

To cite: Katinda X, 'Challenges of Redressing the Victims of Unfair Terms in Standard Form Consumer Contact under the Fair Competition Act No. 8 of 2003'
Journal of African Law and Contemporary Legal Issues (Vol.2, Issue No.1, 2024) 15-29
<http://dx.doi.org/10.58548/2024jalcli21.1529>

Challenges of Redressing the Victims of Unfair Terms in Standard Form Consumer Contact under the Fair Competition Act No. 8 of 2003

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Abstract

The Standard Form Consumer Contracts (SFCCs) are used in the provision of goods and/or services as an instrument to facilitate transactions between consumers and businesses. On the other hand, through the use of unfair terms, the SFCCs have been reported to be used as a tool for economic exploitation to the detriment of consumers. Many countries have enacted provisions for protecting consumers against unfair terms in SFCCs. This article explores the protection of consumers against unfair terms in SFCC under the Tanzania Fair Competition Act No.8 of 2003 (FCA). The article also examines the challenges that face the victims of unfair terms in the SFCCs in accessing redress available under the FCA. The article shows that the challenges of redressing the victims of unfair terms in SFCCs include the absence of effective remedy, absence of an offence for the use of unfair terms in SFCCs, overlapping mandate, and absence of a uniform law for regulating SFCCs. This article recommends for the harmonisation of all consumer protection laws regulating SFCCs. It also calls for amendment of all pieces of legislation that hamper the victims of unfair terms in SFCCs to obtain redress under the FCA.

Keywords

Consumer; Standard Form Consumer Contracts; Redress; Unfair Terms; Victims of Unfair Terms in SFCC

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1. Introduction

Contracts in Mainland Tanzania are primarily regulated by the Law of Contract Act.¹ Since the Act was enacted before the laws that protect consumers' interests, it was framed based on the common law principles of the freedom of contract and caveat emptor.² Under the principles of caveat emptor, consumers are vested with the duty to read and understand the terms of the contract before signing it.³ After signing the contract, consumers are legally bound to the terms of the contract.⁴ The duty to read is not often accompanied by a corresponding duty on the service provider or business to provide a readable contract.⁵ As such, standard Forms Contracts (SFCCs) are sometimes used as a tool for economic exploitation to the detriment of consumers.⁶

The laws regulating SFCCs is distinct from the laws regulating general contracts.⁷ The distinctions are based on the four main characteristics of general contract law namely; (1) general contract legislation is neutral concerning the parties, as it does not seek to protect one of the parties to the transaction; (2) provisions in general contract legislation may be varied by agreement since the content of the contract may be whatever is agreed between the parties; (3) general contract legislation is drafted laconically, briefly, and concisely, since the details are left for the parties to decide and; (4) general contract legislation does not include criminal sanctions or administrative regulations.⁸

SFCCs are characterised by unilateral terms established by service providers without giving the consumer the possibility to modify its content.⁹ However, a contractual term which has not been individually negotiated is regarded as unfair if it is contrary to the requirement of good faith, it causes a significant imbalance in the parties' rights and obligations arising under the contract, to the detriment of the consumer.¹⁰ Thus, consumers have the right to redress

¹ Cap 345 R.E of 2002.

² Nangela JD, 'Safeguarding Consumers' Interests against Misleading and Deceptive Business Conduct in Tanzania' (2019) 4.

³ Mouttoto N, 'Control of Unfair Terms Under Cypriot Contract Law' *Liverpool Law Review* (2022)326 <<https://doi.org/10.1007/s10991-022-09304-8>> accessed on 2nd January 2024.

⁴Benoliel U and Becher IS, 'The Duty to Read the Unreadable' *Boston College Law Review* [Vol. 60, 2019) 2261 <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3313837> accessed on 2nd January 2024.

⁵Ibid.

⁶ Rutgers J and Sauter W, 'Promoting Fair Private Governance in the Platform Economy: EU Competition and Contract Law Applied to Standard Terms' *Cambridge Yearbook of European Legal Studies* (Vol. 23, 2021)343 <<https://www.cambridge.org/core/journals/cambridge-yearbook-of-european-legal-studies/article/promoting-fair-private-governance-in-the-platform-economy-eu-competition-and-contract-law-applied-to-standard-terms/4D6259A62D7E49EA18631960465F7E89>> accessed on 11th January 2024.

⁷ Deutch S, 'Consumer Contracts Law as a Special Branch of Contract Law---The Israeli Model' *Touro Law Review* (Vol. 29, No. 3, 2013) 695 & 698 <<https://digitalcommons.tourolaw.edu/lawreview/vol29/iss3>> accessed at 1st January 2024.

