

# 公平條款 互利共贏

## 標準格式消費合約 不公平條款報告

Report on Unfair Terms in  
Standard Form Consumer Contract



消費者委員會  
CONSUMER COUNCIL  
香港・HONG KONG

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## EXECUTIVE SUMMARY

### Introduction

Standard form contracts are prevalent in today's marketplace for businesses to devise in advance, without individual negotiation, the terms and conditions of supply.

Preprinted standard forms are convenient as they shorten the time for suppliers and consumers to enter into agreement. However, because they are drafted by the supplier they are inherently one sided. Due to superior bargaining power and information asymmetry in its favour, a business may seek to tilt the balance towards itself, at the expense of consumer interests. Because these contracts are presented on a take it or leave it basis, consumers are not in a position to bargain with suppliers. Even if consumers are aware that the terms are unfavourable, their main consideration is the price and quality of the good and service on offer. Typically, consumers will proceed with signing the contract, hopeful that disadvantageous terms will not be exploited.

Through its work, the Consumer Council ("the **Council**") has found that some standard form consumer contracts include unfair terms that are contrary to the requirement of good faith. The terms thereby cause significant imbalance in the parties' rights and obligations arising under the contract, to the detriment of the consumers, for example, unfair conditions regarding termination, cooling off periods, refunds and legal rights. Significantly, it is not uncommon to find unfair exemption clauses that are intended to exclude or limit the liability of suppliers for breach of contract, negligence, misrepresentation or other breach of duty.

### Current Legislation

Hong Kong has enacted some statutory provisions in an effort to limit the extent to which such liability can be avoided. For example:

The *Control of Exemption Clauses Ordinance* attempts to limit the extent to which businesses can exempt themselves from liability for matters such as personal injury or death resulting from negligence; unreasonable breach of contract; liability for loss or damage caused by negligence; or

liability arising from breach of implied obligations owed under the *Sale of Goods Ordinance*.

The *Misrepresentation Ordinance* prevents any contracting party from excluding or restricting liability for misrepresentation by means of a contract term, except to the extent that the term satisfies the requirement of reasonableness as stated in the *Control of Exemption Clauses Ordinance*.

The *Supply of Services (Implied Terms) Ordinance* incorporates into consumer contracts, implied terms that the supplier will carry out a service within a reasonable time and with reasonable skill and care; and that a supplier's liability arising from these implied terms cannot be exempted or limited by reference to a contract term.

However, these provisions only provide for specific instances of unfairness arising from the use of exemption clauses. Currently, unfair terms which seek to serve purposes other than excluding or limiting liability are not specifically addressed by statute. The only other avenues available are to seek a court ruling to strike out an unfair term if it is ambiguous or if the offending term is unconscionable pursuant to the *Unconscionable Contracts Ordinance*.

However, these judicial redresses have limitations. An unfair term might not be ambiguous and the rule would therefore not apply, even if the term is patently unfair. The *Unconscionable Contracts Ordinance* does not provide an exact definition of what is unconscionable but only sets out a non-exhaustive list of factors to be considered by the court. It is most likely that the court would turn to common law for definition, and precedent has determined that the court will tend to focus on the totality of the circumstances and conduct that give rise to unfairness in the bargaining process rather than the meaning and effect of the term alone. In other words, an unfair term on its own is not sufficient to make out a case for unconscionable contract.

## **Self-Regulation**

There have been attempts at addressing unfair terms in consumer contracts through self regulation.

*The Code of Practice for Telecommunications Service Contracts issued by the Communications Association of Hong Kong has been implemented since July 2011.* This Code is largely aimed at addressing the

issue of fairness in procedural matters, such as style, format and structure of contracts, and rights and obligations regarding unilateral variation of terms by the service provider, automatic extension or renewal of contract, and a cooling-off period. The substance of the terms, with regard to fairness is left unattended and unfair terms can still be found in some telecommunications service contracts. Problems also exist with the way in which cooling off periods are applied.

## **The Way Forward**

Experience from comparable legal jurisdictions, for example, the UK and Australia indicates that a common approach by governments is to introduce broad comprehensive legislation governing a range of consumer issues, including unfair terms in consumer contracts. In 2008 the Consumer Council produced a report entitled *Fairness in the Marketplace for Consumers and Business* in which it recommended that this comprehensive approach was also suited to addressing problems with consumer protection found in Hong Kong; including unfair contractual terms. While the Government's response to the report has been generally positive, any legislative initiatives it decides to proceed with will take years to implement.

The Consumer Council believes that unfair terms in standard form consumer contracts should not be left unchecked, while there is ongoing debate on the need for a comprehensive consumer protection law. The Council is of the view that businesses are in a position to take positive steps now to honour the principle of good faith and make sure terms in their standard form consumer contracts are fair to the consumers.

To illustrate how businesses can improve their standing in the community, the report sets out guidelines on how to draft standard form consumer contracts fairly, based on issues arising from the beauty services industry, found at Annexure 1. Also included at Annexure 2 is a sample contract that can be used as a template for other sectors.

The purpose of this report is to encourage and assist traders to avoid using unfair terms. The enclosed guidelines and sample contract both cover a range of issues of unfairness in consumer contracts that have been identified by the Council. The Council urges businesses to examine both documents and apply the principles of fairness, as indicated in the documents, to their business model.

## **Examples of unfair terms and how they can be addressed**

Numerous examples of unfair terms falling into 12 categories can be found in local standard form consumer contracts, in various economic sectors. Accordingly, the report

- discusses in detail the unfairness of certain terms the Council has identified in local standard form consumer contracts; and
- indicates what is considered the appropriate approach that should be taken in relation to the terms.

While the examples might identify particular areas where problems arise, the conduct of specific suppliers is not the subject of this report and the suppliers are therefore not named.

### **A. *Unilateral variation of terms of contract***

#### *Unilateral right to vary terms generally without a valid reason specified*

It is recognized that some suppliers may have a legitimate need to change terms to conform with changes in their own supply contracts and to accommodate changes in market conditions. Nevertheless, these provisions give arbitrary power to the supplier and may result in an unfair situation where the consumer is made to observe the contract which has been amended to such an extent that the consumer is substantially deprived of what was contracted for.

Therefore, if a supplier has unilateral variation power, the consumer should be given a reasonable time to consider the amendments and the right to terminate the contract without penalty if they are unacceptable, and if prepayment has been made, the unused balance should be returned to the consumer upon termination.

#### *Unilateral right to change the product*

This kind of term may address a supplier's concerns where provision of a product is subject to supply by a third party. However, a significant change made to the product supplied may mean that the consumer has to accept something fundamentally different from what was contracted. It appears that these terms intend to shift the risk of commercial uncertainty that

should otherwise be borne by the supplier. It is therefore intrinsically unfair and should be amended to the effect that a consumer may terminate the contract at any time without penalty if the supplier makes a significant change to the goods or service contracted for.

**Supplier's right to notify variation in a way it deems appropriate**

Certain businesses reserve the right to alter and amend terms and conditions from time to time with prior notice in any manner the business deems appropriate. Moreover, the changes take place irrespective of whether the consumer has actual notice or knowledge of the change.

These terms are inherently unfair and should be deleted. Reasonable notice should be given of changes to terms and conditions at all times and a genuine termination right given so that consumers may terminate the contract if they are adversely affected by the change, without penalty, and a deposit or prepayment returned.

***B. Excluding or limiting the legal rights of consumers to offset a debt owed to the supplier against any claim which the consumer may have against it***

Some subscription style contracts require that all payments are non-refundable and non-transferable and that consumers are required to pay all the fees and subscriptions prior to the period in which the fees and subscriptions relate. In addition, the sum payable cannot, for any reason, whether by common law or equity or otherwise be set-off or deducted. The Council considers that it is unfair that a consumer's legal right to offset is excluded in these circumstances. Such terms should be deleted.

***C. Entitlement to "compensation" for early termination***

Some contracts place onerous conditions on early termination and are subject to the permission of the supplier. This can result in a situation where a consumer who has suffered damage due to serious default on the part of the supplier may not be allowed to terminate the contract early, or be punished for early determination. Where a supplier is not in default, it may have legitimate reason to claim for loss sustained due to early termination. However, some termination fees exceed damage reasonably suffered by the supplier and thus amount to a penalty against the consumer, which would not be enforceable by a court.

These provisions should be redrafted to the effect that they apply only to cases where the early termination is due to a breach by the consumer; and that compensation should not exceed the losses reasonably suffered by the supplier due to the early termination.

#### **D. Unreasonable exclusion clauses**

##### Exclusion clauses excessively broad and general

Some contracts are couched in terms where the customer agrees that the supplier excludes all liability to the customer and any third party arising out of or in connection with the service in contract, tort and/or otherwise; including direct and/or indirect loss incurred by the customer or any third party. These types of exemption clauses seek to exclude any liability incurred for any reason or in any circumstance. It is very likely that they would be held void for being unfair and unreasonable under the *Control of Exemption Clauses Ordinance*. As such they should be deleted. Alternatively, they could be amended to satisfy the reasonableness test under that legislation.

##### Excluding or limiting the legal liability of supplier in the event of personal injury to consumer resulting from an act or omission of supplier

Membership style contracts often state that management or agents shall not be held liable for any personal injury or damage to property, or loss of property, whether arising out of use of facilities or as result of negligence on the part of management, its employees or agents or otherwise.

The *Control of Exemption Clauses Ordinance* provides that liability for death or personal injury resulting from negligence cannot be excluded or restricted by reference to a contract term. Terms such as these should be deleted.

#### **E. Requiring unnecessary and unreasonable formality**

Cancellation of contracts is often allowed but then the service provider places onerous conditions on how to effect the termination. For example, that it is only effective from the next billing cycle, or that it has to be given in the prescribed form, served within a specified time or attendance is required in person at a nominated place.

These requirements are in most cases unnecessary and may in certain cases even be impractical or unreasonable. In particular, where they are coupled with an unreasonable delay to the termination of the contract, they can only be viewed as an obstacle and deterrent to consumers exercising their legal rights. As such they should be deleted.

#### **F. *Retaining the right of final decision on any dispute***

Some businesses retain the right to final decision in relation to all disputes about the interpretation of the terms and conditions of the contract. Impartiality cannot be ensured in these circumstances as the business is both the adjudicator and a party to the dispute. Either party should have a right in law to bring a dispute to court for resolution. As such, as these terms should be deleted.

#### **G. *Entire Agreement Clause***

Contracts will often state, in small print, that the document constitutes the entire agreement and understanding between the parties and supersedes all prior arrangements or understandings, whether oral or written, between the parties relating to the subject matter. This term may be susceptible to challenge for unfairness. For example, the Council has found that the term has been used where a supplier attempts to exclude liability for representation or warranty made by its sales personnel during sales talk. Businesses should be aware that the term may be set aside by the court pursuant to the *Unconscionable Contracts Ordinance* and that a term cannot avoid or restrict liability for misrepresentation unless it satisfies the requirement of reasonableness as stated in the *Control of Exemption Clauses Ordinance*. As such, the term should be avoided.

#### **H. *Cancellation fees or penalties***

Some contracts have been found to state that a “cooling off” period is provided but that in order to terminate, a signed cancellation request form must be delivered in person and the purchaser’s right to refund, if any, is subject to an onerous termination fee. Firstly, this sort of provision is not a ‘cooling off’ period, but a termination clause. Secondly, it is inherently unfair that in order to exercise the right of termination a consumer has to pay a considerable sum of money that is designed to be a penalty far exceeding the costs and losses incurred to the supplier due to the cancellation.

These terms should be redrafted to the effect that the supplier is only entitled to the compensation representing the losses reasonably incurred to him due to the termination.

#### **I. No refunds**

Terms stating that the customer shall not be entitled to any refund under any circumstances are commonly found in contracts under which consumers make substantial prepayments. Faced with this term, consumers may be misled into believing that they have no legal rights to seek redress even when the supplier is in serious default. Also, such terms enable the suppliers to take unfair advantage of the consumers when the consumers terminate the contract early. The consumers would lose all his prepayment regardless of losses caused to the supplier by their early termination.

Such terms should be deleted.

#### **J. Unreasonable restriction of consumer's legal rights**

Consumers are sometimes subject to terms that if they terminate a contract they shall not mention the content of the service or business matters of the other party to any persons, including the mass media and on-line discussion forums; otherwise legal proceedings may be taken against them. Other terms might state that the consumer understands that certain unpredictable risks may arise during the course of a treatment and that the customer bears all physiological or psychological risks. Yet others stipulate that the customer is prohibited from lodging any complaint directly or indirectly with any government, court, semi-official organization or mass media.

These restrictions are so broad that they may deprive consumers the right to freedom of speech and expression and the right to seek redress. They go far beyond the protection of legitimate interest in reputation and proprietary interest in trade secrets. It is strongly arguable that such a term is ineffective on the grounds that it is unconscionable. Moreover, they might be misled to believe they cannot file a complaint with the Consumer Council.

These terms should be deleted from consumer contracts as they would fall under the *Control of Exemption Clauses Ordinance*, and most likely be considered void for being unconscionable.

## **K. Automatic renewal of contract**

It is common for some contracts to stipulate that upon expiry of a commitment period, the subscription for services will be automatically renewed.

These terms are considered unfair if there is no accompanying term requiring the supplier to give a clear and conspicuous written reminder to the consumer at a reasonable time before the contract expires, and notice of any increase in fees or limitation in service.

## **L. Read and Understood Declaration**

Declarations purporting that the consumer has read and understood the contract are common. However, many standard form contracts are long and complex, and a consumer may not be able to fully read it before signing, or even understand its full implications. It is not uncommon for a consumer to be asked to sign the declaration even where it is clear it has not been read. In these circumstances, the risk of unfairness by resorting to onerous terms in the contract is apparent.

For long and complex consumer contracts, such a declaration should be deleted. With simple and short consumer contracts, a declaration should be replaced by a clear and prominent warning that the consumer should read and understand the terms before signing the contract. The warning should be placed before the terms and conditions so that the consumer is reminded to read the terms and where necessary ask for further information or clarification before signing the contract.

## **Conclusion**

The examples of unfair terms discussed in the report are indicative of the concern that consumers have with the practice of some businesses in Hong Kong. The use of terms which are superfluous, draconian or convoluted are not in the long term interests of a business. Rather, they are likely to make the contract unnecessarily complicated, raise suspicion on the part of consumers as to the motives of the business, and increase the risk and costs of resolving disputes.

In addition, a standard form consumer contract should be fair not only in substance but also in form. It is fair only when it is legible and intelligible.

Apart from using plain and ordinary language, a standard form consumer contract should be *short and simple*.

The principles of good faith and fairness can also be manifested by a cooling-off arrangement that allows consumers a reasonable period of time after they entered into contract to reconsider issues affecting their decision to buy, such as their actual needs and affordability; and renders them a right to cancel the contract without any condition except payment for administrative costs reasonably incurred by the supplier as a result of the cancellation, and reasonable charges for goods and/or services used during the period.

It is the Council's position that such a cooling-off arrangement should apply to fixed-term contracts and prepaid contracts, particularly those with long-term financial commitment or of substantial value.

Adopting fair terms in consumer contacts indicates the determination of businesses to abide by the principle of good faith and helps the business develop goodwill. In this regard a business can avoid

- the risks and costs that would otherwise be borne through consumer disputes;
- legal challenges by consumers and associated costs in defending legal claims;
- having to spend extra time and resources to deal with complaints or legal challenges.

A consumer contract that contains unfair terms is evidence that a business neither treats consumers fairly nor acts in good faith. The natural response by consumers in these circumstances is mistrust towards the business concerned. A fair consumer contract will serve the best interests of consumers, businesses and society.

The Council trusts that this report, with annexures, will form the basis for businesses to review their consumer contracts and ensure that the principle of fairness, good faith and honesty in trade is fully observed and that consumers are treated fairly.

## I. Introduction

### **Prevalent use of standard form contract**

1. Standard form contracts are commonly used to evidence consumer transactions in written form. They are devised by a business in advance without having negotiated individually with the consumer, with few specific terms (such as those relating to price setting and main subject matter of the contract) left for negotiation.
2. It is surely more convenient to make contracts through preprinted standard forms rather than negotiating on individual basis. The use of standard form contracts shortens the time for suppliers to supply and consumers to obtain goods or services; and thus facilitates the velocity and multitude of mass production and consumption. Moreover, standard form contracts have the effect of reducing transaction costs for suppliers, which may otherwise be passed on to consumers. Proliferation of e-commerce has resulted in augmentation of the use of standard form contracts, as individual negotiations seem to be impracticable for online consumer sales.

### **Detriment to consumers**

3. However, as standard form contracts are drafted by professionals for and on behalf of the suppliers, they are inherently one-sided.
4. Standard form consumer contracts are often in small or virtually illegible print and drafted in legal and/or professional language which consumers find difficult to understand. In addition, a lot of them are lengthy and tedious. Consumers who usually sign the contracts at the spot should not be expected to read over and fully understand them before they put their signatures. It is not uncommon that the salespersons just ask consumers to sign the contracts without advising consumers to read over them. Consumers are often under pressure to conclude the bargain quickly without reading the terms carefully or questioning about them. It may be that a consumer is at the front of a queue or he has been given concession during negotiation; and as a result of this, he would feel obliged to cooperate by wrapping things up as soon as possible.

5. A consumer may be a good price watcher. However, he may not be able to shop around for the best contract terms. It may require a certain level of knowledge and will cost a lot of time to do so. Moreover, it is doubtful whether the full text of contract is accessible to a consumer who is just shopping around. In most cases, consumer would only be given a copy of the contract after he/she has agreed to purchase.
6. With the superior bargaining power and information asymmetry in its favour, in drafting a standard form consumer contract a supplier may seek to tilt the balance towards itself at the expense of the interests of consumers. Even if a consumer is aware that the terms are unfavourable, he would proceed with signing the contract thinking that these terms will not be exploited, or realizing that he is not in a position to bargain as the contract is presented on “take it or leave it” basis. Consumers indeed have limited freedom of choice and little room for negotiation on terms as the terms are so standard across the industry; or the products they want are only supplied by particular traders.

### **Definition of Unfair Term**

7. What are commonly found in standard form consumer contracts are terms, *contrary to the requirement of good faith, causing a significant imbalance in the parties' rights and obligations arising under the contract to the detriment of the consumers.*
8. Such terms are referred to in this Report as “unfair terms” as they are so defined in the EU’s Council Directive on Unfair Terms in Consumer Contracts (93/13/EEC) and the UK’s Unfair Terms in Consumer Contracts Regulations 1999.

### **Inadequate control of standard form contract**

#### **Statutory control**

##### *Control of Exemption Clauses*

9. It cannot be said that Hong Kong lacks any control of the above defined unfair terms in standard form contracts. It is not uncommon to find

exemption clauses in standard form consumer contracts that are intended to exclude or limit the liability of the suppliers for breach of contract, negligence, misrepresentation or other breach of duty. Some of these clauses appear to be unfair and unreasonable. Statutory provisions have been enacted to limit the extent to which such liability can be avoided by means of contract terms. They include:

- i) Control of Exemption Clauses Ordinance (Cap.71) –
  - a) Liability for personal injuries or death resulting from negligence cannot be exempted or restricted by contractual term or notice (s.7);
  - b) Other liabilities resulting from negligence cannot be so exempted or restricted except to the extent that the term or notice satisfies the requirement of reasonableness (s.7);
  - c) Liability arising from a breach of a consumer contract cannot be excluded or restricted by any contract term unless the contract term satisfies the requirement of reasonableness set out in the Ordinance (s.8);
  - d) A consumer cannot by reference to any contractual term be made to indemnify another person for any liability which the other may incur in respect of negligence or breach of contract, unless such a term satisfies the reasonableness test set out in the Ordinance (s.9);
  - e) A term or guarantee relating to consumer goods cannot exclude or restrict liability for loss or damage caused by negligence on the part of the manufacturer or distributor (s.10);
  - f) Liability arising from breach of implied obligations of seller owed to consumer under the Sale of Goods Ordinance, Cap. 26 (namely, implied undertakings as to the title of the goods, conformity of goods with description or sample and as to the quality or fitness for particular purposes) cannot be excluded or limited by reference to a contractual term (s.11).

ii) S.4 of the Misrepresentation Ordinance (Cap.284) –

- a) It prevents any contracting party from excluding or restricting liability for misrepresentation by means of contract term except to the extent that the term satisfies the requirement of reasonableness as stated in the Control of Exemption Clauses Ordinance (Cap 71).

iii) Supply of Services (Implied Terms) Ordinance (Cap.457) –

- a) It incorporates into contract for the supply of a service implied terms that the supplier will carry out the service within a reasonable time and in reasonable skill and care; and provides that the supplier's liability arising from these implied terms cannot be exempted or limited by reference to a contract term where the other party to the contract deals as consumer (s.8(1)).

*Control of unfair terms seeking to serve purposes other than limiting or excluding liability*

10. Exemption clauses contrary to the said provisions will be held ineffective, and the supplier cannot rely on them to restrict or exclude its liability. However, these provisions provide only for specific instances of unfairness arising from the use of exemption clauses rather than a comprehensive protection against unfair terms. Currently, unfair terms which seek to serve purposes other than excluding or limiting liability are not specifically addressed by statute. Consumers aggrieved by such unfair terms may ask the court to: -

- i) interpret them in the way against the suppliers who imposed them applying the rule of *contra proferentem*; or
  - ii) find them unconscionable and refuse to enforce them or to amend them pursuant to the Unconscionable Contracts Ordinance (Cap.458) (the “UCO”).
11. However, these judicial redresses have their own limitations, and are not sufficient in addressing the overall problem of unfairness in standard form consumer contracts.

## **Limitations**

### *Contra proferentem*

12. The court will apply the rule of contra proferentem only where the court determines that the term in question is ambiguous. In other words, the rule would not be helpful to consumers where the terms though unfair are not further tainted by ambiguity.

### *The UCO*

13. The UCO does not provide an exact definition of “unconscionable”. It only sets out in s.6(1) a non-exhaustive list of factors to be considered by the court in determining whether a contract or part of it was unconscionable. It is most likely that the court would turn to common law for definition.
14. To establish unconscionability, the common law requires that: -
  - i) the bargain must be oppressive to the complainant in overall terms;
  - ii) the complainant was suffering from certain types of bargaining weakness; and
  - iii) the other party must have acted unconscionably in the sense of having knowingly taken advantage of the complainant.<sup>1</sup>
15. It can be seen that the court would tend to focus on the totality of the circumstances and conduct that give rise to unfairness in the bargaining process rather than the meaning and effect of the term alone. In other words, an unfair term on its own is not sufficient to make out a case for unconscionable contract.
16. When determining whether a contract or part of it is unconscionable pursuant to UCO, the court would not merely consider whether the term(s) of the contract is unfair. In *Hang Seng Credit Card Ltd. V. Tsang Nga Lee*

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<sup>1</sup> Chitty on Contracts, 28th ed, para.7-078 applied by Shum Kit Ching v Caesar Beauty Centre Ltd [2003] 3 HKC 235.

[2000]3 HKC 269, when considering whether the costs provision in a credit card agreement was unconscionable, the court went through not only the meaning and effect of the provision, but also some other factors referred to in the non-exhaustive list in s.6 of UCO, including the relative strengths of the bargaining positions of the parties, whether the defendant consumer was able to understand the provision, and whether the defendant consumer could have acquired the identical service from a person other than the plaintiff bank. It is from the totality of all the circumstances that the court concluded that the provision was unconscionable.

17. Later, it was held in *Shum Kit Ching v Caesar Beauty Centre Ltd.* [2003]3 HKC 235 that when deciding whether a contract or part of a contract was unconscionable under the UCO, the court must have regard to all circumstances relevant to that issue but on top of that, the court must also take into account the factors set out in s. 6(1) as appropriate.<sup>2</sup>
18. To sum up, it appears that under the current legal framework, a consumer cannot set aside a contract or part of it merely on the ground that a term of it is unfair.

### **Self-regulatory attempt**

19. The Industry Code of Practice for Telecommunications Service Contracts (the “**Code**”) issued by the Communications Association of Hong Kong (“CAHK”) has been implemented since July 2011. It provides guidelines for adoption by the telecommunications industry in drawing up telecommunications service contracts with consumers.
20. It is noteworthy that the Code addresses only the issue of fairness in procedural matters, including clarity regarding terms, style, format and structure of the contracts, and respective rights and obligations of the service provider and the consumer in the event of unilateral variation of terms by the service provider, automatic extension or renewal of contract, relocation of service provisioning and the provision of cooling-off period. On the other hand, the fairness regarding substance of the terms is left unattended. For instance, the issues concerning unreasonable exemption clauses are not addressed. Such clauses can still be found

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<sup>2</sup> *Shum Kit Ching v Caesar Beauty Centre Ltd.* [2003]3 HKC 235 at 244.

in some telecommunications service contracts, which are exemplified in paragraph 40.4.1 hereof.

