



⇒ Why does the law (Artt. 1341 and 1342 CC) favour the party setting down the standard trade terms, who is nearly always a business person?

⇒ Is the law perhaps biased?

The system laid down by the law didn't work because it's based on the unrealistic assumption, that the other party **actually** reads the **STT** drafted in advance.

In fact, in Art. 1341, paragraph 2, CC, the regulations on standard trade terms provide for only one **formal** check, **not** of the content of the contract (**substantial** check):

ie, if there is the **double signature**, the contract is valid in any case!

⇒ Why doesn't the vacuum cleaner manufacturer offer more favourable **STT** with the objective of gaining a larger market share?

N.B.:

Essentially, the party setting down the terms takes advantage of a market failure inherent in the unilateral contract provisions to the exclusive advantage of that party. This is contrary to the notion of **good faith**.

→ **objective good faith**

Directive on unfair terms



Art. 33 ff Consumer Code give effect in Italy to EU Directive 93/13 on **unfair terms**.

EU-Directive 93/13 on **unfair terms** provides for a court scrutiny of the terms which is **not** (solely) **formal**, but extends to the «balance» of rights and duties laid down in the term (**substantial** check):

→ The same regulations exist, with some variations, in **all European Union** countries!



In the UK: **Unfair Terms in Consumer Contracts Regulation 1999**



Art. 33 Consumer Code - *Unfair terms in Consumer contracts*

In contracts between consumers and businesses, terms which, contrary to the requirement of **good faith**, cause a **significant imbalance** in the parties' rights and obligations under the contract to the detriment of the consumer shall not be binding on the consumer.

Example: A term which provides for limited liability exclusively in favour of the party which drafted the contract in advance is, *in principle*, considered unfair **even if** it is specifically approved in writing.

Unfair Terms



5. - (1) A contractual term which has not been individually negotiated shall be regarded as unfair if, contrary to the requirement of **good faith**, it causes a **significant imbalance** in the parties' rights and obligations arising under the contract, to the detriment of the consumer.

Art. 3 Consumer Code - *Unfair terms in Consumer contracts*



"In relation to contracts, in the first paragraph, the **consumer** is the natural person who acts for purposes which are outside his **business**.

Businesses include a natural person or corporate identity, public or private, who uses the contract within the sphere of his trade or professional activity."

The regulations on unfair terms apply **exclusively** to contracts between **businesses** and **consumers**



A term which provides for limited liability exclusively in favour of the party which drafted the contract in advance **cannot** be considered unfair if it occurs in a contract between **two businesses** (two business people) or between **two consumers**.



Example 1: A term which provides for limited liability *exclusively* in favour of a carrier can be asserted – if specifically approved in writing - towards a company that had sent documents to a branch abroad. The company **cannot** claim that the term is not binding.

Example 2: You sell your mobile phone to a colleague. The term you lay down include a provision that your colleague pay for the phone before raising exceptions. Such a term is **never** unfair according to art. 33 Consumer Code.

Terms to which these Regulations apply



4. - (1) These Regulations apply in relation to unfair terms in contracts concluded between a seller or a supplier and a consumer.

Interpretation

3. - (1) In these Regulations:

“**consumer**” means any natural person who, in contracts covered by these Regulations, is acting for purposes which are outside his trade, business or profession;

“**seller or supplier**” means any natural or legal person who, in contracts covered by these Regulations, is acting for purposes relating to his trade, business or profession, whether publicly owned or privately owned;

⇒ *What happens if a term is unfair?*



Art. 36, paragraph 1, Consumer Code – Nullity of protection

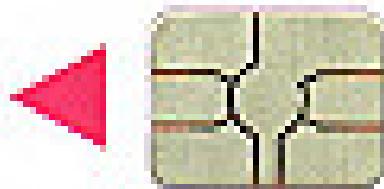
Terms considered unfair pursuant to arts. 33 and 34 are **void**. The remaining contract is **valid**.

N.B.:

Generally, the consumer does **not** want the whole contract **not** to be binding, but rather that the **unfair term** is **not** binding.

