

Bills Committee on the Copyright (Amendment) Bill 2014

The Administration's response to issues raised at the meetings of 20 January and 7 May 2015

Purpose

At the meetings of 20 January and 7 May 2015, the Administration was requested to –

- (A) provide information on the reasons for not including in the Copyright (Amendment) Bill 2014 (the Bill) an express provision restricting contract override as in the case of the United Kingdom (UK), and the arguments for and against such a provision raised during the UK House of Lord's deliberation on its new fair dealing exception for parody, caricature and pastiche, as well as the reasons for not including such a provision in other overseas jurisdictions such as Australia and the United States (US);
- (B) provide information, with reference to precedent cases where appropriate, to illustrate the general application of the Unconscionable Contracts Ordinance (Cap. 458) in preventing private contractual terms from being enforceable that excluded or limited the exercise of statutory permitted acts by a contractual party, and whether the proposed fair dealing exceptions for the purpose of parody, satire, caricature or pastiche would become unenforceable if there was no express provision in the Copyright Ordinance (Cap. 528) limiting such private contractual terms; and
- (C) inform the Bills Committee –
 - (a) whether the Administration agrees with the view of copyright owners that there is “uncertainty as to the limit or boundary of fair dealing exceptions”;
 - (b) whether it is within the contemplation of the Administration that copyright owners would circumvent the boundaries of

fair dealing exceptions set in the Bill and rely instead on commercial agreements with users to set their own boundaries on the scope of use;

- (c) whether it is the policy of the Administration to allow copyright owners to circumvent the boundaries of fair dealing exceptions in the manner described above, which has the effect of rendering the fair dealing exceptions ineffective in safeguarding the freedom of expression; and
- (d) whether, in the light of the reservations above, the Administration will consider moving a Committee Stage Amendment modelled after the contract override provision in the UK Copyright and Rights in Performances (Quotation and Parody) Regulations 2014 (the Regulations).

2. This paper sets out the Administration's response.

(A) and (C) Contract override

3. In the present context, "contract override" refers to the practice of parties entering into contractual agreements which exclude or limit the operation of certain statutory copyright exceptions. We note that in the UK, the new fair dealing exception for parody, caricature and pastiche includes a provision restricting contractual terms from overriding or limiting the exception, stipulated as follows-

"[t]o the extent that a term of a contract purports to prevent or restrict the doing of any act which, by virtue of this section, would not infringe copyright, that term is unenforceable."¹

¹ Similar restrictions on contract override were also included for other new copyright exceptions including those for research, private study and quotation. However, no such restriction on contract override has been imposed on existing copyright exceptions under sections 28-76 of the Copyright, Designs and Patents Act 1988.

Situation in the UK

4. In the UK, introduction of such a categorical restrictive provision has been controversial. Public views received during the consultation exercise in 2011 were distinctly divergent, broadly between those who advocated that permitted acts should not be restricted by contract provisions; and those who considered that freedom to contract was important in principle and in practice, and should not be restricted.² The legislative proposal also attracted intensive discussions during the legislative process in the House of Lords. In the course of the debates on the Regulations which would bring in the new copyright exceptions, in May and July 2014³, Members of the House of Lords made arguments both for and against the provision restricting contract override.

5. Major arguments in favour of restricting contract override included-

- It is entirely reasonable that legislation in the public interest should modify the enforceability of existing contracts in the field of copyright.
- The provision gives users, consumers and businesses certainty and clarity that the exceptions apply in all circumstances regardless of the details of a contract.
- The absence of such a provision can prevent the uses permitted by the exceptions, thus preventing full benefits from being realised.
- The proposed provisions are fully consistent with the UK Government's obligations under the European Union (EU) InfoSoc Directive.⁴

6. Major arguments against restriction of contract override included-

- Limitation on override of contract is not required by the EU InfoSoc Directive as Article 9 states that the Directive should be without prejudice to the law of contract⁵; recital 45 of the Directive

² "Modernising Copyright": see www.ipo.gov.uk/response-2011-copyright-final.pdf.

³ <http://www.publications.parliament.uk/pa/ld201314/ldhansrd/text/140514-0001.htm> and <http://www.publications.parliament.uk/pa/ld201415/ldhansrd/text/140729-0002.htm> respectively.

The Grand Committee of the House of Lords also convened a debate in December 2013 when the Government published the draft exceptions to enable interested parties to provide comments.