21. In respect of procedural fairness, the Code is seen to have room for improvement. For instance, the guideline regarding the application of cooling-off period (not less than 7 days from the date of the contract) is very restrictive. It confines to “contract made for residential use during unsolicited visit to the consumer’s home”<sup>3</sup>. In other words, contracts concluded during street promotion or over unsolicited call are excluded. However, there seems nothing showing that consumers are more protected when entering these excluded contracts and thus making the requirement of cooling-off period dispensable.
22. The basic purpose of cooling-off period is to allow consumers sufficient time to reconsider or seek advice on their purchase and to guard consumers against mis-selling. However, the Code provides that the Cooling-off Period shall cease to apply upon the occurrence of any of the following events: -
  - i) once the service has been provisioned;
  - ii) once the supplier commence the physical provisioning of the service (including by arrangement with a third party);
  - iii) once the network terminating unit, customer premises equipment or user device or any promotional gift supplied in connection with the service has been delivered to the consumer;
  - iv) 3 days before the scheduled completion date of the number porting as agreed by the customer; or
  - v) after a quality control confirmation call in respect of the contract has been made provided that: -
    - a) the supplier shall inform the consumer clearly, and, the consumer acknowledge his awareness that the quality control confirmation call will terminate the Cooling-off Period; and

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<sup>3</sup> Definition of “unsolicited contract” in paragraph 1.1 of the Code.

- b) the quality control confirmation call is made more than 1 hour after the conclusion of the unsolicited contract.<sup>4</sup>
- 23. It is noted that the prior consent of the consumer is not required for the occurrence of the prescribed events initiated by the service provider, upon which the Cooling-off Period will cease to apply. It enables the service provider to shorten the Cooling-off Period simply by causing any of the prescribed events to occur before the end of that period. The Cooling-off period may be as short as just more than an hour after the contract has been concluded in the case where the quality control confirmation call is made. As such, the consumer may not be given sufficient time to reflect on the product and the contract. This would defeat the very purpose of cooling-off period to ensure that consumers make informed choice.
- 24. Besides, as the Code is voluntary, even the telecommunications service providers which have pledged to adopt it are not bound to comply with it fully. For instance, where the service provider unilaterally increases certain charges or makes substantial change to the contract terms, the Code requires that the customer must be permitted to terminate the contract by notice without incurring any charges of any kind in respect of that termination (other than incidental costs)<sup>5</sup>. However, in the general conditions of service of one of the said service providers, it is provided to the effect that under such circumstances, the customer may terminate the contract without paying the early termination charge and any other cancellation charge, *unless the Application says otherwise*. It leaves a leeway for the service provider to impose on the customer charges other than the incidental costs allowed by the Code.
- 25. In response to the Council's comment<sup>6</sup>, CAHK states, among others, to the effect that
  - i) the consumer protection initiative of the Code is not aimed at addressing the nature of the obligations imposed on customers. The issue of unreasonable exemption clauses is already addressed by current legislation; and

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<sup>4</sup> Paragraph 5.6 of the Code.

<sup>5</sup> Paragraph 9.1(d) of the Code.

<sup>6</sup> The Telecommunications Association of Hong Kong was consulted and has expressed its opinion on the part of "Self-regulatory attempt" of this Report, which the Council hereby acknowledges with thanks.

- ii) the reasons for confining the application of cooling-off period to contract made during an unsolicited visit to consumer's home are that
  - a) in the purchase-in-shop and street promotion scenarios, consumers who do not want to sign a contract can simply walk away and come back at another time; whereas it may be more difficult for consumers to do so if the salespersons are in their own home, and
  - b) a "general" cooling-off period will reduce efficiency and would generate more complaints about the speed of deliveries. The current cooling-off period arrangement is formulated based on the main causes of complaints received, and thus focuses on preventing consumers from exposing to undue pressure when signing a contract.

The CAHK's response does not ease the Council's concern over the limitation of the Code. Nonetheless, in the general absence of initiative of local industries to address unfairness in consumer contracts, the telecommunications industry's initiative to improve procedural fairness in consumer contracts is welcomed. That said, the Code can be improved in certain aspects; and further effort of the industry is called upon to ensure fairness in the substance of terms so that consumers entering into the contracts can be effectively protected. In any event, the Code has demonstrated that contractual fairness can be promoted by the concerted efforts of members of an industry through setting up guidelines on drafting standard form consumer contracts.

## **Foreign Experience**

### **The UK**

26. Unfair terms in standard form consumer contracts are regulated in the UK by the Unfair Terms in Consumer Contracts Regulations 1999 (the "**UK Regulations**") which implement EC Directive 93/13 on Unfair Terms in Consumer Contracts. A term will 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”<sup>7</sup>.

27. Schedule 2 to the UK Regulations contains an indicative and non-exhaustive list of terms which may be regarded as unfair. Such a list may be helpful to the traders in drafting the contracts and to the consumers in comprehending unfairness of a term.
28. Apart from consumer contracts for the supply of goods or services, it was held by the English Court of Appeal that the UK Regulations and the Directive also applied to consumer contracts relating to land<sup>8</sup>.
29. Under the UK Regulations, a consumer aggrieved by an unfair term is given the right to treat the term as not binding. But the contract will still continue to be in force if it “is capable of continuing in existence without the unfair term”.<sup>9</sup> The Office of Fair Trading (the “OFT”) and the relevant qualifying bodies such as the Director General of Telecommunications are empowered to consider complaints that any contract term drawn up for general use in consumer contracts is unfair; and to accept undertakings by the infringing suppliers to stop using an unfair term or to revise it so that it is no longer unfair. Alternatively, they can apply to court for an injunction under the UK Regulations or an enforcement order under the Enterprise Act against the use of an unfair term. OFT may arrange for the dissemination of such information and advice as to the operation of the Regulations, such as information regarding the undertakings and injunction orders. Moreover, an unfair term having the effect of distorting consumers’ decisions regarding their purchases generally falls within the scope of the Consumer Protection from Unfair Trading Regulations 2008 and is subject to the enforcement action under these Regulations.

## Australia

30. In Australia, the first piece of legislation in prohibiting substantive unfairness in standard form consumer contract is Part 2B of the Victorian Fair Trading Act 1999 (the “Act”) which is largely based on the UK

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<sup>7</sup> Unfair Terms in Consumer Contracts Regulation 1999, reg.5(1).

<sup>8</sup> The London Borough of Newham v. Khatun & Others [2004] EWCA Civ 55, at para.83.

<sup>9</sup> Unfair Terms in Consumer Contracts Regulation 1999, reg.8(2).

Regulations. In June 2009, the provisions of the Act regarding unfair contract terms were extended by the Fair Trading and Other Acts Amendment 2009 to include consumer credit contracts, mortgages, guarantees and leases.

31. In March 2010, the Commonwealth Parliament passed a package of reforms implementing a comprehensive national consumer law, the Trade Practices Amendment (Australian Consumer Law) Act (the “**ACL**”). Under the ACL, a national unfair terms regime was introduced to regulate standard form consumer contracts for supply of goods or services and sale or grant of an interest in land. As a result, Part 2B of the Victorian Fair Trading Act was replaced by the ACL provisions on unfair terms. Moreover, the ACL also amends the Australia Securities and Investment Commission Act and introduces corresponding provisions regulating unfair terms in consumer standard form contracts for financial products and services.
32. Under the ACL, an unfair term of the said kinds of standard form consumer contract is void. But the contract continues to bind the parties if it is capable of operating without the unfair term. A term is unfair if: -
  - i) it would cause a significant imbalance in the parties’ rights and obligations arising under the contract;
  - ii) it is not reasonably necessary in order to protect the legitimate interests of the party who would be advantaged by the term; and
  - iii) it would cause detriment (whether financial or otherwise) to a party if it were to be applied or relied on<sup>10</sup>.
33. The ACL also provides that in determining whether a term of a consumer contract is unfair as defined, a court may take into account such matters it thinks relevant, but must take into account the following: -
  - i) the extent to which the term is transparent;
  - ii) the contract as a whole.<sup>11</sup>

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<sup>10</sup> Schedule 1, Part 1, Section 3(1), the Trade Practices Amendment (Australian Consumer Law) Act (No.1) 2010.

<sup>11</sup> Section 3(2), Ibid.

34. The meaning of unfair term, like the UK Regulations, is illustrated by an indicative and non-exhaustive list of examples.

### **Position of Consumer Council**

35. The position of the Consumer Council (the “**Council**”) regarding unfair terms of standard form consumer contracts has been enunciated in its Report entitled “Fairness in the Marketplace for Consumers and Business” of 2008. The Council recommends the introduction of a new piece of legislation, modelled on the abovementioned UK Unfair Terms in Consumer Contracts Regulations, with appropriate modifications in view of the differences in the culture and marketplace of Hong Kong and the UK. The proposal amongst others made in the 2008 Report was submitted to the Government for its consideration. While the Government’s response to the 2008 Report is in general positive, it may take considerable time before such a piece of legislation is put in place. In the meantime, unfair terms in standard form consumer contracts should not be left unchecked. The Council is of the view that traders are in a position to take positive steps to honour the principle of good faith and make sure the terms in their standard form consumer contracts are fair to the consumers.

## **II. Purpose of the Report**

36. The purpose of this Report is to encourage and assist traders to avoid using unfair terms. For such a purpose, the Report will demonstrate in Section III with examples,
  - i) the unfairness of certain terms in local standard form consumer contracts; and
  - ii) how such unfairness can be eradicated by making appropriate amendments to the contracts.
37. To illustrate further, this Report proposes, with the beauty services as the subject industry,
  - i) a set of guidelines on drafting standard form consumer contracts; and
  - ii) a sample contract.
38. The Guidelines and the Sample Contract are annexed to this Report respectively marked as Annexure 1 and Annexure 2.
39. The Council believes that the adoption of fair terms will result in a more balanced sharing of risks between traders and consumers and reduce the opportunities for traders' exploitation of consumers. This would boost consumer confidence and thus bring enormous and long-term benefit to the business. It is believed that a win-win situation for consumers and traders will be created.

### **III. Examples of Unfair Terms in Standard Form Consumer Contracts**

40. With Schedule 2 of the UK Regulations as reference, the following examples of unfair terms are taken from the local standard form consumer contracts of various sectors: The examples are grouped under different types of contractual unfairness, followed by respective types of contracts in square brackets from which they were extracted. As the conduct of specific individual suppliers is not the subject to be dealt with in this Report, the suppliers mentioned in the examples are not named; but referred to as “XX”, “the Company” or “the Bank” as the case may be. Following these examples are comments that explain the unfairness involved in the respective types of unfair terms and suggest actions for rectification.

#### **40.1 Unilateral variation**

##### **40.1.1 Unilateral right of the supplier to vary terms generally, without a valid reason specified in the contract**

Example

- a) XX 有權隨時增加、取消、更改或以其他內容代替已公佈的節目及內容，亦有權因應其認為合適的情況下隨時增加、更改或減少任何頻道的數量、結構或組合及/或任何內容而無須預先通知客戶。

XX may at anytime, without giving notice to Subscriber, add, cancel, alter or replace advertised programmes and Contents, increase, vary or decrease the number, structure or combination of Channels and/or any Content.

[Pay TV service contract]

- b) All Members, their Nominees and Families shall abide by this Constitution, the Club Rules and any other Rules which XX makes from time to time...XX may amend at any time in whole or in part this Constitution and the Rules. Every amendment to this Constitution and the Rules shall be binding on every Members, their Nominees and Families and as soon as it has been made whether or not XX has given notice to these persons.

[Recreational club membership agreement]

- c) 本公司保留更改以上條款及細則之最終決定權，毋須預先通知客戶。

[Translation: The Company reserves the right to make final decision on any amendment to the terms and conditions hereinabove without giving prior notice to the Customer.]

[After-sale maintenance and repair contract of electronic goods]

Comment

It is recognized that in on-going fixed-term contracts, some suppliers may have legitimate need to be able to change the terms to conform to the changes of the terms of their own supply contracts and accommodate the dynamic market conditions. Nevertheless, the said provisions give arbitrary power to the supplier to amend the contract for any reason other than meeting such a need at any time without notifying the consumer. This may result in an unfair situation where the consumer is made to observe the contract which has been amended to such an extent that he is substantially deprived of what he has contracted for.

Therefore, if the supplier is given unilateral variation power under the contract, the consumer should be given a reasonable time to consider the amendments and the right to terminate the contract without penalty when he finds the amendments not acceptable. This may, on the one hand, meet the practical and legitimate need to accommodate changes of supply contracts and market conditions, while on the other, prevent abuse of unilateral variation power on the part of the supplier to the detriment of the consumer.

### Suggested Action

#### *Regarding examples (a) and (b)*

Such terms should be deleted.

Alternatively, they should be re-drafted to the effect that the consumers be given

- (i) a reasonable notice (e.g. at least one month's notice) of any variation of the terms; and
- (ii) the right to terminate the contract without penalty by giving a reasonable notice (e.g. one month's notice). If prepayment has been made, the unused balance should be returned to the consumers upon termination.

#### *Regarding example (c)*

This term should be deleted. Amendments to the contract giving the consumer reasonable notice and the right to terminate the contract without penalty cannot practically eradicate the unfairness. It is because the consumer may not be able to find substitute for the service and replacement parts provided under the contract.

#### **40.1.2 Unilateral right to change the product**

##### Example

XX 有權隨時增加、取消、更改或以其他內容代替已公佈的節目及內容，亦有權因應其認為合適的情況下隨時增加、更改或減少任何頻道的數量、結構或組合及/或任何內容而無須預先通知客戶。

XX may at any time, without giving notice to Subscriber, add, cancel, alter or replace advertised programmes and Contents, increase, vary or decrease the number, structure or combination of Channels and/or any Content.

[Pay TV contract]

### Comment

This kind of term may address the supplier's concerns arising from the situation where provision of the product is subject to the supply by a third party, which may be unstable. However, a significant change made to the product supplied may mean that the consumer has to accept something fundamentally different from what he has contracted for. It appears that the term is intended to shift the risk of commercial uncertainty that should otherwise be borne by the supplier to the consumer. It is unfair.

### Suggested Action

The term may be amended to the effect that the consumer may terminate the contract at any time without penalty if the supplier makes significant change to the goods or service contracted for.

### **40.1.3 Supplier's right to notify variation in a way it deems appropriate**

#### Example

- a) 本銀行保留隨時修改本合約條款之權利，包括（但不限於）調整有關之信貸限額、還款條款、利息息率、服務費、年費及其他費用，並以本銀行認為適當之方式事先通知持卡人。唯通知一旦發出，不論持卡人收到與否，均作已知悉論……而信用卡賬戶之賬戶結餘亦受有關之修訂所約束。於此等修訂生效後，持卡人仍保留或使用其信用卡，將被視為接受及同意此等修訂，除非持卡人能於修訂生效前將其信用卡交回本銀行註銷。*[Italics added]*

The Bank reserves the *right to alter and amend* the terms and conditions stipulated in this Agreement including but not limited to the applicable credit limit of the account terms of payment, interest rates, services charges, annual fee and other fees *from time to time with prior notice to the Cardholder in any manner the Bank deems appropriate, to be effective*

*irrespective of whether the Cardholder has actual notice or knowledge thereof..... Such changes will apply to all outstanding balances on the account. By continuing to use the Card thereafter, the Cardholder shall be deemed to have accepted and agreed to such changes unless the Card is returned to the Bank for cancellation prior to the date such alteration shall have effect. [Italics added]*

[Credit Card Cardholder Agreement]

- b) 本公司可隨時及不時修訂本條款及/或作增補新條款。本條款的任何修政及/或增補，經本公司認為合適的方式向各戶作出合理通知後，即開始生效。若客戶於修訂生效日當日或其後，繼續保留或使用此服務，此等修訂即對客戶有約束力。

The Company may at any time and from time to time amend the terms or add new terms to this agreement. Any amendments or additions to this agreement shall become effective upon reasonable notice given to the Customer in any manner the Company deems appropriate. If the Customer continues to retain or use this service, the Customer shall be bound by such amendments or additions.

[Wedding banquet service contract]

Comment

The manner of serving the amendment notice which is considered appropriate by the supplier may not be, objectively speaking, reasonable. However, under the said terms the consumers are deemed to have accepted and agreed to amendments to the contract even though the amendment notice is given in a manner objectively unreasonable. The consumers may not be even aware of the change of their rights and obligations under the contract when they are actually affected by such a change.

Suggested Action

Such a term should be deleted.

Alternatively, it should be redrafted to the effect that the consumers be given

- a reasonable notice (e.g. at least one month's written notice), by reasonable means, of any variation of the terms; and
- a genuine termination right so that the consumers may terminate the contract without penalty if they are adversely affected by the change. If deposit has been placed, the deposit should be returned. In the case of fixed-term contract under which prepayment has been made, the unused balance should be returned to the consumers upon termination.

**40.2     *Clause excluding or limiting the legal rights of the consumer to offset a debt owed to the supplier against any claim which the consumer may have against it***

Example

- a) (會員)應在付款相關月份之前.....立即支付應付的所有月費或定期費用和會費，而不因任何原因抵銷或扣除[法律或衡平法或其他]。[Italics added]

[Translation: (Members) shall pay forthwith all the monthly fees or regular fees and subscriptions prior to the month(s) to which the said fees and subscriptions relate, and (the sum payable) shall not *for any reason* [by common law or equity or otherwise] be set-off or deducted.] [Italics added]

[Fitness club membership agreement]

- b) 所有付款均不獲退還及不可轉讓。客戶所繳付的款項，均須不含任何扣款或抵銷。XX保留運用任何賬戶結餘抵銷客戶所欠集團公司任何或所有欠付款的權利。

All payment made shall be non-refundable and non-transferable. All payment to be made shall be without any deduction or set-off. XX reserves the right to use any account balance to set-off against any or all payment due by the Subscriber to the Group Companies.

[Telecommunications service contract]

Comment

As to example (a), “任何原因” (“for any reason”) would include a legitimate claim against the supplier for damages. It is unfair that the consumer’s legal right to offset is excluded under such a circumstance.

It seems that example (b) is even worse as there is no reciprocal right of offset. While the consumer’s right of offset is excluded, the supplier is entitled to offset the debt owed by the consumer to the supplier or any of its subsidiaries or associates against the outstanding balance in consumer’s account.

Suggested Action

Such terms should be deleted.

**40.3 Supplier’s entitlement to “compensation” for early termination in any event**

Example

- a) 申請表中訂明的使用期是用戶訂購 XX 服務的最短使用期(「承諾使用期」)。你不可於「**承諾使用期**」完結前**提前終止或更改服務計劃**。如欲終止服務或更改服務計劃，必須以指定的終止服務通知表格，給予 XX 不少於三十天的書面通知。如你的要求被接納，服務將於三十天書面通知期後終止；XX 將於你的帳戶內一次過收取相等於「**承諾使用期**」餘下月份之所有服務費作為**終止服務費**(作為算定損害賠償)。你預繳的收費或服務費(如有者)將用作繳付全部或部份該終止服務費，而不會被退還或轉讓予他人。[*Italics added*]

Subscription for XX service must be at least for the period set forth in the application form (“Commitment Period”). You are **not allowed to early terminate it or change your service plan before the end of the Commitment Period**. If you elect to do so, you must give us not less than 30 days prior notice in writing (in our prescribed form) for early termination. If accepted, the early termination will take effect upon the expiry of the 30 days’ notice period; and we shall debit to your account a

***service termination fee (as liquidated damages) equivalent to the total subscription fees payable for the remaining Commitment Period.*** We are entitled to retain your advance payment (if any) to settle the said service termination fee. [Italics added]

[Pay-TV service contract]

Comment

The said provision places hurdles for early termination. A consumer who is minded to terminate the contract early has to give the supplier a prior notice of not less than 30 days in prescribed form. It appears that it is not a notice, but rather a request for early termination. The early termination is subject to the permission of the supplier. It is possible that a consumer who has suffered damage due to serious default on the part of the supplier is not allowed to terminate the contract early. Therefore the term is unfair and unreasonable. Even if the request for early termination is accepted, the consumer will be required to pay a "service termination fee" equivalent to the total subscription fees payable for the remaining Commitment Period. It would mean that the consumer is in any event required to make full payment for the entire Commitment Period. This would deter a consumer from resorting to early termination even if he is aggrieved by the default of the supplier.

In the case where the supplier is not in default, it may have legitimate reason to claim for the loss sustained due to early termination. However, the "service termination fee" could exceed the damage reasonably suffered by the supplier and thus amount to a penalty against the consumer, which is not enforceable by court.

On the other hand, the requirement of serving a 30 days written notice in prescribed form for the application of early termination may not be necessary and reasonable in the circumstances.

### Suggested Action

The provision should be redrafted to the effect that:

- i) it should apply only to the case where the early termination is due to the breach of the consumer;
- ii) the compensation should not exceed the losses reasonably suffered by the supplier due to the early termination.

## **40.4      *Unreasonable exclusion clauses***

### **40.4.1    *Exclusion clauses excessively broad and general***

#### Example

- a) 客戶授權 XX 處理有關攜帶其原有號碼至 XX 之申請。客戶知悉及同意 XX 勿須就客戶或任何第三者因本服務及 / 或攜帶原有號碼而導致之任何直接及 / 或間接損失而承擔合約、侵權及/或其他責任。

Customer authorizes XX to process the application for porting the Existing Number to XX. Customer acknowledges and agrees that XX excludes all liability to the Customer and any third party arising out of or in connection with the Service and/or number porting whether in contract, tort and/or otherwise and including direct and/or indirect loss incurred by the Customer or any third party.

[Telecommunications service contract]

- b) 無論屬於侵權行爲或合約或其他事件而引致你或第三者蒙受以下的任何損失或損毀，XX、XX 的僱員、代理人、承包商及其他第三方供應商（包括但不限於資訊提供者）概不對你或任何人士承擔責任：
  - (i) 直接或間接，隨後發生或偶然發生，可預見或不可見，包括但不限於任何財務的損失或商業、利潤、儲蓄、收入、資料、商譽或任何設備的損失。.....

XX, XX's employees, sub-contractors and other third party suppliers including without limitation any information provider shall not be liable to you or any third party:

- (i) whether in contract, tort or otherwise for any loss or damage incurred by you or any third party, whether direct or indirect, consequential or contingent, and whether foreseeable or not, including without limitation any financial loss or loss of business, profits, savings, revenue, data, goodwill or use of any equipment. ....

[Telecommunications service contract]

#### Comment

The exemption clauses exemplified as above are so broad that they seek to exclude any liability incurred for any reason or in any circumstance. It is very likely that such terms fail to satisfy the requirement of reasonableness set out in s.3 of the Control of Exemption Clauses Ordinance (Cap. 71) and be held void for being unfair and unreasonable.

A circumstance to which example (a) would be sought to apply is illustrated by the case below where the supplier is obviously in default.

A complainant authorized his new telecommunications service provider to port his number from the previous service provider to it, and terminate on his behalf the contract with the previous service provider. However, after the new service commenced, he still received bills from the previous service provider because the new service provider had failed to terminate the preceding contract on his behalf.

#### Suggested Action

Such terms should be deleted.

Alternatively, they could be amended to satisfy the reasonableness test under s.3 of the Control of Exemption Clauses Ordinance (Cap 71). Under that provision, the test is satisfied only if the term is fair and reasonable having regard to the circumstances which were, or ought reasonably to have been, known to or in the contemplation of the parties when the agreement was made<sup>12</sup>.

<sup>12</sup> Green Park Properties Ltd v Dorku Ltd [2001] 3 HKLRD 760; [2002] 1 HKC 121(CFA) per Litton NPJ, (per curiam) para 27.

**40.4.2 Clause excluding or limiting the legal liability of supplier in the event of personal injury to consumer resulting from an act or omission of supplier**

Example

- a) (會員)並同意 XX、其高級人員、董事、員工、志願者、代理人和獨立訂約人，在法律容許的限度內，將不對任何創傷負責，包括但不限於，無論是否與鍛鍊有關，因 XX 或代表 XX 的任何人或使用會所設施的任何人之行為或疏忽而造成的個人、身體或精神創傷……。[Italics added]

[Translation: (Members) also agree that XX, its senior staff, directors, staff, volunteers, agents and independent contractors **shall not be liable, so far as the law allows, for any injuries** including, but not limited to, the personal or bodily injuries or mental sufferings resulting from physical training, the act or negligence of XX or any person acting on behalf of XX or any person using the facilities of the Club .....] [Italics added]

[Fitness club membership agreement]

- b) XX or its management or its agent shall not, nor shall any of its employees or agents be held liable for any **personal injury** or damage to property or loss of property, whether arising out of my attendance at XX, my use of the facilities thereof or as result of **negligence** on the part of XX, its management, its employees or agents or otherwise. [Italics added]

[Beauty and body slimming contract]

### Comment

S.7 of the Control of Exemption Clauses Ordinance (Cap.71) provides among others that liability for death or personal injury resulting from negligence cannot be excluded or restricted by reference to a contract term.

