk.301; 2 Ves Sen 125; 26 ER.191, LC (or, in American citation: 28 English Reports 82 (Ch 1750)).

of the recent line of authorities in which the High Court upheld the equitable jurisdiction to set transactions of sale aside as unconscionable whenever one party by reason of some condition or circumstances is placed at a special disadvantage vis-à-vis another and unfair advantage is taken of the opportunity created.

The sort of criteria that Australian Courts have adopted under the general law in assessing unconscionable conduct are:

- *did the conduct of the supplier cause a disadvantage or was the consumer suffering a pre-existing disadvantage?*

- *was the disadvantage serious enough to affect the person's ability to look after his or her own interests?*

- *did the other party exploit this disadvantage when he or she knew or should have known about this disadvantage?*

Under modern statute law, namely section 52A of the Trade Practices Act 1974 courts may now ask:

- *does the size or strength of the company put it in a substantially stronger bargaining position than the consumer?*

- *is the consumer as a result of the company's conduct required to comply with conditions that do not protect legitimate commercial interests or protect legitimate commercial interests in an unreasonable way?*

- *did the consumer understand the documents?*

- *were undue influence, pressure, or unfair tactics used against the consumer or his/her representative?*

- *was the amount paid for the goods or services higher, or were the circumstances under which they could be acquired more onerous than generally applied elsewhere?*

Further, Section 2-302 of the Uniform Commercial Code (UCC) of the USA, the first official text of which was published in 1952, has enshrined the doctrine of unconscionability in the statutory law of all but three of the individual States of the USA[1][2]. *Section 2-302 re*

Further, Section 2-302 of the Uniform Commercial Code (UCC) of the USA, the first official text of which was published in 1952, has enshrined the doctrine of unconscionability in the statutory law of all but three of the individual States of the USA[1][2]. Section 2-302 reads as follows :

> "(1) If the court as a matter of law finds the contract or any clause of the contract to have been unconscionable at the time it was made the court may refuse to enforce the contract, or it may enforce the remainder of the contract without the unconscionable clause, or it may so limit the application of any unconscionable clause as to avoid any unconscionable result.
>
> (2) When it is claimed or appears to the court that the contract or any clause thereof may be unconscionable, the parties shall be afforded a reasonable opportunity to present evidence as to its commercial setting, purpose and effect to aid the court in making the determination."

Professors White and Summers state in their commentary on the Section that "the targets of the unconscionability doctrine are usually plaintiff-creditors and credit sellers. The courts have not been receptive to pleas of unconscionability by one merchant against another"[3].

However, as Professor E Hondius writes: "The UCC's broad-based expression of the matter was not followed by the first of the continental European countries to adopt legislation on unfair terms of contract, long before the invention of consumerism here"[4]. The European country referred to was Italy; and it may be added that most of the Member States of the European Community which have already legislated on unfair terms of contract have inclined to a rather narrower approach than is offered by the American UCC.

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(1) California and North Carolina omit Section 2-302. Louisiana has not enacted the UCC.

(2) These paragraphs under concerning the law in the USA are taken almost verbatim from White and Summers "Uniform Commercial Code" published in the Hornbook Series by West Publishing Company, St Paul, Minnesota, USA.

(3) Op cit p 114.

(4) Hondius Report written for the Commission entitled "Unfair terms in Consumer Contracts" (September 1987) p 67.

Conclusion

The fact that the Member States haved acted independently in adopting legislation has led to some remarkable differences between them. For example, insurance contracts are excluded from the application of the Unfair Contract Terms Act 1977 in Britain. The French legislation on unfair terms applies to insurance contracts. Part of the 1992 programme to open up the internal market is designed to enable consumers to buy insurance wherever they may do so most advantageously. But the playing field is not level, because the relevant legislation applies unequally. As a result competition is distorted and consumers are put at risk.

The Lufthansa case cited above (page 4) is another example of unequal treatment. Unfair contract terms for the carriage of passengers, ruled void in the Federal Republic, may be valid in other Member States which either have specific legislation differing in scope or application from that of the Federal Republic, or else have no legislation at all and leave these issues unresolved, presumably to be decided under the general law of contract, with the result that their consumers receive less beneficial treatment and their airline operators have a lower level of obligation. It is truly remarkable that passengers sitting side by side on the same flight may be carried under different terms.

