

Extending consumer rights to MSBs

Chris Willett

Professor of Commercial Law

University of Essex.

Introductory Comment

It is clear that a core concern here is that extending consumer rights to MSBs may impose undue costs on suppliers. I absolutely accept these concerns at a general level. However, I have sought to identify the benefits that might come with an extension of the consumer rights to MSBs; while at the same time drawing attention to the ways in which the legal rules either do not necessarily impose extra costs, or provide means by which such costs can be limited. For example, are costs not reduced and certainty enhanced by introducing a 30 day right to reject? In addition, costs can be limited by allowing suppliers to restrict or exclude damages liability for consequential losses. Further, if cure is something that would often happen in practice in any case, are there really substantial extra costs in introducing a legal right to cure? The rights to cure in services contracts also seem to be balanced by the fact that cure can be avoided where it by exercise of the court's discretion or by the use of an exemption clause). Finally, is the uncertainty surrounding the current state of the law on digital content not in itself potentially costly-in that it is likely to lead to disputes? Are costs not reduced by introducing clarity on this issue?

Stakeholder input also raised the possibility of trying to focus any extension of rights on the most vulnerable of MSBs. Certainly, it could be justifiable to retain the most freedom to contract in cases where the buyers are least vulnerable. One way of doing this might be to say that in cases not involving micro businesses, or at least the most vulnerable of them, exclusion or restriction of the cure remedies (i.e. not just damages) is permitted (subject to the general test on reasonableness/fairness).

Supply of Goods

Short term right to reject:-

Removing the 'slight breach' rule.

For sure, this might leave sellers exposed to 'bad faith' claims for refunds, based on very minor, technical breaches, when the real motivation is either simply a change of mind, or that the buyer has found a cheaper source elsewhere. However, while such bad faith rejection may be a real problem in large scale purchases of commodities by large businesses, I have not seen strong evidence that it is a problem in the case of MSB buyers. Also, the uncertainty of the 'slight' breach concept may be apt to generate wasteful disputes, which the MSB comes out on the wrong side of (i.e. based on the weaker bargaining position of the MSB, it ends up not getting a refund when in fact the breach is not nearly as slight as the more powerful seller claims-and this is disproportionately harmful to the economically weaker MSB).

Replacing 'reasonable time'/'affirmation' concepts with the 30 day rule.

The advantages of this (for both buyers and sellers) are that (i) it provides a much more certain cut off point than is provided by the vague 'reasonable time' and 'affirmation' concepts, and (ii) it removes the confusing inconsistency between the treatment of different goods transactions.

However, in the vast majority of cases, the case law shows us 'reasonable time' and 'affirmation' concepts will mean there is a period of at least a few months to reject; so the 30 day rule would actually reduce the MSB's protection as a buyer, meaning that there would be no right to a refund in the very many cases where defects do not show up until a couple of months after the goods are supplied, e.g. where the goods are complex. It is surely only justifiable to remove the right to reject in such cases if, as under the Consumer Rights Act, the buyer can fall back on a right to repair or replacement, and, if this fails, a long term right to refund or price reduction.

Extending the repair/replacement ('cure') rights and the long term refund/price reduction rights to MSBs

First, these rights are arguably needed if there is to be a 30 day cut off for the short term right to reject (see above). Next, there seems to be an independent case, as (i) such remedies are surely often provided in practice in any case, so enshrining them in law would prevent buyers being surprised by sellers who do not adopt such good practice, and (ii) supplier interests are protected by the impossibility and proportionality conditions applicable to the cure rights, and by the right to reduce a long term refund to take account of beneficial use of the goods by the buyer.

Extending the non-excludability of the conformity standards and remedies to MSBs

This certainly seems justifiable in the case of the conformity standards (quality, fitness etc), and the above statutory remedies, given the potentially more vulnerable bargaining and economic position of MSBs, and given the uncertainty that might result from the alternative, i.e. leaving exclusion/restriction to be governed by the general reasonableness/fairness test under the unfair terms regime.¹ At the same time, sellers could be protected from large consequential loss claims, by allowing damages to continue to be excluded or restricted, subject to the general reasonableness/fairness test.

Supply of Digital Content (DC)

Extending the conformity standards to MSBs

It is surely right to do this, given:

(i) the current uncertainty (if DC is not comprised in goods when supplied, the cases show that it is very unclear whether there is a common law 'sui generis' contract, with a fitness for purpose term (outcome based/strict standard like goods), or a service contract (reasonable care/fault standard);

¹ See the point made in the Introduction, i.e. that non-excludability of the cure remedies could be provided for only where the most vulnerable micro businesses are concerned.

(ii) this uncertainty will usually be even more costly in business to business contracts (given the higher value of such contracts), than it is in consumer contracts; and

(iii) it is accepted in consumer cases that the strict goods conformity standards are more appropriate for DC than the fault based service standards; and there is no obvious reason not to apply the same logic to business to business cases.