As to example (a), the phrase "**在法律容許的限度內，將不對任何創傷負責”** (***shall not be liable, so far as the law allows, for any injuries***) implies that at law such a liability for personal injury may be excluded or restricted under certain circumstances. It is actually not the case. As mentioned, such exemption clause is in any event ineffective under the Ordinance. However, a consumer who has sustained injuries due to negligence of the supplier or its agent or servant may be misled by such a clause into believing that he is bound by this term and has no right to sue for damages.

Worse still, example (b) is even a flagrant breach of s.7. It expressly excludes the negligence liability of the supplier, its employee, agents or otherwise for any personal injury sustained by consumer. As regards property damage, the supplier can exclude or restrict its negligence liability only if the term satisfies the reasonableness test under s.3 of the Control of Exemption Clauses Ordinance (Cap 71).

### Suggested Action

Such terms should be deleted. Alternatively, as to example (b), while removing the part concerning negligence liability for personal injury, the supplier should review, the part relating to property damage, and if necessary amend it so as to ensure that it meets the reasonableness test under s.3 of the Control of Exemption Clauses Ordinance (Cap 71).

#### **40.5 Unnecessary and unreasonable formality requirement**

Example

- a) 客戶如欲終止享用任何 XX 服務，必須於服務承諾使用期完結前兩個月內，預先給予我們不少於三十天的書面通知。用戶**必須使用指定的終止通知表格方為有效，而終止服務將於下一個結賬日開始生效。**[*Italics added*]

A subscriber may cancel his subscription of any item of XX service by giving not less than 30 days written notice to XX, and the service will be terminated ***effective from the next billing cycle.*** Any notice of termination, to be effective, ***must be given in the prescribed form and must be served within the last two months of the Commitment Period.*** [*Italics added*]

[Pay TV service contract]

- b) ...客戶如欲終止該建身咭及有關轉賬授權，必須在最少一個月前**親自前往**公司任何一間中心辦理通知手續，...[*Italics added*]

...If the Customer wishes to terminate the Fitness Card and the credit card authorization hereof, he/she must give not less than one month's notice to the Company by ***attending in person*** at any of the centres for the necessary procedures ... [*Italics added*]

[Fitness club membership agreement]

### Comment

The purpose of a notice of termination is just to evince the intention of the consumer to terminate the contract. Thus, it is quite inconceivable that only the prescribed termination form and personal attendance as in the case respectively of examples (a) and (b) shall be accepted for such a purpose. Such formalities are unnecessary and may in certain cases even impractical or unreasonable. For instance, for a physically disabled consumer, to fulfill the formality of personal attendance as mentioned in example (b) could be a very difficult task.

Example (a) illustrates how obstacles are placed in the way of consumer to terminate the contract. The restriction that the contract cannot be terminated at any time before the last two months of the contractual period, coupled with the requirement of 30 days written notice in prescribed form and the provision that the termination be effective from the next billing cycle would defer the termination against the will of consumer until the very end of the contractual period. It is unfair and unreasonable.

### Suggested Action

The formality requirements mentioned above are unnecessary, unreasonable and unfair and should be dispensed with.

## **40.6 *Supplier retains the right of final decision on any dispute arising from the contract***

### Example

- a) 任何有關服務條款爭論，本公司保留最終解釋及決定權。

The Company has the final decision in relation to all disputes about the interpretation of the terms and conditions of the service agreement between the Company and member.

[Beauty service contract]

**Comment**

Such a term gives the supplier the right to decide whether it is in breach of contract and to interpret the contract as it thinks fit. Impartiality cannot be ensured as the supplier is both the adjudicator and a party to the dispute. Either party should have the right in law to bring a dispute to court for resolution.

**Suggested Action**

Such a term should be deleted.

**40.7 *Entire Agreement Clause***

**Example**

- a) 本協議代表 XX 與客戶之間與該服務有關的全部協議及諒解，並代替與該服務有關的一切先前安排、承諾、條款、細則、責任或諒解，不論口頭或書面性質，亦不論明確或隱含者。

This Agreement constitutes the entire agreement and understanding between the parties and supersedes all prior arrangements or understandings, whether oral or written, between the parties relating to the subject matter hereof.

[Telecommunications service contract]

- b) 本「協議書」與「條款與條件」、「聲明」及「規則與指引」一起構成您與 XX 之間有關「課程」購買的完整協議，並取代所有先前的磋商、商談及協議。您確認 XX 或任何其他人未做出本「協議書」中未述及的、您倚賴的任何口頭或書面形式的表述或承諾。以手寫形式變更的本「協議書」中的條約不具有效力。

This Agreement, the Terms and Conditions, the Declaration and the Rules and Guidance altogether constitute the entire agreement between you and XX regarding the purchase of the "Course" and supersede all prior

arrangements or understandings, whether oral or written, between you and XX. You confirm hereby that XX Fitness or any other person has not made any verbal or written representation or undertaking which is not mentioned in this Agreement but relied upon by you. Any variation of this Agreement by handwriting is invalid.

[Fitness club membership agreement]

Comment

This kind of provisions is called “entire agreement clause”. The supplier may seek to employ it to exclude liability for representation or warranty made by its salesman during the sales talk. It is clearly against the principle of good faith.

Such a term is usually hidden in fine print in the standard form contract, and as a boilerplate they may not receive as much attention as the other provisions of the contract. Attention of the consumers is seldom drawn to them. However, as it is so common in certain standard form consumer contracts, consumers may not be able to argue that the term is ineffective on the ground that they have not been given reasonable notice.

Having said that, an “entire agreement clause” in a standard form consumer contract is still susceptible to challenge. It may be set aside by the court pursuant to the Unconscionable Contracts Ordinance (Cap 458) if the consumers can prove that the contract or the term is unconscionable or unfair sales tactics has applied on them.

An entire agreement clause cannot avoid or restrict liability for misrepresentation made before the contract was entered into, unless it satisfies the requirement of reasonableness as stated in s.3 of the Control of Exemption Clauses Ordinance (Cap 71).

Nor does it prevent the use of extrinsic evidence to ascertain and clarify the meaning of an express term in the contract.<sup>13</sup> The language of an entire agreement clause may not be apt to exclude representations, even if it excludes claims arising out of a collateral contract or warranty.<sup>14</sup> In addition, an entire agreement clause may be waived by a party who might otherwise

<sup>13</sup> ProForce Recruit Ltd v Rugby Group Ltd [2006] EWCA Civ 69, paras 40-41 per Mummery LJ, para 59 per Arden LJ.

<sup>14</sup> Chitty on Contracts, 29th Edition, para. 12-104.

have relied on it.<sup>15</sup>

We also note the comment of the UK's *Office of Fair Trading* that entire agreement clause is in their experience potentially unfair and recommended that traders should consider whether they can do business without them<sup>16</sup>.

The inclusion of entire agreement clause in a contract does not automatically make the contract a complete and exclusive statement of the parties' rights and obligations. Rather, such a clause complicates the structure of a consumer contract which should be made simple and intelligible. In any event an entire agreement clause would be disputed by a consumer who treats a pre-contractual statement as a collateral warranty, misrepresentation or even a term of the main contract. In the premises, it is advisable for the businesses to remove it from their standard form consumer contracts.

#### Suggested Action

Such term should be avoided.

### **40.8 Cancellation fees or penalties**

#### Example

"Upon the signing of this Agreement, the Purchaser is granted a right of cooling off period to terminate this Agreement at any time up until the midnight of the third (3<sup>rd</sup>) day from the day which the Purchaser signs this Agreement. In order to terminate, a signed cancellation request form must be delivered in person and must be received by XX. The Purchaser's right to the amount for refund (if any) is ***subject to a deduction of Termination Fee equivalent to Sixty (60) percent of the total amount due.***" [Italics added]

[Time-sharing contract]

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<sup>15</sup> Ibid., citing SAM Business Systems Ltd v Hedley & Co [2002] EWHC (TCC) 2733, 1 All E.R. (Comm) 465.

<sup>16</sup> Ibid, p. 923, para 15-083.

Comment

It is actually not a cooling off period provision as commonly understood. To exercise the right of cancellation the consumer has to pay a considerable sum of money. It is quite obvious that the “fee for cancellation” is indeed a penalty, far exceeding the costs and losses incurred to the supplier due to the cancellation.

Suggested Action

The term should be redrafted to the effect that the supplier is only entitled to the compensation representing the losses reasonably incurred to him due to the termination.

**40.9    *No refund***

Example

- a) 服務療程一經賣出後不能退款及轉讓

[Translation: The Service Package once sold is not refundable and transferable.]

[Beauty and body slimming contract]

- b) 此合約療程是雙方同意下簽署作實，合約即時生效，所以客人在任何情況下 都不能退款

[Translation: This Agreement is signed by consent of both parties and becomes effective forthwith. Therefore the Customer shall not be entitled to any refund under any circumstances.]

[Beauty and body slimming contract]

### Comment

Such clauses are found in contracts under which consumers shall make substantial prepayments. The consumers may be misled into believing that they are in any event bound by the contract. Their misled perception may prevent them from pursuing legal rights when the suppliers are in serious default; or fail to perform; or the contracts are terminated due to no fault of the consumers before the consumers have enjoyed significant benefit. By the same token, such provisions may unfairly allow the suppliers to avoid or limit their contract performance. Also, they enable the suppliers to take unfair advantage of the consumers when the consumers terminate the contract early. The consumers would lose all of his prepayment regardless of losses caused to the supplier by their early termination.

Most importantly, at law such a clause would not be enforced. In *Shum Kit Ching v Caesar Beauty Centre Ltd.* [2003]3 HKC 235, the court dealt with a similar clause in a health club membership which provided that if the beauty treatment contracted for is to end or cancel in any circumstances, the supplier is not liable to refund any of the money received. It was held that the prepayment made by the consumer was plainly not in the nature of a deposit but was in fact full payment. The law was settled that a provision for the forfeiture would not be enforced even against the party guilty of breach of contract resulting in the termination of the contract. In such circumstances, the innocent party would still not be entitled to forfeit anything other than a deposit and his remedy was to recover his damages. Besides, the provision for the non-refunding of money received could not be a genuine estimate of loss, but was in fact a penalty. Hence, it was held to be unenforceable.

### Suggested Action

Such terms should be deleted.

#### **40.10 Unreasonable restriction of consumer's legal rights**

Example:

- a) 於甲方 (供應者) 根據合約中條例而終止合約後，乙方 (消費者) 不能向任何人士，包括傳媒、網上討論區等，提及甲方其服務內容或商業事務，否則甲方有權提出法律起訴。

[Translation: After Party A (the supplier) terminates the contract in pursuance of the provisions herein, Party B (the client) shall not mention the content of the service or business matters of Party A to any persons, including the mass media and on-line discussion forums; otherwise Party A may institute legal proceedings against (the client).]

[Beauty and body slimming contract]

- b) 乙方必須充分理解在減肥過程中包含一定不可預測的風險因素，這風險由乙方同意獨立承擔。如乙方在生理或心理上因此受到影響，乙方不能向甲方（作）出任何索償行為，亦不可向任何政府、法院、半官方機構或各大傳媒作出正式或非正式的投訴。

[Translation: Party B shall fully understand that certain unpredictable risks may arise during the course of the slimming treatment. Party B agrees that he/she shall bear such risks on his/her own. If Party B is affected physically or psychologically as a result of the sliming exercise, he/she shall not make any claim against Party A. Nor shall Party B lodge any complaint directly or indirectly with any government, court, semi-official organization or mass media.]

[Beauty and body slimming contract]

### Comment

#### Example (a)

The scope of restriction is so broad that it may deprive the consumer's right to freedom of speech and expression. It goes far beyond the protection of the supplier's legitimate interest in reputation and proprietary interest in trade secrets. It is strongly arguable that such a term is ineffective on the grounds that it is unconscionable. However, there is a real possibility that consumers could be misled into believing that their right to comment fairly the service of the supplier or even to file complaint with the Council is restricted.

#### Example (b)

It appears that the purported exclusion of this clause covers liability arising from personal injury resulting from negligence and therefore is void under s.7 of the Control of Exemption Clauses Ordinance. Apart from this, the clause is also void for being unconscionable, as it denies the legitimate rights of consumers to seek redress, whether from judicial, governments or public bodies and to voice their grievance through mass media.

### Suggested Action

Such terms should be deleted.

## 40.11 Automatic renewal

### Example

- a) 客戶若選擇以一次付款或分期付款計劃繳費，該健身唔之有效期將於有關計劃即將終止時（除按本協議所述方式終止自動轉賬授權外）**自動延續**。XX有權透過其信用唔戶口以自動轉賬扣取該健身唔之月費，此外，客戶亦必須確保有關自動轉賬繼續有效。*[Italics added]*

For the Customer who elects to pay the fee by one time payment or by installment plan, immediately before the expiry date of such plan (unless

otherwise he/she terminates the auto-pay authorization in the manner as prescribed hereof), the Fitness Card ***will automatically be extended*** and the Customer shall continue to procure the auto-pay, and XX shall also be entitled to continue to debit from the relevant credit card account into XX's account for the monthly fees of the Fitness Card. [Italics added]

[Fitness club membership contract]

- b) 「承諾使用期」完結後，XX 會按當時相同之基本服務收費表自動按月續期，用戶如欲終止服務或更改服務或付款計劃，須以指定的終止服務通知表格，給予 XX 不少於 30 天的書面通知，...。[Italics added]

Upon the expiry of the Commitment Period, your subscription for the Services will be ***automatically renewed from month to month at the then prevailing bundled rate*** for the Services unless we receive from you not less than 30 days' notice (in our prescribed form) for service termination or change of service plan or payment plan.... [Italics added]

[Pay TV service contract]

Comment

This kind of terms is commonly found in fixed-term contract. It is unfair on the grounds that there is no accompanying term requiring the supplier to give clear and conspicuous written reminder to the consumer at a reasonable time before the contract expires.

As in the case of example (b), it is possible that the then prevailing rate to be charged for the renewal period is higher than the original rate charged under the initial contract. If it is the case, the consumer would pay extra money for the same service, which may exceed the cost incurred to the supplier and the benefit obtained by the consumer as a result of the renewal.

**Suggested Action**

Such a clause should be deleted.

On the other hand, the contract should provide that the consumer shall be notified in writing of the impending expiry within a reasonable time prior to that (e.g. at least 30 days, but not sooner than 60 days before the last day). The written notice should specify (i) whether the service will continue after the expiry; and if it will, the charges payable; (ii) the arrangement for termination (which must not discommode the consumer).

Such a notice should be set forth in a conspicuous and clear manner and served on the consumer by the means expressly provided for in the contract such as by mail or on the first page of the monthly statement. It should genuinely prompt the consumer to consider whether he should commit to a renewed fixed-term contract.

To avoid inconvenience to consumer, upon expiration of the contractual term, the contract should be extended, but only on monthly basis, until it is terminated or renewed by the consumer on his own initiative. It seems not unfair that the extended service is charged at a current rate.

**40.12 *Read and Understood Declaration***

**Example**

The purchaser(s) hereby declare(s) by his/her/their signature(s) below to be bound by the TERMS & CONDITIONS as stated on the reverse of this document and further confirm(s) that he/she/they have thoroughly considered the TERMS & CONDITIONS and is/are satisfied that he/she/they has/ have fully understood the said conditions and that he/she/they has/have no outstanding queries.

[Time sharing contract]

### Comment

A standard form consumer contract may contain a declaration purporting that the consumer has read and understood the contract. It is not uncommon for a consumer to be asked to sign the declaration regardless of whether he has actually read and understood the contract. Indeed, the risk of unfairness would be obvious where the contract is so long and complex that before signing the contract, a consumer may not be able to read over it, or even if they did, they would not be able to understand it. Moreover, where a consumer finds any term unfair subsequent to the making of contract, he may be misled by such a declaration into believing that he has to abide the term in any case and is not entitled to seek redress in court or otherwise.

### Suggested Action

For long and complex consumer contracts, such a declaration should be deleted. As regards simple and short consumer contracts, such a declaration should be replaced by a clear and prominent warning that the consumer should read and understand the terms before signing the contract. The warning should be placed before the terms and conditions so that the consumer is reminded of reading the terms and where necessary asking for further information or clarification before signing the contract.

## **IV. Drafting Guidelines and Sample Contract – Beauty Industry**

### **Purpose**

- 41.1 As mentioned, the purpose of including a set of drafting guidelines (Annexure 1) and a sample contract (Annexure 2) in this Report is to illustrate how unfairness can be avoided in consumer contracts. To demonstrate how the drafting guidelines and model contract can be applied, the beauty industry was selected as the object of study.
- 41.2 Its being selected does not mean that contractual unfairness or unfair trade practices in the industry are exceptionally serious when compared with other industries.
- 41.3 The Council has from time to time exchanged views with the industry to enhance consumer protection through self-regulation. In 2006, the “Code of Trade Practices for Beauty Industry” was stipulated as a result of the collaboration of the Council and the industry. The Code has gained wide support in the industry. It gives guidance on the quality of service and goods; promotion and marketing practices; the operation of business model based on prepayment; and the stipulation of performance pledge and handling of consumer complaints. It has been agreed that other guidelines would be added when necessary.
- 41.4 To take its collaboration with the beauty industry further, the Council takes this opportunity to assist the industry further by providing it with the guidelines and sample contract.

### **Benefit of the use of fair standard form consumer contracts**

42. The adoption of a fair, clear and intelligible standard form consumer contract would signify a positive step in addressing the problems arising from the imbalance bargaining powers between suppliers and consumers and that the contract would be negotiated in good faith. It would help to minimize or forestall disputes over the terms of the contract such as the price to be charged. Fair consumer contracts, if widely adopted by members of the beauty industry, together with decent practices treating consumers fairly, would enhance the confidence of consumers in the industry and boost its business.

## **Drafting Guidelines and Sample Contract**

43.1 The Drafting Guidelines and the Sample Contract will show how fairness and good faith in respect of both the process leading up to the agreement and the distribution of substantive rights and obligations under the contract can be upheld, and the interests of the parties can be fairly balanced.

### Cooling-off Period

43.2 What deserves particular mention is the requirement of cooling-off period set out in these documents. It is not uncommon for consumers to complain that they were not allowed before their purchase sufficient time to consider issues affecting their decision to buy, such as the truthfulness of the salespersons' representation about the nature and effectiveness of the beauty treatments and/or products, their actual need and affordability. There are also complaints alleging that the contracts were entered into as a result of unfair practices such as the use of false or deceiving information, undue pressure and harassment. The provision of a cooling-off period may ease consumers' concern about the use of undesirable trade practices. It allows a consumer to reconsider and cancel his/her purchase without incurring any liability where the contract has been made in haste or unfairly or improperly procured.

43.3 In this connection, cooling-off period is an effective means of consumer protection, and thus its application should not be confined to the beauty industry. Given that consumers entering into contracts with long-term financial commitments or contracts of substantial value should be allowed to have reasonably sufficient time to make prudent purchasing decision in the absence of influence of suppliers, the Council is of the view that cooling-off period should be adopted for fixed-term contracts and prepaid contracts which carry the said financial implication that cannot be said to be insignificant to most consumers. Some traders may find the application of cooling-off period to their transactions with consumers complicated. But the Council believes that the problem can be overcome by clearly setting out the rights and obligations of both parties in observance of the principles of fairness and good faith.

- 43.4 We agree that there is no hard and fast rule in determining what is an appropriate cooling off period which can be of general applicability. To strike a proper balance between protection of consumer's rights and business efficacy, a cooling off period of 7 working days is recommended.
- 43.5 When a consumer exercises the right to terminate a contract during the cooling-off period, a full refund of money without any condition is expected. Nevertheless, it is reasonable that a consumer should pay an administrative fee, which should be based on a genuine estimation of actual expenses incurred by the supplier on the consumer's cancellation. We recommend that the administrative fee should be capped at 7% of the contract price or HK\$1,000, whichever is less. This we hope could be applicable in general but it is by no means to be conclusive as we appreciate that the terms and prices of contract may vary from case to case. A schedule of fee to be charged is set out in paragraph 8.3 of the Guidelines (Annexure 1) for general reference.
- 43.6 Given the possibility that the consumers may be desirous of using the services or products under the contract during the cooling-off period, it is proposed that the consumers should be charged also for the services and products used, the sum of which should be based on the services or products actually used, or a genuine estimation of the services and products that can reasonably be used by the consumer during the cooling-off period, whichever is less, to prevent consumers from being lured to consume more than they really need during the cooling off period.

#### Consumer's right to terminate contract

- 43.7 As mentioned in Paragraph 40.9 hereof, the no refund/no cancellation clause is misleading and may deter consumers from exercising their legal rights in appropriate circumstances such as where the supplier is in material breach of the contract. On the contrary, a fair contract should provide expressly for the right of consumers to terminate the contract in circumstances that render the termination justified. Similar provisions will be found in Clause 3 of the sample contract annexed hereto (Annexure 2).

## **Features of the Industry taken into account**

44. In drafting the Guidelines and the Sample Contract, the peculiarities of beauty service contracts are taken into account, in particular:
- i) The services are sold in package which may include various treatments and associated products to be consumed during the treatments or at home;
  - ii) The services are performed over a period of time; and
  - iii) The consumers prepay for the services.

## V. Conclusion

### Social perspective

- 45.1 In the absence of any effective legislative or judicial control over the use of unfair terms, traders are likely to be tempted to avail themselves of their overwhelming bargaining power to impose on consumers terms that go beyond what is reasonably necessary to protect their own legitimate interest. Traders who do not have the self-restraint would seek to draft the contractual terms in the way that goes beyond self-protection. Widespread use of unfair terms and the bad experience of consumers who suffered detriments as a result of the use of unfair terms would create the risk of reducing consumer confidence and depressing consumer spending. Conversely, if consumers are aware that the contracts they are about to enter into were fairly drafted, consumers would feel more confident and secure in making the purchase and this would tend to boost the sales of the market. Besides, consumer contracts drafted in a fair manner and in good faith is the prerequisite of a fair marketplace which would provide a sound basis for a prosperous development of economy, and therefore both consumers and businesses will be benefited ultimately.
- 45.2 A standard form consumer contract should be fair not only in substance but also in form. It is fair only when it is legible and intelligible. Apart from using plain and ordinary language, a standard form consumer contract should be *short and simple*. Terms which are superfluous, draconian or convoluted should not be avoided. They cannot help in the safeguard of the business' interests. Rather, they are likely to make the contract unnecessarily complicated and increase the risk of and costs for resolving dispute.
- 45.3 Adoption of fair terms in consumer contacts would indicate the determination of business to abide by the principle of good faith and this would help business build a rapport with consumers. Of course, it has to be underpinned by fair trade practices to achieve fairness and harmony in the marketplace.

## **Immediate interests of businesses**

46. So far as the immediate interest of business is concerned, to avoid using unfair terms may eliminate the risks and costs that would otherwise be borne by the business. From the business perspective, there is so much to gain and nothing to lose.

## **Legal risk**

47. As illustrated in this Report, an unfair term may be unconscionable in all the circumstances or simply unenforceable, be it a penalty clause, an unreasonable limitation or exemption clause. Such a term is subject to complaints and even legal challenges of consumers leaving the trader to unexpected costs in resolving the disputes and defending legal claims.

## **Operational risk**

48. The trader may have to spend extra time and resources to deal with the complaints or legal challenges. This may disrupt the normal operation of his/her business as well.

## **Reputational risk**

- 49.1 A consumer contract containing unfair terms is a piece of evidence showing that the business does not treat consumer fairly and act in good faith. Consumers would respond by mistrust towards the business and this would significantly impair its goodwill.
- 49.2 A fair consumer contract will serve the best interests of consumers, businesses and society. The Council hopes that this Report and the annexed Guidelines and Sample Contract will form a basis for businesses to review their consumer contracts to ensure that the principle of fairness, good faith and honesty in trade is fully observed and consumers are treated fairly.

## **Guidelines on drafting standard form consumer contracts for beauty industry**

### **1. INTRODUCTION**

- 1.1 This set of guidelines has been drafted by the Consumer Council in consultation with the beauty industry (the “**Industry**”) for its use when drafting standard form consumer contracts.
- 1.2 The Industry includes companies and individuals providing beauty treatment and body shaping services, including slimming, skin treatment, manicures, pedicures and hair removal (the “**Suppliers**”).
- 1.3 It is understood that some suppliers are used to providing their services and products based on oral agreement, even for those contracts involving prepayment or performance over a period of time. However, without a written agreement to refer to, it would be difficult to determine at a later date what have been exactly agreed upon. The uncertainty may induce disputes over performance of contracts. To avoid potential disputes, suppliers are encouraged to reduce, where appropriate, their agreement with clients to writing.
- 1.4 When contracts are put in writing, standard form contracts are commonly used in the Industry. They are an economical and convenient means that enables parties to contract without having to resort to expensive legal services to create a contract for each transaction. However, it is not uncommon to find terms in these contracts that are unfair to consumers. The Council sees a need to provide a practical guidance for drafting standard form contracts in observance of the principle of good faith and fairness to help build and maintain consumer confidence in the Industry.

