**Unfair terms**

The most common type of **unfair terms** are **exclusion clauses** whereby one party seeks to exclude their liability arising under the contract. Other examples of unfair terms include **penalty clauses** where a party specifies an amount payable on breach of contract which is out of proportion to the loss that the party would suffer. As **unfair contract terms** can operate oppressively, the law restricts the use of such terms. The protection comes from the **common law,** the **Unfair Contract Terms Act 1977** and the **Unfair Terms in Consumer Contract Regulations 1999.**

**Protection at common law**

Protection at common law comes in two forms. Firstly, the courts will consider if the term has been incorporated into the contract. Secondly, the courts will consider if the clause covers the loss in question.

**1. Incorporation of unfair terms**

The general rule is that the term must be brought to the attention of the contracting party before or at the time the contract was made. If the term was not brought to their attention it cannot be said that they had accepted the term. Therefore the term will not be part of the agreement between the parties:

*Olley v Marlborough Court* [1949] 1 K.B. 532     [(Case summary)](http://e-lawresources.co.uk/forum/viewtopic.php?f=38&t=200)

[*Thornton v Shoe Lane Parking*](http://www.bailii.org/ew/cases/EWCA/Civ/1970/2.html)[1971] 2 WLR 585 [(Case summary)](http://e-lawresources.co.uk/forum/viewtopic.php?f=38&t=52)

Where there is a written contract which is signed, a party is bound by all the terms in the contract irrespective of whether they were aware of the terms it contained:

*L'Estange v Graucob* [1934] 2 KB 394        [(Case summary)](http://e-lawresources.co.uk/forum/viewtopic.php?f=38&t=201" \o ")

If there has been a misrepresentation of the terms,  the clause is not effective:  
  
*Curtis v Chemical Cleaning* [1951] 1 KB 805   [(Case summary)](http://e-lawresources.co.uk/forum/viewtopic.php?f=38&t=202)

**Reasonable notice of unfair terms**

A party seeking to rely on an unfair term must demonstrate that they gave reasonable notice. ie they took reasonable steps to bring the term to the attention of a reasonable person:

*Thompson v LMS Railway* [1930] 1 KB 41       [(Case summary)](http://e-lawresources.co.uk/forum/viewtopic.php?f=38&t=203)

If a clause is particularly onerous then more steps are required to bring it to the notice of a reasonable person:

[*Interfoto Picture Library v Stilletto*](http://www.bailii.org/ew/cases/EWCA/Civ/1987/6.html)[1989] QB 433          [(Case summary)](http://e-lawresources.co.uk/forum/viewtopic.php?f=38&t=204)

**Incorporation through previous dealings**

If the parties have dealt with each other before then the term may be incorporated through these dealings even where the term was not brought to the attention of the other party on this occasion:

[*Spurling v Bradshaw*](http://www.bailii.org/ew/cases/EWCA/Civ/1956/3.html)[1956] 1 WLR 461       [(Case summary)](http://e-lawresources.co.uk/forum/viewtopic.php?f=38&t=205)

The previous dealings must have been consistent; the parties must always have contracted on the same terms:

*McCutcheon v MacBrayn* [1964] 1 WLR 165       [(Case summary)](http://e-lawresources.co.uk/forum/viewtopic.php?f=38&t=206)

A term will only be incorporated where there is a sufficient number of transactions to amount to a course of dealings:

[*Hollier v Rambler Motors*](http://www.bailii.org/ew/cases/EWCA/Civ/1971/12.html)[1972] 2 WLR 401         [(Case summary)](http://e-lawresources.co.uk/forum/viewtopic.php?f=38&t=207)

**Incorporation through trade custom**

A term may be incorporated where the use of such terms is prevalent in a particular trade and both parties operate in that trade:

[*British Crane Hire v Ipswitch Plant Hire*](http://www.bailii.org/ew/cases/EWCA/Civ/1973/6.html)  [1975] QB 303   [(Case summary)](http://e-lawresources.co.uk/forum/viewtopic.php?f=38&t=208)

**2. Does the clause cover the loss in question?**The second question the courts ask is whether the clause covers the loss in question. This is a matter of interpretation. The ***contra proferentem rule*** applies. This means that where there is any ambiguity in the wording of the clause, the courts will interpret the clause against the party seeking to rely on it.

