



ASEAN Guidelines on Unfair Contract Terms (UCT)



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The Association of Southeast Asian Nations (ASEAN) was established on 8 August 1967. The Member States of the Association are Brunei Darussalam, Cambodia, Indonesia, Lao PDR, Malaysia, Myanmar, Philippines, Singapore, Thailand and Viet Nam.

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The ASEAN Secretariat
Jakarta



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LIST OF ABBREVIATIONS

ACCP	ASEAN Committee on Consumer Protection
AEC	ASEAN Economic Community
AHLPCP	ASEAN High-Level Principles on Consumer Protection
AMS	ASEAN Member State(s)
ASAPCP	ASEAN Strategic Action Plan on Consumer Protection
B2C	Business-to-Consumer
UCT	Unfair Contract Terms

ASEAN Guidelines on Unfair Contract Terms (UCT)

I. INTRODUCTION

General Background and Relevance

1. Efficient and transparent transaction processes are a key concern for consumers and sellers or suppliers, particularly in the evolving digital economy where online tools and technologies increasingly enable new and faster ways of engagement. As a way of making common agreements between sellers or suppliers and consumers more efficient and less costly, **standard form contracts** allow for sellers or suppliers to one-sidedly prepare a template set of contract terms in relation to the supply of goods or services without prior negotiation or bargaining with consumers.
2. In general, standard form contracts used in consumer transactions may contain:
 - terms of the contract which are pre-prepared by the seller or supplier and applied for all consumers;
 - non-negotiated terms that are presented to consumers by the seller or supplier on a “take it or leave it” basis.
3. While standard form contracts are not illegal and widely accepted in many sectors or industries, consumer protection authorities in some jurisdictions administer laws to ensure that contract terms do not result in a significant imbalance in the party’s rights and obligations, to the detriment of the consumer. In some jurisdictions, the contract terms may be unenforceable by the seller or supplier if they are found to be unfair to the consumer or not in line with prevailing consumer protection laws or regulations of the jurisdiction. In some jurisdictions, sellers or suppliers providing unfair contract terms may be subject to enforcement by consumer protection authorities and could risk substantial penalties.
4. Contract terms which are unfair to consumers may have the following features:
 - due to the way they are presented in the contract, being unclear, too difficult to find or too complex to understand such that consumers are not reasonably able to understand the character, nature, language or effect of the transaction, or to make informed decisions;
 - due to their substantive content that imposes an undue burden on consumers, for example requiring the consumer to indemnify the supplier in respect of liability that occurred due to the breach of contract by the supplier.
5. Consumer protection authorities should generally be mindful of the fact that the majority of consumers tends to accept standard form contracts without proper scrutiny as purchasing a good or service is contingent upon acceptance of the standard form contract. Ultimately, such **information asymmetries and imbalances in bargaining power** adversely impact not only the consumers themselves, but may also lead to market failures due to a lack of competition and innovation.
6. A **higher level of consumer knowledge and empowerment** is integral to a more competitive and dynamic ASEAN Economic Community (AEC) that generates benefits for sellers or suppliers and consumers, both in the offline and online marketplace. Consumer protection authorities in the AMS therefore play an important role in monitoring business practices and keeping abusive or unfair conduct in check. This includes proactive actions to understand and consider measures to address the risks associated with unfair contract terms in standard form contracts, notably as they:
 - Contravene basic consumer rights due to lack of transparency, procedural fairness, consent and choice;
 - Exploit and exacerbate existing consumer vulnerabilities, which reinforces societal inequality;
 - Create unfair market conditions that lead to market inefficiencies or failures.