### **2. OBJECTIVES OF THE GUIDELINES**

- 2.1 The aim of the Guidelines is to help ensure that the standard form contracts used in the Industry are fair and clear and that members of the

Industry deal openly, honestly and fairly with consumers.

- 2.2 Members of the Industry are encouraged to devise their standard form contracts along the Guidelines to ensure fairness and transparency in conducting business.
- 2.3 Application of the Guidelines across the Industry would improve the quality of service and trade ethics of the Industry. This would in turn enhance the consumers' confidence and the development of the Industry.
- 2.4 The Guidelines are not intended to be exhaustive. They cover key areas of concern in the use of unfair terms in standard form contracts. Suppliers should draft the contracts along the principle of good faith and fairness with the aid of the Guidelines in light of peculiarity of the services and products they provide under the contracts.

### **3. PRINCIPLES**

- 3.1 The Guidelines seek to manifest the following consumer rights: -
  - to be informed;
  - to choose;
  - to be protected from contractual terms that are to the consumers' disadvantage, but are not reasonably necessary for the protection of the legitimate interests of the traders.

### **4. WHAT IS UNFAIR TERM**

- 4.1 A term is unfair when it is disadvantageous to a party while not reasonably necessary for the protection of the legitimate interest of the other party. Put it in a consumer scenario, it is a term contrary to the requirement of good faith, causing a significant imbalance in the parties' rights and obligations under the contract to the detriment of the consumer.

### **5. AVOIDANCE OF UNFAIRNESS**

#### **5.1 Broad and vague terms**

5.1.1 A term should not be drafted so broadly or vaguely to the detriment of consumers. It is exemplified by the terms stating that the supplier's liability shall be excluded "so far as the law permits". Consumers without legal knowledge would be unclear as to what liability could or could not be excluded in a particular circumstance, and thus whether their right to sue under that circumstance would be limited.

## 5.2 **Exclusion and limitation clauses**

5.2.1 Some terms or statements seeking to exclude or limit the liability of supplier that would arise by implication of law are actually void and unenforceable in law. Examples are disclaimers of liability (i) for death or personal injury caused by negligence<sup>17</sup>; and (ii) for breach of terms implied into the contract by virtue of the Supply of Services (Implied Terms) Ordinance (Cap 457) (e.g. carrying out the service with reasonable care and skill)<sup>18</sup>.

5.2.2 While it is pointless to include such terms or statements in the contract, it could not be said that they would not do any harm to consumer since they are void and not enforceable. Consumer may be misled into believing that the liability of the supplier is so limited or excluded and mistakenly give up the chance to seek redress.

## 5.3 **Exclusion of rights to make claims**

5.3.1 Terms that exclude the consumer's basic rights to make claims for breach of contract on the part of the supplier will generally be considered as unfair and should be avoided.

## 5.4 **'No refund' clauses**

5.4.1 Clauses seeking to deny the right of consumer to a refund under any circumstance are unfair and should be avoided. The consumer may be misled into believing that he/she is in any event

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<sup>17</sup> The disclaimer is void under s.7(1) of the Control of Exemption Clauses Ordinance (Cap 71).

<sup>18</sup> S.8(1) of the Supply of Services (Implied Terms) Ordinance (Cap 457) provides to the effect that a party contracts with consumer cannot exclude or restrict his liability arising from the implied terms provided under the said Ordinance.

bound by the contract. The provisions may deter or discourage the consumer from pursuing legal remedies even where the supplier is in serious default; or the contract does not go ahead or is terminated due to no fault of the consumer before he/she has enjoyed significant benefit. In such a case, the supplier may be induced to pay less heed to the consequences and risks of breaching the contract.

- 5.4.2 In some circumstances, the consumer may be in breach. However, it is unfair to forfeit the unused balance of the consumer's prepayment, regardless of the amount of costs or losses caused to the supplier. A "no refund" clause that requires a consumer in breach to pay more than a genuine pre-estimate of loss is void under the common law as it is regarded as punitive rather than compensatory. Therefore, such a clause is not only unfair but also ineffective. It should be noted that the supplier is also under a duty to mitigate its losses caused by the breach.

## 5.5 **Other penalty clauses**

- 5.5.1 It follows that any other clauses requiring a consumer in breach to pay more than a genuine pre-estimate of loss caused to the supplier would normally be void as penalty.
- 5.5.2 Such clauses should be avoided in that they are misleading as to the extent of liability of the consumer.

## 5.6 **Clauses ruling out all possibility of cancellation**

- 5.6.1 A clause that expressly or impliedly provides that consumer cannot cancel the contract in any circumstances is misleading and unfair. It excludes the consumer's basic right under the law of contract.
- 5.6.2 It should be expressly provided in the contract that the consumer is entitled to terminate the contract in circumstances justifying the termination of the same, such as the death or incapacitating illness or physical disability of the consumer rendering performance of the contract impossible or impracticable; and the

Supplier's repeated and persistent failure to perform its obligations under the contract.

#### **5.7 Unrestricted unilateral variation clause**

- 5.7.1 A clause empowering the supplier to vary the terms unilaterally or to supply something different from what was agreed without legitimate reason is unfair and should be avoided.
- 5.7.2 Genuine consent should be sought from consumer regarding any significant change to the contract. If the contract provides for the right of the supplier to vary the terms unilaterally, the consumer should be given the right to cancel the contract upon variation not agreeable to him/her with a refund of the unused balance of the prepayment, if any, without having to pay anything.

#### **5.8 Supplier's right of final decision**

- 5.8.1 A clause giving the supplier exclusive right to determine any dispute over the contract or to interpret the contract is unfair as it seeks to deprive the consumer of the right to refer the matters to the court for adjudication.
- 5.8.2 Under such a clause, impartiality is not ensured as the supplier is both the adjudicator and the party to the dispute.
- 5.8.3 Suppliers should refrain from using such a clause.

#### **5.9 Entire agreement clauses**

- 5.9.1 Standard form contracts often contain terms that they constitute the complete and final agreement and supersede all prior oral representations, statements or promises regarding the subject of the contract. The core value of good faith is that the parties to the contract will honour their promises. Such terms which exclude or limit the supplier's obligation to respect commitment undertaken by its agent are clearly against the principle of good faith.

- 5.9.2 An entire agreement clause would mislead consumers into believing that they are barred from suing for misrepresentation. If it is intended to exclude the liability of supplier for making false representations inducing consumer into the contract, they may be struck out by the court on the grounds that they are unreasonable. Therefore, if suppliers are minded to include an “entire agreement” clause in the contract, they should
- i) specifically draw the attention of the consumers to the term;
  - ii) ensure that all promises or assurances made during negotiations be duly included in the agreement; and
  - iii) if there is any change of promise or assurance, make it known to the consumer and allow them a reasonable time to reconsider whether to conclude the agreement or not.

## 5.10 Declaration

- 5.10.1 It is quite often that standard form contracts contain a declaration to be signed by consumers confirming that they have read and understood the contract and associated documents. When signing the declaration, consumers may not have read the documents and may not bother themselves to go back and read over. Even if they have read them thoroughly, they may not understand correctly the documents. Nor are they likely to realize that the declaration may be used subsequently to support the argument that they are bound by the terms set out in the contract, even though they are different from what they have been promised.
- 5.10.2 Such a declaration is likely to be unfair and should be replaced by a clear and prominent warning that consumer should read and understand the terms before signing the contracts. The warning should be placed before the terms and conditions so that consumer is reminded of reading the terms and where necessary asking for further information or clarification before signing the contract.

## **5.11   Warranty**

5.11.1 To avoid dispute in future, if the supplier has made any warranty about the efficacy or otherwise of the service and/or goods to be provided, such warranty should be expressly and accurately stated in the contract.

## **6.   MINORS**

6.1 A minor - person under the age of 18, is protected by law against his/her inexperience, as an adult may take unfair advantage of it and induce him/her to enter into a contract which is improvident. It is arguable that contracts for beauty service made by minors are voidable. Therefore the supplier should not supply any service or goods to minors before coming to an agreement with their parents or guardians.

## **7.   TRANSPARENCY**

### **Plain and intelligible language**

7.1 It is important to consider what the consumer is likely to understand by the wording of a term. A term which is likely to be misleading or unintelligible to consumer is potentially unfair and short of transparency. Consumer entering into a contract for beauty services normally would not seek legal advice. A contract drafted in plain and intelligible language would help consumer make informed choice.

7.2 The contracts should be in writing with print in at least 10 pt font size, adequately contrast with the background, stating rights and obligations of the parties in plain and legible Chinese and/or English as the consumers elect, and both language versions carry equal legal effect.

7.3 Before the contract is signed,

(i) the supplier should explain clearly the salient terms of the contract ensuring that the consumer fully understand the respective rights and obligations of the parties; and

(ii) the supplier should give consumer opportunity to read the contract

and relevant documents thoroughly and raise questions about the terms.

## **Content of Contract**

- 7.4 The contract must in clear and intelligible terms identify the following: -
- (i) the parties to the contract;
  - (ii) the services and/or products to be provided with descriptions in reasonable details, such as
    - a) the items included and the number of treatments for each item (in the case of treatments/ therapies sold in packages);
    - b) the methods and /or equipment to be used for the treatments.
  - (iii) the cost of the services and products (if any), including itemised fees paid and/or payable under the contract; should there be a discount, stating the original and discount prices;
  - (iv) the amount of each instalment and the frequency of the payments to be made under the contract (if paid by instalments);
  - (v) the number, frequency and time of the treatment/therapy and duration of the contract (if applicable).

- 7.5 As regards a contract for supply of service over a period of time, it should be provided that the consumer shall have access to information about his account such as the number of unused treatment/therapy.
- 7.6 The contract and invoice should be stated in two separate documents so that consumers will have a clear idea about the respective purposes of the documents.

## **8. COOLING-OFF PERIOD**

- 8.1 Where the contract is made for the supply of prepaid service or goods, or for supply of service or goods within a fixed duration, a cooling-off period of 7 working days (inclusive of the day the consumer enters into the

contract) should be provided for. The consumer may cancel the contract during the cooling-off period and the supplier may charge the consumer, respectively in accordance with paragraph 8.3 and 8.5, for the administrative expenses incurring from the cancellation of the contract and the use of any service and/or goods provided during the cooling-off period. After deducting the said fees, as the case may be, from the prepayment, the supplier must return the balance to the consumer.

- 8.2 The right of charging for the administrative expenses and the service or product consumed as mentioned in paragraph 8.1 should be provided expressly with respective schedules of fees concerned in the contract.
- 8.3 In case an administrative fee is to be charged for cancellation of contract during the cooling-off period, it should be charged either at the percentage of the contract price or a fixed sum as set out in the following schedule, whichever is the less:

**Schedule of Administration Fees to be charged for Termination of Contract during the Cooling-Off Period**

Time of Termination	% of Contract Price*	Fixed Sum*
1-5 days	5%	\$500
6-7 days	7%	\$1,000

\* whichever is the less should be applicable

- 8.4 The supplier may provide any service and/or product to the consumer for trial or otherwise during the cooling off period. The supplier must expressly and clearly state in the contract what such service and/or product is with description in reasonable details and whether they are or it is free.
- 8.5 If such a service and/or product is not free, the suppler must obtain the express consent of the consumer to the provision of the same prior to the contract. Moreover, the supplier must expressly and clearly set out the price of such a service and/or product with a schedule in the contract. The price must be set in a fair and reasonable manner.

- 8.6 If the supplier warrants that the consumer shall not be charged or charged less for the chargeable service and/or product consumed during the cooling-off period on condition that he/she does not cancel the contract during that period, such a warranty must be stated expressly and clearly in the contract.
- 8.7 If any products (with the exception of free gift) are provided within the cooling-off period, the supplier may require the consumer who has cancelled the contract during that period to return in person these products unused with the packaging, if any, intact, or pay for the price of the products so supplied. If these products are not returned intact, the supplier may require the consumer to pay at the scheduled price.
- 8.8 Cancellation of a contract during the cooling off period may be effected by notice in writing (the “Cancellation Notice”), with copy(ies) of document(s) necessary for administrative purposes, served in one of the following ways:
  - (i) delivering personally the notice and the copy(ies) of document(s) to the relevant supplier’s place of business;
  - (ii) sending the notice and the copy(ies) of document(s) to the supplier’s place of business by post;
  - (iii) sending the notice and the copy(ies) of document(s) by fax or by email to the supplier’s designated fax number or email address respectively.
- 8.9 The Cancellation Notice shall be effective upon physical receipt, the date of postmarking or the day when the email or fax is sent as the case may be.
- 8.10 Attention of consumer must be adequately drawn to the cooling-off period and the relevant contractual rights and obligations prior to their entry into the contract. Notice of the cooling-off period must be given to consumer in bold type, not less than 10 point in size, and prominently displayed in the body of the contract, which must include the following:

- (i) advice to the consumer that he or she may cancel the contract at any time within the cooling-off period;
- (ii) the ways in which the notice of cancellation may be served (as described in paragraph 8.8); and
- (iii) the other right and obligations of the consumer regarding cooling-off period, such as the right to be refunded and the obligation to pay an administration fee.

## **9. CIRCUMSTANCES RENDERING IT UNFAIR TO HOLD CONSUMER TO THE CONTRACT**

- 9.1 It is quite common in the industry that prepayment is made by consumer for service to be provided over a long or indefinite period of time. During the period, mishaps happened to a consumer, such as death, incapacitating illness or physical disability may render performance of the contract impossible or impracticable.
- 9.2 There may also emerge some circumstances that a consumer could not reasonably anticipate when entering into the contract, such as relocation of the premises where the contract is performed, closure of the premises for a long period of time and transfer of the contractual rights or obligations of the supplier to another party. Such change of circumstances may result in the consumer accepting to his/her detriment what he/she has not bargained for.
- 9.3 A contract may become worthless to consumer if the supplier repeatedly and persistently fails to perform its obligations under the contract (e.g. repeated failure in providing a slot for service reasonably requested by the consumer).
- 9.4 It would be unfair to hold the consumer to the contract under such circumstances. Consumer should be allowed to terminate the contract when any of the said circumstances occur, and be refunded the unused balance of the prepayment.
- 9.5 In the event of termination by reason of death, incapacitating illness or physical disability of the consumer, the supplier may require the

consumer to compensate it for the administrative costs reasonably incurred as a result of the termination.

- 9.6 The termination may be effected by a reasonable notice in the manner described in paragraph 8.8 and 8.9.

## **10. REFUND**

- 10.1 For cancellation within the cooling off period, if prepayment has been made, the supplier should, subject to paragraph 8, return it to the consumer within 30 days after the service of the notice of cancellation. For other refunds consumer entitled to under the contract, they should be made within 30 days following the date of written request of the consumer.

## **11. CONFIDENTIALITY AND PRIVACY**

- 11.1 The supplier must keep information about current, former and prospective clients confidential unless the disclosure of which is required by law or permitted by them.
- 11.2 The supplier must comply with all laws and regulations in relation to the protection of the consumer's privacy, personal data, sensitive information and health information.

## **12. ASSIGNABILITY**

- 12.1 The supplier must not assign or transfer the contract to a third party unless express consent in writing has been obtained from the consumer.

## **13. PROVISION OF A COPY OF THE CONTRACT**

- 13.1 The supplier should deliver a fully completed copy of contract to the consumer after the contract is signed.

## **Sample Beauty Service Contract**

### **INSTRUCTION FOR USE**

1. This Sample Contract is intended to demonstrate how the Guidelines on Drafting Standard Form Consumer Contract for Beauty Industry (the “**Guidelines**”) should be complied with. The user is advised to adapt this Sample Contract to particular circumstances of the transaction, of course, in line with the requirements set out in the Guidelines.
2. It is intended that the Sample Contract applies to prepaid contracts under which services and products (if any) shall be supplied over a period of time.
3. Before you use this Sample Contract, you should read carefully the Guidelines so as to ensure that your contract is consistent with the Guidelines.

### **DISCLAIMER**

1. The Council does not recommend or endorse any company or individual who use this Sample Contract.
2. If you use this Sample Contract as the basis for your contract with consumers, you should modify it to suit your particular circumstances while ensuring that you comply with all applicable laws and the Guidelines. You are recommended to seek legal advice in the drafting of your own contracts.

## **Beauty Service Contract**

### **Important Notice**

**A cooling-off period applies to this Contract.**

**You, the client, may cancel this contract during the cooling-off period provided for under Clause 2 of this Contract.**

**If you choose to cancel this Contract, you must notify us, the supplier, about your intention to do so pursuant to that Clause. Please also note that your other rights and obligations in relation to your cancellation of this Contract within the cooling-off period are set out in the provisions under that Clause. You have to read them carefully.**

**Date:**

**Parties:** [Name] of [Address] [Contact Number] [Membership Number {if appropriate}] (the “**Client**”)

[Name] of [Address] (the “**Supplier**”)

#### **1. Service(s)/ Product(s) to be provided**

- 1.1 The Supplier shall provide the Service(s) and the Product(s) (if any) to the Client at the location and price(s) as described in Clause 1.3 below.
  
- 1.2 For the avoidance of doubt, the Service(s) shall include but not limited to the performance of the Treatment, the use of material and device/equipment incidental to the performance of the Treatment, and the provision of consultation services in connection with the Treatment, where applicable.

### 1.3 Schedule of Service(s)/ Product(s) and Price(s)

Code	Location	Service (Treatment) / Product <sup>1</sup>	Unit Price	Quantity	Total (HK\$)

- a) If the supplier agrees to provide any free item in addition to the service(s) and/or product(s) to be charged, such items should be stated expressly and clearly in the Schedule.
- b) If discount is given, the supplier should state expressly and clearly in the column of "Unit Price" both the discounted price and the original price.

Total sum payable	HK\$		
Deposit paid	HK\$	Date:	Invoice No.:
Balance	HK\$	Due Date:	
Payment method	( ) Cash	( ) EPS	( ) Credit Card

Description of the Treatment/Product (including the free item)

(Details of the Treatment such as the method and equipment to be used and the frequency of the Treatment.)

<sup>1</sup> To avoid confusion the title of the treatment or product should be the same as that advertised and/or used by the supplier during negotiation for the contract.

## **2. Client's Right to Cancellation during Cooling-off Period**

- 2.1 Subject to Clauses 2.4 to 2.6, the Client may cancel this contract by giving a notice in writing (the "**Notice of Cancellation**") to the Supplier within 7 working days from the date hereof (the "**Cooling-Off Period**") without incurring any payment liability or other obligation.
- 2.2 The notice of cancellation may be served in person, by mail, e-mail or fax with copy(ies) of (insert name(s) of document(s) necessary for administrative purposes) and shall be effective upon physical receipt, the date of postmarking or the day when the email or fax is sent, as the case may be.
- 2.3 The Supplier shall refund all the monies paid by the Client under this Contract, minus any of the fees set out in Clauses 2.4 to 2.6, within 30 days after the service of the Notice of Cancellation.
- 2.4 If the Client cancel the contract during the cooling-off period, the Supplier may charge an amount in accordance with Schedule I below to cover the Supplier's administrative expenses.

### Schedule I

Administrative Fees to be charged for Cancellation of Contract during the Cooling-off Period

Time of Termination	Fees (% of contract price)*	Fixed Sum*
1-5days	5%	\$500
6-7 days	7%	\$1,000

\*whichever is the less should be applicable

**[Clauses 2.5 to 2.7 are applicable only where service and/or product is to be provided within the cooling-off period.]**

- 2.5 The Supplier shall provide the Product(s) stated in Schedule II below to the Client within the Cooling-Off Period. If the Client cancels this Contract within the period, the Client shall be required to return in person

the Product(s) so provided (except the free gift), unused with the packaging, if any, intact, to the Supplier. Otherwise, the Client shall pay the Product(s) at the price set out in Schedule II below.

#### Schedule II

##### Product(s) provided during the Cooling-off Period

Product	Quantity	Free/ Unit Price	Total

- 2.6 The Supplier shall provide the Service(s) stated in Schedule III below to the Client within the cooling-off period. If the Client cancels this Contract within the period, the Client shall be required to pay for the Service(s) so provided (except any Service(s) agreed to be provided for free) in accordance with the Schedule.

#### Schedule III

##### Service(s) provided during the Cooling-off period

Service (Treatment)	Quantity	Free/ Unit Price	Total

- 2.7 If the Client continues this Contract after the cooling-off period, the Supplier shall waive/reduce charging for the Service(s) and/or Product(s) respectively provided under Clauses 2.5 and 2.6 in accordance with Schedule IV below.

## Schedule IV

Free/Discounted Service(s) and/or Product(s) provided during the Cooling-off Period

Service (Treatment) / Product	Quantity	Free/Discounted Unit Price (% of Discount)	Total

### 3. Client's Right to Termination

- 3.1 The Client or his/her administrator(s) or executor(s), as the case may be, may terminate this Contract by a twenty one (21) day notice in writing in the event of: -
  - i) death or incapacitating illness or physical disability of the Client rendering performance of this Contract impossible or impracticable;
  - ii) the Supplier's repeated and persistent failure to perform its obligations under this Contract;
  - iii) a transfer of any right or obligation of the Supplier under this Contract to another person without the Client's consent in writing;
  - iv) relocation of the premises where the contract is performed; or
  - v) closure of the premises for a period of more than four (4) weeks.
- 3.2 In the event of termination by reason of Clause 3.1(i), the Client shall pay a cancellation fee in the sum of (insert an amount representing the administrative costs reasonably incurred as a result of the termination) to the supplier.
- 3.3 Upon receipt of the notice, the Supplier shall refund any unused balance to the Client or his/her administrator(s) or executor(s), as the case may be, within thirty (30) days.

3.4 Refund of the unused balance shall not in any event prejudice or affect any claim of the Client or his/her administrator(s) or executor(s), as the case may be, against the Supplier for death or injuries caused by the negligence or any other faults of the Supplier, its servants or agents.

#### **4. Record card**

4.1 The Supplier shall note accurately and legibly in a record card the number of treatments in a course, and the date of each treatment and other details such as the machine settings, the products used during the treatment and/or advised for home use, and the names of the handling beauticians.

4.2 The Client shall have access to the information contained in the record card.

#### **5. Appointment**

5.1 The Client may make, cancel or change appointments at least \_\_\_\_ hours in advance at the booking desk during the office hours, by calling the Supplier at \_\_\_\_\_ (telephone number:\_\_\_\_\_ or \_\_\_\_\_) from \_\_\_\_ am to \_\_\_\_ pm or by e-mailing (e-mail address) at any time.

5.2 The Supplier shall confirm with the Client the making, cancelling or changing of appointment as soon as practicable.

#### **6. Standard of Performance**

6.1 The Supplier shall perform its Service(s) with care, skill and diligence to such standard of quality as it is reasonable for the Client to expect in all the circumstances.

#### **7. Warranty**

7.1 The Supplier warrants that the Service(s) and Product(s) (if any) are safe and fit for the Client's intended purpose which has been made known to it, or which it would reasonably be expected to know.

7.2 The Supplier further warrants that all information, representations or

statements provided by it to the Client in connection with the Services and Product(s) (if any) are accurate. The Supplier acknowledges that the Client enters into this Contract in reliance upon such information, representations and statements.

## **8. Personal data and Privacy**

- 8.1 The Supplier shall comply with all the laws and regulations in relation to the protection of personal data and shall use its best endeavours to keep confidential all the personal, sensitive and health information obtained from the Client.

## **9. Force Majeure (events beyond the Party's control)**

- 9.1 A party shall not be liable or responsible for any failure to perform, or delay in performance of any of the Party's obligations under this Contact that is caused by events beyond the Party's reasonable control ("Force Majeure Event"). A Force Majeure Event includes (a) strike, lock-out or other industrial action; (b) civil commotion, riot, invasion, terrorist attack or threat of terrorist attack, war (whether declared or not) or threat or preparation for war; (c) fire, explosion, storm, flood, earthquake, subsidence, epidemic or other natural disaster; (d) impossibility of the use of public or private transport; and (e) impossibility of the use of public or private telecommunication networks.
- 9.2 The Party's performance under this Contract is deemed to be suspended for the period that the Force Majeure Event continues. Nonetheless, the Party shall use its reasonable endeavours to bring the Force Majeure Event to a close or to find a solution by which its obligations under the Contract may be performed despite the Force Majeure Event.

