

Consumer Contracts: When Is It OK to Change the Rules of the Game?

Executive summary
June 2009

This study draws a portrait of the situation in Canada regarding the inclusion in consumer contracts of clauses that allow merchants, at their discretion, to alter the conditions of a service contract to which the consumer consented in accepting the contract.

We analysed the unilateral amendment clauses contained in some consumer contracts, as well as the use merchants make of this right. We also analysed legislative measures adopted in a few Canadian provinces and in France, Australia and the United Kingdom to regulate unilateral amendment clauses or limit their effects.

An exchange of consents is essential to the contracting process. To give his informed consent, the contractor must have all the information enabling him to discern whether the aspects he considers essential and for which he is contracting are indeed present.

Despite the principles at the very basis of contractual law, many companies systematically use, in adhesion contracts they offer consumers, clauses authorizing them in advance to amend at their discretion the rights and obligations of the parties entering into contracts with them. Nowadays, such clauses to the companies' advantage are contained in a great many adhesion contracts, involving telecommunications services, online sales, banking services, etc. Merchants don't hesitate to use this option they've reserved for themselves, and thus they frequently amend, during the contract period and without requesting the consumer's prior consent, certain aspects that may be essential to the contract, such as features, duration, price, programming, and any other service component.

Our analysis shows that amending the provisions of consumer contracts may, in addition to depriving consumers of the advantage of contractual predictability (regarding price, conditions), cause them damage both directly (higher price, reduced service) and indirectly (cancellation fee, migration fee), without any compensation given to consumers for this advantage they concede to the merchant. The merchant may choose to increase his revenues by increasing the rates previously agreed to with the consumer, or by reducing the services provided to the consumer without lowering the price as compensation, etc.

The use of unilateral amendment clauses in all the consumer contracts we have examined raises doubt as to the protection provided to Canadian consumers by existing legislation. The measures adopted by provincial legislators regarding unilateral contract amendments do not prohibit such clauses systematically and apply only to certain types of contracts. In addition, general rules regarding consumer contracts involve legal proceedings likely to entail long deliberations with an uncertain outcome.

Accordingly, the study concludes that it would be essential for all Canadian provinces and territories to adopt provisions specifically regulating the unilateral amendment of consumer contracts, in order to improve consumer protection and establish a certain balance in consumer

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6226, rue Saint-Hubert, Montréal (Québec) Canada H2S 2M2
T : 514 521 6820 | Sans frais : 1 888 521 6820 | F : 514 521 0736
union@consommateur.qc.ca | www.consommateur.qc.ca/union

contracts. The abusive nature of unilateral amendment clauses should be formally recognized by Canadian legislators. The experience of other countries confirms that unilateral amendment clauses should be strictly regulated. Preventive action should also be enabled to suppress abusive clauses, and a strategy to constantly monitor contractual clauses should be put in place.

French version available on our website.

The present document summarizes a research report published by the Union des consommateurs in 2009 as part of a research project funded by Industry Canada's Office of Consumer Affairs. This report is available in French on our website.