

CONSUMER RIGHTS ACT 2015: FOCUS ON “UNFAIR” TERMS

The Consumer Rights Act 2015 which came into force on 1 October means all businesses must ensure that their customer terms are not “unfair”. **Tom Edmonds** and **Dhruvi Gore** of Harris Hagan provide a brief on its applicability to iGaming operators and what they need to consider.

Bill Gates once commented that, “Life is not fair, get used to it.” Conversely, some gambling operators may need to be reminded that: “Your customer terms and conditions must be fair, get used to it.”

On 1 October 2015, the main provisions of the Consumer Rights Act 2015 (the “CRA”) came into force. A key point from the CRA is for all operators to ensure that their customer terms are not “unfair”. The significance is that a term which is “unfair” is not enforceable and the operator will be in breach of their Gambling Commission (“Commission”) licence.

Ensuring that terms are fair is not a new concept to gambling operators. The CRA broadly codifies previous legislation and there was an existing Commission licence condition that an operator’s terms must not be “unfair”. However, the recent commencement of the CRA and a related Commission licence condition mean that both regulators and consumers are likely take a particular interest in this area and operators should check that their terms are compliant to avoid disputes.

To note, the CRA will only apply to contracts with “consumers” and will not cover business to business contracts, such as those between B2B operators and their B2C operator customers, which will continue to be governed by other legislation.

What is an “unfair” term?

The CRA defines an “unfair term” as the following: “A term is unfair if, contrary to the requirement of good faith, it causes a significant imbalance in the parties’ rights and obligations under the contract to the detriment of the consumer.”

Further guidance regarding what may be considered to be an “unfair term” is provided by a list of terms in the CRA which may be regarded as unfair (the “Grey List”).

What are the consequences of a term being “unfair”?

If a term is unfair, it will not be enforceable and will not bind the consumer, but the rest of the contract will continue in existence to the extent that it is practicable.

The operator would also be in breach of their Commission licence. Licence condition 7.1.1 B(1) of the Commission’s Licence Conditions and Code of Practice (“LCCP”) requires that: “Licensees must satisfy themselves that none of the terms on which gambling is offered are unfair terms within the meaning of the Consumer Rights Act 2015 and must comply with those terms.”

Examples of potentially “unfair” terms

There are a number of terms commonly included operators’ terms and conditions which could potentially be deemed to

unfair. These include terms regarding: free bets; bonus abuse; or palpable errors. We consider a couple of these examples below in detail.

- **Right to void a bet for “bonus abuse”**
Many operators’ terms and conditions contain provisions which allow them to void a bet for “bonus abuse”.

Such a term could be deemed “unfair” as it could be seen to cause a significant imbalance in the parties’ rights as it gives an operator a very wide unilateral right to void a bet, which will only likely be exercised in a scenario which is to a customer’s detriment.

Additionally, such a term is similar to one of the examples of terms in the Grey List: “A term which has the object or effect of authorising the trader to dissolve the contract on a discretionary basis where the same facility is not granted to the consumer”. A term allowing an operator to void a bet for bonus abuse could be seen as equivalent to this Grey List term as it effectively allows an operator to dissolve a contract on a discretionary basis where the customer does not have the same right to dissolve the contract.

Any terms which allow an operator to unilaterally void a bet should detail the circumstances in which the operator is permitted to do so (such as abuse of the service – ideally providing an objective test of what constitutes “abuse”) to increase the chances of the term not being deemed to be “unfair”.

In addition, if the customer was shown to have not placed the bet in “good faith” there could be an argument that the term was not “unfair”, as the general definition of what constitutes an “unfair” term includes a reference to “good faith”. Therefore, if there was strong evidence the customer had not entered into the contract in “good faith”, for example by seeking to manipulate the offer (which is intended to be used by one person with a single account) by opening multiple accounts and taking arbitrage positions, the term might not be deemed to be “unfair”.

• **Right to void a bet for a “palpable error”**
A term commonly included in terms and conditions, regards an operator’s rights concerning a ‘palpable error’. Examples of a “palpable error” could include:

- a bingo operator offering a higher payout for a single line win than a full house win; or
- a sports betting operator offering bets on a football match after the match has ended.

Operators’ terms and conditions vary in respect of palpable errors, including reserving the right to void a bet made in relation to a palpable error or only paying out winnings at odds which were available from another operator.

Such a term could be deemed to fall within the general definition of an “unfair” term as it could cause a significant imbalance in the parties’ rights to the detriment of a consumer. For example, it allows a bookmaker a wide scope to offer bets and then refuse to pay out winnings if it considers that the odds it provided were higher than should have been offered.

As such, “palpable error” terms should be drafted carefully and include (where possible) objective tests of what constitutes

such an error to reduce the chance of such a term being deemed “unfair”.

Terms that cannot be assessed for unfairness

The CRA provides that a term may not be assessed for fairness to the extent:

- that it specifies the “main subject matter” of the contract; or
- the assessment is of the appropriateness of the price.

A term that specifies the “main subject matter” of the contract would likely include a term regarding the definition of the event, the amount of the bet or the amount to be won. However, such terms must be:

- “transparent” - expressed in plain, intelligible language; and
- “prominent to the customer” - brought to the consumer’s attention in such a way that an average consumer would be aware of the term.

An example of a term which might be excluded from the test of fairness is a term in a free £50 bet promotion which excludes any free bet stake from the winnings. The exclusion of the stake from the winnings could be deemed to be part of the “main subject matter” of the contract, as it concerns the amount to be won. However, if it is not brought to the attention of the consumer in a way that a consumer would be aware of the term or is not expressed in plain intelligible language, it could still be deemed to be “unfair”.

Governing law

Operators may consider that by using a governing law for their terms and conditions other than the laws of England and Wales, that they will escape the obligations of the CRA. However, the CRA requirements regarding “unfair terms” will apply, even if

the law of another jurisdiction is selected as the governing law, in either of the following situations:

- the customer is UK-based, which means that there will be a close connection to the UK and the CRA “unfair term” provisions will apply; and/or
- the terms and conditions concern gambling facilities offered under a Commission licence, as such terms must be compliant with the LCCP which includes the requirement that terms are not “unfair” within the meaning of the CRA.

Conclusion

Failure to comply with the CRA could have significant consequences for an operator, from both a contractual and regulatory perspective. As such, it is vital that all operators dealing with UK consumers have considered the impact of the CRA on their business, which will likely involve a review of your existing terms and conditions.



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