## **10. Assignability**

- 10.1 This Contract is not assignable or transferable unless otherwise agreed expressly by the parties in writing.

## **11. Variation**

- 11.1 Any terms and conditions of this Contract can only be varied by consent in writing from the Client.

## **12. Governing Law and Jurisdiction**

12.1 This Contract is governed by, and shall be construed in accordance with, the Laws of Hong Kong. The parties submit to the non-exclusive law and jurisdiction of the courts of Hong Kong.

### **Signatures**

[If the Client is under the age of 18, his/her parent or guardian must execute the following, for and on behalf of the minor.]

Parent/ Guardian

I, the undersigned \_\_\_\_\_ (parent/guardian's name) the parent/legal guardian of the Client, \_\_\_\_\_ (the Client's name) hereby execute this Contract for and on behalf of the Client. As the natural or legal guardian of the Client, I hereby agree to bind myself and the Client to the terms this Contract. I represent that I have the legal capacity and authority to act for and on behalf of the Client.

Signature : \_\_\_\_\_

Name : \_\_\_\_\_

Relationship with the Client : \_\_\_\_\_

Contact No. : \_\_\_\_\_

Address : \_\_\_\_\_

Date : \_\_\_\_\_

Client's signature : \_\_\_\_\_ Supplier's signature : \_\_\_\_\_

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## 報告撮要

### 導言

現時，市面上廣泛使用的標準格式合約乃由供應商預先制訂，當中的條款及條件並沒有與個別消費者磋商。

預先印製的標準格式合約使用方便，它可縮短供應商與消費者訂立合約的時間。然而，標準格式合約是由供應商草擬，本質上著重供應商的利益。由於供應商有較高的議價能力，以及掌握着資訊，他們可嘗試盡佔優勢，而不考慮消費者的利益。因為這些標準格式合約是基於「要或不要」形式提出，消費者根本沒有能力跟供應商討價還價。即使消費者知道合約條款對他們不利，但他們關心的主要是貨品及服務的價錢及質素，因此一般情況下，消費者仍會簽約，一心希望供應商不會引用這些對他們不利的條款。

消費者委員會（「消委會」）的研究發現，在部份標準格式消費合約內，包含有違誠信要求的不公平條款。這些條款導致合約雙方的權利及義務嚴重不平衡，損害消費者的權益。特別是一些意圖卸除或限制供應商在違約、疏忽、失實陳述或其他違反責任方面的法律責任的不公平免責條款，這種條款頗為普遍。

### 現行法例

香港現時有法例限制透過合約條款，避免法律責任的程度。例如：

《管制免責條款條例》試圖限制營商者可以卸除他們的法律責任的程度，包括因疏忽而引起的人身傷亡的責任、違約、因疏忽而引起的損失或損害；或因違反在《貨品售賣條例》下營商者對消費者的隱含責任等。

《失實陳述條例》訂明除非合約條款符合《管制免責條款條例》所訂立的合理準則，否則合約任何一方均不能透過合約條款卸除或限制因失實陳述而引起的法律責任。

《服務提供（隱含條款）條例》把服務提供者須在合理時間內，及以合理的技術和謹慎提供服務的隱含條款納入消費合約中，並規定供應者不能藉任何合約條款，卸除或限制他因這些隱含條款而產生的法律責任。

然而，這些條例只針對因使用免責條款而產生的特定不公平情況。現時還未有專門針對免責或限責以外的不公平條款的法例。受到這些不公平條款損害的消費者，惟有當這些不公平條款是含糊不清，或根據《不合情理合約條例》是不合情理時，要求法院將它們剔除。

但是，這些司法補救方法是有限制的。若不公平條款並非含糊不清，即使條款很明顯是不公平的，有關的規則便不適用。此外，《不合情理合約條例》並沒有就「不合情理」訂立明確的定義。而只以未盡臚列的列表，列出若干法庭可以考慮的因素。法庭很可能從普通法方面尋找定義，而案例已確定法庭將會著眼於雙方於交易過程中產生不公平的整體情況及行為，而不單單是條款的意思及影響。換句話說，不公平條款本身並不足以證實合約是不合情理的。

## 自我規管

香港有自我規管的措施，處理消費合約內不公平條款的問題。

香港通訊業聯會發出的《電訊服務合約實務守則》已於 2011 年 7 月起實行。守則主要針對程序方面之公平性，例如合約的文體、版式及結構，以及服務供應商單方面更改條款、合約自動延長或續訂，及冷靜期等方面的權利及責任。惟守則條文的公平性，仍有改善空間；不公平條款仍可於某些電訊服務合約內找到。另外，在冷靜期的應用上，亦存在一些問題。

## 未來方向

從類似香港的司法管轄區(如英國及澳洲)的經驗來看，政府普遍的處理方法是訂立廣泛而全面的法例，以規管一系列的消費事宜，這包括消費合約中的不公平條款。於 2008 年，消委會發表了題為《公平營商，買賣共贏》的報告書，建議這個綜合方案亦適用於處理香港的消費者保障問題，包括不公平合約條款。雖然政府對報告書的反應整體屬正面，但是任何立法建議均需時落實。

消委會相信在討論設立全面性消費者保障法例的同時，標準格式消費合約內的不公平條款不應置諸不理。消委會認為現時營商者應當採取積極步驟，履行誠信的原則，並確保他們所提供的標準格式消費合約內的條款是對消費者公平的。

爲了說明營商者可如何提高在社會上的地位，根據從美容業界發現的問題，本報告的附件一列出如何公平地草擬標準格式合約的指引。此外，附件二載有一份合約範本，這範本亦可供其他行業參考。

本報告的目的旨在鼓勵及協助營商者避免使用不公平條款。報告內的指引及合約範本都涵括消委會於不同的消費合約內發現的一系列不公平問題。消委會促請業界細閱該指引及合約範本，並在業務中落實上述文件所顯現的各項公平原則。

### **不公平條款的例子及應如何處理這些條款**

消委會在本地的不同界別的標準格式消費合約內發現了不少不公平條款的例子，它們可歸納為 12 個類別。本報告

- 詳細地討論消委會於本地標準格式消費合約內所發現的一些條款的不公平之處；及
- 說明就該等條款應採取的適當處理方法。

本報告列舉的例子可能顯示某些方面的問題，但個別供應商的行爲並非本報告的主旨所在，故此本報告並沒有提及個別供應商的名稱。

#### **A. 單方面修改合約條款**

##### 單方面更改條款而無須合理理由

無可否認，部份供應商可能有合理需要去更改合約，以應付他們本身的供應合約中條款的改變及市場環境的變遷。然而，這些條款卻給予供應商隨意更改條款的權力，而可能導致不公平的情況；即就算合約的修改使消費者實質上喪失他原來購買的東西，消費者仍要遵守合約。

因此，如供應商有權單方面修改合約的話，消費者應有合理的時間去考慮相關的修改，及如果消費者不接納有關修訂的話，有權終止合約而不會受罰。另外，在終止合約時，如消費者已就合約支付款項，消費者應獲退還未用餘款。

## 單方面轉換產品的權利

有些情況，供應商的產品乃依賴第三方提供，而這類條款就是顧及供應商在這方面的顧慮。然而，當供應商對供應的產品作出重大的改變時，意味著消費者須接受一些完全不是他立約時所要求的東西。由此看來，條款是將供應商應該承受的商業不確定性風險，轉嫁到消費者身上。因此，該等條款委實為不公平，應予修改，讓消費者在供應商重大改變議定的貨品或服務時，可隨時終止合約，並不會受到任何懲罰。

## 供應商以其認為合適的方法通知消費者合約的修改

有些營商者保留權利，隨時可以任何他們認為合適的方法，預先通知消費者，以修改合約條款。而無論消費者是否確實收到通知或知悉有關的修改，這些修改均視為有效。

這些條款本身就是不公平，應該刪除。消費者應有合理的通知及真正的終止合約權，讓消費者因修改而受到嚴重影響時，可以取消合約，而毋須受到懲罰及獲得退回訂金或預先支付的款項。

## **B. 卸除或限制消費者利用對供應商可提出的索償，去抵銷欠下供應商債項的法律權利。**

一些認購式合約規定所有已支付的款項，均不可退回及不能轉讓，以及消費者須預先支付所有合約期內的費用。此外，消費者不可因任何原因（包括普通法、衡平法或其他原因）抵銷或扣除應該支付的款項。消委會認為在這些情況下卸除消費者可抵銷的法律權利是不公平的，這類條款應該刪除。

## **C. 提早終止合約可獲「賠償」的權利**

就提早終止合約，部份合約設有嚴苛的條件，此外消費者還須事先得到供應商的批准。這可能會造成一個情況，就是如消費者因供應商之嚴重失誤而受損，亦未必能得到供應商的許可，讓他提早終止合約，或甚至會因提早解約受到懲罰。但當供應商沒有過失，它卻可有合理原因，就消費者提早終止合約所導致的損失要求消費者賠償；而有些合約的終止費用卻超出供應商所蒙受的合理損失，變成是對消費者的懲罰，而法庭是不會要求消費者支付這種懲罰性款項的。

這類條款應重新草擬，使它們只適用於因消費者違約，而引致提早終止合約的情況，及賠償金額不應超出供應商因提早終止合約而蒙受的合理損失。

#### D. 不合理免責條款

##### 過於廣泛及概括的免責條款

一些合約聲稱消費者同意卸除供應商對消費者及任何第三者有關在合約下的服務或所引起的所有責任或相關責任、侵權責任及其他責任，包括消費者或任何第三者直接或間接受到的損失。這類免責條款試圖卸除供應商因任何理由或在任何情況下所產生的法律責任。根據《管制免責條款條例》，這類條款很可能因為不合理而被裁定無效。因此，這類條款應被刪除，或應修改至符合《管制免責條款條例》所訂的合理準則。

##### 卸除或限制供應商因其行爲或疏忽，導致消費者受傷所引起的法律責任的條款

會員制的合約經常訂明管理層或其代理人毋須為任何人身傷害或財物損壞，或財物損失負責；不論是因使用供應商的設備、或因供應商的管理層、僱員、代理人或其他人士的疏忽所造成。

《管制免責條款條例》禁止藉合約條款卸除或限制因疏忽而引致死亡或人身傷害的法律責任。這類條款應被刪除。

#### E. 非必要及不合理的終止合約手續

標準格式合約一般都容許取消合約，但是服務供應商就如何終止合約設有繁苛的條件。例如，終止服務只會於下一個結單日才開始生效；或須以指定的表格並於指定的時間內將表格遞交；又或者客戶須親身將表格交回指定地點。

在很多情況下，這些要求都是不必要的；而在某些情況下，更可能是不切實際或不合理的。特別是當終止合約被不合理地拖延時，這些條款可被視為阻礙及阻嚇消費者行使他們的法律權利。故此，這類條款應該刪除。

## **F. 保留對合約爭議的最終決定權**

有些營商者會保留對所有因詮釋合約條款而引起的爭議的最終決定權。由於營商者既是爭議的裁判者；亦是爭議的一方；所以，在這些情況下，並不能確保公正。

事實上，合約的任何一方在法律上皆有權將爭議提交法庭解決。因此，這類條款應該刪除。

## **G. 全部協議條款**

合約經常以細小的字體表述該合約已構成合約雙方的全部協議及諒解，並代替之前雙方所有與該服務有關的安排或理解，無論是口頭抑或書面性質。這類條款的公平性可被質疑。例如，消委會發現供應商試圖利用這類條款，以卸除其銷售員於銷售相談時所作出的陳述或保證的責任。惟營商者應留意法庭可能根據《不合情理合約條例》將這類條款剔除。此外，除非這類條款符合《管制免責條款條例》所訂的合理準則，否則這類條款不能卸除或限制失責陳述的責任。故此，應避免這類條款。

## **H. 取消費用或懲罰**

消委會發現部份聲稱有冷靜期的合約，實際上消費者在終止合約時，須要親身遞交已簽好的取消合約的表格；至於要取得退款權利，消費者須先付一筆嚴苛的取消合約費用，才可得到退款。首先，這類條文並不是真正的冷靜期條款，而只是一項終止合約的條款。其次，這類條款本身就是不公平。消費者須支付一筆相當的款項才能行使他的終止合約權；該筆款項遠超供應商因終止合約而產生的費用及受到的損失；實際上是一種懲罰。

這類條款應重新草擬，使供應商只有權得到一筆相當於因終止合約所引起的合理損失的賠償。

## **I. 不予退款**

在消費者須預繳大量金額的合約內，經常發現一些訂明無論在任何情況下消費者都無權獲得到任何退款的條款。面對這類條款，即使供應商有嚴重過失，消費者可能被誤導以為他們沒有法律權利尋求補償。另外，當消費者提前終止合約，這類條款容許供應商從消費者身上取得不公平的利益。不論供應商有何損失，消費者將失去所有預付款項。

## **J. 不合理地限制消費者的法律權益**

當消費者終止合時，消費者有時須遵守一些訂明消費者不能向任何人士（包括傳媒及網上討論區）透露服務的內容或其他方面的業務的條款，否則，供應商會向消費者提出法律訴訟。又有一些條款訂明消費者明白他們於接受療程期間可能會遇到一些無法預計的風險，而消費者須承擔所有生理及心理上的風險。此外，更有一些條款禁止消費者向政府、法庭、半官方機構或傳媒直接或間接提出任何投訴。

這些限制的範圍是太過廣泛，並會剝奪消費者的言論及表達意見的自由，及尋求糾正的權利。這類條款已遠超保護商譽的正當權益及保守商業秘密的所有權權益。這類條款是否會因不合情理的原因而被當作無效是富爭議性的。此外，這類條款可能使消費者誤以為他們不可向消委會作出投訴。

根據《管制免責條款條例》，這類條款很有可能因不合情理而被視為無效，這類條款應從消費合約中刪除。

## **K. 自動續約**

很多合約都有訂明在合約期屆滿後，認購的服務將會被自動續期。

如合約內沒有相關條款要求供應商於合約屆滿前的合理時間內，就有關續約後增加收費及服務限制等方面，向消費者發出一個清晰而明確的書面提示，這類條款是不公平的。

## **L. 閱讀及明白合約的聲明**

合約內載有聲明表示消費者已閱讀及明白合約是很普遍。然而，很多標準格式合約是很冗長及複雜的，消費者於簽署前很可能沒有將合約完全閱讀，或不能明白合約的所有含意。很多時候，消費者會被要求簽署這項聲明，即使他並沒有閱讀合約。在這情形下，可出現供應商引用苛刻條款以致出現不公平的情況。

對於冗長而複雜的消費合約，這類條款應該刪除。至於簡短的消費合約，取而代之應是一個清晰而明確的忠告，提醒消費者在簽署合約前，應細閱及明白合約的條款。這忠告應放在所有條款之前，以提醒消費者去閱讀條款及如有需要，可在簽約前要求更多的資訊或說明。

## 總結

這報告所討論的不公平條款反映消費者對香港一些營商者的營商手法的關注。使用不必要的，嚴苛的或令人費解的條款，對營商者的長遠利益沒有好處。反之，這些條款可能不必要地將合約複雜化，令消費者對營商者產生懷疑，並增加了解決爭議的風險及成本。

此外，標準格式消費合約不僅在內容上，在形式上也應該是公平的。公平的合約應該是易讀易明。除了使用簡潔及日常用語外，標準格式消費合約應該是簡單短小的。

冷靜期的安排也可體現誠信的原則及公平精神。冷靜期使消費者於簽約之後，有合理的時間再考慮影響他們作出購買決定的事情，例如他們的真正需要及可負擔的能力；並給予他們在無任何條件的情況下取消合約的權利。但消委會同意消費者需向供應商支付因取消合約而合理地產生的行政費用，及就冷靜期內使用貨品及／或服務支付合理的費用。

消委會認為冷靜期的安排應該應用於固定期限消費合約及預繳式消費合約，尤其是涉及大額或需負長期財務承擔的。

於消費合約內使用公平條款，反映商戶遵守誠信的原則，並能協助他們建立商譽。商戶可從而避免

- 因消費爭議而引起的風險及成本；
- 消費者提出訴訟，及就申索作出抗辯而引致的相關費用；
- 花額外的時間及資源去處理投訴及訴訟。

消費合約內如載有不公平條款，表示商戶既不公平對待消費者，也不以誠信行事。這樣，消費者的自然反應是不信任有關商戶。一份公平的消費合約能同時令消費者，營商者和社會獲得最佳利益。

消委會相信這報告及其附件可幫助營商者檢視他們的消費合約，確保在交易過程中遵守公平、誠信及誠實的原則，從而令消費者得到公平的對待。

# 有關標準格式消費合約中的不公平條款報告

## I. 前言

### 標準格式合約的廣泛使用

1. 市場普遍使用標準格式合約，以書面形式去證明消費交易的內容。它們都是由供應商預先擬備，而沒有與消費者個別磋商，祇剩下少數特定的條款（如有關定價及合約主要標的）容後商議。
2. 透過預先印製的標準格式去訂立合約，較與消費者逐一商議，然後立約，肯定來得便捷。使用標準格式合約可縮減供應商供應，及消費者獲取貨品或服務的時間，因而促進大規模生產及消費的高速發展及多樣化。此外，標準格式合約為供應商降低交易成本，否則該部分的成本可能轉嫁予消費者。電子商務活動的盛行使標準格式合約更為廣泛使用，因為對網上消費銷售活動而言，個別洽談合約似乎是不太可行的。

### 對消費者不利之處

3. 可是，標準格式合約是由代表供應商利益的專業人士草擬，本質上側重供應商的利益。
4. 標準格式消費合約一般的字體細小或模糊難辨，以消費者難以掌握的法律或專業語言草擬。此外，它們大多是冗長乏味，消費者在簽約前都不會翻閱一遍，或者消費者根本沒有獲得足夠時間或機會去閱讀合約。而銷售人員沒有提醒消費者閱讀合約，便要求他們在合約簽署，這種情況並非罕見。結果，消費者經常在短促的時間內，在壓力下成交，而沒有仔細閱讀合約條文或就條文詢問，這可能是因為消費者背後有人龍等候，或者在洽購時供應商給予某些優惠，使消費者覺得有必要合作，儘快把事情辦妥。
5. 消費者也許擅於格價，但是未必能夠到處比較，揀選最好的合約條款，若要這樣做，消費者須要有相當程度的知識水平及花上相當的時間。況且，純粹貨比三家的消費者恐怕不大可能得到合約的全文，因為供應商大多祇會在消費者同意購買後，才給他合約的文本。
6. 藉着議價優勢及資訊掌控，在草擬標準格式消費合約時，供應商可在損害消費者利益的情況下令合約對自己有利。此外，消費者就算知道合約條款對自己不利，仍去簽署立約，心想供應商或不會引用這些條款，或者認為這是一

份「要或不要」的合約，故此要求供應商修改亦只會是徒然。事實上，當這些條款於整個行業中趨於一致，或者，消費者所想得到的產品只是由個別特定的供應商供應的情況下，消費者的選擇自由變得有限，在條款方面的商議空間亦變得狹小。

## 不公平條款的定義

7. 在標準格式消費合約裏，經常可以找到違反誠信要求的條款，導致立約雙方在合約上的權利及責任方面，出現顯著失衡，從而損害消費者的利益。
8. 本報告稱這些條款為「不公平條款」，而在歐盟《就消費合約中不公平條款的理事會指令》(the Council Directive on Unfair Terms in Consumer Contracts) (93/13/EEC) 及英國的《在消費合約中不公平條款規例 1999》(Unfair Terms in consumer Contracts Regulations 1999) 中，這類條款亦被界定為不公平條款。

## 對標準格式消費合約的管控不足

### 法例管制

#### 管制免責條款

9. 若說香港對上述所定義的不公平條款沒有任何管控，似乎是言過其實。在標準格式消費合約中，不難找到各式各樣的免責條款；試圖卸除或限制供應商在違反合約、疏忽、失實陳述，或其他不履行責任方面的法律責任。部分的免責條款看來是不公平和不合理的。事實上，現時有法例限制可藉合約條款，規避上述法律責任的程度。有關法例包括：
  - i) 《管制免責條款條例》〈第 71 章〉相關條文包括：-
    - a) 因疏忽而引起，有關人身傷害或死亡的法律責任不可以利用合約條款或告示卸除或限制（第 7 條）。
    - b) 至於其他損失或損害方面，除非該條款或告示符合合理標準，否則任何人亦不得藉合約條款卸除或局限自己因疏忽而引致的法律責任（第 7 條）。

- c) 因違反消費合約而引起的法律責任不能藉合約條款卸除或局限，除非該合約條款符合條例所訂之合理標準（第 8 條）。
  - d) 消費者不須因合約條款而就別人因疏忽或違約所可能引致的法律責任，對該人作出彌償，除非該條款符合法例所訂之合理標準。（第 9 條）
  - e) 消費貨品有關的合約條款或保證不能卸除或限制製造商或分銷商因其疏忽而引致的損失或損害之法律責任（第 10 條）。
  - f) 賣方因違反在《貨品售賣條例》（第 26 章）下對消費者承擔的隱含責任（即有關貨擁有權、貨品與說明或樣本相符、貨品質量或適合作某種用途等的隱含保證），不能藉合約條款予以卸除或局限（第 11 條）。
- ii) 《失實陳述條例》（第 284 章）第 4 條
- a) 此條文訂明除非條款符合《管制免責條款條例》（第 71 章）所訂合理標準，否則不能卸除或局限因作出失實陳述而引起的法律責任。
- iii) 《服務提供（隱含條款）條例》（第 457 章）
- a) 這條例把服務提供者須在合理時間內，及以合理的技術和謹慎作出版務之隱含條款納入服務提供合約中，並且規定當合約一方是以消費者身份交易，供應者不能藉任何合約條款，卸除或限制他因這些隱含條款而產生的法律責任。（第 8(1) 條）。

#### 對非免責或限責的不公平條款的管控不足

10. 違反上述條文的免責條款將會是無效的，即是說供應商不可藉着它們來限制或卸除其法律責任。但問題是這些條文只處理因使用免責條款而產生的特定不公平情況，而並非為針對不公平條款提供全面的保障。現時還未有法例特地針對並非以免責或限責為目的之不公平條款。受到這些不公平條款損害的消費者，可能會要求法院：
- i) 應用「不利於提出者的解說」（*Contra proferentem*）規則，以不利加諸條款一方，即供應商的角度，去解讀這些條款；或

- ii) 判定該些條款為不合情理，並按《不合情理合約條例》（第 458 章）拒絕強制執行這些條款或對它們作出修正。
11. 可是，這些司法濟助有其一定的局限性，不足以全面地處理標準格式消費合約中的不公平條款。

## 限制

### 不利於提出者的解說(*Contra proferentem*)

12. 當法庭認為有關條款是含糊不清時，法庭才會應用這合約解釋規則，換句話說，縱然條款是不公平，若它沒有含糊不清的問題，消費者也不會從這規則得到什麼幫助。

### 《不合情理合約條例》（第 458 章）

13. 條例沒有就「不合情理」訂立明確的定義，而只在第 6(1)條為法庭就決定一份合約或其中部分是否不合情理，訂下一個未盡臚列的列表 (non-exhaustive list)，列出若干法庭可以考慮的因素。法庭大概會從普通法方面理解何謂「不合情理」。
14. 按普通法去證實不合情理，須證明以下各點：
- i) 以整體的情況而言，交易對投訴者具欺壓性；
  - ii) 投訴者在議價方面有某些弱點；以及
  - iii) 另一方不合情理地行事；即是說，蓄意地利用投訴者的弱點去佔取其利益。<sup>1</sup>
15. 可見普通法較着眼於交易過程中所產生的不公平情況和行為。在判定一項合約條款是否不合情理，法庭會着眼於有關的所有情況而非單純考慮條款本身的意思和效果。換句話說，單憑一項不公平的合約條款不足以證實合約是不合情理的。
16. 當根據該條例去裁定合約或其部分是否不合情理時，法庭不會單單考慮合約條款是否不公平。在 *Hang Seng Credit Card Ltd. V. Tsang Nga Lee [2000]3 HKC 269*，當法庭考慮一份信用卡合約中有關訟費的條款是否不合情理時，除該條款的含意和影響外，法庭還審視《不合情理合約條例》第 6(1)條

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<sup>1</sup> Chitty on Contracts, 第 28 版, 7-078 段應用於 *Shum Kit Ching v Caesar Beauty Centre Ltd [2003] 3 HKC 235*。

列出的各項因素，如立約雙方的相關議價能力、被告消費者是否能夠明白該條款，及被告消費者當時是否本來可以從原告銀行以外的第三者獲取相同服務。法庭在考慮過整體的情況後，才判定該條款為不合情理。