⁸ Ibid 699.

⁹ Giorgi M and Hupffer MH, 'A Behavioural Law and Economics Approach to Standard Form Contract,' *Scientia Iuris, Londrina* (Vol. 21, No. 1, 2017) 33.

¹⁰ Article 3 of the the EU Directive on Unfair Terms in Consumer Contracts (Directive 93/13) Council Directive 93/13, 1993 Official Journal of the European Communities (L 95/31) <[eur-](http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:31993L0013)

against unfair terms in the SFCCs including the right to seek redress against unscrupulous exploitation.¹¹

In Tanzania Mainland, complaints related to SFCCs reported to the Fair Competition Commission (FCC) have been increasing every year. For example, in the financial year 2018, forty-three percent of the complaints handled by the FCC were on unfair business terms and conditions.¹² Also, in the financial year 2019, sixty-six percent of the complaints received by FCC were on financial services grounded on unfair terms and conditions.¹³ Again, in the financial year 2022, sixty-two percent of the complaints received and handled by FCC, were on unfair business terms.¹⁴ This trend of consumer complaints related to unfair business terms calls for a critical examination of the legal framework regulating the SFCCs in Tanzania. This article, therefore, examines the FCA which is the law regulating SFCCs in Tanzania to determine its effectiveness in ensuring protection of consumers against unfair terms in the SFCCs.

2. Historical Background on the Laws Regulating SFCCs

Historically, private arrangements between individual persons began when there was surplus product.¹⁵ Production of surplus products ensured the individual adequate and constant food supply.¹⁶ The surplus product could be exchanged for products that one did not produce. It is the contract that facilitated the transactions.¹⁷ Such transactions were binding according to customs, usage, or rules of a given community or tribe.¹⁸ The Tanganyika Order in Council, 1920, required the Governor, when making Ordinances, to respect the existing native laws and customs save if opposed to justice or morality.¹⁹ Also, the Tanganyika Order in Council, 1920, imported the Indian Contract Act, 1872 as a law applicable to govern the contracts between the parties.²⁰ The court was vested with the power to adjudicate native cases by using native laws without undue regard to technicalities of procedure and without undue delay.²¹

lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:31993L0013> accessed on 2nd January 2023.

¹¹ Sur D, et al, *Consumer and Consumer Protection Legislations*, (Indira Gandhi National Open University, 2018) 10.

¹² FCC Annual Report of the year ended 30th June 2018, p.22.

¹³ FCC Annual Report of the year ended 30th June 2019, pp.7&46.

¹⁴ FCC Annual Report of the year ended 30th June 2022; P.48 annexure V available at FCC office.

¹⁵ Nditi NNN, the Open University of Tanzania course Materials for the LL. B Degree Programme Law of Contract (2004)5 <https://www.academia.edu/39697129/LAW_OF_CONTRACT_IN_TANZANIA> accessed on 1st January 2024.

¹⁶ Ibid.

¹⁷ Ibid.

¹⁸ Ibid, 10.

¹⁹ Ibid, 12; Tanganyika Order in Council, 1920, art.13(4). Available at Multi language Documents, <https://vdocuments.site/embed/v1/the-tanganyika-order-in-council-1920>, accessed on 1st January 2024.

²⁰ Ibid, 20.

²¹ Ibid, 12; Tanganyika Order in Council, 1920, art. 24.

The development of the institution of contract and the laws are linked with the development of commerce and industry.²² The institution of the contract was accompanied by basic concepts of the binding nature of contract, freedom of contract, and sanctity of contract.²³ The contract becomes sacrosanct in the sense that nobody, not even the state, should interfere with it when it appears that the parties have voluntarily concluded it.²⁴

In Mainland Tanzania, the first consumer protection law was the Control of Price Ordinance of 1920.²⁵ The law made it an offence to sell or buy any price-controlled articles at a price exceeding the fixed maximum price.²⁶ During the colonial period, the colonial government enacted consumer protection laws to regulate: the weights and measures of products offered for sale,²⁷ the sale of adulterated food,²⁸ dangerous food, and drugs,²⁹ and to prohibit deceptive trade practices.³⁰ During this era, criminal law and the English law of tort were also imposed to protect consumers.³¹ Generally, laws in use mostly favoured the colonial master. Thus, the consumer's right to redress was enjoyed mainly by the colonial masters.³²

The period between 1961 and 1967 was a mixed economy era and in this phase, colonial laws were still in use.³³ European and Asian traders dominated the business of producing, importing, distributing and selling commodities in Tanzania.³⁴ The period between 1967 and the first half of the 1980s was the state economic monopoly.³⁵ In 1973, the Government passed the Regulation of Prices Act³⁶ to control and safeguard the interests of consumers in the markets.³⁷ The Act vested powers to the established Commission to enforce consumer protection infringement in consultation with the Minister.³⁸ The period from the second half of the 1980s to the present, is termed the economic liberalisation phase where in 1986, Tanzania adopted the Structural Adjustment Programme (SAP) which resulted to deregulation of

²² Ibid, 6.