Purpose of the Guidelines

7. The ASEAN Guidelines on Unfair Contract Terms (henceforth “Guidelines”) constitute a priority deliverable under Strategic Goal 1 of the **ASEAN Strategic Action Plan on Consumer Protection (ASAPCP) 2016-2025**, which is oriented towards establishing a common ASEAN Consumer Protection Framework. With a view to guiding ASEAN Member States (AMS) in gradually updating and unifying national consumer protection frameworks, the Guidelines acknowledge the importance of Unfair Contract Terms (UCT) in consumer law and address key principles, good practices, recent regulatory developments as well as enforcement approaches.
8. Given that AMS have adopted varying policies, legal provisions and procedures for controlling and regulating UCT in consumer contracts, the Guidelines are intended as a principle-based but **non-binding soft law instrument** that provides orientation for policy and decision-makers in the AMS to help advance consumer protection actions in line with the shared vision of regional cooperation and policy convergence. Where feasible, AMS may consider reviewing and amending or expanding existing legal provisions in their respective jurisdiction in line with the Guidelines.
9. Aside from aiding regulatory reforms, the Guidelines may be used in conjunction with a database on provisions which may be considered as UCT by certain AMS and feed into **educational efforts toward sellers or suppliers as well as consumers**. For the latter, it would be necessary to transpose the content of the Guidelines into other media, such as shorter guides for businesses and/or consumers, explainer videos etc. See the annex for some snapshots of good practices from AMS and selected jurisdictions outside of ASEAN.
10. As a common benchmark, the **ASEAN High-Level Principles on Consumer Protection (AHLPCP)** allow for application tailored to the scale and scope of markets and consumer interests in the AMS. The Guidelines contribute to the achievement of the following principles:
 - Principle 1 on the fair, consistent, effective and proportionate enforcement of consumer protection laws;
 - Principle 2 on equipping consumers with skills, knowledge, information and confidence to exercise their rights;
 - Principle 4 on consumers’ access to advice and redress; and
 - Principle 8 on extending the scope of consumer protection to e-commerce.
11. The Guidelines further take into account emerging needs for **strengthening consumer protection in e-commerce and the digital economy**, noting that new digital technologies and services pose particular challenges for online transparency. The Guidelines therefore contain an initial outlook concerning online standard form contracts and possible new recommended best practices for online sellers or suppliers and digital service providers, for consideration by AMS in reviewing and/or adapting existing UCT rules. This complements the [ASEAN Online Business Code of Conduct](#) as well as the [ASEAN Guidelines on Consumer Protection in E-Commerce](#) which encourage transparent and fair terms and conditions for online transactions between sellers or suppliers and consumers.
12. Developed under the purview of the **ASEAN Committee on Consumer Protection (ACCP)**, the Guidelines primarily focus on the consumer protection authorities in the AMS to the extent that they have mandates to regulate sellers or suppliers’ use of UCT in consumer contracts. As the regulation on the use of UCTs may fall under the purview of other regulatory authorities, examples are provided where the interaction with other relevant public authorities or stakeholders is warranted in the implementation of the Guidelines.
13. For this, lessons were drawn from different jurisdictions and the international discussion, such as the European Union and the United Kingdom, then contextualized against the backdrop of diverse regulatory and institutional settings in ASEAN. The Guidelines may be updated from time to time in order to accommodate the **latest international legal and enforcement developments**.

