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CH Coulson Harney
ADVOCATES

Member of Bowman Gilfillan Africa Group

NEWSLETTER

A NEW DAWN FOR CONSUMER PROTECTION IN KENYA - HOW DOES IT AFFECT YOU?

1. Introduction

In December 2012, Parliament passed the Consumer Protection Act 2012 (the "Act") into law. The Act was later assented to by the President and came into force on 14 March 2013.

Prior to the enactment of the Act, Kenya did not have a specific law that governs consumer protection. The main objective of the Act is to provide for the protection of the consumer and prevent unfair trade practices in consumer transactions.

2. Consumer Rights

The Act gives a consumer the right to commence legal action on behalf of a class of persons in relation to any contract for the supply of good or services to the consumer. This right cannot be ousted by any agreement between the parties.

a. Implied warranties

A supplier of goods and services is deemed to warrant that the goods and services are of a reasonably merchantable quality. There are additional implied warranties that are deemed to apply notwithstanding any provisions to the contrary in the agreement.

b. Ambiguities to be interpreted in favour of the consumer

Any ambiguities in a consumer agreement (including oral agreements) shall be interpreted in favour of the consumer.

c. Estimates – suppliers can only charge 10% above their estimate

If a supplier of goods or services provides an estimate, the supplier cannot charge the customer an amount that exceeds 10% of the estimate provided, unless additional or different goods or services are provided.

d. Advertising on internet gaming sites

Advertisement (including sponsorship relationships) on internet gaming sites that are operated contrary to the law is prohibited.

3. Unfair Practices

The Act prohibits 'unfair practices' and proceeds to provide for radical sanctions against a supplier who engages in 'unfair practices'.

a. What actions are deemed to be unfair practices?

The Act has given a very wide interpretation of what is deemed to be an unfair practice. The following are deemed to be unfair practices:

- i. making false, misleading or deceptive representations, including (a) representing that goods or services have a sponsorship, approval, performance or characteristics that they do not have (b) representing that goods or services are of a particular standard, quality, grade, style or model, if they are not, and so on.
- ii. making an unconscionable representation. In determining whether a representation is unconscionable some of the matters that will be taken into account include whether the person making the representation knows:
 - that the consumer is not reasonably able to protect his interests due to disability, ignorance, illiteracy, inability to understand language;
 - the price grossly exceeds the price at which similar goods or services are readily available to like consumers;
 - there is no reasonable probability of the consumer making payment in full;
 - the consumer transaction is excessively one-sided; and
 - the consumer is being subjected to undue pressure to enter into the transaction.

b. Sanctions for unfair practices

- i. Right to terminate agreement & sue for damages - where a consumer enters into an agreement, whether oral or written, after or while a person has engaged in an unfair practice, the consumer has the right to terminate the agreement and seek any remedy available to them in law, including a suit for damages.
- ii. Other related agreements terminate as well - where a consumer terminates an agreement, such termination also operates to terminate the following additional agreements, as if they never existed (i) all related agreements (ii) all guarantees issued in respect of monies payable under the agreement (iii) all securities given by the consumer or a guarantor and (iv) all loan agreements including promissory notes.
- iii. Oral evidence to be admissible - in determining whether there has been an unfair practice or a representation that is unconscionable, oral evidence will be admissible, notwithstanding the existence of a written contract.
- iv. Exemplary and punitive damages payable- courts are expressly permitted to award exemplary or punitive damages in addition to any other remedy available to the consumer.
- v. Damages for consequential loss? - it is unclear whether the right to sue for damages on termination of an agreement by the consumer as indicated above would include any damages for any consequential loss, which would normally be significant.

4. How the new law affects specific sectors of our economy

a. Future performance contracts (e.g. off plan sale of real estate units)

No repossession or right to resell the goods sold may be undertaken without leave of the court if more than two thirds of the consideration has already been paid. Any agreement including a security agreement under which the supplier may retake possession is not enforceable.

b. Agreements entered into over the internet

A supplier who enters into an agreement over the internet for the supply of goods or services is required to disclose certain prescribed information (this information has not yet been prescribed).

In addition, they must provide the consumer with an express opportunity to accept or decline the agreement or to correct errors before entering into the contract.

The agreement is to be delivered to the consumer in writing within the prescribed time (this time is yet to be prescribed).

In certain instances, a consumer has the right to terminate an internet agreement.

c. Repairs to motor vehicles

Save for certain defined circumstances; a repairer of motor vehicles may only charge the consumer for work or repairs that the repairer had initially given an estimate of charges to the consumer.

A repairer may only charge for work or repairs that were authorized by the consumer.

A repairer cannot charge for work or repairs for which an estimate was given, an amount that exceeds the estimate by more than ten per cent.