²³ Ibid, 7.

²⁴ Ibid.

²⁵ Control of Price Ordinance [Cap. 110 of the Laws of Tanganyika Vol. II]

²⁶ Ibid, ss3, 4 and 9.

²⁷ Weights and Measures Ordinance [Cap. 426].

²⁸ Meat Hygiene Ordinance [Cap. 432].

²⁹ Food and Drugs Ordinance [Cap. 93].

³⁰ Penal Code [Cap. 16].

³¹ Mniwasa EE, 'The Protection of Rights of Consumers of Goods in Tanzania: A Law-based Approach' *The African Journal of Finance and Management* (Vol .25, No. 1, 2016) 41.

³² Mwenegoha T, 'The Development of Consumer Protection Laws in Tanzania for Electronic Consumer Contracts' (PhD Thesis, Bond University 2015)³³ <https://pure.bond.edu.au/_Thesis>.

³³ Mniwasa (n31) p. 41; Mwenegoha (n32) p. 34.

³⁴ Ibid, p. 39.

³⁵ Ibid.

³⁶ No. 19 of 1973.

³⁷ Regulation of Prices Act of 1973, ss19(2)(a), 13(1)(a), 8(1)(a)(iv).

³⁸ Ibid, s27(6).

government institutions that were responsible for controlling trade. No other measures were put forward for protecting the consumer rights.³⁹

In the early 1990s, the government started taking measures to revive its economy.⁴⁰ One of the measures taken was the enactment of the Fair-Trade Practices Act in 1994 which repealed the Regulation of Prices Act⁴¹ and established a Trade Practice Tribunal to hear appeal cases on unfair trade practices.⁴² In 1996, the Fair-Trade Practices Act was replaced with the Fair Competition Act⁴³ and the Fair Competition Act of 1994 was repealed by the Fair Competition Act of 2003 (FCA).⁴⁴ The FCA provides *inter alia*, for the protection of consumers from unfair and misleading market conduct in trade and protects the interest of consumers against unfair terms in SFCCs. The FCA vests the duty to the FCC to review the SFCCs in accordance with the regulations made thereunder. The FCA requires persons who use the terms and conditions that govern any consumer transaction to register them with the Commission in accordance with the regulations made thereunder.⁴⁵ Moreover, in 2014, the Standard Form (Consumer Contracts) Regulations was enacted.⁴⁶ The Regulations among other things, provide for the procedures for handling consumer complaints related to SFCCs.

3. Legal Protection of Consumers against Unfair Terms in the SFCCs

The FCA defines consumer to mean a person who purchases or offers to purchase goods or services otherwise than for resale but does not include a person who purchases any goods or services to use them in the production or manufacture of any goods or article for sale.⁴⁷ Based on the definition of consumer under the FCA, a person who encounters unfair terms in SFCC will not be protected if the goods and or service acquired were for resale or production of another item for resale. Therefore, persons who acquire goods or services as household small entrepreneurs under the SFCCs have no legal protection under the FCA. Winn and the United Nations Guidelines for Consumer Protection (UNGCP) define the term consumer as a natural person, acting primarily for personal, family, or household purposes.⁴⁸

Section 36 of the FCA, when read together with Regulations 16 and 20 of the Standard Form (Consumer Contracts) Regulations, 2014(SFCCR), empowers

³⁹ Mugyabuso E, 'The Industrialisation of the Economy in Tanzania: A Case for Reforms of the Consumer Protection Legal and Institutional Frameworks' *The Tanzania Lawyer Journal* (Vol. 1 No. 2, 2019) 9.

⁴⁰ *Ibid.*

⁴¹ Fair Trade Practices Act No. 4 of 1994, s116.

⁴² *Ibid.*, s4.

⁴³ Fair Competition Act [Cap 285 RE 2002].

⁴⁴ *Ibid.*, s102.

⁴⁵ Fair Competition Act, No.8 of 2003, s36.