⁴ Council Directive 2001/29/EC of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society.

⁵ Article 9 of the Directive confirms the continued application of other legal provisions by providing that "This Directive shall be without prejudice to provisions concerning in particular patent rights, trade marks, design rights, utility models, topographies of semi-conductor products, type faces, conditional access, access

further states that the exceptions and limitations should not prevent the definition of contractual relations designed to ensure fair compensation for the rights holders insofar as permitted by national law.

- The sanctity of contract will be overridden.
- The provision will potentially run into conflict with the ability of rights holders to ensure the enforceability of technical protection measures.
- Exceptions should not apply where commercially available alternatives already exist.
- There will likely be a negative impact on rights holders as they will have to give free licences for services that are a potential source of valuable income.
- The UK's competitiveness may be affected as content companies may choose to contract in other jurisdictions where they can freely negotiate contracts.

7. In particular, the Secondary Legislation Scrutiny Committee, while noting that the UK Government had presented its justifications for introducing the restrictive provision, said it was struck by the strength of concerns expressed by some stakeholders on the issue and considered it possible that the changes would have a greater economic impact on producers and creators than the Government had envisaged. The UK Government was urged to monitor the impact of the changes from the point of implementation and respond effectively if it became clear that any negative potential was realised. Among other responses, the responsible minister reassured the House of Lords⁶ that the impact of the changes would be evaluated within five years and the evaluation results would be published by 2019.

Situation in Australia

8. The Copyright Act 1968 in Australia generally contains no provisions that prevent agreements excluding or limiting the operation of exceptions, except in relation to certain exceptions for computer programs.

to cable of broadcasting services, protection of national treasures, legal deposit requirements, laws on restrictive practices and unfair competition, trade secrets, security, confidentiality, data protection and privacy, access to public documents, the law of contract.”

⁶ At one stage, a Member moved an amendment to the Motion that sought to approve the draft Regulations, by inserting at the end “but this House regrets that the Regulations fail to take into account concerns raised by the Secondary Legislation Scrutiny Committee about contract override...”. This was later withdrawn.

9. The issue of contract override / contracting out was considered by the Copyright Law Review Committee in Australia in 2002 and revisited by the Australian Law Reform Commission (ALRC) in recent years. In February 2014, the ALRC released its Final Report on Copyright and the Digital Economy⁷, commenting that contract override raises fundamental questions about the objectives of copyright law, the nature of copyright owners' exclusive rights and exceptions, and the respective roles of the Australian Copyright Act (ACA), contract, and competition and consumer law and policy.

10. The ALRC recommended that the ACA be amended to provide that contractual terms restricting or preventing the doing of any act which would otherwise be permitted by the libraries and archives exceptions are unenforceable. Furthermore, limitations on contract override should apply to the new fair dealing exception, which incorporates the existing fair dealing provisions (covering criticism and review, parody or satire, reporting news and the giving of professional advice) and, in addition, provides for fair dealing covering quotation, non-commercial private use, incidental or technical use, educational use, library or archive use, and access for people with disability.⁸

11. In the ALRC's view, broader limitations on contract override – for example, extending to all exceptions, or to all fair uses, would not be practical or beneficial. The ALRC considered that, in the less confined, more marked-oriented environment of an open-ended fair use exception, limitations on contracting out are harder to justify and more likely to have unintended effects. Generally, the ALRC considered that removing freedom to contract risks reducing the flexibility of the copyright regime, and the scope to develop new business models for distributing copyright materials. At this stage, it is unclear as to whether or not, and if so, when and how, the Australian Government will take forward the ALRC's recommendations.

⁷ See <http://www.alrc.gov.au/publications/copyright-report-122>.

⁸ The ALRC notes that the existing fair dealing exceptions protect important public interests in education, the free flow of information and freedom of expression. Given that they are long-established and their scope is well understood, limitations on contracting out should not cause disruption to existing business models. Meanwhile, it considers that, if users of copyright materials continue to be restricted to a closed category of fair uses, these rights should be protected from contracting out. This would reflect a balancing of interests. The ALRC's primary reason for such recommendations is to ensure that certain public interests protected by some copyright exceptions are not prejudiced by private arrangements, promoting fair access to content.

