

Diagram 12C maps the contractual terms which are subject to the control of the Unfair Contract Terms Act 1977 and the Unfair Terms in Consumer Contracts Regulations 1999. It also shows how the Law Commission proposes to extend these statutory controls.

1. The **left half of the circle** represents **consumer contracts** (where one party deals as a consumer whilst the other acts in the course of business): **1*** denotes the different definitions of a consumer:

- In the **1999 Consumer Regulations** ‘consumer’ means ‘any *natural person* who’ is not acting in his business or profession.
- The main point of difference is that under the **1977 Unfair Contracts Terms Act**, a consumer need not be a natural person a **business** can ‘deal as a consumer’ if the contract relates to goods that are ordinarily supplied for private use or consumption.

The **right half of the circle** represents **business contracts** (where both parties act in the course of their businesses or profession).

2. The **top half of the circle** refers to **terms** which have been specifically negotiated between the parties. The **bottom half** refers to **terms which have not been negotiated**. **2*** denotes the differences in definitions. **The 1977 Act** refers to ‘*written* standard terms of business’ and so does not cover oral terms. **The 1999 Regulations** refers to terms which are ‘not individually negotiated’ and so *does* cover oral terms; and the burden is on the **business** to prove that the challenged term has been negotiated in order to escape control.

3. The **terms reviewable** in consumer contracts are shaded in blue:

The Unfair Contracts Terms Act controls clauses that require a party ‘dealing as a consumer’ to *indemnify* the business by requiring such indemnities to be reasonable in order to be enforced. This applies whether the term is negotiated or not.

The Act also controls various types of terms (whether negotiated or not) that ‘limit or exclude liability’ for negligence, and for breach of certain statutory implied terms as found

in the Sale of Goods Act. This is done by making such terms either invalid outright or subject to the requirement of reasonableness.

Otherwise, terms exempting liability for the breaches of contract are required to be reasonable if the claimant either 'acts as a consumer' or 'contracts on the other's standard terms'. The broken line signifies the uncertain scope of the exemption clauses covered here because the Act has extended the definition to cover certain duty-defining terms (and on this point please see diagram 12F).

4. **The Unfair Terms in Consumer Contracts Regulations** controls *all* non-negotiated terms in consumer contracts
5. except for core terms. 3* denotes that even such non-negotiated *core* terms are reviewable if they are not in 'plain and intelligible language'.
6. In its Report 292 on *Unfair Terms in Contracts* the Law Commission recommends that review should extend to *all* non-core terms (whether negotiated or not) in favour of consumers. The problems of unfair surprise, incomprehensibility, inassessability, non-negotiability, and ultimately substantive unfairness will often remain even when contracts *are* negotiated because consumers are generally in no position to assess the full implications of what is being negotiated.
7. The terms reviewable in *business to business* contracts are shaded in grey. Here, we are only talking about the **Unfair Contracts Terms Act** because the **Unfair Terms Regulations** does not apply in favour of businesses at all.
8. A business can challenge terms exempting liability for negligence and for some implied statutory terms (whether negotiated or not).
9. A business can also challenge clauses exempting liability for breach of contract if they are contained in the other business' standard form. Again, the broken line signifies the uncertain scope of reviewable exemption clauses here due to extensions of its definition to some duty-defining terms.

10. With respect to business-to-business contracts, the **Law Commission recommends** cautious expansion of protection, to allow only 'micro-businesses' to challenge as unfair and unreasonable, terms which are both non-core *and* non-negotiated. 'Micro-businesses' are those with nine or less full-time staff; are not associated with other businesses; do not provide financial services and make contracts valued at £500,000 or less. The main problem is that this recommendation is not backed up by empowering some watchdog body such as the Office of Fair Trading, to challenge unfair terms. The Unfair Terms Regulations 1999 does have such a mechanism in place for consumer contracts and this has been shown to give real teeth to the legislation. So if the Law Commission's recommendations are enacted, micro-businesses will be unwilling to incur the risk of large costs orders if they lose, and 'blacklisting' if they win, unless their businesses are already in very serious trouble.