⁴⁶ Government Notice Number 305 of 2014.

⁴⁷ *Ibid.*, r3. See also the Fair Competition Act No.8 of 2003, s2.

⁴⁸ Winn KJ, 'Is Consumer Protection an Anachronism in the Information Economy?', in Winn K J (Ed.), *Consumer Protection in the Age of the 'Information Economy'* (Ashgate Publishing Limited Gower House Croft Roa Aldershot, 2006)2; United Nations Guidelines for Consumer Protection, adopted by the General Assembly in resolution 39/248 of 16 April 1985, later expanded by the Economic and Social Council in resolution 1999/7 of 26 July 1999, and revised and adopted by the General Assembly in resolution 70/186 of 22 December 2015, guideline 3.

the FCC to review and register terms and conditions which are to govern consumer transactions. It is the mandatory requirement that all terms and conditions which are to govern consumer transactions in SFCC are registered with the FCC.⁴⁹ A person who uses the standard business terms in a contract is obliged to apply to the FCC for registration within twenty-one days before the conclusion of the contract.⁵⁰ The FCC has the power to remove all unfair terms and conditions for the welfare of consumers.⁵¹

Apart from the obligation imposed on the service providers/businesses to make an application for the FCC for review and registration of terms and conditions used in business, the FCC may also recommend a trade association, firm, or recognised consumer organisation to prepare a set of SFCC to be used in certain field of business and submit them to FCC for review.⁵² Such recommendations are only made if the FCC's investigation reveals frequent consumer injury due to unfair terms in SFCC or due to the absence of SFCC in a particular field of trade.⁵³

Further, the law provides that, upon review of SFCC, the Division responsible for consumer protection may advise the Director General on the unfairness of the terms and conditions contained in the SFCC or may recommend corrective measures including removal, amendment, or replacement of unfair terms.⁵⁴ Unfair terms include contractual terms which cause financial or non-financial detriment to a consumer.⁵⁵ They comprise all terms that cause a significant imbalance in the parties' rights and obligations arising from the contract.⁵⁶ Unfair terms embrace all terms that may cause financial or non-financial detriment to a consumer.⁵⁷ Moreover, the phrase contractual terms is defined to mean terms, conditions, agreement, and consent, including announcements and notice excluding or restricting liability.⁵⁸ The unfairness of contractual terms is assessed by taking into consideration the nature of the goods or services for which the contract was concluded.⁵⁹

4. Remedies under the FCA to Victim of Unfair Terms Contained in SFCCs

In addressing the victim of unfair terms in the SFCCs, the principle of redress is central to the consumer.⁶⁰ The FCA provides that any person alleging the contravention of the provisions of the FCA and the SFCCR, may complain to the FCC in a prescribed form.⁶¹ Upon receipt of the complaint, the respondent

⁴⁹ See Standard Form (Consumer Contracts) Regulations, 2014, r20.

⁵⁰ *Ibid*, r16(1).

⁵¹ *Ibid*, r19(1)(2).

⁵² *Ibid*, r5(3).

⁵³ *Ibid*.

⁵⁴ *Ibid*, r19(1) & (2).

⁵⁵ *Ibid*, r24(1).

⁵⁶ *Ibid*.

⁵⁷ *Ibid*.

⁵⁸ *Ibid*, r3 *ibid*.

⁵⁹ *Ibid*, r 25(1).

⁶⁰ Riefa C and Gamper H, 'Economic Theory and Consumer Vulnerability: Exploring an Uneasy Relationship', in Riefa C & Saintier S, (Eds.), *Vulnerable Consumers and the Law, Consumer Protection and Access to Justice* (Routledge Publication, 2021) 18 and 20.

⁶¹ Standard Form (Consumer Contracts) Regulations, 2014, r28(1) and (2).

will be notified by the FCC on the submitted complaint requiring the respondent to respond within 7 days from the date of receipt.⁶² If the respondent does not submit a written reply, the law does not provide for the procedures on how to handle the complaint. The FCA and SFCCR are silent on whether FCC should proceed to redress the complainant *ex parte* or not.

Besides, the law provides that, an unfair term in an SFCC concluded with a consumer by a producer is void to the extent of an unfair term.⁶³ The contract that contains unfair terms shall continue to bind the parties after the exclusion of unfair terms.⁶⁴ Further, section 59 (1) of the FCA excludes awards of compensatory orders for offences under part six of the FCA. Part six of the FCA includes section 36 which provides power to the FCC to review and register SFCCs in line with the SFCCR. Although vide regulation 29 of SFCCR, the FCC can receive and determine complaints. Nevertheless, it lacks the powers to issue compensatory orders for the violation of SFCCR.