Situation in the US

12. While the US fair use exception provides a general defence to copyright infringement, the US Copyright Act does not contain any provisions that prohibit contractual terms from excluding or limiting the operation of copyright exceptions. It has been commented that the US courts may refuse to enforce agreements that attempt to extend protection of copyright material beyond the limits set by copyright based on the copyright misuse doctrine or where copyright is being used in a manner contrary to the public policy.⁹ However, there seem to be no clear instances of the application of the copyright misuse doctrine to the multitude of online contracts that exclude otherwise fair use of copyright materials. Rather, it has been observed that courts have generally followed a “freedom of contract” line. There also do not currently seem to be any consultations or government-led research on this issue in the US.

Situation in other jurisdictions

13. In the EU, it seems that copyright exceptions are protected against contract override in the domain of software and databases¹⁰ but not of other works.¹¹ During the second reading of the proposal for the InfoSoc Directive, there was a suggestion to introduce a new Article 5(6) stating that “[n]o contractual measures may conflict with the exceptions or limitations incorporated into national law pursuant to Article 5”.¹² Nevertheless, such a suggestion was not accepted by the European Commission.¹³

14. In Ireland, section 2(10) of the Copyright Act 2000 states that “[w]here an act which would otherwise infringe any of the rights conferred by this Act is permitted under this Act it is irrelevant whether or not there exists any term or condition in an agreement which purports to prohibit or restrict that act.”¹⁴

⁹ Australian Law Reform Commission, Copyright and the Digital Economy, 17. Contracting Out (4 June 2013), paras. 17.45 & 17.47, <http://www.alrc.gov.au/publications/17-contracting-out/current-law>.

¹⁰ Council Directive 91/250/EEC of 14 May 1991 on the legal protection of computer programs and Council Directive 96/9/EC of 11 March 1996 on the legal protection of databases.

¹¹ See footnote 4.

¹² Article 5 of the InfoSoc Directive provides for a list of exceptions and limitations to the Reproduction Right provided in Article 2 and the Right of Communication to the public in Article 3. Exceptions include allowing certain acts of temporary reproduction and private copying, for parody, caricature or pastiche, for cases such as educational and scientific purposes, for the benefit of public institutions such as libraries and archives, for purposes of news reporting, for quotations, for use by people with disabilities, for public security uses, for uses in administrative and judicial proceedings, etc.

¹³ http://eprints.bournemouth.ac.uk/16091/1/_contractlaw-report.pdf, at pp. 89-92.

¹⁴ http://eprints.bournemouth.ac.uk/16091/1/_contractlaw-report.pdf, at p. 102.

However, the Copyright Review Committee commented that the section does not go far enough in making clear exactly what the effect of the section is upon the impugned term or condition. It recommended in 2013 that any contractual term which unfairly purports to restrict an exception permitted by Irish copyright law should be void.¹⁵ It is unclear as to whether or not the Irish Government will take forward this recommendation.

15. In New Zealand, it is generally accepted that parties can contract out copyright exceptions, so long as the Copyright Act 1994 does not expressly or impliedly prohibit it and the effect of contracting out would not be contrary to law or fundamental public norms. Nothing in the New Zealand copyright legislation prohibits the ability to contract out. On the contrary, section 80(3)(b) of its Copyright Act expressly allows contracting out of the exception for making back-up copies of computer programs¹⁶. The statutory exception for format shifting also specifies that it is subject to contractual terms.¹⁷

16. There is no express statutory provision restricting or limiting contract override in the respective copyright legislations of Canada and Singapore.

Situation in Hong Kong

17. It is well accepted that the copyright regime is to promote or incentivise creativity by providing a fair reward to authors of original works. Copyright law operates to define the property right that subsists in a work and the

¹⁵ <http://www.enterprise.gov.ie/en/Publications/CRC-Report.pdf>, at p. 13.

¹⁶ Section 80(3) of New Zealand Copyright Act 1994 provides -

(1) Subject to subsection (3), copyright in a computer program is not infringed by the making of a copy of the computer program if—

- (a) the copy is made by or on behalf of the lawful user of the copy of the program (in this section referred to as the original copy) from which the first-mentioned copy is made; and
- (b) the copy is made solely for the purpose of being used by or on behalf of the lawful user of the original copy –
 - (i) instead of the original copy in order to preserve the original copy for use if the copy is lost, destroyed, or rendered unusable; or
 - (ii) if the original copy is lost, destroyed, or rendered unusable.