II. KEY TERMS AND PRINCIPLES

Definitions

14. The Guidelines apply to all contracts, whether in written form or online, that cover transactions between a business – i.e. a seller or supplier - and consumer (B2C). Consumer-to-consumer as well as business-to-business contracts do not fall under the scope of the Guidelines.
15. Throughout the Guidelines, the following terms are used:
 - “**consumer**” means any natural person, in a contract, that is acting for purposes outside of his or her trade, business or profession, who receives or has the right to receive goods or services from a seller or supplier under the contract;
 - “**seller or supplier**” means any natural or legal person who, in a contract, is acting for purposes relating to their trade, business or profession, whether publicly owned or privately owned, who provides goods or services to consumers under the contract;
 - “**notice**” means consumer notice, which includes an announcement, whether or not in writing, and any other communication or purported communication by the seller or supplier that are brought to the attention of the consumer by the seller or supplier;
 - “**standard form contract**” means a consumer contract that has been pre-formulated for general use by a particular seller or supplier, whether or not the contract differs from other contracts normally used in that industry;
 - “**unfair contract terms**” or “**UCT**” means a contractual term that shall be regarded as unfair if, with regard to all circumstances, it causes a significant imbalance in the parties’ rights and obligations arising under the contract, to the detriment of the consumer, and which may have arisen due to a difference in bargaining power between the parties.
16. A term shall be regarded as **not individually negotiated** where it is a term in a preformulated standard form contract, and the consumer therefore is not able to negotiate the term.
17. In the event that certain aspects of a term or one specific term in a standard form contract has been individually negotiated, this shall not affect the rest of a contract or the whole contract if an overall assessment of the contract indicates that it is nevertheless a pre-formulated standard form contract.
18. In some jurisdictions, the **burden of proof lies with the seller or supplier** to demonstrate whether a standard term has been individually negotiated. This reversal of the burden of proof, as introduced as a legal provision in some jurisdictions, take note of the imbalance of power between consumers and sellers or suppliers.
19. To avoid the use of UCT by sellers or suppliers in consumer contracts, the following outlines the principles adopted by a number of jurisdictions which regulate UCTs in relation to standard form contracts. Further to this, **basic criteria are set out for tests to assess whether a term is potentially unfair**. These tests may be performed by sellers or suppliers upon formulating standard form contracts, by consumers before entering into a standard form contract, or by consumer protection authorities that possess a mandate for controlling and clearing standard form contracts for certain sectors or industries.

Fairness

20. In jurisdictions which have adopted the fairness test, the general **principle of fairness** on the part of the seller or supplier is considered in all circumstances, starting with the pre-contractual stage of information provision to the consumer and transparency of terms and conditions in the consumer contract. In the lead-up to the agreement of a contract, fairness can be understood in procedural terms, while substantive fairness concerns the distribution of substantive rights and obligations of the parties under the contract:

- **Procedural fairness** considers if the consumer is in a position to provide informed consent to the consumer contract, i.e. whether the seller or supplier is taking advantage of the consumer as the seller or supplier knows or ought reasonably to know that the consumer is not in a position to protect his or her own interests, or is not reasonably able to understand the character, nature, language or effect of the consumer contract. This aims at promoting transparency and avoiding misrepresentation.
 - **Substantive fairness** considers the extent of compromise of the legitimate expectation of the consumer, accounting for contractual balance and proportionality.
21. With the above in mind, a term is “unfair” if, in contradiction with the requirement of the good faith principle, this leads to a **significant imbalance of rights and obligations** among the parties, to the detriment of the consumer.
 22. The rights and obligations of the parties in the contract should be phrased clearly and stated in simple terms, so that the **consumer is reasonably able to understand** their significance, scope and implications. This requires that the consumer is granted sufficient time and opportunity to review all terms and their implications prior to entering into a contract.
 23. If a term in a consumer contract is vague, ambiguous and has more than one possible interpretation, the meaning that is more appropriate and favourable to the consumer should be adopted. Thus when drafting contract terms, sellers or suppliers should **consider** the tendency of many consumers to not thoroughly read through all terms.
 24. The unfairness of a contractual term should be assessed by taking into account the nature of the goods or services for which the contract was concluded e.g. if there are alternative means by which the customer’s requirements could have been met, and by referring, at the time of conclusion of the contract, **all the circumstances attending the conclusion of the contract**, notably:
 - nature of the subject matter;
 - circumstances existing whenever the term is agreed;
 - other terms of the contract; and
 - terms of another contract on which it depends.
 25. Assessment of the unfairness should not relate to the adequacy of the price, for the services or good supplied in exchange.
 26. The **fairness test** includes the following aspects: significant imbalance in the rights and obligations of the parties to the loss or detriment of the consumer as well as against the principle of good faith.
 - Significant imbalance in the rights and obligations of the parties under the contract is where the term benefits the seller or supplier to the detriment of the consumer and the term is not reasonably necessary to protect the seller or supplier’s legitimate business interests.
 - A consumer contract shall be considered balanced if both the consumer and the business have equal rights in negotiating the terms beforehand, whether it is related to the goods and/or services, provided under the contract.
 - Significant imbalance shall not be understood as being restricted to cases where consumers are impacted in financial or material terms. The fairness test in general helps to ensure the consumer’s legal rights and responsibilities.
 27. Special attention should be paid to the requirement of ‘circumstances existing when the term is agreed’ as this may **cover conditions to protect vulnerable consumers**, including consumers with disabilities, elderly people, etc. and to those circumstances that make consumers vulnerable to exploitation or pressure at the time of signing or agreeing to a contract.

