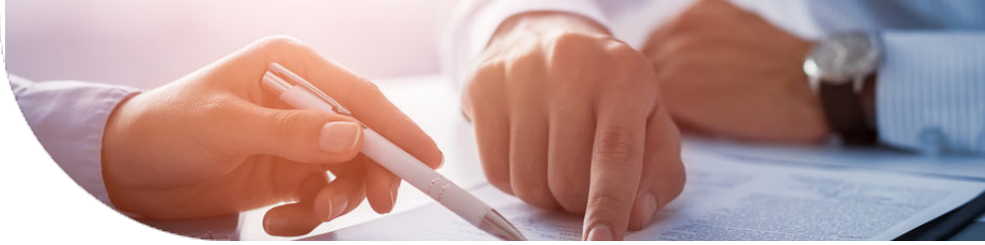

Highlighting Onerous Terms in Business Contracts

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When contracting with consumers, it is very important to highlight and explain onerous terms, however, in business-to-business contracts, it is still important to bring the other party's attention to such terms, otherwise, you may not be able to rely on a clause.

In a recent case, the court considered whether a term requiring payment of a cancellation fee of £180,000 plus VAT arising under a telecoms contract was enforceable or not. The Court looked at whether the term had been adequately incorporated into the contract and whether or not it was a penalty clause.

A social care provider entered into a contract with Blu-Sky Solutions Ltd for the provision of connections for 800 mobile phones for a minimum period of 48 months for a monthly rental of £9,600. The social care provider had signed an order form that stated that Blu-Sky's terms and conditions were incorporated by reference. The terms and conditions consisted of just over a page of detailed text, in closely spaced small type without separate clause headings. The text was not labelled as being terms and conditions. They were therefore described as being "not in any way user-friendly to any reader let alone a non-legal reader". The terms and conditions contained a clause that stated that the customer would have to pay a £225 administration charge per connection if cancelled prior to the expiry of the minimum term or if a connection was downward migrated during the minimum term without written consent from Blu-Sky. The social care provider did cancel in this way and Blu-Sky then sought to enforce the onerous clause, requiring a £225 administration charge per connection amounting to £180,000.

Firstly, the Court considered whether the terms and conditions and the clause in question had been validly incorporated into the contract by reference. The court found that they had. The next question was whether the onerous cancellation fee clause had been sufficiently brought to the attention of the customer.

This question normally does not arise where a contract is signed, particularly in a business-to-business scenario. Usually, when a person signs a contract they are bound by its terms, whether or not they have been read. However here, whilst the contract was signed, it incorporated the other terms merely by reference, and the onerous term was not therefore included in the signed document itself.

Care should therefore be taken when incorporating terms and conditions by reference only. The existence of onerous terms should be highlighted so that the customer is alerted to their presence and given an opportunity

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to read them and decide whether or not to enter into the contract on that basis. In business-to-business contracts, it should be sufficient to state at the beginning of the document that the other party's attention is brought to specific clauses of an onerous nature.

The court then explored whether the clause might be a penalty clause. Parties often seek compensation in certain scenarios, however, a penalty clause goes beyond proportionate compensation to cover loss and seeks sums as almost a 'punishment' for breach of the contract regardless of whether they genuinely cover a loss suffered or not. Penalty clauses are not enforceable under English law. It was found that the "administration charge" was disproportionate to any reasonable pre-estimate of Blu-Sky's loss resulting from a cancellation.

Ultimately, the court found that Blu-Sky could not rely on its cancellation fee clause for reasons including the following:

- Blu-Sky had made no attempt to highlight the relevant clauses, which were "cunningly concealed in the middle of a dense thicket which none but the most dedicated could have been expected to discover";
- It would have been possible to include the terms and conditions as part of the Order Form rather than incorporating them merely by reference, however, Blu-Sky had not done so;
- Whilst the Order Form did refer to Blu-Sky's terms and conditions, it did not explain their purpose or give any warning that they imposed potentially substantial and potentially onerous obligations;
- Blu-Sky did not warn the customer that it would be exposed to a very substantial liability should it decide to cancel its order.

This case, therefore, shows that businesses seeking to rely on onerous clauses, need to take steps to bring such clauses to the other party's attention. Hiding onerous clauses in the depths of terms and conditions or incorporating terms by reference only may mean that businesses cannot rely on such onerous terms.

If you would like assistance in negotiating or reviewing a business contract, please do not hesitate to contact our Corporate & Commercial team by emailing online.enquiries@la-law.com or calling 01202 786188.

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