A repairer shall offer to return to the consumer all parts removed in the course of repairs.

A repairer shall be deemed to warrant all new and reconditioned parts installed and the labour required to install them for a minimum of 90 days or 5,000 kilometres, whichever comes first.

In the event that a vehicle becomes inoperable or unsafe to drive following repairs due to failure of parts or inadequacy of repairs done (as opposed to misuse or abuse), and it is not reasonable to return the vehicle to the original repairer, the vehicle may be repaired at the closest facility available, with the owner of the vehicle being entitled to claim under the warranty described above to the original repairer for the cost of the work, repairs and reasonable towing charges.

Repairers are prohibited from giving an estimate or charging for work or repairs at an amount that is greater than that normally charged by that repairer merely because the cost is to be paid by an insurance company.

d. Banking and finance – credit agreements

- i. Insurance from any insurance provider – a borrower who is required to purchase insurance under a credit agreement may purchase it from any insurer of his choice and the lender may only disapprove such insurer on reasonable grounds.
- ii. No default charges – a lender is not entitled to charge default charges other than (i) legal costs that the lender incurs in collecting a payment required by the borrower, realising a security interest or protecting the subject matter of the security interest or (ii) reasonable charges that the lender incurs due to a payment instruction issued by the borrower being dishonoured.

- iii. No prepayment penalties – a borrower is entitled to pay the full outstanding balance under a credit agreement at any time without any prepayment charge or penalty. In addition, a borrower may prepay in full any payment to be made on a scheduled date of the borrower's required payments under the agreement or in any month, without any prepayment charge or penalty.
- iv. Initial disclosure statement – a lender is required to deliver to the borrower an initial disclosure statement for a credit agreement (such disclosure statement to contain such information as shall be prescribed), prior to the borrower entering into the credit agreement.
- v. Subsequent disclosure requirements – where the interest rate in a credit agreement is a floating rate, the lender shall at least once every 12 months deliver a disclosure statement to the borrower disclosing the prescribed information (this information has not yet been prescribed). In the case of open credit, a disclosure statement is to be issued once monthly.

e. Lease of goods - other than goods under a residential tenancy

- i. Disclosure statements – where a lease is (i) for a period of four months or more or (ii) for an indefinite term or capable of being renewed automatically unless one party takes positive steps to terminate the lease or (iii) the lease has residual obligations then the landlord is required to deliver a disclosure statement for lease to the tenant prior to (a) the tenant entering into the lease or the time the tenant makes any payment in connection to the lease, whichever occurs earlier.
- ii. The disclosure statement is to contain the prescribed information (this information is yet to be prescribed).
- iii. Maximum break fee for terminating lease - the law permits a limitation on the maximum amount of compensation that a landlord may charge a tenant for terminating a lease prior to the end of the lease term. This limitation will be prescribed by regulations to be issue in due course.
- iv. Maximum liability on termination of lease at the end of the term – the law permits a limitation on the maximum liability of a tenant upon termination of the lease at the end of the term (by effluxion of time) after returning the leased goods. This maximum liability is to be calculated in the prescribed manner (this has not been prescribed yet).
- v. These provisions will apply to all leases of goods other than (1) leases of goods under residential tenancies and (2) leases of goods for a term of less than four months.

f. Airlines

Passenger air carriers will now be required to provide to passengers whose flights have been cancelled or are subject to long delays, services including overnight accommodation or meals as may be prescribed. Further, the Cabinet Secretary responsible for matters relating to trade and industry is to make regulations to provide for passenger rights and the standards of service by air carriers. These regulations are to include provisions on access to necessary services while on a grounded air carrier, customer complaints, notification of delays, cancellations, overbooking, baggage concerns, compensation for passengers and the right to deplane where such rights are infringed.

5. Institution Created - Kenya Consumers Protection Advisory Committee

The Act establishes the Kenya Consumers Protection Advisory (CPA) Committee that shall aid in the formulation of policy related to consumer protection, accredit consumer organisations, advise consumers on their rights and responsibilities, investigate complaints and establish conflict resolution mechanisms amongst other duties.

A breach of any regulations made under the CPA, will make a person liable to a fine not exceeding five hundred thousand shillings or imprisonment for a term not exceeding two years or both such fine and imprisonment.

6. Conclusion

The CPA, being in its infancy, will take some time for its full effects to be experienced but undoubtedly suppliers will need to be more conscious of consumer rights once the CPA comes into force.

We expect players in various sectors of our economy to re-look at the business practices and documentation of consumer contracts, especially standard form contracts, to ensure they adhere to the provisions of the Act.

If you would like any further information or clarification, please contact **Joyce Karanja-Ng'ang'a** or **Alex Njage** at Coulson Harney.

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