Good Faith

28. The **definition of good faith is subject to interpretation**, taking into consideration the legal system organising the contract (civil or common law legal system), the type of the contract (consumer or commercial contract), and the nature of the subject matter of the contract (insurance or sale of goods contract). In general, good faith consists of good standards of commercial morality and practice.
29. Good faith further includes the obligation to act in good conscience under the **unconscionability principle**. The meaning of “unconscionable” is also subject to interpretation. Depending on the jurisdiction, it may refer to procedural unconscionability (unconscionability in the process of making a contract) or substantive unconscionability (the unconscionability of the actual terms in the contract).
30. In jurisdictions which have adopted the good faith test, good faith is a requirement to encourage parties to a contract to deal with each other honestly, fairly and to take into account the other parties’ interest to ensure a fair and just contractual relationship between the contracting parties. In the context of consumer contracts in these jurisdictions, good faith includes obligations for sellers or suppliers to **meet the reasonable and legitimate expectations of the consumer** and the incorporation of terms which are reasonably necessary to protect the seller or supplier’s legitimate business interests in balancing the interest of the contracting parties.
31. In these jurisdictions, sellers or suppliers not acting in good faith may occur **at every stage of contractual relationships** from contractual negotiations and formation, contract performance and dispute resolutions to remedies:
- Negotiations and contract formation: sellers or suppliers abusing their power to take advantage of consumers, particularly through non-disclosure of information or material facts.
 - Contract performance: sellers or suppliers using contract terms to their advantage in evading the spirit of the deal; lack of diligence or wilfully rendering imperfect or merely “substantial” performance; abusing powers to determine contractual compliance; and interfering with or failing to cooperate in the other party’s contractual performance.
 - Dispute resolution: sellers or suppliers abusing their power by adopting overreaching and vague interpretations of contractual language; taking advantage of the consumer who is not reasonably able to understand the character, nature, language or effect of the transaction or any matter related to the transaction to secure a favourable settlement of a dispute, or extorting unfair contract term modifications.
32. The principle of **intelligibility** in consumer contracts is critical to enhance and ensure consumer choice and self-determination. The openness required by the good faith principle will only take place when terms are expressed fully, clearly, legibly, and contain no concealed difficulties or traps.
33. It should not be assumed that consumers have the ability to identify terms that are important, or which may lead to their disadvantage. Sellers or suppliers should therefore be obliged not to take advantage of the consumer’s circumstances to the latter’s detriment, if the seller or supplier knows or ought reasonably to know that the consumer is not in a position to protect his or her own interests. Sellers or suppliers should also be aware that the **requirement not to knowingly take advantage of the consumer in the aforesaid manner** is regarded as the bare minimum rather than a full statement of the importance of the good faith principle.

Transparency

34. Transparency testing is not only related to the provision of legible, comprehensible and unambiguous use of language for the purposes of legal compliance, but also to ensure that consumers are able to make informed decisions. In general, **clarity and legibility in contractual language promote legal certainty**.
35. Clear and sufficient information in **plain, non-technical and less legalistic language** shall be provided to ensure that the consumer understands and is not deceived or misled on his or her rights and responsibilities under the consumer contract. This is based on the assumption that consumers may not understand in a detailed manner what a particular transaction entails if it is complex.

36. Transparency is likely to be presented when :

- words are clear and phrases short, or the text of the contract is easily understood despite containing many (sub-) sections;
- a contract is structured in a logical manner and important provisions are given appropriate prominence and are not hidden in fine print;
- terms are contained in a contract or context where they can reasonably be expected, including in conjunction with other related contract terms etc.;
- where a contract term refers to an annex or another document, the consumer also has access to those documents.