Another example concerns the so-called "fraction légale". Under Belgian law an unpaid lender is entitled to intercept a proportion of the borrower's earnings without having first to obtain an order of the court. In France a contractual term to this effect would be illegal, as indeed in the Federal Republic, the UK and most other Member States. Creditors in these Member States do not have the degree of freedom allowed in Belgium for the recovery of debts and therefore have to bear larger expenses than their Belgian counterparts. This will distort competition in the single banking market and leave debtors in, say, Charleroi, in a less favourable position than those in Lille, London, Lübeck ....

A further example is a case which is probably not covered specifically by the legislation or case law of any Member State. It concerns the terms of a contract upon which a well-known plastic payment card/credit card is issued,

requiring the cardholder to "charge" in favour of the card issuer (ie to give him a right of security over) the cardholder's salary, wages, other income, including rents receivable, dividends, and all other property of his, for the purpose of securing the card account. In 999 cases out of 1000 this security requirement is totally disproportionate to the debts which could be incurred by the cardholder vis-à-vis the card issuer. The term is unfair - even grossly unfair on an objective view of it - and would be so treated in the courts of many Member States; but Belgium has no modern law on unfair terms of contract, and this term may be lawful in Belgium. Certain Belgian lawyers have expressed the view that the term might be found illegal by a Belgian court. The situation is not clear. But in a single market there ought to be no doubt about such a term.

It is with cases like this, and the examples cited above, among others, that the attached directive is intended to deal. At one and the same time, it will create a level playing field by eliminating distortions of competition, create equal and fair treatment for consumers where this does not at present exist, and eliminate areas of doubt and confusion.

Proposal for a

COUNCIL DIRECTIVE

on unfair terms in consumer contracts

THE COUNCIL OF THE EUROPEAN COMMUNITIES,

Having regard to the Treaty establishing the European Economic Community, and in particular Article 100a thereof,

Having regard to the proposal from the Commission,

In cooperation with the European Parliament,

Having regard to the opinion of the Economic and Social Committee,

Whereas it is necessary to adopt measures to progressively establish the internal market before 31 December 1992; whereas the internal market compromises an area which has no internal frontiers and in which goods, persons, services and capital move freely;

Whereas national laws of Member States relating to the terms of contract applicable between the seller of goods or services, on the one hand, and the purchaser of them, on the other hand, show many disparities, with the result that the national markets for the sale of goods and services to consumers differ from each other and that distortions of competition may arise amongst the sellers, notably when they sell in Member States other than their own;

Whereas, in particular, national laws of Member States relating to unfair terms in contracts concluded with consumers show marked divergences, and the same is true of their national laws relating to the obligation of the seller of goods to answer for the quality of them, for their fitness for the purpose for which they are sold, and for their conformity to the contract, and of the supplier of services to answer for the performance of them;

Whereas consumers do not know the laws which, in other Member States than their own, govern contracts for the sale of goods or services; and whereas this difficulty may deter them from direct transactions of purchase of goods or services in another Member State;

Whereas in order to facilitate the establishment of a single market and to safeguard the citizen in his role as consumer when buying goods and services by contracts which are governed by the laws of other Member States than his own, it is essential to remove unfair terms from those contracts;

Whereas sellers of goods and services will thereby be helped in their task of selling goods and services, both at home and throughout the single market; and whereas competition between sellers will thus be stimulated, so contributing to increased choice for Community citizens as purchasers;

Whereas the Community's programmes for a consumer protection and information policy[1] underlined the importance of safeguarding consumers in the matter of unfair terms of contract; and whereas this protection ought to be provided by laws and regulations which are either harmonised at Community level or adopted directly at that level;

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(1) OJ No C92, 25.4.1975, p. 1 and OJ No C133, 3.6.1981, p. 1.