5. Challenges in Redressing Victims of Unfair Terms in SFCC

A review of the FCA and SFCCR reveals legal and institutional challenges that consumers face in accessing redress against unfair terms in the SFCCs. The victim of unfair terms in the SFCCs, who submit complaints before the FCC with a view to seeking redress, will likely encounter the following challenges:

5.1 Lack of effective remedy

The Consumer Protection law aims to ensure that consumers have access to accessible, transparent and efficient redress.⁶⁵ Effective redress should be inexpensive; take full account of the consumer's lack of experience; consumer's own choice; speedy; enforceable; and well-publicised.⁶⁶ Neither the FCA nor the SFCCR contain all these elements. The architecture of sections 28 (1) and section 59 (6) of the FCA indicates that redress on the unfair terms on SFCC is tenable in the court of competent jurisdiction. The normal courts are based on the adversarial system of adjudicating complaints tied up with adhering to strict procedural formalities which are long and expensive.⁶⁷ Kanyabuhinya is of the view that the court system does not guarantee quick access to justice that is suitable for consumers with small claim cases.⁶⁸

⁶² Ibid, r29 (2).

⁶³ Ibid, r27 (1).

⁶⁴ Ibid, r27 (2).

⁶⁵ Woker T, 'Evaluating the Role of the National Consumer Commission in Ensuring That Consumers Have Access to Redress', *South African Mercantile Law Journal* (Vol. 29, No. 1, 2017) 1 <<https://heinonline.org/HOL/welcome>> accessed on 16th of December, 2022.

⁶⁶ Borrie G, 'Consumer Redress - An Overview', *Denning Law Journal* (Vol.6, 1991) 29 and 30 <<https://heinonline.org/HOL/welcome>> accessed on 16th of December, 2022.

⁶⁷ Finkle P and Cohen D, 'Consumer Redress through Alternative Dispute Resolution and Small Claims Court: Theory and Practice' *Windsor Yearbook of Access to Justice* (Vol.13, 1993) 87 <<https://heinonline.org/HOL/welcome>> accessed 7 January 2023.

⁶⁸ Kanyabuhinya FB, 'Legal Challenges in Addressing Counterfeit Goods in Tanzania Mainland: The Right of Consumers to Redress' (PhD Thesis, University of Dar es Salaam 2014) X.

Besides, the FCC which enforces the provisions of the FCA has no power to issue any redress to the victim of unfair terms contained in the SFCCs. FCC's mandate as far as SFCCs is concerned, is only limited to registrations. Section 28 (1) of the FCA provides that, if a consumer purchases goods or services for household consumption and encounters the terms that limit the liability of the supplier in relation to repair, replacement, and refund, will have to seek the declaration of the court to declare that term void.⁶⁹ In the Complaint of *Lucas P. Kusare v Bayport Financial Services Limited*,⁷⁰ the complainant requested FCC to terminate the SFCC on the basis that the contract signed contained unfair terms. The FCC responded to the complainant that, vide section 59 (6) of the FCA, it had no power to terminate the SFCC and advised the complainant to seek such relief from the court of competent jurisdiction.⁷¹

5.2 Lack of specific offence and penalty

Deterrence is one of the enforcement techniques which aim at securing conformity with the law by detecting violations, determining who is responsible for the violation, and penalising violations to deter violations in the future.⁷² The FCA neither creates offences nor imposes penalties to the users of unfair terms in the SFCCs which contravene the law. The only offence created under the SFCCR is failure to submit SFCCs for review and registration but not the use of unfair terms in the SFCC.⁷³ The penalty imposed under the SFCCR for failure to submit SFCC is administered under the criminal court justice with competent authority. The duty to prosecute criminal cases is vested in the office of the Director of Public Prosecution (DPP),⁷⁴ FCC often is relaxed waiting for the DPP to take measures against those who have not complied with the law. Also, since the FCA does not contain an express provision allowing the FCC to prosecute the infringers of the FCA in the court of competent jurisdiction, offenders are always left unprosecuted hence the continuity of the use of unregistered SFCCs and re-occurrences of unfair business terms in the SFCCs.

The absence of penalty for unfair terms in SFCCs gives benefit to the service providers and suppliers to continue victimising the consumers vide SFCCs on reliance to the principle of *nulla poena sine lege* and *nullum crimen sine lege*. The principles require that in criminalising conduct the legislature should specify a penalty for that offence and no crime without a law respectively.⁷⁵

⁶⁹The Fair Competition Act No.8 of 2003, ss28 (1) and 59 (6).