37. With respect to the **visual display or presentation of terms** in written contracts, the print must be clear, not only with respect to the size of the font, but also taking into account the colour, background, and print quality of the paper. In online contracts prepared on websites or digital platforms, terms should be clearly displayed, taking into consideration the different conditions and abilities of consumers.

38. Where sellers or suppliers are clear and transparent about the terms and conditions of the consumer contract, consumers benefit from transparency and fairness and are better able to learn and understand the nature and consequences of their rights and responsibilities by the time they agree with the contract, and it becomes legally binding. In some jurisdictions, consumers are also afforded the opportunity to thoroughly review and examine all the terms written in the draft contract, including checking on consumer rights such as **cooling-off periods and cancellation rights**.

Exemption

39. Despite the importance of the fairness and transparency principles and tests, exemptions can be foreseen with respect to **main subject matter and price**. A term is not unfair simply because:

- it covers a good or service that the consumer considers poor value for money; or,
- it sets a higher price than charged by other sellers or suppliers.

40. Making the exemptions clear to the consumers, enables them to compare **what is on offer across the market, and to decide on entering a contract in full knowledge about the exemptions**.

41. It is important to emphasize that the exemption is conditional upon the consumer having prior knowledge about the **essential features of a bargain**, with the terms in question being transparent, prominent, and expressed in plain language. Where the latter is not the case, the terms are still subject to a full assessment for fairness. Sellers or suppliers are therefore required to draw the attention of consumers to the essential features of the bargain so that these can be fully understood and appreciated.

Blacklisted Terms

42. An approach adopted by some jurisdictions to regulate UCTs is the blacklisting of particular contract terms such that they are not binding and enforceable by the sellers or suppliers against the consumer. Without the need for a fairness or transparency test, a **blacklisted term is treated as unenforceable in all circumstances**.

43. Blacklisted provisions in these jurisdictions include, but are not limited to:

- the exclusion or restriction of liability of the seller or supplier for death or personal injury resulting from the seller or supplier's negligence;
- terms that exclude the basic rights including seeking of remedies under the consumer contract by consumers against the seller or supplier.

44. Generally, blacklisted terms in these jurisdictions can be classified according to the following broad **criteria**:

- terms giving the seller or supplier significant control of the terms of the contract or of the performance of the contract which are not reasonably necessary to protect legitimate business interests (e.g. terms

which enable the seller or supplier to alter the terms of the contract unilaterally without a valid reason which is specified in the contract);

- terms determining the duration of the contract (e.g. terms enabling the seller or supplier to terminate a contract of indeterminate duration without reasonable notice);
- terms restraining a consumer from having the same rights as the seller or supplier, as parties of the contract (e.g. terms making an agreement binding on the consumer whereas provision of services by the seller or supplier is subject to a condition whose realisation depends on his own will alone);
- exemption and limitations clauses (e.g. terms excluding or limiting the legal liability of a seller or supplier in the event of the death of a consumer or personal injury to the latter resulting from an act or omission of that seller or supplier).

45. The following overview covers **examples of blacklisted terms** (*list not meant to be exhaustive*) in certain jurisdictions:

- i. excluding or limiting the legal liability of a seller or supplier in the event of the death of a consumer or personal injury to the latter resulting from an act or omission of that seller or supplier.
- ii. inappropriately excluding or limiting the legal rights of the consumer vis-à-vis the seller or supplier in the event of total or partial non-performance or inadequate performance by the seller or supplier of any of the contractual obligations, including the option of offsetting a debt owed to the seller or supplier against any claim which the consumer may have against him.
- iii. making an agreement binding on the consumer whereas provision of services by the seller or supplier is subject to a condition whose realization depends on the seller or supplier's own will alone.
- iv. permitting the seller or supplier to retain sums paid by the consumer where the latter decides not to conclude or perform the contract, without providing for the consumer to receive compensation of an equivalent amount from the seller or supplier where the seller or supplier is the party cancelling the contract.
- v. requiring any consumer who fails to fulfil his obligation to pay a disproportionately high sum in compensation to the seller or supplier.
- vi. authorizing the sellers or suppliers to dissolve the contract on a discretionary basis where the same facility is not granted to the consumers, or permitting the sellers or suppliers to retain the sums paid for services not yet supplied by them where it is the seller or supplier themselves who dissolve the contract.
- vii. enabling the seller or supplier to terminate a contract of indeterminate duration without reasonable notice except where there are serious grounds for doing so.
- viii. automatically extending a contract of fixed duration where the consumer does not indicate otherwise when the deadline fixed for the consumer to express this desire not to extend the contract is unreasonably early.
- ix. irrevocably binding the consumers to terms with which they had no real opportunity of becoming acquainted before the conclusion of the contract.
- x. enabling the seller or supplier to alter the terms of the contract unilaterally without a valid reason which is specified in the contract.
- xi. enabling the seller or supplier to alter unilaterally without a valid reason any characteristics of the good or service to be provided.
- xii. providing for the price of goods to be determined at the time of delivery or allowing a seller of goods or supplier of services to increase their price without in both cases giving the consumer the corresponding right to cancel the contract if the final price is too high in relation to the price agreed when the contract was concluded.

