

Contracting With Consumers: Key Considerations

An Introduction to the Briefing Note

A consumer is someone who purchases a product or enters into a contract in a personal capacity, as opposed to in the course of business. Under the current legislation, "a consumer is an individual acting for purposes which are wholly or mainly outside that individuals trade, business, craft or profession". Contracts made between a business and a consumer are governed by an extensive body of consumer protection law which aims to provide consumers with rights that cannot be taken away. Differing rights and remedies apply depending on whether the contract is for goods, digital content, services or a mix of all three. This Briefing Note provides an overview of the key protections offered to consumers that a business should be aware of before entering into a contract with a consumer.

You should always take legal advice when drafting or negotiating contracts. This Briefing Note should not be relied upon as legal advice and you should contact us for advice on your specific circumstances.

Implied terms

Certain terms are implied into all contracts with consumers, whether for the sale of goods or the supply of services. A seller cannot exclude or restrict liability for breach of these implied terms in consumer contracts.

The following key conditions are implied into contracts for the sale of goods:

- Good title - the seller has the right to sell the goods and that the goods are free from undisclosed encumbrances;
- The goods correspond with their description;
- Satisfactory quality - the goods meet the standard that a reasonable person would regard as satisfactory, taking account of any description of the goods, the price and all other relevant circumstances;
- Fitness for purpose - the goods will be reasonably fit for any purpose which the seller is either expressly or by implication made aware of; and
- Correspondence with samples – the goods supplied are consistent with any samples shown to the buyer before purchase.

Similar conditions are implied into all contracts for the supply of services. The primary obligation of the seller in service contracts is to perform the service with reasonable skill and care.

Remedies

In a contract for the sale of goods, a consumer has certain prescribed remedies when those goods do not comply with the terms of the sale contract. These include:

- Rejection – consumers can reject goods and require their money back as long as they complain within a reasonable time.
- Damages – a buyer can claim damages (generally the cost of repair or replacement of the goods). If the consumer has accepted the goods, their only remedy is to claim damages.

Briefing Note

Updated May 2016

Summary:

An overview of the key protections offered to consumers that a business should be aware of before entering into a contract with a consumer for the sale of goods or services.

For detailed advice on all commercial contract matters please contact:

Gemma Ritchie
Associate Solicitor

01323 435955
gcr@gabyhardwicke.co.uk

Contracting With Consumers: Key Considerations

- Repair or replacement – the consumer can request a repair or replacement. Sellers need to carry these out within a reasonable time but can refuse to repair if the cost would be disproportionately higher than the cost of replacement (or vice versa).
- Partial or full refund – where repair or replacement fails, the consumer may request a full or partial refund.

A consumer also benefits from a presumption that any lack of conformity of the goods to the sale contract, which becomes apparent within six months of delivery, is presumed to have existed at the time of delivery. After six months, this burden of proof is reversed and a consumer will have to show that the goods were defective at the time of delivery.

Consumers do not have to accept credit notes offered when goods are faulty or not as described. Sellers must offer a refund. However, if returns are accepted from consumers who simply change their mind, offering a credit note is sufficient.

Similar remedies are provided in relation to contracts with consumers for the supply of services.

Distance and off-premises contracts

Whenever a contract is entered into at a place other than the trader's premises (e.g. at a consumer's own home) or otherwise at a distance (e.g. by mail order, telephone, SMS or online), additional rules and protections apply. These include:

- A prescribed list of information must be provided to the consumer by the trader.
- A statutory cancellation period (or cooling-off period) of 14 days applies. This is extended to one year if the trader fails to provide certain pre-contract information. The consumer does not have to give any reason for cancelling and must be given a full refund.
- Online traders must make it clear where proceeding with a transaction will trigger a payment.
- Where the consumer has a right to cancel, the trader must provide a model cancellation form.
- Traders must seek the consumer's express prior consent before taking any additional payments (for example pre-ticked boxes are not permitted).
- Traders must, unless the consumer agrees otherwise, deliver any goods purchased within 30 calendar days.

The fairness test

A contract term that has not been individually negotiated is regarded as unfair if, contrary to the requirement of good faith, it causes a significant imbalance in the parties' rights and obligations, to the detriment of the consumer. When ascertaining fairness, the following issues must be taken into account:

- The nature of the goods or services to which the contract relates;
- All the circumstances surrounding the conclusion of the contract at the time of entering into it; and
- All other terms of the contract, or of another contract on which it depends.

Contracting With Consumers: Key Considerations

Price

For all consumer contracts, it must be clear whether the following are included in the price or will be charged extra:

- Customs duties and other taxes and duties;
- Postage and packaging; and
- Insurance.

Additionally:

- All prices must be set out in sterling;
- All prices must include VAT. If the amount of VAT is not stated, it is implied that the price is inclusive of VAT;
- Terms that allow the seller to change the price are potentially unfair. If a seller wants to raise the price, it should give the consumer the chance to terminate the contract without penalty.

Other key considerations

- Sellers of goods and services to consumers must comply with the rules against discrimination, harassment and victimisation set out in the Equality Act 2010.
- A seller must use plain and intelligible language in his written terms with consumers.
- Sellers must ensure that any standard terms are incorporated into a contract effectively. All terms must be brought to a consumer's attention at the earliest possible opportunity and any unusual terms may require more notice to bring these to a consumer's notice.
- When dealing with a consumer's personal data, sellers must comply with data protection and privacy laws.
- The inclusion of terms in a consumer contract that exclude or limit liability is heavily controlled by statute. Particular care must be paid to the drafting of such clauses.
- Traders must not make the consumer use a premium rate telephone line to contact the trader about an existing contract.
- Traders must not impose excessive payment surcharges when consumers pay by certain means, such as credit or debit cards.

Summary

As you can see from this brief overview, there is a vast amount of consumer protection law in place and a number of key issues that should be considered whenever a contract is entered into with a consumer. The importance of such contracts being properly drafted and effectively incorporated into a business's relationships with its clients cannot be overstated. All too often we see contracts which have been cribbed from other companies and terms which are not properly incorporated into contracts. This can lead to business's failing to comply with key legal requirements or, in some cases, failing to have their terms and conditions apply at all. This can be potentially very costly for businesses.

Contracting With Consumers: Key Considerations

If you would like to know more about this topic or our other legal services, please contact Gemma Ritchie on 01323 435900 or by email gcr@gabyhardwicke.co.uk

Gaby Hardwicke Solicitors

33 The Avenue
Eastbourne
East Sussex
BN21 3YD

Tel: 01323 435955
Fax: 01323 435901
gcr@gabyhardwicke.co.uk
www.gabyhardwicke.co.uk