*Andrews Bros ltd v Singer Cars* [1934] 1 KB 17  [(Case summary)](http://e-lawresources.co.uk/forum/viewtopic.php?f=38&t=209" \o ")

Where the clause is a limitation clause as oppose to an exclusion clause the courts will apply the natural meaning and not seek to find ambiguity where none exists:

[*Ailsa Craig Fishing v Malvern*](http://www.bailii.org/uk/cases/UKHL/1981/12.html)[1983] 1 WLR 964    [(Case summary)](http://e-lawresources.co.uk/forum/viewtopic.php?f=38&t=5)

**Penalty clauses**

Some contracts may contain a clause specifying an amount which is payable in the event of a breach of contract. This can be helpful to both parties in that each will know exactly what their position is in advance and can prepare for such eventualities. However, if such a clause specifies an excessive sum is payable this can operate harshly on the breaching party and as such the law provides some protection. English law draws a distinction between **liquidated damages** **clauses** (which are valid) and **penalty clauses** (which are invalid).

To amount to a liquidated damages clause the sum specified must be a genuine pre-estimate of loss. A penalty clause is where the sum specified acts *in terrorem* (to punish, or to deter a breach).  It will be held to be penalty if the sum stipulated for is extravagant and unconscionable in amount in comparison with the greatest loss that could conceivably be proved to have followed from the breach:

[*Dunlop v New Garage*](http://www.bailii.org/uk/cases/UKHL/1914/1.html) [1915] AC 79    [(Case summary)](http://e-lawresources.co.uk/forum/viewtopic.php?f=38&t=210)

[*Cine Bes Filmcilik v United International Pictures*](http://www.bailii.org/ew/cases/EWCA/Civ/2003/1669.html) [2003] EWCA Civ 1669

[*Murray v Leisureplay Plc*](http://www.bailii.org/ew/cases/EWCA/Civ/2005/963.html) [2005] EWCA Civ 963    [(Case summary)](http://e-lawresources.co.uk/forum/viewtopic.php?f=38&t=224)

[*Euro London Appointments Ltd. v Claessens*](http://www.bailii.org/cgi-bin/markup.cgi?doc=/ew/cases/EWCA/Civ/2006/385.html&query=) [2006] EWCA Civ 385

[(case sumary)](http://e-lawresources.co.uk/forum/viewtopic.php?f=38&t=225)  
  
Further reading:  
  
Law Commission Report - [Unfair Terms in Contracts](http://www.lawcom.gov.uk/docs/lc292.pdf) 2005

**Unfair Terms - Regulation by statute - Unfair Contract Terms Act 1977 and Unfair Terms in Consumer Contract Regulations 1999**

**Intro**

In addition to the protection offered by the common law, there exists statutory protection from unfair terms in the form of the **Unfair Contracts Terms Act 1977**  and the **Unfair Terms in Consumer Contracts Regulations 1999.** The Unfair Contract Terms Act 1977 is a piece of primary legislation whereas the Unfair Terms in Consumer Contracts Regulations is in the form of secondary legislation introduced to implement a European Directive.

There is some overlap in the protection offered by the two pieces of legislation. There are, however, some important differences:

* UTCCR applies only to consumer contracts, whereas UCTA applies to business to business relationships as well.
* UTCCR only applies to contracts not individually negotiated. No such restriction applies in UCTA
* UTCCR applies only to contracts whereas UCTA applies to exclusion of tortious liability also.
* The definition of consumer differs with an extended meaning given in UCTA whereby a business can be classed as a consumer if it is purchasing goods which are ordinarily supplied to a consumer.
* UCTA provides specific instances of what may amount to an unfair term. If a term is not within one of the specified categories it is not capable of amounting to an unfair term under the Act. Whereas under the UTCCRs any term is capable of amounting to an unfair term.
* Under UCTA some terms are automatically treated as unfair. UTCCRs all terms must be shown to be unfair
* UCTA applies a test of reasonableness in deciding whether terms are unfair.
* UTCCR has its own test of fairness based on dealing in good faith and balancing the rights and obligations of the parties.

