

UNFAIR TRADE PRACTICES AND UNCONSCIONABLE CONDUCT IN COMPETITION AND CONSUMER PROTECTION LAW

Monopolies and restrictive trade practices are considered bad if they endanger the existence of competition in the market. On the other hand, there are some practices known as unfair trade practices (or unfair competition conduct) and unconscionable conduct, which are considered to be bad because they harm particular traders and consumers directly.

These largely include cases where the interaction is directly between the seller and the buyer and the buyer or another trader is adversely affected by an unfair act of the seller.

Laws against unfair trade practices and unconscionable conduct are an exception to the classical principle of *caveat emptor* (buyer beware). The principle of *caveat emptor* was based on the notion that a buyer should make all necessary examination and take all possible care before buying a thing or before entering into contract of purchase. It is increasingly felt that in the growing complicated world of business a buyer becomes helpless and can be cheated in more ways than one.

UNFAIR TRADE PRACTICE

The term unfair trade practice or UTP is used in the context of both domestic activity and international trade. Unfair trade practice in international trade has, however, a different meaning. In international trade, unfair trade practice again relates to the issue of competition between different suppliers. Unfair trade practices objected to in international trade include dumping and subsidies. These practices are considered bad because they hurt the industry of the country in which they are sold although they may be helpful to the consumer.

Types of unfair trade practices prohibited in domestic law depends on customs and law construction approach of a particular country. The World Bank and OECD Model Law lists following trade practices to be unfair:

- Distribution of false and misleading information that is capable of harming the business interests of another firm;
- Distribution of false and misleading information to consumers, including the distribution of information lacking reasonable basis related to price, character, method of the place of production, and suitability for use or product quality;
- False or misleading comparison of goods in the process of advertising;
- Fraudulent use of another's trademark, firm name, or product labeling or packaging; and
- Unauthorised receipt, use or dissemination of confidential scientific, technical, production, business or trade information.

Unfair trade practices may be regulated by competition law or consumer protection law, depending on the context of specific country.

In **India**, these practices were taken into account in Monopoly and Restrictive Trade Practices Act 1979, nevertheless, were excluded from regulations of Competition Act 2002, the new competition law. Then they were included in Indian Consumer protection Act 1986 and continued to be effective up to now.

In **Tanzania**, in addition to unfair trade practices, the fair trade practices Act prohibits:

- Misinterpretation;
- Misleading advertising and conduct;

- Bait and switch; and
- Harassment and coercion.

It also imposes the obligation to:

- Label price in shops to increase transparency and hence competition;
- Need for statement and conformity with safety standards and warning requirements; and
- Labeling product information, product recall requirements, imposition of standards as to quality fitness for purpose, basic warranties and indemnities and the like to prevent unfair trade practices.

In **Vietnam**, similar practices are prohibited in Chapter III, from art 39 to art 48, Vietnam Competition Law 2004, including:

- (1) Misleading direction;
- (2) Violating business secret;
- (3) Coercion in business;
- (4) Detracting other businesses;
- (5) Causing onerousness to the business of other corporations;
- (6) Advertising for the purpose of unfair competition;
- (7) Promotion for the purpose of unfair competition;
- (8) Association's discrimination conduct;
- (9) Illegal network marketing;
- (10) Other unfair competition acts based on identification criteria in Article 3(4) of this law governed by the government.

UNCONSCIONABLE CONDUCT

Another practice closely related to unfair trade practice is that of unconscionable conduct. Law courts around the world, especially in developed countries, are increasingly developing the concept of unconscionability.

What is an unconscionable conduct? Basically it involves the exploitation by a stronger party of a weaker party. While in a business dealing there will generally be an overall winner and loser in the bargain yet there may be dealings that on the face may seem grave exploitation by stronger party of the weaker party and hence may be revolting to the conscience.

Australian Trade Practices Act includes the following as unconscionable conduct:

Unconscionable conduct in commercial dealings: This results from disability in the weaker party that seriously affects his/her ability to decide what is in his/her own best interests. Such disability could be because the party is ignorant of important facts known to the other party, illiteracy or lack of education, poverty, infirmity, drunkenness, or lack of assistance or explanation when these are necessary. If the corporation knows or should have known the disability and the effect on the person but takes unfair advantage of its superior of its position, or bargaining power the corporation is said to indulge in unconscionable conduct.