...

(3) Subsection (1) does not apply to the making of a copy of a computer program—

- (a) from an infringing copy of the computer program; or
- (b) contrary to an express direction by or on behalf of the owner of the copyright in the computer program given to the lawful user of the original copy not later than the time when the lawful user of the original copy acquired that original copy.

¹⁷ Section 81A(2) of New Zealand Copyright Act 1994 provides that the exception “does not apply if the owner of the sound recording is bound by a contract that specifies the circumstances in which the sound recording may be copied”.

ownership it belongs to.¹⁸ Owners of copyright may then freely assign or license the property right by contract to others for a consideration mutually agreed.

18. In introducing the new fair dealing exceptions in Hong Kong, the Government is mindful of several basic principles, including the following—

- (a) Creators and producers of creative works should receive sufficient protection, recognition and reward for their contributions to economic and cultural development.
- (b) Copyright law, while reflecting an appropriate balance between the rights of creators and copyright owners and the interests of consumers and other users of works, should not overregulate the normal operation of business models or contractual arrangements which cater for specific needs and circumstances of the contractual parties.
- (c) The importance of freedom of contract and the inter-play between copyright law and other areas of law.

19. Essentially, freedom of contract plays a vital role in Hong Kong’s free-market economy and it remains a cornerstone in the law of contract. Allowing copyright owners and users room to negotiate appropriate terms in respect of the use of copyright works not only provides flexibility and legal certainty that the parties desire in specific circumstances, but also facilitates the efficient and competitive exploitation of copyright works to the benefits of both owners and users of copyright works.

Current law and practice

20. Part II Division III of the Copyright Ordinance contains over 60 provisions specifying permitted acts to facilitate uses of copyright works in appropriate circumstances without attracting any liability for copyright infringement. The “Introductory provisions” for permitted acts under section 37 stipulates that “The provisions of this Division ... relate only to the question of infringement of copyright and do not affect any other right or

¹⁸ Infringement of the property right is a statutory tort.

obligation restricting the doing of any of the specified acts.” There is no express provision limiting operations of private contractual terms.

21. Under the current regime, individual users may enter into contractual agreements with copyright owners on terms mutually agreed, e.g. to license the use of copyright works for specific purposes. It is possible that the owner may, at the same time of granting the licence, secure an undertaking from the user not to engage in certain permitted acts, but only for a consideration that the user is willing to pay and the owner is willing to accept.¹⁹ Importantly, this private undertaking would not affect all other users who are not parties to the contract. The benefits of Part II Division III remain intact as intended.

22. We note that although it is theoretically possible for parties to override a permitted act prescribed in the Copyright Ordinance by way of contractual agreements, over the years, the above regime has served us well and there is no empirical evidence before us that users have encountered any particular difficulties when relying on the statutory permitted acts due to restrictions or limitations imposed by contracts. The scepticism that copyright owners may relentlessly exploit the contractual route to unfairly erode the intended benefit of copyright exceptions appears more theoretical than real.²⁰

23. Further, the doctrine of freedom of contract is not unfettered. For example, where a contract term is found to be contrary to public policy, it might be unenforceable. There is room for judicial intervention where important public interest is at stake. The doctrine may also be subject to statutory encroachment, for instance, consumer protection legislation such as the Unconscionable Contracts Ordinance discussed below.

New copyright exceptions

24. In proposing new copyright exceptions in the Bill, we are aware that certain similar exceptions introduced in the UK have contained contract override provisions and appreciate the strengths of arguments behind. We have carefully considered whether Hong Kong should follow suit and concluded with reservation over such a course in the Bill –

¹⁹ As restriction of such permitted acts is not part of the property rights that copyright owners enjoy.

²⁰ In practice, a licensor will loathe to resort to legal action in circumstances where the sympathy of the court is likely to be in favour of the defendant. It is thus possible that the practical impact on users of the so-called contract override is being exaggerated.

