

UNUSUAL OR ONEROUS TERMS

A customer who has signed an order form is bound by all the terms it contains, no matter how unusual or onerous they might be¹, and until recently it seemed that the same applied to a customer who signed an order form which referred to terms in a separate document.

But a judge has rejected that approach and ruled that any unusual or onerous terms contained in a separate document are only effective if they were brought to the customer's attention. The supplier's failure to do that meant that its claim for fees of £180,000 failed.

The judge's comments are of great significance:

- He emphasised that this approach applies to terms which are unusual *or* onerous, and that a term can be classified as onerous even if it is in widespread use by reputable businesses.
- He thought that the terms should have been sent with the order form, and that there should have been a prominent heading for the onerous ones.
- If the full terms had been included *in* the order form, that would have drawn the customer's attention to their length and complexity, and the need to read them carefully before signing.

Going forward, businesses can (and should) change their contracting procedures to accommodate this ruling, but nothing can be done about existing contracts and they will be affected for years to come. Many businesses are reluctant to take anything other than a clear-cut case to court to obtain payment, but this ruling will enable more customers to challenge demands for payment, so a more robust approach to contract enforcement may be needed.

Recommendations

- Set all terms out in the order form and make sure it is signed before work starts. This is the only safe approach now.
- If that is not possible, send a copy of the full terms with the order form and ensure that: the order form clearly states that those terms are part of the contract; unusual or onerous terms are clearly signposted, both within those terms and in the order form; the order form is signed and returned before work starts.
- Do not use a small font for terms, or put them in a small box that requires endless scrolling. Aim to make them as easy to read as an online newspaper.

For help with any of these issues, contact:

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Disclaimer: This note is intended as a signpost to some important issues on which professional advice should be obtained. It is not comprehensive, it is not a substitute for proper advice, and it is provided without any responsibility or liability.

¹ This general rule was modified by the Unfair Contract Terms Act, but only so far as very specific kinds of clauses are concerned.