Whereas in accordance with the principle laid down under the heading "Protection of the economic interests of the consumers", as stated in those programmes : "Purchasers of goods and services should be protected against the abuse of power by the seller, in particular against one-sided standard contracts and the unfair exclusion of essential rights in contracts";

Whereas more effective protection of the consumer can be achieved by adopting uniform rules of law in the matter of unfair terms; whereas those rules should apply to all consumer contracts, whether concluded in writing or by word of mouth, and, if in writing, whether by means of one document or several;

Whereas more effective protection of the consumer can be achieved by adopting rules of law which, in the matter of unfair terms, are to apply to all of them;

Whereas Member States should ensure that unfair terms are not used in contracts concluded with consumers in the course of the trade, business or profession of the person who carries it on, and that if, nevertheless, such terms are so used they will be treated as void, but the remaining terms will remain valid and the contract shall continue to bind the parties upon those terms if it is capable of continuing in existence without the void provisions;

Whereas it is desirable to identify certain types of terms which must not be used in contracts concluded with consumers;

Whereas persons or organisations, if regarded under national law as having a legitimate interest in the matter, must have facilities for initiating proceedings concerning terms in contracts concluded with consumers, and in particular unfair terms, either before a court or before an administrative authority which is competent to decide upon complaints or to initiate appropriate legal proceedings;

Whereas the courts or administrative authorities must have powers enabling them to order or obtain the withdrawal from use of offending terms,

HAS ADOPTED THIS DIRECTIVE :

Article 1

The purpose of this Directive is to approximate the laws, regulations and administrative provisions of the Member States relating to unfair terms in consumer contracts.

Article 2

For the purposes of this Directive :

1. A contractual term is unfair if, of itself or in combination with another term or terms of the same contract, or of another contract upon which, to the knowledge of the person or persons who conclude the first-mentioned contract with the consumer, it is dependent :

- it causes to the detriment of the consumer a significant imbalance in the parties' rights and obligations arising under the contract; or

- it causes the performance of the contract to be unduly detrimental to the consumer; or

- it causes the performance of the contract to be significantly different from what the consumer could legitimately expect; or

- it is incompatible with the requirements of good faith.

2. The Annex contains a list of types of unfair terms.

3. "The consumer" means a natural person who, in transactions covered by this Directive, is acting for purposes which can be regarded as outside his trade, business or profession.

4. "Trade" and "business" shall be taken to include the activities of suppliers, whether publicly owned or privately owned, and those expressions also cover the sale, hiring out or other provision of appliances by those suppliers.

5. The fairness or unfairness of a contractual term is to be determined by reference to the time at which the contract is concluded, to the surrounding circumstances at that time and to all the other terms of the contract.

Article 3

Member States shall :

- prohibit the use of unfair terms in any contract concluded with a consumer by any person acting in the course of his trade, business or profession ; this prohibition shall be without prejudice to the seller's right to obtain compensation from his own supplier ;

- provide that if, notwithstanding this prohibition, unfair terms are used in such a contract they shall be void, and that the remaining terms of the contract shall continue to be valid and that the contract shall continue to bind the parties upon those terms if it is capable of continuing in existence without the void provisions.

Article 4

1. Member States shall ensure that in the interests of consumers, competitors and the public generally, adequate and effective means exist for the control of unfair terms in contracts concluded with consumers and of the terms of contracts for the sale of goods or services to them.

2. Such means shall include provisions of law whereby persons or organisations, if regarded under national law as having a legitimate interest in protecting consumers, may take action before the courts or before an administrative authority competent to make a decision for determination of the question whether the terms used in such a contract are inconsistent with the provisions of this Directive.

Article 5

Not later than 31 December 1997 the Commission shall present a report to the Council concerning the operation of this Directive.

Article 6

1. Member States shall bring into force the laws, regulations and administrative provisions necessary to comply with this Directive not later than 31 December 1992 and shall forthwith inform the Commission thereof. Those provisions shall apply to all contracts concluded with consumers after 31 December 1992.

   The provisions adopted pursuant to the first subparagraph shall make express reference to this Directive.

2. Member States shall communicate to the Commission the texts of the main provisions of national law which they adopt in the field covered by this Directive.

Article 7

This Directive is addressed to the Member States.