17. 之後，在 *Shum Kit Ching v Caesar Beauty Centre Ltd.* [2003]3 HKC 235 中，法庭裁定在決定某一合約或其某部分是否不合情理時，法庭必須考慮所有與這問題有關的情況，但除此之外，法庭亦必須視乎情況，考慮第 6(1)條列出的各項因素<sup>2</sup>。
18. 因此，在現時的法律框架下，似乎消費者不能單以合約條款不公平為理由，去取消合約或其中部分。

### 自我規管的嘗試

19. 香港通訊業聯會（「聯會」）所發出的《電訊服務合約實務》（「守則」），於 2011 年 7 月開始實施。該守則為電訊服務的消費合約草擬，向電訊業提供指引。
20. 值得注意的是，該守則只針對程序方面之公平性，包括合約的條文、文體、版式及結構的清晰度，以及服務供應商與消費者在服務供應商單方面更改合約條文、合約自動延長或續訂、服務搬遷與冷靜期等方面之各別的權利及責任。另一方面，該守則並不涵蓋合約條文在內容實質上的公平性；例如：它沒有提到應怎樣處理不合理的免責條款；而這類條文仍可在一些電訊服務合約中找到，例子見於下文第 40.4.1 段。
21. 在程序公平性方面，該守則仍有改善空間，例如：有關冷靜期（由立約日起不少於七天）的指引有很大的局限性，它只應用於「非應邀到訪客戶住所期間訂立的合約」<sup>3</sup>，換句話說，冷靜期不會應用於街頭推廣和非應邀電話中訂立的合約。可是，似乎沒有證據顯示在上述情況下，訂立這些合約時消費者是較有保護，以致冷靜期的要求是毫無必要的。
22. 冷靜期的基本目的是讓消費者有充分時間對其購買決定重新考慮或尋求意見，以及保護消費者免受不當銷售的損害。但是該守則訂明，在出現以下情況冷靜期將不再適用：
  - i) 服務一旦已開始提供；

<sup>2</sup> *Shum Kit Ching v Caesar Beauty Centre Ltd.* [2003] 3 HKC 235 第 244 頁。

<sup>3</sup> 守則第 1.1 段，「非應邀合約」的定義。

- ii) 服務供應商一旦已實質地開始為提供服務進行安裝或設置工作（包括已與第三方作出安排）；
  - iii) 因訂用服務而提供的網絡終端裝置、用戶室內設備或用戶裝置、或任何宣傳禮品一旦已由客戶收取或送達客戶；
  - iv) 經由客戶同意的號碼轉攜完成日的三天前；或
  - v) 已就有關合約向客戶打出服務確認通話，但：
    - a) 服務供應商須清楚通知客戶，而客戶亦須確認知道在完成服務確認通話後，冷靜期即會終止；以及
    - b) 服務確認通話在非應邀合約訂立後超過一個小時後向客戶打出。<sup>4</sup>
23. 我們注意到上述令到冷靜期不再適用的指定情況，是由服務供應商促成，而毋須事先得到消費者的同意。這樣，服務供應商便可藉著這些事件的發生，而把冷靜期縮短。在服務供應商給消費者打出服務確認通話的情況中，冷靜期可短至一個多鐘頭。因此，消費者可能未能有充分時間考慮產品和合約，這會違反冷靜期確保消費者能作出明智抉擇的本意。
24. 此外，該守則是自願性的，就算對承諾採用守則的電訊服務供應商而言，並無約束力，要他們完全遵守。舉例，在當服務供應商單方面增加某些費用或對合約條文作重大更改時，守則要求須容許顧客給予預先通知以終止合約，而無須承擔任何費用（直接相關費用除外）<sup>5</sup>。可是在其中一個服務供應商的消費合約中，提到在上述情況下，顧客可終止合約而無須支付提早終止費用及任何其他取消費用，除申請書另有訂明外。這為服務供應商留下餘地，向顧客收取該守則容許的與其提早終止合約之直接相關費用以外的費用。
25. 就本會的評論，聯會作出包括以下的回應<sup>6</sup>：

- i) 守則的消費者保護措施，目的不在於處理消費者所承擔的合約責任之性質問題，而不合理的免責條款的問題已有現行條例處理；及

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<sup>4</sup> 守則第 5.6 段。

<sup>5</sup> 守則第 9.1(d) 段。

<sup>6</sup> 本會就報告的「自我規管的嘗試」部分，諮詢香港通訊業聯會，該會對此向本會表達意見，本會謹此致謝。

- ii) 把冷靜期的應用規限於非應邀到訪客戶住所期間訂立的合約，是因為
  - (a) 在店內購物和街頭推廣的情況下，不想簽約的消費者可以自行離開，改天回來，而當銷售人員在消費者家中，消費者會較難做到這點；
  - (b) 「全面」的冷靜期安排，將會減低效率，引發更多有關服務交付速度的投訴，而現行的冷靜期安排是基於接獲投訴的主要成因而制定，因此它着眼於防止消費者在簽約時受到不當的壓力影響。

聯會的回應沒有釋除本會有關守則局限性的疑慮。然而，在本地商界對解決消費合約中不公平的問題，一般缺乏積極性的氛圍下，我們歡迎電訊業在改善消費合約的程序方面的公平性所作出的努力。然而，該守則在某些方面仍有改善的地方，因此我們呼籲電訊業作進一步努力，確保合約條文在內容實質上的公平性，使訂立合約的消費者得到有效的保障。無論如何，該守則顯示透過業界成員的合作，制定以公平和合理方式草擬標準格式消費合約的指引，合約的公平性可得以促進。

## 外地經驗

### 英國

26. 在英國，標準格式消費合約中的不公平條款受到《消費合約中不公平條款規例1999》(the Unfair Terms in Consumer Contracts Regulations 1999) 所規管，該規例履行歐盟《有關消費合約中不公平條款的理事會指令》(the Council Directive on Unfair Terms in Consumer Contracts) (93/13/EEC) 在該規例下，一項條款將會被視為不公平，如果它

「違反誠信的要求，導致立約雙方在合約中的權利及責任方面，有着顯著的失衡，從而損害消費者利益。」<sup>7</sup>

27. 該規例附表 2 列出一個用作示範之未盡臚列列表，列舉一些被視為不公平的條款。這樣的列表對供應商草擬消費合約，以及消費者理解何謂不公平條款來說，會有所幫助。
28. 除有關貨品或服務供應的消費合約外，英國上訴法院判定上述歐盟指令和該規例可應用於與土地有關的消費合約。<sup>8</sup>

<sup>7</sup> 消費合約中不公平條款規例 1999，規例 5(1)。

<sup>8</sup> The London Borough of Newham v. Khatun & Others [2004] EWCA Civ 55 at para. 83.

29. 在該規例下，受到不公平條款損害的消費者有權視該條款為沒有約束力的。然而，若有關合約「在沒有該不公平條款的情況下，可以繼續存在」，這合約將依然有效<sup>9</sup>。該規例亦授權公平貿易署 (Office of Fair Trading) 及相關具資格機構，如電訊總監 (Director General of Telecommunications)，處理針對供消費合約普遍使用的不公平條款的投訴；以及接受違法供應商所作出，停止使用不公平條款或修改條款以去除其不公平成份的承諾。另一方面，這些機構亦可依據該規例，向法院申請強制令 (injunction) 或依據《企業法例》(Enterprise Act) 申請強制執行令 (enforcement order)。公平貿易署亦可發放有關該規例在執行方面，如有關承諾及禁制令的資料及建議。再者，有扭曲消費者購買決定效果的不公平條款一般亦會受《保護消費者免受不公平貿易規例 2008》(Consumer Protection from Unfair Trading Regulation 2008) 規管，以及受該規例下的執法行動管制。

## 澳洲

30. 在澳洲，首項禁止標準消費合約內不公平條款的法例，是《維多利亞省的公平貿易法例 1999》之 2B 部分(Part 2B of the Victorian Fair Trading Act 1999)。此條例大致上是基於上述英國規例而制定。於 2009 年 6 月，該法例按《公平貿易及其他法例修訂案 2009》(Fair Trading and Other Acts Amendment 2009) 得以擴展，涵括消費信貸、按揭、擔保及租賃等合約。
31. 2010 年 3 月，澳洲聯邦議會通過一籃子的改革，實施名為《貿易實務修訂 (澳洲消費者法)法例》(Trade Practices Amendment (Australian Consumer Law) Act)之全國性全面保護消費者法律。該法例引進了一個全國性規管不公平條款的機制，涵括有關貨品或服務供應及售賣或土地權益授予的標準格式消費合約。因此，《維多利亞省的公平貿易法例 1999》之 2B 部分則為該法例中有關不公平條款的條文所取代。此外，該法例亦修改《澳洲證券與投資委員會法例》(Australia Securities and Investment Commission Act)，使其規管不公平合約條款的條文，相應地應用於購買金融產品和服務的標準格式消費合約。
32. 在該法例下，上述各類的標準格式消費合約裏的不公平條款是無效的。可是若合約能夠在沒有該不公平條款的情況下，可繼續運作，則這合約仍舊約束立約雙方。一項條款若有以下三個特點，就會被視為不公平：

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<sup>9</sup> 《消費合約中不公平條款規例 1999》，規例 8。

- i) 它會導致立約雙方在合約中的權利及責任方面，有着顯著失衡；
- ii) 對保護從它得到好處的一方之合法權益而言，並非合理地必要；
- iii) 它一旦被應用或依靠，會對合約的另一方構成不利(不論是經濟或其他方面)。<sup>10</sup>

33. 該法例亦規定在判定消費合約中某一項條款是否不公平時，法院可考慮其認為是相關的事情，但同時亦必須考慮以下各事項：-

- i) 條款的透明度；
- ii) 合約的整體。<sup>11</sup>

34. 正如上述英國的規例一樣，該法例包含一個用作標示的不盡臚列的列表，列出各種不公平條款的例子。

### 消費者委員會的立場

35. 消費者委員會(“消委會”)對於標準格式消費合約的立場，已於其 2008 年發表，題為《公平營商，買賣共贏》的報告書內闡述，消委會建議借鏡上述英國之《消費合約中不公平條款規例 1999》，並因應香港及英國在文化和市場狀況方面的差異作出適當的修改，以制訂新的法例。連同報告書內其他建議，這項建議已呈交政府考慮。政府對報告的整體反應是正面的，但制定有關法例需時間頗長，在此期間，對標準格式消費合約內的不公平條款，不應置諸不理，消委會認為供應商可採取積極步驟，履行誠實信用的經營原則，確保在標準消費合約的條款對消費者來說是公平的。

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<sup>10</sup> 附表 1，部分 1, 3(1) 條，《交易慣例修訂（澳洲消費者法）條例》

<sup>11</sup> 3(2)條，同上

## **II. 本報告書之目的**

36. 本報告書旨在鼓勵及協助供應商避免使用不公平合約條款，為此我們在第 III 部列舉例子，指出：
  - i) 本地標準格式消費合約內某些條款之不公平的地方；及
  - ii) 如何透過對適當修改，消除這些不公平之處。
37. 為進一步闡釋，本報告書以美容服務業為例，建議
  - i) 一份草擬標準格式消費合約的守則；及
  - ii) 一份合約範本。
38. 該守則及合約範本分別載於本報告書的附件 1 和附件 2。
39. 消委會相信採用公平的合約條款，可使供應商和消費者較均衡地分擔合約的風險，以及可減低消費者利益遭到侵損的機會。這有助加強消費者對市場的信心，並為商界帶來巨大和長期的利益。相信這可為消費者和營商者創造一個雙贏局面。

### III. 標準格式消費合約中不公平條款的例子

40. 參考上述英國規例的附表 2，消委會從本地不同行業的標準格式消費合約中，選取不公平條款的例子，並按其不公平性質分類列出，至於例子所出自的合約，其類別則在例子下面的方括號內註明。由於個別供應商的行爲並非本報告書要處理的事情，故此例子提及的供應商都沒有具名，而是按情況，以「XX」、「本公司」或「本銀行」等稱號代表。此外，例子附有評論，解釋不公平之處，以及建議更正的方法。

#### 40. 單方面修改合約條款

##### 40.1.1 供應商有權單方面修改合約條款，而合約並沒有說明任何有效的原因

###### 例子

- a) XX 有權隨時增加、取消、更改或以其他內容代替已公佈的節目及內容，亦有權因應其認為合適的情況下隨時增加、更改或減少任何頻道的數量、結構或組合及/或任何內容而無須預先通知客戶。

XX may at anytime, without giving notice to Subscriber, add, cancel, alter or replace advertised programmes and Contents, increase, vary or decrease the number, structure or combination of Channels and/or any Content.

[收費電視服務合約]

- b) All Members, their Nominees and Families shall abide by this Constitution, the Club Rules and any other Rules which XX makes from time to time...XX may amend at any time in whole or in part this Constitution and the Rules. Every amendment to this Constitution and the Rules shall be binding on every Members, their Nominees and Families and as soon as it has been made whether or not XX has given notice to these persons.

[譯文]

所有會員、其名義持有人及家人須受本章程、會規及 XX 不時制定的其他規則的約束...XX 可在任何時間修改本章程及規則之全部或部分。本章程及規則的任何修改，不論是否事前有對所有會員、其名義持有人及家人發出告示，均對他們具約束力。

## [休閒俱樂部會籍合約]

c) 本公司保留更改以上條款及細則之最終決定權，毋須預先通知客戶。

## [電子產品售後維修及保養合約]

### 評論

無可否認，在履行固定期限合約時，一些供應商可能有正當合理的原因，需要修改條款，以迎合其供應合約中條款的改變及適應動態的市場環境。然而，上述條文卻給予供應商任意的權力，讓它除了切合上述需要外，可以任何理由，隨時在不給予消費者任何通知的情況下修改合約，這樣可能出現一個不公平的情況，就是縱然合約的修改使消費者失去立約所需的東西，消費者還得遵行合約。

因此，如果合約給予供應商單方面修改權，應同時讓消費者有合理時間，考慮有關修訂，並應容許消費者當發覺條款的修訂不可接受時，在不會受到懲罰的情況下，終止合約。這樣，一方面可滿足迎合供應合約和市場環境的轉變的實際和正當需要，而另一方面，可防止供應商濫用單方面修改合約的權力，以確保消費者利益不受侵損。

### 建議行動

關於例子(a) 及 (b)

這類條款應該刪除。

或者，它們可重新草擬以便

- 就任何條款的修訂，預先給予消費者合理通知，(如：至少一個月的通知)；及
- 消費者有權以合理通知（如：一個月的通知），終止合約，而不會受到懲罰，若消費者已預先繳交費用，未用的餘額應在合約終止時悉數退回消費者。

關於例子(c)

這條文應予刪除。就算合約得以修改，以致供應商須給予消費者合理通知，並且讓消費者可終止合約而不會受到懲罰，這條文的不公平之處實際上亦無法消除，因為消費者可能沒法找到其他東西，替代該合約所提供的服務及更換配件。

#### **40.1.2 單方面轉換產品的權利**

##### 例子

XX 有權隨時增加、取消、更改或以其他內容代替已公佈的節目及內容，亦有權因應其認為合適的情況下隨時增加、更改或減少任何頻道的數量、結構或組合及/或任何內容而無須預先通知客戶。

XX may at any time, without giving notice to Subscriber, add, cancel, alter or replace advertised programmes and Contents, increase, vary or decrease the number, structure or combination of Channels and/or any Content.

##### [收費電視合約]

###### 評論

有些情況，產品的提供是有賴第三者的供應，而這供應可能是不穩定的，上述的條款可能是回應供應商對這方面的關注。但是，若供應商顯著改變所提供之消費者的產品，消費者變相要接受一些根本在他立約時不是他想要的東西。看來，這條款之目的是把商業不確定性的風險由供應商轉移至消費者，這實在是不公平。

###### 建議行動

這條款可以修改，使消費者在供應商對約定提供的貨品或服務作出重大改變時，可在任何時間內終止合約，而不會受到任何懲罰。

#### **40.1.3 供應商以其認為合適的方法通知合約的變更**

##### 例子

- a) 本銀行保留**隨時修改**本合約條款之權利，包括（但不限於）調整有關之信貸限額、還款條款、利息息率、服務費、年費及其他費用，並**以本銀行認為適當之方式事先通知持卡人**。**唯通知一旦發出，不論持卡人收到與否，均作已知悉論……**而信用卡賬戶之賬戶結餘亦受有關之修訂所約束。於此等修訂生效後，持卡人仍保留或使用其信用卡，將被視為接受及同意此等修訂，除非持卡人能於修訂生效前將其信用卡交回本銀行註銷。[斜體添加]

The Bank reserves the ***right to alter and amend*** the terms and conditions stipulated in this Agreement including but not limited to the applicable credit limit of the account terms of payment, interest rates, services charges, annual fee and other fees ***from time to time with prior notice to the Cardholder in any manner the Bank deems appropriate, to be effective irrespective of whether the Cardholder has actual notice or knowledge thereof.....*** Such changes will apply to all outstanding balances on the account. ***By continuing to use the Card thereafter, the Cardholder shall be deemed to have accepted and agreed to such changes unless the Card is returned to the Bank for cancellation prior to the date such alteration shall have effect.*** [斜體添加]

[信用卡持有人合約]

- b) 本公司可***隨時及不時修訂***本條款及/或作增補新條款。本條款的任何修政及/或增補，經本公司***認為合適的方式***向各戶作出合理通知後，即開始生效。若客戶於修訂生效日當日或其後，繼續保留或使用此服務，此等修訂即對客戶有約束力。[斜體添加]

The Company may ***at any time*** and ***from time to time amend*** the terms or add new terms to this agreement. Any amendments or additions to this agreement shall become effective upon reasonable notice given to the Customer ***in any manner the Company deems appropriate.*** If the Customer continues to retain or use this service, the Customer shall be bound by such amendments or additions. [斜體添加]

[婚宴服務合約]

評論

供應商認為合適或合理的通知方式，客觀來說可能是不合理的。然而在這些條款下，就算合約條款變更的通知是以不合理的方式發出，消費者也被視為已經接納及同意合約的修訂。這樣消費者甚至可能不知道他在合約中的權利及責任已經有所改變，但卻實際上受到這改變的影響。

### 建議行動

這些條款應該刪除。

或者，它們可重新草擬確保消費者

- 就合約的任何變更，獲得以合理方式發出的合理通知（例如至少一個月的書面通知）；及
- 獲得真正的終止合約權；使受到變更影響的消費者可在不被懲罰的情況下終止合約。若消費者已繳付訂金，退回訂金予消費者，在固定期限的合約下，若消費者已支付預繳款項，可在終止合約時取回未用的餘額。

### **40.2 免除或限制消費者利用對供應商可提出的索償，去抵銷欠下供應商債項的法律權利之條款**

#### 例子

- a) (會員)應在付款相關月份之前.....立即支付應付的所有月費或定期費用和會費，而不因**任何原因**抵銷或扣除[法律或衡平法或其他]。[斜體添加]

[健身中心會籍協議]

- b) 所有付款均不獲退還及不可轉讓。客戶所繳付的款項，均須不含任何扣款或抵銷。XX保留運用任何賬戶結餘抵銷客戶所欠集團公司任何或所有欠付款的權利。

All payment made shall be non-refundable and non-transferable. All payment to be made shall be without any deduction or set-off. XX reserves the right to use any account balance to set-off against any or all payment due by the Subscriber to the Group Companies.

[電訊服務合約]

### 評論

在例子(a) 裏，「任何原因」可包括有正當理由要求供應商賠償；在這種情況下免除消費者作出抵銷的法律權利是不公平的。

例子(b)的情況似乎更差，卻容許因雙方在抵銷方面並沒有相互的權利。一方面消費者作出抵銷的權利被免除，而另一方面供應商以消費者賬戶中的餘額，抵銷其欠下它或它任何附屬或相聯公司的款項。

### 建議行動

這些條款應予以刪除。

## **40.3 倘論任何情況，當消費者提早取消合約，供應商均可獲「賠償」的權利**

### 例子

- a) 申請表中訂明的使用期是用戶訂購 XX 服務的最短使用期（「承諾使用期」）。  
你不可於「承諾使用期」完結前**提前終止或更改服務計劃**。如欲終止服務或更改服務計劃，必須以指定的終止服務通知表格，給予 XX 不少於三十天的書面通知。如你的要求被接納，服務將於三十天書面通知期後終止；XX 將於你的帳戶內**一次過收取相等於「承諾使用期」餘下月份之所有服務費作為終止服務費**（作為算定損害賠償）。你預繳的收費或服務費(如有者)將用作繳付全部或部份該終止服務費，而不會被退還或轉讓予他人。[斜體添加]

Subscription for XX service must be at least for the period set forth in the application form ("Commitment Period"). You are **not allowed to early terminate it or change your service plan before the end of the Commitment Period.** If you elect to do so, you must give us not less than 30 days prior notice in writing (in our prescribed form) for early termination. If accepted, the early termination will take effect upon the expiry of the 30 days' notice period; and we shall debit to your account **a service termination fee (as liquidated damages) equivalent to the total subscription fees payable for the remaining Commitment Period.** We are entitled to retain your advance payment (if any) to settle the said service termination fee. [斜體添加]

## [收費電視服務合約]

### 評論

上述的條文為提早終止合約設置障礙，有意提早終止合約的消費者須向供應商，以指定表格給予不少於三十天的預先通知，似乎實際上這只是通知供應商，消費者要求提早終止合約，因為合約終止與否，取決於供應商是否接納這要求。由此觀之，因供應商之嚴重誤失而受損的消費者，亦未必能夠得到提早終止合約的許可，因此，這條款是不公平和不合理的。就算供應商接納提早終止合約的要求，消費者還須繳交相等於「承諾使用期」餘下月份之所有服務費，作為「終止服務費」。即是說，無論如何，消費者都須支付「承諾使用期」全期費用。這樣，就算消費者不滿供應商的過失，亦會無奈地繼續履行合約。

在供應商沒有過失的情況下，它可能有正當理由向消費者追討因提早解約而導致的損失，但是，「終止服務費」可能超出它因消費者提早解約而蒙受的合理損失，從而構成對消費者的懲罰，法院是不會命令消費者償付這懲罰性款項的。

另一方面，在提出終止日期的 30 天前，必須以指定格式書面通知，以申請提早終止合約的規定，這些要求是不必要和不合理的。

### 建議行動

上述條款應該按以下意思重新草擬：

- (一) 它只應用於提早取消合約是由消費者違約而造成的情況；
- (二) 賠償不應超過供應商因客戶提早取消合約而合理地蒙受之損失。

## **40.4 不合理的免責條款**

### **40.4.1 過於廣泛及概括的免責條款**

#### 例子

- a) 客戶授權 XX 處理有關攜帶其原有號碼至 XX 之申請。客戶知悉及同意 XX 勿須就客戶或任何第三者因本服務及/或攜帶原有號碼而導致之任何直接及/或間接損失而承擔合約、侵權及/或其他責任。

Customer authorizes XX to process the application for porting the Existing Number to XX. Customer acknowledges and agrees that XX excludes all liability to the Customer and any third party arising out of or in connection with the Service and/or number porting whether in contract, tort and/or otherwise and including direct and/or indirect loss incurred by the Customer or any third party.

[電訊服務合約]

- b) 無論屬於侵權行爲或合約或其他事件而引致你或第三者蒙受以下的任何損失或損毀，XX、XX 的僱員、代理人、承包商及其他第三方供應商(包括但不限於資訊提供者)概不對你或任何人士承擔責任：
- i) 直接或間接，隨後發生或偶然發生，可預見或不可見，包括但不限於任何財務的損失或商業、利潤、儲蓄、收入、資料、商譽或任何設備的損失.....

XX, XX's employees, sub-contractors and other third party suppliers including without limitation any information provider shall not be liable to you or any third party:

- (i) whether in contract, tort or otherwise for any loss or damage incurred by you or any third party, whether direct or indirect, consequential or contingent, and whether foreseeable or not, including without limitation any financial loss or loss of business, profits, savings, revenue, data, goodwill or use of any equipment. ....

[電訊服務合約]

## 評論

以上列舉的免責條款過於廣泛，它們試圖免除供應商因任何理由或在任何情況下產生的法律責任，這很有可能違反《管制免責條款條例》(第 71 章) 第 3 條 所訂的合理標準，並因不公平和不合理而判定為無效。

譬如，例子(a) 會涵蓋以下供應商犯有明顯過失的情況。

一名消費者授權新簽約的電訊服務供應商，把他的手機號碼由前供應商轉往這供應商，及取消與前供應商之間的合約。可是，當新服務啓用後，他仍舊收到前供應商的賬單。原因是新供應商未有代其取消舊有合約所致。

## 建議行動

這等條款應予以刪除。

或者，可予以修改使之符合《管制免責條款條例》(第 71 章) 第 3 條所訂的合理標準。根據該條文，當考慮立約各方在立約時所知悉、預料或理應知悉或理應預料到的情況後，該條款是公平合理的，則該條款才符合合理標準的要求<sup>12</sup>。

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<sup>12</sup> Green Park Properties Ltd v Dorku Ltd [2001] 3 HKLRD 760; [2002] 1 HKC 121(CFA) per Litton NPJ, (per curiam) 第 27 段.