- xiii. giving the seller or supplier the right to determine whether the goods or services supplied conform with the contract, or giving him the exclusive right to interpret any term of the contract.
- xiv. limiting the obligations of the sellers or suppliers to respect commitments undertaken by their agents or making their commitments subject to compliance with a particular formality;
- xv. obliging the consumers to fulfil all their obligations where the sellers or suppliers are not obliged to perform theirs.
- xvi. giving the sellers or suppliers the possibility of transferring their rights and obligations under the contract, where this may serve to reduce the guarantees for the consumer, under the contract without the latter's agreement.
- xvii. excluding or hindering the consumer's right to take legal action or exercise any other legal remedy, particularly by requiring the consumers to take disputes exclusively to arbitration not covered by legal provisions, unduly restricting the evidence available to them or imposing on them a burden of proof which, according to the applicable law, should lie with another party to the contract.
- xviii. Automatically selecting an option for a consumer to perform an obligation, such as but not limited to, payment of additional fees, when a consumer would not ordinarily select or choose to perform the option.

Contracts for Goods, Services and Digital Content

Goods

46. In general, sellers or suppliers that sell or supply goods must be able to ensure the following conditions for consumers:
- goods must be of the quality represented by the seller or supplier to the consumer;
 - goods must be reasonably fit for the purpose, including any particular purpose the consumer made known to the seller or supplier before the contract;
 - description of the good must match with the goods being marketed.
47. Any terms and conditions in the contract which may lead to have the effect of excluding or restricting the seller or supplier's liability regarding any of those aforementioned rights could be blacklisted in certain jurisdictions.

Services

48. In terms of transactions on services, consumers have the following rights that fall under the responsibility of the seller or supplier:
- the service must be delivered with reasonable quality, skill, and/or competence as represented by the seller or supplier to the consumer;
 - in cases where the price for the service has yet to be agreed upon between the seller and supplier and the consumer, only a reasonable price for the service is payable;
 - in cases where the time for performance has yet to be agreed upon, the service must then be performed within a reasonable timeframe.
49. In jurisdictions which blacklist certain UCTs, a term of the contract for services is blacklisted to the extent that it would:
- exclude the seller or supplier's responsibility in relation to the failure of carrying out the service with reasonable quality, skill, and/or competence, or for failing to act in accordance with information about the seller or supplier or service which is binding on the seller or supplier under the relevant laws and regulations.

- exclude or restrict any available remedy in case of breach of the consumer rights or make it challenging for consumers to seek remedy.
- limit the amount of compensation a seller or supplier can be required to pay for any breach of consumer rights to less than the price the consumer is required to pay in accordance with the provisions of the contract.

Digital Content

50. Any contract or notice used in relation to the delivery of digital content, whether it is paid or offered for free, would have to still meet the fairness and transparency requirements or tests. Digital content (for instance downloads or apps) may be delivered to consumers in several different ways:

- On one hand, the consumer is purchasing only the rights to enjoy or use the digital content that is set out under the terms of a standard form contract license.
- On the other hand, digital content may also be supplied to consumers in return for something other than money, for example, if the seller or supplier requires access to consumer personal data in return for the service provided.