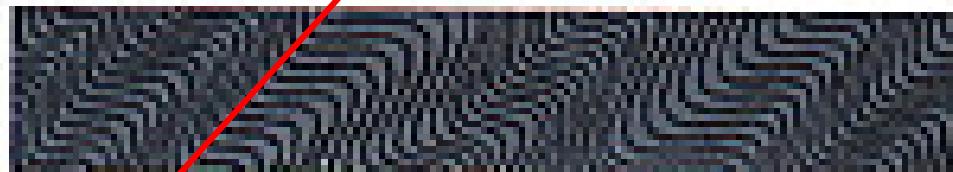
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in Deutschland: 0800 33 00 222
3. Beginn der Anruftaste drücken
4. PIN eingeben
5. Bei Wählton gewünschte Rufnummer
inkl. Vorwahl eingeben

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Example: In a loan agreement, the consumer does not want to obtain **nullity** of the (whole) contract, with the consequent obligation to return the loan granted by the bank. Rather, the consumer wants an unfair term to be declared **not** binding.



Art. 34, paragraph 2, Consumer Code – *Determination of the unfair character of clauses*

The evaluation of the unfair character of a clause has **no** relation to the **determination of the subject matter** of the contract or to the **adequacy of the compensation** payable for the property and services, provided that such elements are identified in a clear and comprehensible manner.

Art. 34, paragraph 3, Consumer Code - *Verification of the unenforceability of terms*

Terms that reproduce legal provisions or that are **reproductions of legal provisions** or implementations of principles contained in international conventions to which all member states of the European Union or the European Union are parties, are not unfair.



Example: Sect. 19 - Duty of disclosure – German Insurance Contract Act (“GICA”)

- (1) The policyholder shall disclose to the insurer before making his contractual acceptance the risk factors known to him which are relevant to the insurer's decision to conclude the contract with the agreed content and which the insurer has requested in writing. If, after receiving the policyholder's contractual acceptance and before accepting the contract, the insurer asks such questions as are referred to in the first sentence, the policyholder shall also be under the duty of disclosure as regards these questions.
- (2) If the policyholder breaches his duty of disclosure under subsection (1), the insurer may **withdraw from the contract**.

⇒ Is a term that were to grant to the insurer the right to withdraw from the contract in the cases of a breach of the duty of disclosure pursuant to Sect. 19 GICA unfair?

Art. 34, paragraph 3, Consumer Code - Verification of the unenforceability of terms



Terms that reproduce legal provisions or that are reproductions of legal provisions or implementations of principles contained in international conventions to which all member states of the European Union or the European Union are parties, are not unfair.

This is **absolutely obvious!**

- The purpose of the EU-Directive is to sanction the insertion of a contractual term favourable to the business: if the business drafting the contract in advance inserts terms that reproduces legal provisions, such term – by definition – did not introduce any “**significant imbalance**” of rights and duties flowing therefrom (**art. 33 Consumer Code**).
- Otherwise, legal provisions would end up being considered unfair. This would lead to the absurd result of making the law “unfair”, denying the **impartial function** which falls to the law.

Art. 34, paragraph 4, Consumer Code - Assessment of the unfairness of terms



Terms or parts of terms which have been individually negotiated are not unfair.

⇒ *Why is this provision important?*

It makes it clear that the consumer is not protected as an “inherently weak” subject.

⇒ *What does this provision explicit?*

The consumer is, in fact, any subject not acting within the sphere of his trade or professional activity. The «weakness» is inherent in entering into a contract drafted in advance by a business.

Example: A jurisdiction clause providing for the competence of the Court where the business has its seat is binding if it is approved by the consumer following (exhaustive) **negotiations**.