#### **40.4.2 卸除或限制供應商因其行爲或疏忽，導致消費者受傷所引起的法律責任的條款**

##### 例子

- a) (會員)並同意 XX、其高級人員、董事、員工、志願者、代理人和獨立訂約人，在法律容許的限度內，將不對任何創傷負責，包括但不限於，無論是否與鍛鍊有關，因 XX 或代表 XX 的任何人或使用會所設施的任何人之行為或疏忽而造成的個人、身體或精神創傷……。[斜體添加]

[健身中心會籍協議]

- b) XX or its management or its agent shall not, nor shall any of its employees or agents be held liable for any **personal injury** or damage to property or loss of property, whether arising out of my attendance at XX, my use of the facilities thereof or as result of **negligence** on the part of XX, its management, its employees or agents or otherwise. [斜體添加]

[譯文]

XX 或其管理層或其代理人毋須，而其任何的僱員或代理人亦毋須為任何人身傷害或財物損害承擔責任，無論這些人身傷害或財物損害是因本人身處 XX、使用該處之設備或因 XX、其管理層、僱員、代理人或其他人的疏忽所造成。[斜體添加]

[美容及纖體合約]

## 評論

根據《管制免責條款條例》(第 71 章) 第 7 條，因疏忽而引致死亡或人身傷害的法律責任是不可藉合約條款卸除或限制的。

例子(a) 聲稱供應商”**在法律容許的限度內，將不對任何創傷負責”** 暗示在法律上這項有關人身傷害的責任是在某些情況下卸除或限制的。可是，實際上並非如此，按上面所述，在該條例下，這類免責條款是在任何情況下都是無效的。然而，因供應商的疏忽而受傷的消費者可能會被這條款誤導，以為自己受其約束，無權追討賠償。

例子(b) 更糟，它明目張膽地違反上述條例第 7 條，因為它明示地卸除供應商、其僱員或代理人對消費者因其疏忽，而導致傷亡的法律責任。至於財物受損部分，供應商只能在條文符合《管制免責條款條例》(第 71 章) 第 3 條所訂的合理標準的情況下，其疏忽責任才能得以卸除或限制。

## 建議行動

這條款應予刪除。至於例子(b)，除了刪除有關人身傷害部分外，供應商應檢討有關財物損害部分，有需要時應修改，以符合《管制免責條款條例》(第 71 章) 第 3 條所訂的合理標準。

## **40.5 非必要及不合理的終止合約手續**

### 例子

- a) 客戶如欲終止享用任何 XX 服務，必須於服務承諾使用期完結前兩個月內，預先給予我們不少於三十天的書面通知。用**戶必須使用指定的終止通知表格方為有效，而終止服務將於下一個結帳日開始生效**。[斜體添加]

A subscriber may cancel his subscription of any item of XX service by giving not less than 30 days written notice to XX, and the service.... Any notice of termination, to be effective, **must be given in the prescribed form and must be served within the last two months of the Commitment Period.** [斜體添加]

[收費電視合約]

- b) ...客戶如欲終止該健身卡及有關轉賬授權，必須在最少一個月前親自前往公司任何一間中心辦理通知手續，...[斜體添加]

...If the Customer wishes to terminate the Fitness Card and the credit card authorization hereof, he/she must give not less than one month's notice to the Company by **attending in person** at any of the centres for the necessary procedures ...[斜體添加]

[健身中心會員合約]

#### 評論

合約終止通知祇不過是體現消費者終止合約的意圖，所以在例子(a) 和(b) 中，客戶須填寫指定的終止通知表格或親身前往辦理，方可取消合約的手續，實令人大惑不解。這些手續實無必要，而且在某些情況下是不切實際和不合理的；例如，對一位殘障消費者來說，親身前往辦理的手續可能是一件十分困難的事情。

例子(a)說明供應商如何在消費者終止合約方面設置障礙。在這條款下，合約期最後兩個月前才可終止合約的限制、加上 30 天指定書面通知，以及服務終止將於下一個結賬日開始生效的規定，可能違反消費者的意願，把合約終止拖延至合約期最後一刻，這是不公平和不合理。

#### 建議行動

這些手續是無必要、不合理及不公平，應該棄而不用。

### **40.6 供應商對合約引起的爭議保留最終決定權**

#### 例子

- a) 任何有關服務條款爭論，本公司保留最終解釋及決定權。

The Company has the final decision in relation to all disputes about the interpretation of the terms and conditions of the service agreement between the Company and member.

## [美容服務合約]

### 評論

這樣的條款授權供應商決定自己是否違約，及按其意願去解釋合約。由於供應商既是爭議的一方，同時亦是裁判者，因此公正是不能確保的。其實，任何一方應有權把爭議交由法院處理。

### 建議行動

這條款應被刪除。

## **40.7 全部協議條款**

### 例子

- a) 本協議代表 XX 與客戶之間與該服務有關的全部協議及諒解，並代替與該服務有關的一切先前安排、承諾、條款、細則、責任或諒解，不論口頭或書面性質，亦不論明確或隱含者。

This Agreement constitutes the entire agreement and understanding between the parties and supersedes all prior arrangements or understandings, whether oral or written, between the parties relating to the subject matter hereof.

## [電訊服務合約]

- b) 本「協議書」與「條款與條件」、「聲明」及「規則與指引」一起構成您與 XX 之間有關「課程」購買的完整協議，並取代所有先前的磋商、商談及協議。您確認 XX 或任何其他人未做出本「協議書」中未述及的、您倚賴的任何口頭或書面形式的表述或承諾。以手寫形式變更的本「協議書」中的條約不具有效力。

This Agreement, the Terms and Conditions, the Declaration and the Rules and Guidance altogether constitute the entire agreement between you and

XX regarding the purchase of the “Course” and supersede all prior arrangements or understandings, whether oral or written, between you and XX. You confirm hereby that XX Fitness or any other person has not made any verbal or written representation or undertaking which is not mentioned in this Agreement but relied upon by you. Any variation of this Agreement by handwriting is invalid.

[健身中心會籍協議]

#### 評論

這類條款稱為「全部協議條款」。它容許供應商引用它來卸除其推銷員在推銷說辭中所作的陳述或保證的法律責任。明顯地，這是有違誠實信用的原則。

這類條款通常會隱藏在標準合約微細的字裏行間內；由於是千篇一律的樣板條文，它並不如合約的其他條款般受到注視，消費者也很少會留意到它。但是，由於這條款在某些標準格式消費合約中是很常見，消費者未必能夠以沒有得到合理知會為理由，辯說該條款無效。

話雖如此，標準消費合約的「全部協議條款」仍可被質疑。如消費者可證明合約是不合情理或他們曾受不公平的銷售手法影響，則法院可根據《不合情理合約條例》(第 458 章)，把該條款撤銷。此外，除非該條款符合《管制免責條款條例》(第 71 章) 第 3 條所訂的合理標準，否則「全部協議條款」是不能卸除或限制立約前作出失實陳述的責任的。

該條款亦不能限制立約方使用外在證據，去確定及澄清合約內明示條款的意思<sup>13</sup>。「全部協議條款」的遣詞用語未必能恰當地排除立約前陳述的效應，即使它免除因附屬合約或保證所引起的申索<sup>14</sup>。況且，立約方有放棄引用該條款的權利<sup>15</sup>。

我們亦留意到英國的公平貿易部(Office of Fair Trading)指稱根據他們的經驗，「全部協議條款」潛在不公平性，建議商人考慮是否可在營商時不使用它<sup>16</sup>。

把「全部協議條款」納入標準消費合約中，並不就等如自動把標準消費合約視為買賣雙方權利及義務的完整及獨一的表述。相反，這條款使本應是簡單易明的消費合約變得複雜。無論如何，認為合約前的陳述為附屬保證、失實陳述，或甚至為合約條款的消費者，都會對完整協議條款提出異議。因此，我們建議供應商應

<sup>13</sup> ProForce Recruit Ltd v Rugby Group Ltd [2006] EWCA Civ 69, 40-41 段 per Mummery LJ, 第 59 段 per Arden LJ.

<sup>14</sup> Chitty on Contracts, 第 29 版, 12-104 段

<sup>15</sup> 同上., 引用 SAM Business Systems Ltd v Hedley & Co [2002] EWHC (TCC) 2733, 1 All E.R. (Comm) 465.

<sup>16</sup> 同上, 923 頁, 15-083 段

把這條款從標準格式消費合約中剔除。

#### 建議行動

避免使用這條款。

### **40.8 合約取消費或罰款**

#### 例子

“Upon the signing of this Agreement, the Purchaser is granted a right of cooling off period to terminate this Agreement at any time up until the midnight of the third (3<sup>rd</sup>) day from the day which the Purchaser signs this Agreement. In order to terminate, a signed cancellation request form must be delivered in person and must be received by XX. The Purchaser’s right to the amount for refund (if any) is ***subject to a deduction of Termination Fee equivalent to Sixty (60) percent of the total amount due.***” [斜體添加]

#### [譯文]

“在簽署合約後，買方有權在簽約日後直至第三天午夜前的冷靜期內取銷合約。為取銷合約，買方須把簽署好的要求取銷合約表格親身遞交，並由 XX 接收。買方獲得退款的權利(若有的話)，是須受**扣除等同應收總額百分之六十(60)的取銷費**的條件限制。” [斜體添加]

#### [共享時光合約]

#### 評論

這實際上並不是一般理解的冷靜期條款。在取消合約時消費者須繳付一大筆費用。明顯地，「取消費」實際是罰款，遠超供應商因取消合約而帶來的成本及損失。

#### 建議行動

把條款的意思修改為供應商只有權獲得相當於因終止合約而合理地產生的損失之賠償。

## 40.9 不予退款

### 例子

- a) 服務療程一經賣出後不能退款及轉讓

[織體美容合約]

- b) 此合約療程是雙方同意下簽署作實，合約即時生效，所以客人在任何情況下都不能退款

[織體美容合約]

### 評論

這條款可於預繳的消費合約中找到。它可誤導消費者，使他們以為自己在任何情況下皆受合約約束。在供應商犯下嚴重過失、或沒有履行合約；或在消費者沒有過錯，未及享用合約利益時，卻已被終止合約等情況下，消費者在這方面的誤解會令他們失去追求其法律權利的意欲。同樣地，這條款可不公平地讓供應商逃避或限制履行合約的義務。而且，它能令供應商在消費者提前終止合約時，從他們身上獲取不公平的利益；因為不論供應商因合約取消所帶來的損失是多少，消費者將失去全部的預繳費用。

最重要者，在法律上這類條款是不能強制執行的。在 *Shum Kit Ching v Caesar Beauty Centre Ltd.* [2003]3 HKC 235 中，法庭審理一份健康俱樂部會籍合約中一條類似的條款。該條款訂明若訂購的美容療程在任何情況下完結或終止，供應商毋須退還任何消費者經已繳付的款項。法庭裁定消費者預繳的款項明顯地是全數繳付訂購的服務，而不是訂金。法律已經確定，就算在一方違約，以致合約終止的情況下，受損一方亦不可強制執行沒收款項的條款，除非有關款項是訂金，而其補救方法應是向對方追討賠償。此外，這不退已收款項的條款，絕不等如對供應商蒙受損失的真正估量，而實際上是一項懲罰，因此這條款被判定為不能強制執行。

### 建議行動

這條款應被刪除。

## **40.10 不合理地限制消費者的法律權益**

### 例子

- a) 於甲方 (供應者) 根據合約中條例而終止合約後，乙方 (消費者) 不能向任何人士，包括傳媒、網上討論區等，提及甲方其服務內容或商業事務，否則甲方有權提出法律起訴。

[纖體美容合約]

- b) 乙方必須充分理解在減肥過程中包含一定不可預測的風險因素，這風險由乙方同意獨立承擔。如乙方在生理或心理上因此受到影響，乙方不能向甲方(作出任何索償行爲，亦不可向任何政府、法院、半官方機構或各大傳媒作出正式或非正式的投訴。

[纖體美容合約]

### 評論

#### 例子(a)

這條款限制的範圍太廣，它剝奪了消費者的言論自由，並遠超保護供應商聲譽及商業秘密等方面的合理權益之需要。很有可能這條款會被視作不合情理，因而無效。然而，消費者可能會被誤導，以為自己是不能對供應商的服務作出公正的評論，甚至以為不能向消委會作出投訴。

#### 例子(b)

這條款看來是企圖卸除因疏忽致人身傷害的責任，根據《管制免責條款條例》第 7 條，這條款是無效的。除此以外，這條款亦因不合情理而無效，因為它否定消費者向法院、政府或公共機構尋求補償，以及經傳媒表達不滿的合法權利。

### 建議

這些條款應被刪除。

#### 40.11 自動續約

##### 例子

- a) 客戶若選擇以一次付款或分期付款計劃繳費，該健身卡之有效期將於有關計劃即將終止時〈除按本協議所述方式終止自動轉賬授權外〉**自動延續**。XX有權透過其信用卡戶口以自動轉賬扣取該健身卡之月費，此外，客戶亦必須確保有關自動轉賬繼續有效。[斜體添加]

For the Customer who elects to pay the fee by one time payment or by installment plan, immediately before the expiry date of such plan (unless otherwise he/she terminates the auto-pay authorization in the manner as prescribed hereof), the Fitness Card **will automatically be extended** and the Customer shall continue to procure the auto-pay, and XX shall also be entitled to continue to debit from the relevant credit card account into XX's account for the monthly fees of the Fitness Card. [斜體添加]

[健身會會籍合約]

- b) 「承諾使用期」完結後，XX 會**按當時相同之基本服務收費表自動按月續期**，用戶如欲終止服務或更改服務或付款計劃，須以指定的終止服務通知表格，給予 XX 不少於 30 天的書面通知，...。[斜體添加]

Upon the expiry of the Commitment Period, your subscription for the Services will be **automatically renewed from month to month at the then prevailing bundled rate** for the Services unless we receive from you not less than 30 days' notice (in our prescribed form) for service termination or change of service plan or payment plan.... [斜體添加]

[收費電視服務合約]

### 評論

這類條款普遍見於定期合約內，它們是不公平的，因為合約內沒有其他條款要求供應商在合約期完結前的合理時間內，向消費者提供清晰顯明的書面提示通知。

在例子(b) 的情況中，續約後的收費有可能比原來合約所訂的收費為高。若然如此，消費者會為相同服務而多付金錢，而這些額外收費，可能超出為合約續期供應商所花費的成本，以及因合約續期消費者所得到的利益。

### 建議行動

這類條款應予剔除。

另一方面，合約應訂明供應商須在認購期完結前的合理時間內（例如：至少在最後一天前的 30 天，但不得早於 60 天）書面通知消費者期限快將完結。通知書應具體說明服務是否在期限完結後繼續，若會繼續，須支付的費用；以及終止服務的安排（須避免對消費者造成不便）。

通知應以顯明及清晰的方式表達，並以合約內明確規定的方式送達消費者，如郵遞，或載於月結單首頁上。供應商應真心誠意的提醒消費者考慮是否需要續約。

為避免給消費者造成不便，在合約期滿時，合約可以按月延續，直至消費者主動終止或續約。而以原來的收費支付延長服務，應是一個公平的安排。

## **40.12 閱讀及明白聲明**

### 例子

The purchaser(s) hereby declare(s) by his/her/their signature(s) below to be bound by the TERMS & CONDITIONS as stated on the reverse of this document and further confirm(s) that he/she/they have thoroughly considered the TERMS & CONDITIONS and is/are satisfied that he/she/they has/ have fully understood the said conditions and that he/she/they has/have no outstanding queries.

[Time sharing contract]

## [譯文]

買方現聲明，基於他 / 她 / 他們以下的簽署，將受本文件背頁的條款及條件約束，並確認他/她/他們已仔細考慮過該些條款及條件，並完全明白，沒有任何疑問。

## [共享時光合約]

### 評論

標準格式消費合約可能包含一項聲明，聲稱消費者已閱讀及明白該合約。不論事實上消費者是否曾經閱讀及明白該合約，銷售人員都要求消費者簽署該聲明，這實非罕見。若果合約是冗長及複雜的，在簽署前，消費者未必能夠把條款一一閱讀，即使有這樣做，他們也未必能夠明白。所以，出現不公平情況的風險尤其明顯。而且，立約後當消費者發現合約中有不公平的條款時，此類聲明可能會誤導消費者，使他以為無論如何他須接受這條款，而無權循法律或其他途徑尋求公道。

### 建議行動

對於冗長及複雜的消費合約，這條款應予刪除。至於簡短的消費合約，這樣的聲明應以一段清晰及顯明的警示代替，說明在簽署合約前消費者應閱讀及理解條文。這段文字應放在各項條款之前，提醒消費者在簽約前閱讀條款，以及當有需要時索取進一步資料或澄清疑問。

## **IV. 指引及合約範本 - 美容業**

### **目的**

- 41.1 如上所述，為闡述如何避免在消費合約中出現不公平的地方，本報告包括一份指引，及一份合約範本。本會選取美容業作為研究對象，展示草擬指引和合約範本如何在業界中應用。
- 41.2 本會以美容業作為草擬指引及合約範本的對象，並不代表在這行業中出現合約不公平的問題或不公平營商手法，比其他行業嚴重。
- 41.3 本會不時與美容業界交換意見，以透過其自我規管提升對消費者的保護。於二〇〇六年，本會與業界合作完成《美容業營商實務守則》的制定，該守則廣受業界支持，它涵括服務及產品質素、宣傳及推銷手法、預先繳費營運模式的運作、服務承諾的制定及消費者投訴的處理。訂制該守則時，本會與美容業同意日後有需要時會加添其他指引。
- 41.4 進一步發展這合作關係，本會藉此機會協助美容業；向其提供草擬標準消費合約的指引及合約範本。

### **使用公平標準格式消費合約的好處**

- 42 採用公平、清楚、易明的標準格式消費合約象徵一項主動積極的步驟，去解決因消費者與供應商之間議價能力不平衡而衍生的問題，以及合約是建基於真誠的商議而訂定。這有助減少或防止由合約條款引起的爭議，例如有關收費的糾紛。公平的消費合約，若廣泛的為業界採用，加上正當的、以公平態度對待消費者的營商手法，可加強消費者對業界的信心，使業務更為興旺。所以，本會鼓勵業界採用以公平方式和誠實信用的原則草擬的標準格式消費合約。

### **草擬指引及合約範本**

- 43.1 該草擬指引及合約範本將說明在立約過程中，以及在合約裏具體權利和責任的分配兩方面，公平和誠信的原則是如何得以維護，並公平地平衡立約雙方的利益。

## 冷靜期

- 43.2 特別一提的是該兩份文件內有關設立冷靜期的要求。不少消費者投訴供應商沒有給予充分時間，讓他們在立約前考慮一些影響其購買決定的問題，如銷售人員在有關美容療程及/或產品性質及效能的描述之真確性，自己真正的需要及負擔能力等。亦有投訴指合約是因不公平的手法而促成，此等手法包括傳遞虛假或欺騙性的資訊、施以不當壓力和進行滋擾。冷靜期的條文可減少消費者對可能遭到不當營商手法對待的憂慮，因為即使合約在短促的時間內或因不公平或不恰當的手法訂立，消費者亦可藉此條文重新考慮及在毋須負上任何責任下取消合約。
- 43.3 因此，冷靜期是保護消費者的有效方法，其應用不應規限在美容業界裏。有鑑於訂定涉及長期財務承擔的消費者或相當款額的合約之消費者，應當有合理充足的時間，在不受供應商的影響下，去作審慎的購買決定；本會認為固定期限合約和預繳合約均應採用冷靜期，因為它們對消費者有上述的財務影響，而這影響對大部分的消費者而言，不可謂不重要。有些營商者認為應用冷靜期在與消費者的交易裏是一件頗複雜的事，但本會相信透過遵從公平和誠信的原則，清晰地羅列雙方的權利和責任，問題是可克服的。
- 43.4 我們同意不能採用一成不變的規則去決定何謂可供普遍應用合適的冷靜期。在平衡到消費者權益保障及營商效率兩方面，我們建議冷靜期應為七個工作天。
- 43.5 在冷靜期內取消合約的消費者，會期望可無條件地全數收回已付款項，但是供應商在消費者取消合約時，已有一些實質的相關開銷，故此要求消費者支付一項基於這開銷的真誠估量而釐訂的行政費用，是合理的。我們亦建議應為這行政費用應設上限，即不超過合約價格的 7% 或港幣 1,000 元，以較低者為準。我們希望此等建議可普遍實行，但亦非一成不變，因為每個個案之合約條文及價格都有所不同。指引(附件一) 的第 8.3 段所列出的收費表，可供參考。
- 43.6 考慮到消費者可能在冷靜期內希望使用根據合約提供的服務或產品，我們建議若消費者在冷靜期內使用這些服務或產品，應為已使用的服務或產品支付費用，數額應基於消費者實際使用過的服務或產品計算或以消費者在冷靜期內可合理地使用的服務或產品的真誠估值計算，以較小的為準，以防止消費者遭慫恿在冷靜期內大量使用超過實際所需的服務或產品。

## 消費者的終止合約權利

43.7 正如先前第 40.9 段所述，不能退款 / 不能取消合約之條款是誤導的，並會妨礙消費者在適當情況下，例如當供應商嚴重違反合約時，行使其法律權利。相反，一份公平的合約應明確地訂明消費者有權利，在合理情況下終止合約。類近條款見附載合約範本第三條（附件二）。

## 考慮業界的特殊情況

44 在草擬指引及合約範本時，我們考慮了美容服務合約的特殊情況，特別是：

- i) 服務以一籃子的形式出售，可能包含各種不同療程及相關產品會在接受療程時或在家中時使用；
- ii) 服務在一段時間內提供；及
- iii) 消費者為服務預繳費用。

## V. 結論

### 社會層面

- 45.1 現時不公平合約條款缺乏有效的法例或司法管控，這會令營商者利用其壓倒性的議價能力優勢，把超出合理地保護其正當利益的條文加諸消費者。沒克制的營商者會嘗試把合約條款草擬得超越自我保護的需要。不公平條款的廣泛使用，加上消費者因不公平條款的使用而蒙受損失的不快經驗，會削弱消費信心和壓抑消費。相反地，如消費者知道他們要訂立的合約條款是公平的，他們在消費時會感到有信心和安心，這有助促進市場的銷售活動。此外，以公平方式和按真誠原則草擬的消費合約是建立一個公平市場的先決條件，這樣的市場能為經濟的蓬勃發展提供良好基礎，而最終消費者及商人可同樣得益。
- 45.2 一份標準格式消費合約在內容及形式上也須公平。公平的合約應該是易讀易明，除了使用淺白及常用的語言，一份標準格式消費合約應該是簡短及不複雜的。應當避免深奧、抽象、累贅的措辭。它們對保障商業利益並無幫助；相反，它們會令到合約不必要地複雜，增加解決紛爭的成本及風險。
- 45.3 在消費合約中採用公平條款是營商者恪守誠信原則的表現，這有助營商者與消費者建立一個融洽關係。當然，要達致公平和諧的市場，這目標須要由公平的營商手法去達成。

### 當前的業界利益

- 46 就業界直接可得的利益來說，避免使用不公平條款可排除營商者因採用這些條款而承受的成本及風險。從業界的角度看，這是百利而無一害的。

### 法律風險

- 47 正如本報告所示，不公平條款可能是不合情理，或者可能是一項懲罰性條款、或不合理地限制或卸除法律責任的條款，是不能強制執行的。這樣的條款可被消費者投訴，甚至以法律挑戰，為解決糾紛或對訴訟申索進行答辯，營商者可能須要付出意想不到的代價。

## **營運風險**

**48** 為應付投訴或訴訟，供應商須要投入額外時間和資源，這更可能妨礙業務的正常運作。

## **聲譽風險**

**49.1** 消費合約中存在不公平條款，是供應商未有本着誠實信用行事，公平地對待消費者的證據。消費者會對營商者失去信任，這將對其商譽構成極大的損害。

**49.2** 公平的消費合約，對消費者、營商者及社會，能帶來最佳的利益。消委會希望透過本報告及附錄的指引及合約範本，給業界作為基礎，去檢討其現時使用的消費合約，確保在交易中完全遵守公平、誠實信用的原則，公平地對待消費者。

## 美容業標準格式消費合約草擬指引

### 1. 簡介

- 1.1 本指引乃消費者委員會經諮詢美容業界後草擬，以供業界在制定標準格式消費合約時使用。
- 1.2 這裏所指的美容業界（「業界」）包括提供美容護理及身形塑造服務，例如纖體、皮膚護理，指甲及足部護理，及脫毛服務的公司或個人（「供應商」）。
- 1.3 一些供應商在提供服務或產品時，習慣依賴口頭協議，即使該協議涉及預先繳費或將會在一段時間內持續履行。由於沒有書面合約作為依據，日後雙方將難以確定到底曾經確切的同意了什麼。這不確定性，可能使雙方在合約履行方面引致爭拗。為免爭議，我們鼓勵供應商在合適情況下，把它們與客戶的協議以書面合約形式訂定。
- 1.4 當採用書面合約時，業界普遍使用標準格式合約，這是因為它提供了既經濟又方便的途徑，讓買賣雙方毋須就每宗交易，聘用昂貴的法律服務去草擬合約。可是，在這些標準合約當中，不難找到對消費者不公平的條款。因此，消費者委員會認為有需要就標準合約的草擬提供一套奉行真誠及公平原則的實務指引，以協助業界建立及維持消費者的信心。