III. ENFORCEMENT AND EDUCATION

51. An effective protection of consumers is through public administrative measures that can tackle abuses across sectors and industries by applying preventive measures that remove UCT from standard form contracts. However, it is noted that the mandates and degree of proactiveness of consumer protection authorities and other regulators in monitoring standard form contracts may differ depending on the jurisdiction.

Cooperation with Other Entities

52. Consumer protection authorities in the AMS are encouraged to explore **sharing responsibilities and resources with other sectoral and sub-national entities**, both for the control of UCTs, consumer and seller or supplier education, as well as to facilitate consumer access to advice and redress when sellers or suppliers seek to enforce UCT against them. The following lists examples of possible approaches for cross-sectoral coordination and cooperation among public, private and civil society stakeholders:

- The consideration of industry-specific conditions in standard form contracts requires close cooperation between consumer protection authorities and relevant sectoral regulators, for example on financial services, in order to align supervisory and enforcement efforts. Where consumer protection laws mandate that standard form contracts, for example, related to insurance or housing, require formal approval from the responsible government entities, it may often still be necessary to **allocate appropriate resources and build capacities, particularly at the local level**.
- Where consumer protection laws do not specify a focus on UCTs in particular sectors or industries, consumer protection authorities can work with consumer associations and/or legal aid organisations not only with respect to consumer education and outreach, about also in **analysing empirical data from complaints or disputes**, as the basis for targeted enforcement and/or advocacy actions.
- Co-regulatory initiatives with the private sector are indispensable in fostering a culture of fair and ethical business conduct, particularly in the face of low consumer empowerment, uneven public enforcement or ongoing legal reforms. Good practices include educating business associations as multipliers or “consumer champions”, as well as enshrining principles for fair consumer contracts in **voluntary industry codes**.
- With a view to widen policy dialogue and realize overarching economic reforms or goals, engagement with competition authorities could prove useful in raising awareness about the impact of UCTs on fair competition and innovation. This may also be linked to the application of specific tools and methodologies to **assess consumer and competition impacts in certain industries**.

Wider Developments and Digitalisation

Dark Patterns

53. In the evolving digital economy, sellers or suppliers may also conclude standard form contracts at a distance and in a digital format, provided on websites, platforms or mobile applications. In doing so, sellers or suppliers should design the online user interface in a manner that enables consumers to make informed purchasing decisions without being tricked or nudged into unwanted transactions. This includes **avoiding deceptive designs** (so-called “**dark patterns**”), such as hidden contract terms, default payments and other processes that impose contractual obligations on the consumer without their knowledge or consent.

54. Due to their high prevalence and potential of causing significant consumer harm, dark patterns are increasingly attracting attention from consumer protection authorities. To substantiate enforcement actions against the use of dark patterns by sellers or suppliers, consumer protection authorities in the AMS may consider **expanding the scope of the existing UCT regime**.

Use of Digital Technologies in Enforcement

55. New digital technologies, such as **artificial intelligence**, present opportunities for being utilized by sellers and suppliers in developing standard form contracts and ensuring compliance with fairness and transparency requirements.
56. Similarly, so-called **enforcement technologies** (in short “**Enftech**”) enable technology-assisted enforcement by consumer protection authorities and other regulators. An example concerns automated, large-scale screening and analysis of standard form contracts according to fairness and transparency, as well as with respect to data protection issues. This can help close gaps in underenforcement, alleviate administrative burdens and leverage sweeping efforts. See the annex for examples.
57. Digital tools and technologies should be used with caution in order to **avoid unintended consequences**, for example programming that leads biased or discriminatory outcomes – risks that are particularly probable when data sets are either limited, incomplete or faulty.