**Unfair Contract Terms Act 1977**

The [**Unfair Contract Terms Act**](http://www.statutelaw.gov.uk/legResults.aspx?LegType=All+Legislation&title=Unfair+Contract+Terms+Act&Year=1977&searchEnacted=0&extentMatchOnly=0&confersPower=0&blanketAmendment=0&TYPE=QS&NavFrom=0&activeTextDocId=224526&PageNumber=1&SortAlpha=0) **1977** applies only to liability arising in the course of a business. It does not therefore provide comprehensive protection against unfair terms. Also it provides for specific instances of unfair terms. In particular, penalty clauses are outside its remit. The Unfair Contract Terms Act provides different levels of protection. Some provisions provide absolute protection whereas some will be subject to a consideration of whether the term was a reasonable one to include. The Unfair Contract Terms Act extends beyond liability arising from contracts and extends to tortious liability arising from negligence or liability arising from the Occupiers Liability Act 1957.

The main provisions cover:

* s.2 - Exclusion of liability for negligence
* s.3 - Exclusion of liability for breach of contract
* s.4 - Liability to pay an indemnity
* s.6 - Exclusion of liability in contracts for the sale of goods and hp
* s.7 - Exclusion of liability in hire contracts
* s.8 - Exclusion of liability arising from a misrepresentation
* s.11 - Sets out the reasonableness test
* Sch 2 - Provides further guidance on application of the reasonableness test where the contract is a non-consumer contract and ss 6 or 7 are under consideration.

[**s.2 - Exclusion of liability for negligence**](http://www.statutelaw.gov.uk/content.aspx?LegType=All+Legislation&title=Unfair+Contract+Terms+Act+&Year=1977&searchEnacted=0&extentMatchOnly=0&confersPower=0&blanketAmendment=0&sortAlpha=0&TYPE=QS&PageNumber=1&NavFrom=0&parentActiveTextDocId=224526&ActiveTextDocId=224534&filesize=2110)

* S.2(1) provides that a business can not exclude or restrict liability for death or personal injury arising from negligence. This provision is absolute and not subject to the requirement of reasonableness.

* S.2(2) provides that a business may exclude or restrict liability for other types of loss only if it is reasonable to do so. The question of what is reasonable is decided by applying the reasonableness test set out in s.11.

* S.2(3) provides that where a person is aware of an exclusion clause this is not to be taken as a voluntary acceptance of risk.

[**S.3 - Exclusion of liability for breach of contract**](http://www.statutelaw.gov.uk/content.aspx?LegType=All+Legislation&title=Unfair+Contract+Terms+Act+&Year=1977&searchEnacted=0&extentMatchOnly=0&confersPower=0&blanketAmendment=0&sortAlpha=0&TYPE=QS&PageNumber=1&NavFrom=0&parentActiveTextDocId=224526&ActiveTextDocId=224535&filesize=2896)

S.3 applies where one party deals as a consumer or where there exists a standard form contract. The provisions are subject to the reasonableness test in s.11 and provide restrictions on the other party to the contract's ability to:

* Exclude or restrict liability for breach of contract
* Provide substantially different performance to that reasonably expected
* Provide no performance at all

[**S.4 - Unreasonable indemnity clauses**](http://www.statutelaw.gov.uk/content.aspx?LegType=All+Legislation&title=Unfair+Contract+Terms+Act+&Year=1977&searchEnacted=0&extentMatchOnly=0&confersPower=0&blanketAmendment=0&sortAlpha=0&TYPE=QS&PageNumber=1&NavFrom=0&parentActiveTextDocId=224526&ActiveTextDocId=224536&filesize=1161)

* A person dealing as a consumer can not be made to pay an unreasonable indemnity arising from liability incurred as a result of breach of contract or negligence. - Subject to the reasonableness test under s.11.

[**s.6 - Exclusion of liability in contracts for the sale of goods and hp**](http://www.statutelaw.gov.uk/content.aspx?LegType=All+Legislation&title=Unfair+Contract+Terms+Act+&Year=1977&searchEnacted=0&extentMatchOnly=0&confersPower=0&blanketAmendment=0&sortAlpha=0&TYPE=QS&PageNumber=1&NavFrom=0&parentActiveTextDocId=224526&ActiveTextDocId=224539&filesize=5025)

S.6 is applies to contracts for the sale of goods and contracts of hire purchase. The provisions relate to liability arising under the implied terms under the Sale of Goods Act 1979 and the Supply of Goods (Implied Terms) Act 1973.

S.6 provides:

* A party can never exclude liability relating to title - absolute - applies to both consumer and non-consumer sales.
* In consumer sales a party can never exclude liability relating to description, quality, fitness for purpose or sample - absolute.
* In non-consumer sales a party can only exclude liability relating to quality, description, fitness for purpose or sample where it is reasonable to do so. Reasonableness is judged under s.11 reasonableness test and the factors set out in Sch 2.