### 2. 指引的目的

- 2.1 指引的目的在於協助業界確保所使用的標準格式合約是公平及清晰的，以及業界成員以坦率、誠實及公平的態度對待消費者。
- 2.2 我們鼓勵業界成員依照本指引草擬標準合約，以確保交易是在公平及資訊透明的情況下進行。
- 2.3 業界廣泛採用本指引將改善其整體的服務質素及商業操守，從而加強消費者信心及促進業界的發展。
- 2.4 本指引並不旨在鉅細無遺，它只涵蓋對標準格式合約內不公平條款之主要關注事項。供應商應按照所提供的產品及服務的獨特性，借助本指引，並遵從誠信公平的原則去草擬合約。

### **3. 原則**

**3.1 本指引旨在彰顯以下消費者權益：**

- 知情權；
- 選擇權；
- 得到保障，免受不利消費者，但同時對保障營商者合法正當的利益毫無合理需要的合約條款所損害。

### **4. 何為不公平條款**

**4.1 不公平條款是指既不利於立約一方，又對保障立約另一方合法正當的利益毫無合理需要的合約條款。應用在消費者上，這些條款違反誠信的要求，引致雙方在合約下的權利和責任，出現不利於消費者的顯著失衡情況。**

### **5. 避免採用不公平條款**

#### **5.1 概括及模糊條款**

**5.1.1 草擬條款不應概括或模糊，以致對消費者不利，例如有條款聲稱在法律容許下卸除一切供應商的責任，一般欠缺法律知識的消費者難以清楚在特定的情況下，哪些責任可以或不可以卸除，及在該情況下其追訴權利是否受到限制。**

#### **5.2 免責及限責條款**

**5.2.1 某些意圖卸除或限制供應商因法律而產生的責任之條款或聲明，其實是無效及不能執行的。例如(一) 卸除由疏忽引致人身傷亡的法律責任<sup>17</sup>；及(二) 卸除因違反《服務供應(隱含條款)條例》下的隱含條款(例如；須以合理的謹慎及技術提供服務)所引起的法律責任<sup>18</sup>等的免責聲明。**

**5.2.2 雖然把這些免責條款或聲明包括在合約內是毫無意義的，但卻不能說由於它們無效及不能執行，就不會對消費者造成損害。消費者可能被它們誤導，以致相信供應商的法律責任已經卸除或限制，因而放棄追討賠償的機會。**

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<sup>17</sup> 根據《管制免責條款條例》第 7(1)條，該免責條款在法律上是無效的。

<sup>18</sup> 根據《服務供應(隱含條款)條例》8(1) 條，與消費者立約的一方不能限制或卸除該條例下隱含條款所引起的法律責任。

### 5.3 排除追訴權利

5.3.1 消費者向違約供應商作出申索是其基本權利，如排除此權利的合約條款，一般都被視作不公平，故此應避免採用。

### 5.4 「不作退款」條款

5.4.1 訂明消費者在任何情況下都無權獲得退款的條款是不公平的，應避免採用。消費者可能給這條款誤導，以為自己無論如何都會受合約約束；就算供應商犯了嚴重過失，或者在消費者還未及享受合約帶來的主要利益時，合約已在其沒犯過失的情況下被中止或結束，此外，消費者亦可能會給這些條款阻嚇，打消提出法律申索的念頭。因此，這些條款可能會使供應商輕視違反合約的後果和風險。

5.4.2 在某些情況下，消費者或許違約。可是，若果供應商不論自己損失多寡，沒收消費者的所有未用預繳款項餘額，這樣的做法是不公平的。其實，當「不作退款」條款要求違約消費者償付供應商多於真誠預計的損失時，該條款在普通法上是無效的，因它會被視為是一項懲罰性而不是補償性的條款。因此，該條款不單止是不公平，並且是無效的。此外，須注意的是，供應商有亦責任去採取合理步驟，以減輕因消費者違約而導致的損失。

### 5.5 其他懲罰條款

5.5.1 由此可見，任何要求違約消費者償付多於真誠預計下，供應商可能蒙受之損失的條款，一般來說都會被視為是懲罰性，在法律上是無效的。

5.5.2 這些條款會使消費者錯誤理解其須負上責任的限度，故此應避免採用。

### 5.6 排除一切取消合約的可能性之條款

5.6.1 明示或隱含地規定消費者在任何情況下均不能取消合約的條款，是誤導和不公平的。它剝奪了消費者在合約法下的基本權利。

5.6.2 合約應明確地規定消費者在正當合理的情況下可以取消合約，這些情況包括：消費者身故，患病或殘障，以致履行合約已是不可能或不可行的事；以及供應商重覆及持續地沒有履行合約上的責任。

## 5.7 不受限制的單方面更改條款

- 5.7.1 一項條款若授權供應商可在無需合理正當的理由下，單方面更改合約或提供一些與雙方協定不同的東西，這條款是不公平的，應避免採用。
- 5.7.2 任何有關合約的重要更改，應先取得消費者的真正同意。倘若在合約上訂明供應商有權單方面更改合約，就必須同時給予消費者，在不接受更改時，取消合約並獲退還未用預繳款項餘額的權利。

## 5.8 供應商之最終決定權

- 5.8.1 紿予供應商就任何合約爭議有最終決定權或就合約有最終解釋權的條款都是不公平的，因為它意圖剝奪消費者將有關問題交予法庭裁決的權利。
- 5.8.2 在這條款下，供應商既是裁決者又是爭議的一方，所以根本不能保證供應商以不偏不倚的態度去處理有關問題。
- 5.8.3 供應商應避免採用這種條款。

## 5.9 「全部協議條款」

- 5.9.1 標準合約通常都包含一些條款訂明該合約構成合約的全部，並取代立約前的一切口頭表述，陳述或承諾。然而，誠信的核心價值在於立約雙方都會兌現承諾。這些條款免除或減少供應商恪守其代理所作承諾之責任，明顯地有違誠信的原則。
- 5.9.2 「全部協議條款」會誤導消費者，使他們以為不得就失實陳述提出申索。如供應商試圖利用這條款卸除因以失實陳述誘使消費者立約而產生的責任，法庭可能會以該條款不合理為理由，將之剔除。因此，如供應商希望在合約中包含「全部協議條款」，則應：
- i) 特別提醒消費者注意該些條款；
  - ii) 確保所有在合約商議期間所作出的承諾或保證都包括在合約中列出；

- iii) 如該些承諾或保證有任何更改，通知消費者及給予他們合理時間重新考慮是否立約。

## 5.10 聲明

5.10.1 在標準格式合約裏，經常可以找到一些要求消費者簽署的聲明，確認他們已閱讀及明白所有合約及相關文件。消費者在簽署這些聲明時，未必閱讀過上述合約文件，他們也未必會回過頭來，把文件閱讀一遍。即使他們徹底閱讀過，也未必能正確理解其內容。況且，他們也未必明白那些聲明日後可能會用來作證據，支持即使合約內某些條款的內容與他們曾經獲得的承諾不同，他們仍須受該些條款約束的說法。

5.10.2 這樣的聲明似乎是不公平。取而代之的應該是清楚、明顯的警告字眼，提醒消費者在簽約前應先閱讀及明白合約條款。這些警告字眼應置於合約條款之前，以提醒消費者在簽約前閱讀條款，並在有需要時，要求提供進一步資料或澄清不明確的地方。

## 5.11 保證

5.11.1 為免將來產生爭議，當供應商對其產品及/或服務作出有關功效或其他方面之保證時，應將該項保證清楚及準確地在合約上列明。

## 6. 未成年人

6.1 法律保障缺乏人生經驗的未成年人(18 歲以下人士)，因為成年人可能不公平地利用此弱點，誘導未成年人在未經深思熟慮的情況下訂立合約。未成年人所立的美容服務合約其實是可爭議為無效的。因此，供應商不應在取得其父母或監護人同意之前，向未成年人提供任何服務或貨品。

## 7. 透明度

### 簡潔的語言

7.1 考慮消費者會怎樣理解條款裏的字眼是重要的。可能誤導消費者或晦澀難懂的條款，潛在着不公平的地方及有欠透明度。消費者在簽署美容合約時一般都不會預先徵詢法律意見。以簡潔清晰的語言草擬的合約將有助消費者作出明智的抉擇。

**7.2** 合約應以淺白及清晰可讀的中文及/或英文訂立，以說明立約雙方的權利與義務，文字應以至少以 10 pt 的字號打印，與背景有足夠的對比，而中英文版本皆具同等法律效力，消費者可選擇採用。

**7.3 在消費者簽約前**

- (i) 供應商應向消費者清楚解釋合約的主要條款，以確保消費者完全明白立約雙方的權利及義務。
- (ii) 供應商應給予消費者機會，讓消費者徹底閱讀合約和相關文件，以及對條款作出提問。

**合約內容**

**7.4** 合約須以清楚易讀的文字列明以下各項：

- (i) 立約雙方；
- (ii) 以合理詳盡的資料說明所提供的貨品或服務，例如：
  - a) 所包含的項目及每一項的療程次數(適用於以套餐形式出售的療程或護理)；
  - b) 療程所使用的療法及/或儀器。
- (iii) 服務及/或貨品的價錢，包括以分項列出根據合約已付或須付的價錢；如提供折扣，列明原價及折扣價；
- (iv) 分期付款的每期供款數目及期數 (如用分期付款方式)；
- (v) 療程或護理的數量、次數、時間以及合約期限 (如適用)。

**7.5** 對於所提供之服務會持續一段時間的合約，應訂明消費者有權查閱關於其帳戶的資料，例如剩餘療程或護理的次數。

**7.6** 合約及發票應分別載於兩份不同的文件，使消費者清楚理解這兩份文件各別的意義。

## 8. 冷靜期

- 8.1 若合約涉及預繳式消費服務或產品，或其供應服務或商品的期限為固定的，合約應容許有 7 個工作天的冷靜期(包括消費者立約當天)。消費者可於該冷靜期內取消合約，而供應商則可就取消合約所引致的行政開支，以及於冷靜期內消費者所使用之服務或產品，按照第 8.3 及 8.5 段向消費者收取費用。供應商按情況從預繳金額中扣除上述費用後，須把餘額悉數退回消費者。
- 8.2 8.1 段提及的就行政支出及消費者使用服務或產品收取費用的權利須在合約中，分別輔以收費表明確地說明。
- 8.3 如在冷靜期內取消合約，消費者須支付行政費，供應商應按下列收費表所訂的合約價值百分比或定額收取，以較低者為準：

**冷靜期內取消合約之行政收費表**

取消時間	合約價值的百份比*	定額*
1-5 天內	5%	\$500
6-7 天內	7%	\$1,000

\*以較低者為準

- 8.4 供應商可於冷靜期內提供服務及 / 或產品予消費者試用或作其他使用。供應商須於合約內以合理詳盡的資料，明確及清晰地說明該服務及/或產品的內容以及它們是否免費。
- 8.5 如果該服務及 / 或產品並非免費，則供應商須在立約前先取得消費者就該些收費的明確同意，才提供有關服務及 / 或產品。此外，供應商須明確及清晰地在合約內以收費表列明該些服務及 / 或產品的價格 / 並以公平及合理的方式定價。
- 8.6 若供應商向消費者保證，只要消費者在冷靜期內沒有取消合約，供應商將免收或減收其在冷靜期內，因使用的服務及 / 或產品而應支付的費用，則該保證須於合約內明確及清晰地列明。

- 8.7 如有任何貨品於冷靜期內提供（贈品除外），供應商可要求取消合約的消費者親身將未用之貨品（如有的話）連包裝完好無缺地退回，否則須繳付所提供之貨品的價錢。如這些貨品沒有完好無缺地退回，則供應商可要求消費者按收費表所列的價錢悉數繳付。
- 8.8 消費者可於冷靜期內以書面通知（「取消通知」）連同為進行有關行政工作而必需的文件副本取消合約。取消通知及文件副本可利用以下任何一種形式遞交：
- (i) 親身交往供應商的營業地址。
  - (ii) 郵寄至供應商的營業地址。
  - (iii) 傳真或電郵到供應商指定的傳真號碼或電郵地址。
- 8.9 該取消通知將按照情況，於親身收取當日，或郵戳日期或電郵或傳真的發出日期生效。
- 8.10 立約前須讓消費者充份注意到有關冷靜期及其相關的合約權責。有關冷靜期的通知須以粗體及不小於 10pt 字號印刷，並在合約主體內顯眼的位置展示以下內容：
- (i) 消費者可於冷靜期內的任何時間取消合約；
  - (ii) 遞交取消通知的方式（如第 8.8 段所述）；及
  - (iii) 其他有關冷靜期消費者的權利及責任，例如可獲得退款的權利及繳付行政費的責任。
- 9. 在某些情況下，要消費者堅守合約是不公平的**
- 9.1 消費者預先繳付費用，購買長期或無限期的服務，在業內頗為常見。於這段期間內，一些發生在消費者身上的不幸事件，例如身故，及身患導致喪失能力的惡疾或殘障，會令合約的履行變得不可能或不可行。
- 9.2 此外，亦有可能出現一些消費者於立約時不能合理地預見的情況，如履行合約的地方遷移或長時間關閉，以及供應商將合約權利及責任轉讓至第三者。這些情況的轉變可能會令到消費者被迫接受一些並不是他想要，而有損其利益的東西。
- 9.3 如果供應商重覆及持續地未能履行其合約責任（例如：重複持續地未能向消費者提供其合理要求的服務時段），則這合約對消費者而言將變得毫無價值。

- 9.4 在上述任何一個情況下，若要消費者堅守合約，實在是不公平的。故此，當這些情況出現時，供應商應容許消費者取消合約，並退還消費者剩餘的預繳費用餘額。
- 9.5 若合約取消是因為消費者身故、或身患導致喪失能力的惡疾或殘障，供應商可要求消費者就其因合約取消而合理地招致的行政費用作出補償。
- 9.6 消費者可以經合理通知，按第 8.8 及 8.9 段所述的方式終止合約。

## **10. 退款**

- 10.1 當已預繳費用的消費者在冷靜期內取消合約，在符合第 8 段的規定下，供應商應在取消通知送達 30 日內將款項退還消費者。對於其他根據合約消費者有權獲得的退款，供應商應在收到書面要求的 30 天內退還消費者。

## **11. 保密與私隱**

- 11.1 除非是法律要求披露或得到現有、之前及潛在客戶的同意，否則供應商須將他們的資料保密。
- 11.2 供應商須遵守一切有關保障消費者私隱、個人資料、敏感資料和健康資料的法律及規例。

## **12. 轉讓合約**

- 12.1 供應商不能在沒有消費者明確書面同意的情況下，把合約轉讓予第三方。

## **13. 提供合約副本**

- 13.1 簽訂合約後，供應商應給予消費者一份完整的合約副本。

## 美容服務合約範本

### 使用指引

1. 這份合約範本旨在示範如何遵照美容業標準格式消費合約草擬指引(「指引」)草擬合約。使用者應依據指引的要求，適當的修改合約範本，以符合每宗交易的個別情況。
2. 此範本適用於有關在一段時間內供應服務及產品(如有)的預繳合約。
3. 在使用這範本前，應小心閱讀指引以確保你的合約符合指引要求。

### 免責聲明

1. 消費者委員會並不會對任何使用這合約範本的公司或個人作推薦或認可。
2. 如你使用這合約範本作為你與消費者所訂立之合約的基礎，你應為它作適當修改以切合個別情況，但必須同時確保草擬是遵照一切相關法律及指引進行。我們建議你在草擬合約時諮詢法律意見。

## 美容服務合約

### 重要通知

本合約設有冷靜期的安排。

閣下作為顧客，可根據本合約第 2 條的安排，在冷靜期內取消本合約。

如閣下選擇取消本合約，須根據該條款向我們供應商通知閣下的意願。亦請注意，有關閣下在冷靜期內取消合約的權利及義務，已列明於該條款，敬請小心閱讀。

日期：

立約雙方：[姓名] [地址] [聯絡電話] [會員編號 (如適用)] (「顧客」)

[姓名] [地址] (「供應商」)

### 1. 提供的服務/產品

1.1 供應商須按以第下 1.3 條所列的地點及價錢，提供該條款所描述的服務及產品(如有)。

1.2 為避免任何疑問，服務須包括(但不限於)護理服務，在提供護理服務時所使用的材料及儀器/設備，以及相關和適用的諮詢服務。

1.3 服務 / 產品及價錢表：

編號	地點	服務 (護理/產品) <sup>1</sup>	單價	數量	合計(港幣)

<sup>1</sup> 為免混淆，護理或產品名稱應與供應商在廣告中及 / 或在商議合約時所敍述的相同。

- (a) 如供應商同意提供任何免費服務及/或產品，該免費項目應明確地在表中列明。
- (b) 如有折扣提供，供應商應在“單價”一欄明確及清晰地列明原價及折扣價。

總應付款項：	港幣：		
訂金：	港幣：	支付日期：	發票編號：
餘額：	港幣：	清付到期日：	
付款方式：	( ) 現金	( ) EPS	( ) 信用卡

護理 / 產品說明（包括免費項目）
(護理服務的詳細說明，如所用方式、儀器及護理次數)

## 2. 顧客在冷靜期內取消合約的權利

- 2.1 除第 2.4 及 2.6 條另有訂明外，顧客可自本合約日期起計的 7 個工作天內（「冷靜期」），以書面通知供應商取消本合約（「取消通知」），而毋須負上任何付款或其他責任。
- 2.2 顧客可親身、以郵寄、電郵或傳真方式，連同 [請填寫為進行有關行政手續而必需的文件的名稱] 副本，遞送取消通知。該通知按情況自實際交收當日、郵戳日期或電郵或傳真送出日期起生效。
- 2.3 供應商須於收到顧客所發出的取消通知起計 30 天內，在扣除第 2.4 至 2.6 條所列明的收費後，退還所有顧客按本合約已繳付的款項。
- 2.4 如顧客於冷靜期內取消合約，供應商可按照以下附表一收取行政費。

## 附表一

### 於冷靜期取消合約所收取的行政費

取消時間	收費(合約價值的百份比)*	定額*
1-5 天	5%	\$500
6-7 天	7%	\$1,000

\*以較低者為準

[第 2.5 至 2.7 條只適用於在冷靜期內提供服務及/或產品。]

**2.5** 供應商須在冷靜期內向顧客提供列於附表二的貨品。如顧客在這段時間內取消合約，顧客須親身把未使用過的產品(贈品除外)連同包裝完整的退回供應商。否則，顧客須按附表二的價錢繳付有關產品的費用。

## 附表二

### 在冷靜期內提供的產品

貨品	數量	免費/價格	總數

**2.6** 供應商須在冷靜期內向顧客提供列於附表三的服務。如顧客在這段時間內取消合約，顧客須按附表三，為已提供的服務繳費 (協議免收費用的服務除外)。

## 附表三

### 在冷靜期內提供的服務

服務(療程)	數量	免費/價格	總數

**2.7** 如顧客在冷靜期後繼續履行本合約，供應商須按以下附表四減收/免收分別在第 2.5 及 2.6 條列出的服務及產品收費。

#### 附表四

##### 在冷靜期內提供的免費/折扣服務及/或產品

貨品(療程)/ 產品	數量	免費/折扣價格(折扣百分比)	總數

### 3. 顧客取消合約的權利

- 3.1 在下列情況下，顧客、或其遺產管理人或遺囑執行人(視乎情況而定)，可給予 **21** 天書面通知取消本合約：
- (i) 因顧客死亡，疾病或殘障，致使合約的履行變得不可能或不可行；
  - (ii) 供應商重覆及持續地沒有履行合約所訂的責任；
  - (iii) 供應商在沒有取得顧客的書面同意下轉讓任何合約中的權利或責任予他人；
  - (iv) 於合約履行期間更改履行合約的地點；
  - (v) 履行合約的地點關閉多於 **4** 週。
- 3.2 若合約取消是因為上述第3.1(一)條所引致，顧客須向供應商繳付 [請填寫相當於因合約取消而合理地產生的行政費用的金額] 作為取消合約費。
- 3.3 在收到通知後，供應商須於 **30** 天內退還任何未用餘款予顧客、或其遺產管理人或遺囑執行人(視乎情況而定)。
- 3.4 在任何情況下，餘款的退還不會損害或影響顧客，或其遺產管理人或遺囑執行人(視乎情況而定)，因供應商或其員工或代理因疏忽或其他過失而引致的死亡或受傷，而對供應商作出的申索。

### 4. 記錄卡

- 4.1 供應商須準確及清楚地在記錄卡上記下每項護理療程的護理次數，護理日期及其他資料，如儀器設定、在護理中及/或建議在家中使用之產品，以及負責美容師的姓名。

**4.2 顧客有權查閱記錄卡上的資料。**

## **5. 預約**

**5.1 顧客可預早至少\_\_\_\_\_小時，於辦公時間經服務櫃檯、或由上午\_\_\_\_\_至下午\_\_\_\_\_時致電（電話：\_\_\_\_\_或\_\_\_\_\_）或於任何時間以電郵（電郵地址：\_\_\_\_\_）向供應商作出，取消或更改預約。**

**5.2 供應商須在切實可行的情況下，盡快與顧客確認訂定、取消或更改預約。**

## **6. 服務水平**

**6.1 供應商須以顧客合理期望的謹慎、技術及努力提供服務。**

## **7. 保證**

**7.1 供應商保證服務及產品(如有)是安全，以及可符合顧客向供應商所指明或顧客合理地預期供應商應該知道的目的。**

**7.2 供應商亦保證一切提供給顧客，關於服務及產品(如有)的資料、描述或陳述均為正確無誤。供應商確認顧客是依賴這些資料、描述或陳述而訂立合約的。**

## **8. 個人資料及私隱**

**8.1 供應商須遵守所有有關保障個人資料的法律及規例，並以最大努力把所有從顧客獲取的個人、敏感及健康資料保密。**

## **9. 不可抗力事件 (立約方控制範圍外之事件)**

**9.1 如立約一方因其合理控制範圍以外的事件（「不可抗力事件」）而未能有履行或延誤履行任何本合約中的責任，則它毋須負上責任。不可抗力事件包括（一）罷工，勒令停工或其他工業行動；（二）騷亂、暴動、攻擊、恐怖襲擊或威嚇、恐怖襲擊、戰爭（不管宣戰與否）或威脅或準備戰爭，（三）火災、爆炸、風暴、水災、地震、沉陷、傳染病或其他自然災害；（四）無法使用公共或私人交通工具；及（五）無法使用公眾或私人通訊網絡。**

**9.2** 於不可抗力事件持續的期間，合約履行將被視作暫停。然而，立約方須用合理努力結束不可抗力事件，或找出在不可抗力事件期間仍可履行其合約責任的方法。

## **10. 轉讓性**

**10.1** 除非立約雙方明確地透過書面同意，否則本合約是不可轉讓或移轉。

## **11. 更改**

**11.1** 本合約之任何條款及條件，只有在得到顧客的書面同意後，方可作出更改。

## **12. 管限法律及司法管轄權**

**12.1** 本合約須由香港法律管限及依據香港法律作出解釋。立約雙方同意接受香港法院的非專屬法律及司法管轄權管轄。

## **簽署**

[如顧客是 18 歲以下人士，他 / 她的父母或監護人須代表該未成年人士簽署確認以下聲明。]

### **父母 / 監護人**

本人，即下述簽署人\_\_\_\_\_ (父母 / 監護人姓名)，乃是顧客\_\_\_\_\_ (顧客姓名)的父母 / 監護人，於此代表顧客簽署這份合約。作為顧客的自然或法律上的監護人，本人現同意本人及顧客受本合約的條款約束。本人聲明本人具法律地位及權力代表顧客簽署合約。

簽名：\_\_\_\_\_

姓名：\_\_\_\_\_

與顧客關係：\_\_\_\_\_

聯絡電話：\_\_\_\_\_

地址：\_\_\_\_\_

日期：\_\_\_\_\_

顧客簽署：\_\_\_\_\_ 供應商簽署：\_\_\_\_\_

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