ANNEX

ANNEX 1: REGULATIONS OF UNFAIR CONTRACT TERMS IN AMS

Country	Laws & Regulations	Provisions
Brunei Darussalam	Unfair Contract Terms Act (Chapter 171 of Laws of Brunei Darussalam)	The Act limits the extent to which civil liability for breach of contract, or for negligence or other breach of duty can be avoided by means of contract terms. The Act also sets out prohibited unfair contract terms and the exemptions.
	Consumer Protection (Fair Trading) Act, (Chapter 261 of Laws of Brunei Darussalam)	CPFTA protects consumers against unfair practices, such as taking advantage of a consumer by including in an agreement terms or conditions that are harsh, oppressive or excessively one-sided so as to be unconscionable.
Cambodia	Law on Consumer Protection 2019	There is no specific law on unfair contract terms but the LCP provides the definition and examples of unfair business acts.
Indonesia	Law No. 8 on Consumer Protection 1999	There is no specific law on unfair contract terms, but the Law No 8 Year 1999 contains “Provisions in the Inclusion of Standard Clauses” that prohibit the following in any document, agreement or contract between businesses and consumers.
Lao PDR	Consumer Protection Law 2010 (CPA)	There is neither specific law on unfair contract terms nor any provisions in the CPA.
Malaysia	Consumer Protection Act 1999 (CPA)	There is no specific law on unfair contract terms in Malaysia. The CPA includes provisions dealing with aspects of unfair contract terms.
Myanmar	Law on Consumer Protection 2014 (LCP) amended in 2019	There is no separate statute regulating contract terms. The LCP contains general consumer protection provisions regarding deception and disclosure, albeit not unfairness.
Philippines	Consumer Act of the Philippines 2014 (Republic Act No 7394)	There is no separate unfair contract terms law in the Philippines. The CAP however addresses unfair or unconscionable sales acts and practices in relation to consumer transactions.
Singapore	Unfair Contract Terms Act 1977	The UCTA seeks to impose further limits on the extent to which civil liability for breach of contract, or for negligence or other breach of duty, can be avoided by means of contract terms.

Thailand	Unfair Contract Terms Act 1997 (UCTA)	<p>The key principle underpinning the UCTA is to preserve the principle of the “autonomy of will” and “freedom of contract”.</p> <p>The UCTA also allows judicial supervision of commercial conduct and the voiding of unfair terms.</p>
	Consumer Protection Act 1979 (CPA)	The CPA aims to empower an administrative body to rule on particular contractual terms and prohibit their enforcement against consumers.
Vietnam	Law on Consumer Protection 2011 (LoCP)	There is no specific law on unfair contract terms. The LoCP addresses provisions regarding formulation of contracts between traders and consumers, along with general trading conditions.

ANNEX 2: SELECTED CASE STUDIES OF UNFAIR CONTRACT TERMS IN ASEAN

Malaysia: Inequality of Bargaining Power

Saad Bin Marwi v Chan Hwan Hua (2001)2 AMR 2010; (2001) 3 CLJ98

A Malaysian coconut farmer, who spoke no English, was persuaded to enter into a property sales arrangement for a fraction of the real value of the land. He had no legal advice and was required under the contract to meet near impossible conditions. Although not decide with reference to the provisions on unfair contracts in the Consumer Protection Act, the Malaysian Court of Appeal found the contract could not be enforced as it clearly resulted in an inequality of bargaining power.

Singapore: ADX Suing by Her Lawful Mother and Litigation Representative B v Fidgets Pte Ltd (2009) SGDC 393

A child playing in a playground called Turf City was seriously injured when sliding down a slide. The injury was quite severe as she suffered a deep gash on her leg which required stitching. The injury was caused by a bolt present within the slide that contains a sharp edge. The mother of the child subsequently sued the establishment due to the injury suffered by her child.

The defendant of this case relied on the exclusion of liability clause as the mother, before paying and letting her child enter the defendant's business establishment, to sign an acknowledgment stating that the plaintiff will not hold the defendant or their staff, liable for any pain, injury and death that may be sustained by the child. The defendant also required the plaintiff to supervise the child at all times.

The defense however fails due to Section 2 (1) of the Unfair Contract Terms Act 1977 ("the Act") prohibits a person from excluding his liability for personal injury arising from his negligence. On the face of it therefore, this provision rejects the terms which the Defendants rely on.

ANNEX 3: UNFAIR CONTRACT TERMS FLOWCHART