Art. 36, paragraph 2, Consumer Code – Nullity of protection

Even if individually negotiated, terms which have the following subject matter or effect are **void**:

- 1.) terms which exempt from or limit the liability of the business in case of the **death of or damage to the person** of the consumer resulting from an action or an omission on the part of the business;
- 2.) terms which **exclude** or **limit** the claims of the consumer towards the business or towards another party in case of **total or partial non-performance**;
- 3.) terms which provide for the consumer's **total acceptance** of terms that he could not have learned **before entering into the contract**.

so-called
“**black**”
list

Art. 33, paragraph 3, Consumer Code - Assessment of the unfairness of terms

Terms are considered unfair until proved otherwise if their subject matter or effect is:

1.) 20)

so-called “**grey**” list

Art. 36, paragraph 3, Consumer Code – Nullity of protection

The nullity will have effect solely for the benefit of the consumer. A Court will have to state the nullity **on its own motion**.

Art. 36, paragraph 5, Consumer Code – Nullity of protection

Any term providing for the application to the contract of provisions of a non-EU-member country is void whenever it results in the non-application of the provisions of this Title, provided the contract has a **closer connection** with the territory of any EU-member country.

Art. 37 Consumer Code – *Enjoining action*



Associations that represent consumers and businesses [...] may sue a business [...] that uses standard trade terms and petition the court to enjoin the use of standard trade terms determined to be unfair pursuant to this Title.

The standing to sue is granted to those who, because of their collective nature, have an interest in promoting a **judgment of unfairness**.

The protection given by the Unfair Terms-Directive would be worthless, if each time, a **judgment of unfairness** towards every single business making use of the same (unfair) terms were necessary.

“standard trade terms”
(Art. 1341 CC)



“Unfair terms”



All parties

Only standard trade terms

Formal check (**double signature**)

Exclusively contractual relationships between businesses and consumers

Also contracts that have been unilaterally drafted in advance for individual use

Substantial check
(scrutiny of the **regulatory balance** of the contract)



Terms to which these Regulations apply

4. - (1) These Regulations apply in relation to unfair terms in contracts concluded between a **seller** or a **supplier** and a **consumer**.
- (2) These Regulations do **not** apply to contractual terms which **reflect**:
- (a) mandatory statutory or regulatory provisions (including such provisions under the law of any Member State or in Community legislation having effect in the United Kingdom without further enactment);
 - (b) the provisions or principles of international conventions to which the Member States or the Community are party.

Unfair Terms

5. - (2) A term shall always be regarded as not having been individually negotiated where it has been **drafted in advance** and the consumer **has therefore not been able to influence the substance of the term**.

Assessment of unfair terms

6. - (2) In so far as it is in plain intelligible language, the assessment of fairness of a term shall **not** relate:
- (a) to the definition of the **main subject matter** of the contract, or
 - (b) to the **adequacy of the price or remuneration**, as against the goods or services supplied in exchange.

Effect of unfair term

8. - (1) An unfair term in a contract concluded with a consumer by a seller or supplier shall **not** be **binding** on the consumer.
- (2) The contract shall continue to bind the parties if it is capable of **continuing its existence** **without** the unfair term.

N.B:

Whilst the Italian **Consumer Code** provides for the **nullity** of so-called “**black list**”-terms, according to English law such **unfair** terms are **not** binding.

INDICATIVE AND NON-EXHAUSTIVE LIST OF TERMS WHICH MAY BE REGARDED AS UNFAIR



1. Terms which have the object or effect of:

- (a) excluding or limiting the legal liability of a seller or supplier in the event of the **death of a consumer or personal injury** to the latter resulting from an act or omission of that seller or supplier;
- (b) inappropriately excluding or limiting the legal rights of the consumer vis-à-vis the seller or supplier or another party in the event of **total or partial non-performance or inadequate performance** by the seller or supplier of any of the contractual obligations;
- (c) making an agreement binding on the consumer whereas provision of services by the seller or supplier is subject to a condition whose realisation **depends on his own will** alone; ...

Injunctions to prevent continued use of unfair terms



- 12. - (1) The Director or, subject to paragraph (2), any qualifying body may apply for an injunction (including an interim injunction) against any person appearing to the Director or that body to be **using, or recommending use of, an unfair term drawn up for general use** in contracts concluded with consumers.