Done at Brussels, For the Council

ANNEX

The following types of terms are unfair if they have the object or effect of :

(a) excluding or limiting the liability of a contracting party in the event of death or personal injury to the consumer resulting from an act or omission of that contracting party;

(b) providing that a seller or supplier of goods or services may alter the terms of contract unilaterally, or terminate unilaterally a contract of indeterminate duration by giving an unreasonably short period of notice. This prohibition shall not prevent a supplier of financial services :
(i) from altering the rate of interest on a loan or credit granted by him or the amount of other charges therefor, or
(ii) from terminating unilaterally a contract of indeterminate duration,
provided the contract confers the power to do so and also requires suitable notice of the alteration or termination to to be given to the other contracting party or parties.
Moreover, this paragraph (b) shall not affect :
(i) the application of price indexation clauses where these are lawful;
(ii) stock exchange transactions;
(iii) contracts for the purchase of foreign currency;

(c)(1) denying the consumer the right, as purchaser under a contract for the sale of goods :

- to receive goods which are in conformity with the contract and are fit for the purpose for which they were sold;

- to complain that the goods contain hidden defects;

- to require the seller (in the event that the goods supplied are not in conformity with the contract or are not fit for the purpose for which they were sold):

  (i) to reimburse the whole of the purchase price, or
  (ii) to replace the goods, or
  (iii) to repair the goods at the seller's expense, or
  (iv) to reduce the price if the consumer retains the goods;

- to require the seller (whichever of the foregoing options the consumer chooses) to compensate the consumer for damage sustained by him which arises out of that contract;

- (in cases where the seller transmits to the consumer the guarantee of the manufacturer of the goods) to benefit from the manufacturer's guarantee for a period equal, at the least, to the normal life of the goods or twelve months, whichever is the shorter; and to enforce payment, either by the seller or by the manufacturer, of the costs incurred by the consumer in obtaining implementation of that guarantee;

(2) denying the consumer the right, as purchaser under a contract for the supply of services :

- to be supplied with those services at the agreed time and efficiently from his point of view;

- to have the supplier's warranty that the supplier has the requisite skill and expertise to supply the services in the manner specified in the foregoing indent.

(d) providing for the price of goods to be determined at the time of delivery or allowing a seller or supplier of goods to increase their price, notwithstanding that in these various cases the consumer buyer has no corresponding right to cancel the contract if the final price is too high in relation to the price he expected when concluding the contract; but the application of price indexation clauses where lawful shall not hereby be affected;

(e) excluding or limiting the liability of the seller or supplier or of another party in the event of total or partial non-performance by him;

(f) imposing on the consumer a burden of proof which, according to the applicable law, should lie on another party to the contract;

(g) in relation to a contract for the purchase of a timeshare interest in a building, fixing the date of conclusion of the contract in such a way as to deny to the consumer the possibility of withdrawing from the contract within seven clear days after making it.

COMPETITIVENESS AND EMPLOYMENT IMPACT STATEMENT

I. What is the main reason for introducing the measure?
To contribute to the equalisation of the conditions of competition for sellers of goods and suppliers of services, and to safeguard consumers' interests when purchasing goods and services.

II. Features of the businesses in question. In particular:

a) Are there many SMEs? YES

b) Are they concentrated in regions which are:

i. eligible for regional aid in the Member States? No

ii. eligible under the ERDF? No

III. What direct obligations does this measure impose on businesses?
It seeks to attain the purposes set out at point I above by the actions specified in the Annex hereto.

IV. What indirect obligations are local authorities likely to impose on businesses?
Local authority action is not contemplated by the proposed directive.

V. Are there any special measures in respect of SMEs? Please specify.
No

VI. What is the likely effect on:

a) the competitiveness of businesses? The conditions of competition will be rendered more equal.

b) employment? No effect.

VII. Have both sides of industry been consulted? Please indicate their opinions: Yes their initial reaction was antagonistic. However, they do not perceive the true significance for them of the proposal. It will not harm their interests; just as the extensive legislation which already exists in 9 of the 12 Member States has not proved prejudicial to small and medium-sized businesses.

A N N E X

(1) removing unfair terms from contracts concluded with consumers.

(2) by importing into every contract for sale of goods to a consumer, compulsory terms to the effect that

(a) the goods are of sound quality and are fit for the purpose for which they are sold;

(b) that where a seller transmits to a consumer-buyer of new goods the manufacturer's guarantee in respect of them, the seller will be liable to the consumer-buyer to ensure that the guarantee is good;

(3) by importing into every contract for the supply of services to a consumer, terms to the effect

(a) that they will be supplied at the agreed time and efficiently from the consumer's point of view, and

(b) that the supplier guarantees his own skill and expertise in relation to the supplying of them.

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