

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 negligence¹; 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)².

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

¹ The disclaimer is void under s.7(1) of the Control of Exemption Clauses Ordinance (Cap 71).

² 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 supplier 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.