- (a) There is no evidence before us that the current copyright exceptions have failed to achieve the benefits intended owing to contract override. It remains speculative that the new copyright exceptions will be treated differently to deprive them of the intended benefit.
- (b) The latest UK approach is new and not without controversies, subject to lengthy consultation since the Hargreaves review in 2011 and equal strengths of arguments against it. We should be prudent in observing the actual effect and benefiting from the review that the UK Government promised the legislature. Developments in other jurisdictions are also relevant.
- (c) It would not be satisfactory to include only contract override provisions in the new copyright exceptions proposed in the Bill, as this might amount to a hierarchy of different exceptions provided for in Part II Division III without cogent analysis and justification in a comprehensive manner. Piecemeal inclusion of the limitation on contract override in respect of specific new exceptions will have the unintended consequence that existing copyright exceptions that are silent on the limitation can be overridden by contracts.
- (d) It would equally not be satisfactory to include a categorical contract override provision to which all permitted acts in Part II Division III would be subject, as this might amount to a fundamental change of the legal norms underpinning the incentive mechanism intended by the copyright regime.
- (e) Inclusion in the Copyright Ordinance of a restriction of contract override may have little practical impact and give rise to more disputes and uncertainty than it is meant to avoid in cross-border contracts. This may be particularly relevant in the case in Hong Kong where such contractual arrangements are common. These contracts may be governed by laws other than those of Hong Kong, either through a specific choice of law clause or under the general rule of conflict of laws on the applicable proper law. In that circumstance, the effect of a contract override provision in the Copyright Ordinance on the enforceability or interpretation of the contractual term according to foreign law will likely be called into

question. This may result in legal uncertainty and increased legal disputes.

- (f) Introducing a general statutory limitation on all copyright exceptions may also have other practical problems. It cannot be ruled out completely that it would result in reduced access to digital copyright works outside Hong Kong for Hong Kong residents if their right-holders or licensees take the view that they do not wish to conduct business in Hong Kong as a result of the perceived consequences of the change.
- (g) In sum, the subject is a complex one. It would not be prudent to rush into legislating contract override provisions in this round without a comprehensive review (including operation of the new copyright exceptions), thorough consultation with stakeholders and consideration of on-going developments in overseas jurisdictions. We will maintain an open mind in reviewing the subject as we seek continuous improvement of our copyright regime.

25. In addition to analysing overseas experiences and reflecting on Hong Kong's circumstances and copyright regime, we do not think this is an appropriate time to consider contract override in the Hong Kong context also because of the divergent views we received during the scrutiny of the Bill. While some users advocate that Hong Kong should follow the UK footpath of introducing restrictions on contract override for parody, copyright owners consider that restrictions on contract override should not be introduced without proper discussion as it may restrict freedom of contract and impact on businesses. Any material change at this late stage would upset the balance between the interests of different stakeholders that we have striven to maintain all the way.

26. Turning to the specific questions in paragraph 1(C) above raised by a Member, we maintain that the new copyright exceptions proposed in the Bill are meant to provide a fair balance between different interests and are underpinned by accepted legal concepts in overseas jurisdictions and international copyright treaties. In particular, the use of a fair dealing formulation in striking a balance is well proven and reasonable in delineating the extent of copyright protection (see two past Bills Committee papers).

27. The use of a commercial contract, for example, a licensing contract, to exploit copyright is natural and within the contemplation of the Copyright Ordinance. And each contract is to be viewed as applicable to the set of specific circumstances that the two contracting parties are facing and the legal certainties that they both desire. It is unfair to suggest that conclusion of such a commercial contract on mutually agreed terms would be meant to “circumvent” copyright exceptions.²¹ There is little basis to suggest that such exercising of the freedom of contract within the bounds of the laws would render the fair dealing exceptions ineffective in safeguarding the legitimate interest of users, including freedom of expression.

(B) Unconscionable Contracts Ordinance (UCO)

28. The UCO generally applies to consumer contracts in respect of the sale of goods or supply of services.²² While it is applicable to copyright contracts concerning the sale of copyright products to consumers, there do not appear to be any decided cases concerning contractual terms purported to override statutory copyright exceptions. We discuss below the general application of the UCO in various scenarios for Members’ reference.

Factors for determining “unconscionability”

29. In determining whether the contract or any part of it is unconscionable under section 5(1) of the UCO, section 6(1)(a) to (e) provides that the court may have regard to the following (among other things)-

- (a) The relative strengths of the bargaining positions of the consumer and the other party;
- (b) whether, as a result of conduct engaged in by the other party, the consumer was required to comply with conditions that were not

²¹ As a hypothetical example, a filmmaker may negotiate with an author to turn his or her novel into a serious film adaptation. It will be entirely reasonable for the author to provide explicitly that the film should be an authentic rendition without any parodic or satirical element.