⁷⁰ FCC Consumer Complaint Number CD.140/656/9.

⁷¹ Letter with reference Number CD.140/656/10, Available at FCC's Registry Office.

⁷² Cartwright P, *Consumer Protection and the Criminal Law, Theory, and Policy in the UK* (Press Syndicate of the University of Cambridge, 2004)218.

⁷³ Standard Form (Consumer Contracts) Regulations, 2014, r23(1) and (2).

⁷⁴ Constitution of the United Republic of Tanzania (CAP. 2) as amended, art 59B (2).

⁷⁵ *The State v Thokozani Nhloso Mchunu*, Case No. CC 168/2011 P, Kwazulu-Natal High Court, Pietermaritzburg Republic of South Africa, para.10 and 30, <<https://www.saflii.org/za/cases/ZAKZDHC/2011/89.pdf>> accessed on 3 July 2024.

5.3 Overlapping mandate

The FCA applies to all sectors of the economy in Tanzania Mainland.⁷⁶ However, there are other specific sectoral laws that also address SFCCs. For instance, the Insurance Act gives power to the Tanzania Insurance Regulatory Authority (TIRA) to regulate SFCCs used in insurance policy thus leading to overlapping of mandate between FCC and TIRA.⁷⁷ It is on record that overlapping mandates had not only confused consumers but also the FCC. The overlapping mandate in consumer protection legislation affects the protection of the consumer rights, particularly when it comes to the issue of enforcement.⁷⁸ One case in point includes the notice the FCC issued to insurance companies requiring the latter to submit their SFCCs for review and registration by the FCC under FCA and SFCCR.⁷⁹ In response to the notice, FCC was informed by the Association of Tanzania Insurers (ATI) that, the Insurance Act and FCA are conflicting with regard to receiving and reviewing insurance policies and that vide sections 6 and 11 of the Insurance Act, TIRA receives and reviews the policy.⁸⁰ Thus, from the year 2020 up to the present, the FCC has not received any SFCC from the insurance business.⁸¹

5.4 Absence of exhaustive procedures for handling complaints associated with online SFCCs

Regulation 2 of the SFCCR extends the application of SFCCR to online SFCCs involving business to consumer transactions. That being the case, FCC has the power to review SFCCs both online and offline and handle complaints associated with these SFCCs. Despite these powers, there are no laid down procedures on how the victims of unfair terms associated with online SFCCs can get redress under the FCA. Nangela argues that, even though the FCA was enacted after the development of the internet, it does not sufficiently contemplate the protection of online consumers.⁸²

The SFCCR treats handling complaints associated with online SFCCS the same as offline SFCCS. However, there are significant differences between offline SFCCs and online SFCCs. Online transaction is not a face-to-face encounter.⁸³ The online environment offers possibilities to businesses to present terms to consumers in several different places, accessible via

⁷⁶ Fair Competition Act No.8 of 2003, s6 reads together with s96 (1) (a) & (b).

⁷⁷ Insurance Act of 2009, ss6 and 11.

⁷⁸ Kisyombe M, 'Emerging Issues in Consumer Protection: Complementarities and Areas of Tension', paper presented at *the interface between competition and consumer policies, UNCTAD ad-hoc expert group meeting, Geneva (2012)* 14.

⁷⁹ The notices were issued on 13th day of November, 2020, in accordance with s36 of the FCA read together with r16 (1) Standard Form Consumer Contracts Regulations of 2014 (SFCCRs), Available under FCC Standard Form Consumer Contract Files of 2020.

⁸⁰ Available at the FCC's Registry office under FCC Standard Form Consumer Contract Files of 2020.

⁸¹ Information Gathered from FCC's Reviewed SFCC.

⁸² Nangela D J, 'The Adequacy of the Tanzanian Law on E-commerce and E-contracting: Possible Solutions to be Found in International Models and South African Legislation' (PhD Thesis, University of Cape Town 2011)92 <https://open.uct.ac.za/bitstream/handle/11427/11497/thesis_law_2011> accessed on 17 December, 2021.

⁸³ Braucher J 'Delayed Disclosure in Consumer E-commerce as an Unfair and Deceptive Practice' *Wyne Law Review* (2000) 46.

numerous hyperlinks that consumers may fail to notice.⁸⁴ Also, complaints associated with online unfair terms may involve parties from different legal jurisdictions and it may be difficult to determine the location and identity of the parties.⁸⁵ Treating SFCCR as the instrument that can handle both online and offline disputes is like denying the right to redress to the victim of unfair terms in online SFCCs.