Extending the repair/replacement ('cure') rights and the price reduction rights to MSBs

As in the case of goods, there is a strong case for this, because (i) such remedies will often be provided in practice, so enshrining them in law would prevent buyers being surprised by sellers who do not adopt such good practice, and (ii) supplier interests are protected by the impossibility and proportionality conditions applicable to the cure rights.

Also, there would be confusing inconsistency for all concerned, if the same basic conformity standards were to apply to goods and DC contracts, while the cure and price reduction remedies only applied to goods contracts.

Extending the non-excludability of the conformity standards and remedies to MSBs

I would repeat the same arguments as those made above in relation to goods: arguments for making the basic conformity standards and statutory remedies non-excludable,² but possibly allowing exclusion/restriction of the damages remedy, subject to the test of reasonableness/fairness under the unfair terms regime. Then, of course, there is the point that there would be confusing inconsistency, if the approach taken was to be significantly different in goods and DC contracts.

Supply of Services

Extending the repeat performance and price reduction rights to MSBs

Again, there seems to be a good case for this:

(i) It provides consistency with the availability of cure and price reduction rights in goods and DC contracts, and without this consistency, there is surely undesirable confusion, especially in the many cases where services are provided along with goods and/or DC, e.g. construction work, supply and (cloud) storage of DC.

(ii) Repeat performance is a useful practical remedy, especially for defective services. If an MSB must find a 3rd party to cure a defective service, and recover the costs through damages, this may cause detriment and make dispute resolution more complex.

² Ditto the point in note 1 above.

- (a) It may be time consuming and inconvenient.
- (b) It may cause disputes over what the third party charges and whether the original supplier should refund all of this (e.g. possible arguments over whether the customer has 'mitigated his loss'.
- (c) It may cause disputes where the third party cannot cure and/or makes things worse (e.g. possible arguments over causation).
- (d) These problems are likely to be greatest in cases where more complex and/or expensive cure work is required, especially where services are involved, where cure may be a more complex process than with goods/DC.

(iii) If repeat performance is not possible, the supplier is protected by the 'impossibility' defence.

(iv) If repeat performance is outrageously expensive and/or would involve an unacceptably long term commitment, it is true that there is no express 'disproportionality' defence (as sometimes applies with goods and DC). However, the court powers section (s. 58) in the Consumer Rights Act appears to allow the courts discretion to refuse to grant specific performance (SP) in support of the repeat performance right. S. 58 (2) provides that the court 'may' (not 'must' or 'will') grant specific performance. This could allow refusal of SP where huge expense or long term commitment was involved for the service supplier.

Further, s. 58 (4) provides that the 'court may make an order under this section unconditionally or on such terms and conditions as to damages, payment of the price and otherwise as it thinks just'. This seems broad enough to allow the court to issue SP orders which require the customer to contribute to the cost of repeat performance by the supplier, or only to require the supplier to repeat perform in part. Again, therefore there appears to be scope to protect the supplier in cases of significant expense or long term commitment.

Finally, the Consumer Rights Act does not impose an outright ban on excluding/restricting the repeat performance or price reduction remedies (see below on what the outright ban *does* apply to). So, suppliers are able to insert a term in the contract, excluding or restricting these remedies, so long as such a term satisfies the general reasonableness/fairness test under the unfair terms regime.

Extending the non-excludability of the conformity standards and remedies to MSBs

For similar reasons to those given above, I would see this as having advantages. It should also be remembered that the only remedy here that is non-excludable is the right to recover the price-a right that will only apply where there has been a total failure of consideration, i.e. where the customer has received virtually no benefit at all from the service. Exclusion or restriction of the repeat performance, price reduction and damages remedies would be allowed subject to the test of reasonableness/fairness under the unfair terms regime.

Extending unfair terms protection beyond exclusion and limitation clauses

The Law Commission Report of 2005 made a very well-reasoned case for this, which I would broadly support. Currently, in business to business contracts, there is no statutory control over deposits, indemnification clauses, terms allowing for price increases, requiring full payment in advance for goods or services. All such terms may cause problems. It is hard to see why exclusion clauses should be controlled when these terms are not. This is surely inconsistent. There is also the point that

consumers are protected from such terms (and exemption clauses as well of course), on the basis that they are not in a position to influence the terms, and are in a weaker economic position (than the supplier) when it comes to absorbing losses caused by the terms. Yet, many MSBs will suffer from similar weaknesses. Finally, many other EU countries have unfair terms regimes that cover these sorts of terms, and there is no indication that this has proven especially more problematic than regulating exemption clauses.

Consumer Contracts Regulations

I am afraid I have not had time to give proper consideration to the issue of extending these to MSBs.