²² Section 5(1) of the UCO provides that “if, with respect to a contract for the sale of goods or supply of services in which one of the parties deals as consumer, the court finds the contract or any part of the contract to have been unconscionable in the circumstances relating to the contract at the time it was made, the court may – (a) refuse to enforce the contract; (b) enforce the remainder of the contract without the unconscionable part; (c) limit the application of, or revise or alter, any unconscionable part so as to avoid any unconscionable result”.

reasonably necessary for the protection of the legitimate interests of the other party;

- (c) whether the consumer was able to understand any documents relating to the supply or possible supply of the goods or services;
- (d) whether any undue influence or pressure was exerted on, or any unfair tactics were used against, the consumer or a person acting on behalf of the consumer by the other party or a person acting on behalf of the other party in relation to the supply or possible supply of the goods and services; and
- (e) the amount for which, and the circumstances under which, the consumer could have acquired identical or equivalent goods or services from a person other than the other party.

30. It has been established that the court should take into account the factors in section 6(1) as appropriate.²³ However, such factors are not exhaustive and the court should have regard to all the circumstances relevant to the issue at the time the contract was made in order to decide whether a contract or any part of it is unconscionable.²⁴

Strength of the parties' bargaining positions

31. In general, this factor is considered based on the particular facts of each case. In cases involving standard form agreements, such as credit card agreements²⁵, agreement for beauty services²⁶ and timeshare contracts²⁷, the courts were of the view that the party which imposed the standard forms have a stronger bargaining position than their customers, since such standard terms were usually drafted without consulting the consumers and with only the interests of the party imposing the terms in mind.²⁸ The consumers can hardly have any real negotiation or bargain on the terms of the services or goods.²⁹ However, the courts also considered that unequal bargaining power per se provides no basis for interference in the absence of unconscionable or

²³ *Shum Kit Ching v Caesar Beauty Centre Ltd* [2003] 3 HKLRD 422 at 431.

²⁴ *Shum Kit Ching v Caesar Beauty Centre Ltd* [2003] 3 HKLRD 422 at 431; *Tung Ho Wah v Star Cruises (HK) Ltd* [2006] 3 HKLRD 254 at 263.

²⁵ For example in the cases of *Hang Seng Credit Card Ltd. v. Tsang Nga Lee* [2000] 3 HKLRD 33 and *Citibank (Hong Kong) Ltd v. Au Wai Lun*, DCCJ no.1816 of 2003.

²⁶ *Shum Kit Ching v Caesar Beauty Centre Ltd.* [2003] 3 HKLRD 422.

²⁷ *Lau Ying Wai v. Emperor Regency International Ltd*, DCCJ No.1600 of 2013 and *章錦城及另一人 訴 International Resort Developments Ltd*, [2003] 2 HKLRD 113.

²⁸ *Hang Seng Credit Card Ltd. v. Tsang Nga Lee* [2000] 3 HKLRD 33 at 39.

²⁹ *Shum Kit Ching v Caesar Beauty Centre Ltd.* [2003] 3 HKLRD 422 at 435.

extortionate abuse³⁰, as the consumer always have the option to choose whether to accept the terms or not. It is therefore necessary to look into other factors and the circumstances of the case as well.

Reasonableness and necessity of the terms

32. This factor relates to whether the agreement or specific terms in an agreement alleged to be unconscionable is reasonably necessary for the legitimate interests of the seller or the service provider. A “no refund” clause in an agreement for beauty services was held to be not necessary for the protection of the legitimate interests of the service provider as the court was of the view that such clause was a penalty clause instead of a genuine estimate of loss.³¹ In another case concerning cruise holiday package, an exclusive jurisdiction clause was held to be reasonably necessary for the protection of the legitimate interests of the cruise liner since a uniformity of treatment in case of claims was something of considerable significance for the owner or operator of a cruise liner. The court considered that it is a norm to include such clause in a contract of carriage.³²

Consumers’ understanding about the terms

33. The court would take into account matters such as whether the terms alleged to be unconscionable have been drawn to the consumer’s attention or supplied and explained to consumers in a language they would understand. The font size and the colour of the print, as well as the language of the terms are also matters which the court may consider.³³ The courts will also take into account the complications of the legal terms and contents of the contract, the time used by the service provider to explain and for the consumer to consider and understand the contract before signing.³⁴ The court may also consider the background of the consumer in assessing his or her ability to understand terms of a contract. For example, in a credit card agreement case, the court was of the view that the consumer being a solicitor for 15 years should not have

³⁰ *Citibank (Hong Kong) Ltd v. Au Wai Lun*, DCCJ no.1816 of 2003 at paragraph 63.