[**S.7 Exclusion of liability in contracts of hire**](http://www.statutelaw.gov.uk/content.aspx?LegType=All+Legislation&title=Unfair+Contract+Terms+Act+&Year=1977&searchEnacted=0&extentMatchOnly=0&confersPower=0&blanketAmendment=0&sortAlpha=0&TYPE=QS&PageNumber=1&NavFrom=0&parentActiveTextDocId=224526&ActiveTextDocId=224540&filesize=6830)

S.7 applies to contracts of hire and provides:

* In consumer contracts provisions relating to description, sample, quality and fitness for purpose can not be excluded - absolute
* In non-consumer sales the above provisions can only be excluded in so far as it is reasonable to do so - reasonableness is decided by reference to the reasonableness test under s.11 and the factors set out in sch 2.
* Provision relating to title under s.2 Supply of Goods and Services Act  1982 can not be excluded - absolute.

[**S.8 Liability arising for misrepresentation**](http://www.statutelaw.gov.uk/content.aspx?LegType=All+Legislation&title=Unfair+Contract+Terms+Act+&Year=1977&searchEnacted=0&extentMatchOnly=0&confersPower=0&blanketAmendment=0&sortAlpha=0&TYPE=QS&PageNumber=1&NavFrom=0&parentActiveTextDocId=224526&ActiveTextDocId=224542&filesize=4695)

* S.8 amends s.3 of the Misrepresentation Act 1967 and makes provision for exclusion or restriction of liability arising from a misrepresentation, subject to the requirement of the reasonableness test under s.11 UCTA

[**S.11 - The reasonableness test**](http://www.statutelaw.gov.uk/content.aspx?LegType=All+Legislation&title=Unfair+Contract+Terms+Act+&Year=1977&searchEnacted=0&extentMatchOnly=0&confersPower=0&blanketAmendment=0&sortAlpha=0&TYPE=QS&PageNumber=1&NavFrom=0&parentActiveTextDocId=224526&ActiveTextDocId=224546&filesize=4240)

* The term is required to be a fair and reasonable one to include in the contract.
* This is judged by all the circumstance which were known, or ought to have been known or in the contemplation of the parties
* The fairness and reasonableness is decided at the time the contract is entered - not with hindsight knowing of the events which in fact occurred
* Where the term is restricting rather than excluding liability regard is to be had to the resources of the party seeking to rely on the term and the availability of insurance.
* The burden is on the party seeking to enforce the term to show that it was fair and reasonable.

[Sch 2](http://www.statutelaw.gov.uk/content.aspx?LegType=All+Legislation&title=Unfair+Contract+Terms+Act+&Year=1977&searchEnacted=0&extentMatchOnly=0&confersPower=0&blanketAmendment=0&sortAlpha=0&TYPE=QS&PageNumber=1&NavFrom=0&parentActiveTextDocId=224526&ActiveTextDocId=224581&filesize=428)

Sch 2 provides the factors for the court to consider in applying the reasonableness test when looking at non-consumer sales in relation to s.6 & 7 UCTA. The factors are:

* The strength of the bargaining positions of the parties taking into account alternative suppliers available to the purchaser.
* Whether the customer received an inducement to accept the term. Eg were they given the opportunity to pay a higher price without the exclusion clause.
* Whether the customer knew or ought to have known of the term and whether such terms are in general use in a particular trade.
* Where exclusion relates to non performance of a condition whether it was reasonably practicable to comply with the condition.
* Whether the goods were made or adapted to the special order of the customer.

Some cases which have considered the application of schedule 2:

[*Phillips Products v Hyland*](http://www.bailii.org/ew/cases/EWCA/Civ/1984/5.html)[1987] 1 WLR 659   [Case summary](http://www.e-lawresources.co.uk/forum/viewtopic.php?f=38&t=2)

[*Photo Production v Securicor*](http://www.bailii.org/uk/cases/UKHL/1980/2.html) [1980] AC 827    [Case summary](http://www.e-lawresources.co.uk/forum/viewtopic.php?f=38&t=3)

[*Smith v Eric Bush*](http://www.bailii.org/uk/cases/UKHL/1990/1.html)[1990] 1 AC 831       [Case summary](http://www.e-lawresources.co.uk/forum/viewtopic.php?f=38&t=4)