Unconscionable conduct in consumer dealings: This can be explained with the help of an example. Suppose an insurance agent visits a remote tribal community in the countryside and speaks to a group of workers employed by the local community council. The workers are unfamiliar with the legalese in the documents and regularly leave the workforce for extended periods for family and cultural reasons. The agent persuades a number of workers to sign insurance/superannuation policies and to authorise their payment by payroll deduction. A term of each policy states that if two monthly payments are missed the policy will be cancelled. This happens to some of the workers, costing them the premiums they had paid. This is unconscionable conduct that the agent takes unfair advantage of the workers' itinerant circumstances. On account of being on the move for extended lengths of time, some workers failed to make their monthly payments and suffered losses.

In this case, a court can take into account any considerations tending to establish a special disability as it sees it fits. However, the Australian Trade Practices Act specifically states that the court may have regard to:

- The relative bargaining strengths of the parties;
- The consumer's ability to understand the documentation;
- Whether undue influence or pressure, or unfair tactics were used;
- Whether the conditions imposed went beyond what was needed for the supplier's legitimate interests; and
- The amount the consumer would have to pay for equivalent goods or services elsewhere.

High-risk situations: The unconscionable conduct provisions do not prevent the ordinary cut and thrust of everyday commercial life that comes from vigorous competition and it is a fact of life that parties nearly always do not meet on equal terms in their dealings. However, to avoid claims of unconscionable conduct, extreme caution should be exercised in the following situations:

1/ Where the stronger party knows or ought to know that the weaker party did not fully understand the transaction. Such situations may arise when the weaker party:

- Is under a serious misapprehension about the terms or subject matter of the transaction;
- Has difficulty with language
- Suffers from mental or physical infirmity;
- Is incapacitated by drugs or alcohol; and
- Has no access to independent assistance or advice.

2/ Where there is no real opportunity for the weaker party to bargain. These days we have standard form contracts. Standard contracts are those contracts where the contract does not result by the bargaining of the parties on its detailed conditions and terms. Instead one of the parties usually the trader puts down the terms and conditions of the contract in writing to all who wish to adhere to it and other party has only to accept it fully or to reject it fully. A common example of such contracts is insurance contracts. The use of take it or leave it contracts may be risky if:

- Pressure is brought to bear to make the party sign;

- The terms of the contract are onerous or their onerous nature is disguised in fine print;
- The weaker party is not allowed to seek independent advice on its rights under the contract.

3/ *Where a contract is grossly one sided.* Terms and conditions that may be considered grossly one sided, include those:

- That exclude the legal rights of the weaker party;
- That state the weaker party has understood terms and conditions of the contract when this is not the case;
- That are so strict that a breach of contract by the weaker party is inevitable; and
- That allow termination of the contract by the stronger party for technical and/or minor breaches of contract.

4/ *Excessive terms and prices:* In business, different parties have different bargaining strengths and same trader may sell same goods to different buyers at different prices depending on the bargaining strength of different parties. The law and the court take such things to be normal business practice. However, it may happen that the weaker party is paying considerably above what other similar parties are paying or where other excessive terms are imposed, the court may find the conduct to be unconscionable.

5/ *Using powerful position to impose unreasonable conditions:* Sometimes, a large business uses its power to extract a deal from a small business on terms unfavorable to the weaker party. This often occurs when the smaller business is vulnerable, e.g. when an agreement is up for renewal. Companies should:

- Ask whether the condition is one that is reasonably necessary to protect the legitimate interests of the stronger party;
- Be clear about the conditions of any renewal of an agreement with a smaller company before entering the original agreement;
- Not build up expectations about a renewal that can be exploited against the commercial interests of a smaller party; and
- Act in good faith at all times.

Vietnam Competition Law also refers to similar practices. For example, according to art 13, businesses in dominant position (large enterprises) are prohibited to:

- (...)
- *Impose unreasonable buying, selling prices for goods and services or maintain minimum resale price to discourage customers*
- (...)
- *Impose different trade conditions in dealing in order to create unfairness in competition*
- *Impose conditions for other enterprises who enter selling, buying contracts of goods or services or force others to accept obligations that are not directly subjected to the contract*

Meanwhile, according to art 14, monopoly is also prohibited to the same practices, and cannot “impose adverse terms for customers” or “abuse of monopoly position to unilaterally change or terminate the contract that has been signed unreasonably”.

In the draft consumer protection law being submitted to the National Assembly for examination, unconscionable conduct also constitutes part or important guidelines, as it is considered as an Act, when being passed in the near future, it would protect the interests of the weaker party, who do not have bargaining strength and usually lack of information in dealings with the parties in the manufacture and sales of goods or services – Consumers.