The UNGCP sets the principles that establish benchmarks for good business practices for conducting online and offline commercial activities with consumers.⁸⁶ Among other things, the UNGCP provides the principle of disclosure and transparency. The UNGCP stresses that businesses should provide complete, accurate, and information which is not misleading regarding the goods and services, terms, conditions, applicable fees, and final costs to enable consumers to make informed decisions. Also, businesses should ensure easy access to information, especially to the key terms and conditions.⁸⁷

5.5 Unsatisfactory complaint handling mechanism under the FCA

The mechanism of handling complaints associated with unfair terms in the SFCCs is not satisfactory due to inadequate prevailing laws and regulations protecting consumers against unfair terms contained in the SFCCs. The implications for inadequate complaint handling mechanism under the FCA include delay in the provision of redress to the victims of unfair terms in the SFCC. Due to an unsatisfactory complaint handling mechanism, the complaint can remain unresolved for the duration of more than three months. This is evidenced by the FCC quarterly performance report whereby between July and September 2023, ten (10) complaints were not resolved pending responses from the respondents.⁸⁸ Also, between October and December 2023, twenty-eight (28) complaints were not resolved pending responses from the respondents.⁸⁹ Similarly, between January and March 2024, twenty-four (24) complaints were not resolved awaiting responses from the respondents.⁹⁰ The position of the law concerning the reply to the complaint is that the respondent should give a written response within seven (7) days from the date of receipt of the notice of complaint.⁹¹ The challenge which causes delay is that the law does not prescribe what the FCC should do if the respondent will not reply within the statutorily prescribed time or will not reply at all. The

⁸⁴ Gardiner, C *Standard Form Consumer Contracts: The Background and Context*, (The Online Platform for Elgar publication, 2022)12 <<https://www.elgaronline.com/configurable/content/book>> accessed on 28 June 2024).

⁸⁵ Nangela,(n82)172.

⁸⁶ United Nations Guidelines for Consumer Protection, (adopted for the first time by the General Assembly in Resolution 39/248 of 16 April, 1985, later expanded by the Economic and Social Council in Resolution 1999/7 of 26 July, 1999, and revised and adopted by the General Assembly in Resolution 70/186 of 22nd December, 2015), principle IV (c & f).

⁸⁷ Ibid.

⁸⁸ FCC, 1st Quarter Performance Report of the Consumer Protection Section of the Financial Year,2023/2024, 4, available at FCC's office.

⁸⁹ FCC, 2nd Quarter Performance Report of the Consumer Protection Section in the Financial Year,2023/2024, 7, available at FCC's office.

⁹⁰ FCC, 3rd Quarter Performance Report of the Consumer Protection Section in the Financial Year,2023/2024, 6, available at FCC's office.

⁹¹ Standard Form (Consumer Contracts) Regulations 2014, r29(2).

victims of unfair terms in SFCC are obligated to wait until the respondent responds to the complaint even when the prescribed time expires.

The UNGCP provides the principles of effective consumer complaints and disputes mechanism. The UNGCP emphasises that businesses should make available complaints-handling mechanisms that provide consumers with expeditious, fair, transparent, inexpensive, accessible, speedy, and effective dispute resolution without unnecessary cost or burden.⁹² Also, the UNGCP insists that businesses consider subscribing to domestic and international standards pertaining to internal complaints handling, alternative dispute resolution services and customer satisfaction codes.⁹³

Generally, a satisfactory complaint handling mechanism should have at least the following characteristics: should have different levels to allow for appeals; should be known to the consumers; should have a systematic way of recording and monitoring the progress or resolution of issues; should be accessible to all consumers; should include participation, representation, and consultation of consumer in its design, planning, and operational processes; should provide equitable access for consumer to information, advice, and expertise; should have a reasonable time frame that prevents grievances from dragging on unresolved; should be independent and have a clear governance structure with no external interference with the conduct of grievance redress processes and reaching agreements; should show clarity in procedures, processes, and time frames adopted; should be run by professionals.⁹⁴

6. Conclusion

The FCA and the SFCCR are inadequate for guaranteeing the right to redress to the victims of unfair terms in the SFCC. This is because; the right to redress under the FCA is not effectively protected. This article has revealed that the victims of unfair terms in the SFCC who seek redress under the FCA are delayed in getting the requested relief on the basis of inadequate legal protection of the right to redress under the FCA. Among the challenges that face the victims of unfair terms in the SFCC in realising the right to redress include the absence of effective remedy, absence of an offence for use of unfair terms in SFCC, and overlapping mandate. The study has also found that unsatisfactory complaint-handling mechanism causes delays in getting redress to the victims of unfair terms. Because of an inadequate complaint handling mechanism. This being the case, the FCA and the SFCCR are not aligned with the principle enunciated in the UNGCP which requires effective complaints-handling mechanisms that provide for effective redress to consumers with expedition, fairness, transparency, and speed.