³¹ *Shum Kit Ching v Caesar Beauty Centre Ltd.* [2003] 3 HKLRD 422 at 434 and 437.

³² *Star Cruises (HK) Ltd v Tung Ho Wah* [2006] 3 HKLRD 254 at 265.

³³ *Hang Seng Credit Card Ltd. v. Tsang Nga Lee* [2000] 3 HKLRD 33 at 39, *Shum Kit Ching v Caesar Beauty Centre Ltd.* [2003] 3 HKLRD 422 at 433 to 434 and *Lau Ying Wai v. Emperor Regency International Ltd*, DCCJ 1600 of 2013 at paragraph 16.

³⁴ 章錦城及另一人 訴 *International Resort Developments Ltd*, [2003] 2 HKLRD 113 at 122.

difficulty understanding the terms of the credit card application form and the agreement.³⁵

Undue influence or unfair tactics

34. This factor was considered in timeshare contracts cases where the service providers or seller exerted pressure in promoting its services. Unfair tactics which were considered as unethical include consumers being informed to claim a prize but was then coaxed to attend a seminar for timeshare contract and thereafter subject to continuous and lengthy persuasion for hours without the opportunity to have independent discussion with other third parties nor allowed to leave and use his or her mobile phone.³⁶

Possibility of obtaining similar goods or services from other suppliers

35. In considering this factor, the court will look into the reasonableness of the terms of the contract, the market practices as well as the facts of the case. If the terms in question are reasonable, then even if other identical or equivalent choices available to consumers are also offered on similar terms or conditions, it is unlikely that the contract or the term will be held unconscionable. For example, in a case of standard credit card agreements which contained a costs provision imposing no upper limit, the court found that consumers lack of choices in acquiring identical services on different terms as most credit card agreements in Hong Kong contained similar terms in relation to costs or expenses. Such a lack of choices reinforced the unequal bargaining positions between the parties as credit card companies are able to dictate contractual terms which can operate harshly against consumers.³⁷ If, however, the cost provision imposes reasonable fees and expenses only, the court considered that even if other credit card companies contain identical or similar terms, it would not render such a clause to be unconscionable under this factor.³⁸

³⁵ *Citibank (Hong Kong) Ltd v. Au Wai Lun* [2006] DCCJ no.1816 of 2003 at paragraph 69.

³⁶ 章錦城及另一人 訴 *International Resort Developments Ltd* [2003] 2 HKLRD 113 at 123 and *Lau Ying Wai v. Emperor Regency International Ltd*, DCCJ 1600 of 2013 at paragraph 16.

³⁷ *Hang Seng Credit Card Ltd. v. Tsang Nga Lee* [2000] 3 HKLRD 33 at 39.

³⁸ *Citibank (Hong Kong) Ltd v. Au Wai Lun*, DCCJ no.1816 of 2003 at paragraphs 69 and 70.

Other considerations

36. Depending on the nature of the agreements, the court may also consider other matters such as the specific terms of the contract itself. For example, in a case concerning standard form credit card agreements, the court took into account that a cost provision without upper limit was extremely wide. It was possible that the clause would be applied unconscionably by the credit card companies.³⁹

37. In short, the UCO applies to “a contract for the sale of goods or supply of services in which one of the parties deals as consumer”. Whether the court will refuse to enforce contractual terms purporting to override statutory copyright exceptions hinges on the “conscionability” of the terms with regard to the factors as set out in section 6(1) of the UCO, the facts and circumstances of each case, as well as the background of the relevant consumer under individual contracts. There are also cases where factors and circumstances other than that in section 6(1) have been considered by courts as appropriate.

Presentation

38. Members are invited to note the response provided in this paper.

Commerce and Economic Development Bureau
Intellectual Property Department
June 2015

³⁹ *Hang Seng Credit Card Ltd. v. Tsang Nga Lee* [2000] 3 HKLRD 33 at 40.