[*Ailsa Craig Fishing v Malvern*](http://www.bailii.org/uk/cases/UKHL/1981/12.html)[1983] 1 WLR 964     [Case summary](http://www.e-lawresources.co.uk/forum/viewtopic.php?f=38&t=5)

[*George Mitchell v Finney Lock Seeds*](http://www.bailii.org/ew/cases/EWCA/Civ/1982/5.html)[1983] QB 284                                              [Case summary](http://www.e-lawresources.co.uk/forum/viewtopic.php?f=38&t=6)

[**Unfair Terms in Consumer Contracts Regulations 1999**](http://www.statutelaw.gov.uk/legResults.aspx?LegType=All+Legislation&title=Unfair+Terms+in+Consumer+Contracts+Regulations&Year=1999&searchEnacted=0&extentMatchOnly=0&confersPower=0&blanketAmendment=0&sortAlpha=0&TYPE=QS&PageNumber=1&NavFrom=0&activeTextDocId=2730925)

The UTCCR 1999 replace the 1994 Regulations of the same name. They derive from an EU Directive and apply only to consumer contracts ([Reg 4](http://www.statutelaw.gov.uk/content.aspx?LegType=All+Legislation&title=Unfair+Terms+in+Consumer+Contracts+Regulations&Year=1999&searchEnacted=0&extentMatchOnly=0&confersPower=0&blanketAmendment=0&sortAlpha=0&TYPE=QS&PageNumber=1&NavFrom=0&parentActiveTextDocId=2730925&ActiveTextDocId=2730931&filesize=1177" \o ")).  A term will be regarded as unfair under [Reg 5](http://www.statutelaw.gov.uk/content.aspx?LegType=All+Legislation&title=Unfair+Terms+in+Consumer+Contracts+Regulations&Year=1999&searchEnacted=0&extentMatchOnly=0&confersPower=0&blanketAmendment=0&sortAlpha=0&TYPE=QS&PageNumber=1&NavFrom=0&parentActiveTextDocId=2730925&ActiveTextDocId=2730932&filesize=1767) if:

* It has not been individually negotiated
* It is contrary to the requirement of good faith
* It causes a significant imbalance in the parties' rights and obligations to the detriment of the consumer
* [Sch 2](http://www.statutelaw.gov.uk/content.aspx?LegType=All+Legislation&title=Unfair+Terms+in+Consumer+Contracts+Regulations&Year=1999&searchEnacted=0&extentMatchOnly=0&confersPower=0&blanketAmendment=0&sortAlpha=0&TYPE=QS&PageNumber=1&NavFrom=0&parentActiveTextDocId=2730925&ActiveTextDocId=2730959&filesize=362) contains an indicative but not exhaustive list of what may be regarded as unfair

[Reg 6](http://www.statutelaw.gov.uk/content.aspx?LegType=All+Legislation&title=Unfair+Terms+in+Consumer+Contracts+Regulations&Year=1999&searchEnacted=0&extentMatchOnly=0&confersPower=0&blanketAmendment=0&sortAlpha=0&TYPE=QS&PageNumber=1&NavFrom=0&parentActiveTextDocId=2730925&ActiveTextDocId=2730933&filesize=1341) the fairness of a term shall be assessed with reference to:

* The nature of the goods and services
* All circumstances attending to the conclusion of the contract

Where the term is clear the fairness of the term can not relate to

* the definition of the subject matter of the contract or
* the adequacy of the price or remuneration

 See also:

*Director General of Fair Trading v First National Bank*[2001] UKHL 52     [Case summary](http://www.e-lawresources.co.uk/forum/viewtopic.php?f=38&t=270&p=269#p269)

[Reg 8](http://www.statutelaw.gov.uk/content.aspx?LegType=All+Legislation&title=Unfair+Terms+in+Consumer+Contracts+Regulations&Year=1999&searchEnacted=0&extentMatchOnly=0&confersPower=0&blanketAmendment=0&sortAlpha=0&TYPE=QS&PageNumber=1&NavFrom=0&parentActiveTextDocId=2730925&ActiveTextDocId=2730935&filesize=645)  If a term is found to be unfair it is not binding on the consumer. The rest of the contract remains valid

Further reading:  
  
Law Commission Report - [Unfair Terms in Contracts](http://www.lawcom.gov.uk/docs/lc292.pdf) 2005