⁹² United Nations Guidelines for Consumer Protection, (n86) principle IV (f).

⁹³ Ibid.

⁹⁴ Asian Development Bank, *Designing and Implementing Grievance Redress Mechanisms: A Guide for Implementers of Transport Projects in Sri Lanka* (Asian Development Bank, 2010)5 <https://www.adb.org/sites/default/files/institutional-document/32956/grievance-redress-mechanisms_0.pdf> accessed on 28 June 2024.

7. Recommendations

Having seen the challenges that the victims of unfair terms in SFCCs may encounter when approaching remedies under the FCA, it is recommended that there be unifying of the laws and institutions handling SFCC and complaints associated with unfair terms. This recommendation is in line with the Blueprint which capitalises that, Tanzania's business regulatory regime is characterised among other things, by the multiplicity of overlapping mandates in some laws and regulations.⁹⁵ In addressing the challenge, the Blueprint proposes that business-enabling environment reforms should be guided among other things, with consolidation of similar regulations and remove overlap in which all related regulations should be mandated to a single regulatory agency to enhance coordination and minimise regulatory burden.⁹⁶ Therefore, it is recommended that all issues related to unfair terms in SFCCs and complaints related to SFCCs, should be handled by the FCC as a regulator of consumer protections in Mainland Tanzania.

Further, it is recommended that FCA should be amended to ensure that victims of the unfair term in the SFCCs have access to transparent and efficient redress which is inexpensive, speedy, enforceable and well-publicised.

Furthermore, it is recommended that the FCA should be amended to create an offence and imposes penalties for the use of unregistered SFCCs and unfair terms in the SFCCs.

Moreover, to prevent the re-occurrence of unfair terms in the SFCCs, the FCC should be empowered to prosecute persons who use unfair terms in the SFCCs. Such prosecution should be by way of class action. In collective redress, a single plaintiff may pursue an action on behalf of all persons with a common interest in the subject matter of the suit.⁹⁷ Class actions serve as an enforcement function in the areas of civil rights, environmental law, and consumer claims.⁹⁸ To be more specific, this article recommends the introduction of class action under the FCA so that the interest of consumers against unfair terms in SFCCs can be safeguarded.

References

Asian Development Bank, *Designing and Implementing Grievance Redress Mechanisms: A Guide for Implementers of Transport Projects in Sri Lanka* (Asian Development Bank, 2010) <https://www.adb.org/sites/default/files/institutional-document/32956/grievance-redress-mechanisms_0.pdf> accessed on 28 June 2024.

⁹⁵ Ministry of Industry, Trade and Investment, *Blueprint for Regulatory Reforms to Improve the Business Environment* (2018) XIII.

⁹⁶ *Ibid.*

⁹⁷ Cassim F and Sibanda OS, 'The Consumer Protection Act and the Introduction of Collective Consumer Redress through Class Actions' *Journal for Contemporary Roman-Dutch Law* (Vol. 75, No. 4, 2012) 591 <<https://heionline.org/HOL/welcome>> accessed on 17th of December, 2022.

⁹⁸ *Ibid.*

- Borrie G, 'Consumer Redress - An Overview', Denning Law Journal (Vol.6, 1991) <<https://heinonline.org/HOL/welcome>> accessed on 16 December 2022.
- Braucher J 'Delayed Disclosure in Consumer E-commerce as an Unfair and Deceptive Practice' Wyne Law Review (2000).
- Cartwright P, *Consumer Protection and the Criminal Law, Theory, and Policy in the UK* (Press Syndicate of the University of Cambridge, 2004) 218.
- Cassim F and Sibanda OS, 'The Consumer Protection Act and the Introduction of Collective Consumer Redress through Class Actions' Journal for Contemporary Roman-Dutch Law (Vol. 75, No. 4, 2012) <<https://heinonline.org/HOL/welcome>> accessed on 17 December 2022.
- Deutch S, 'Consumer Contracts Law as a Special Branch of Contract Law--- The Israeli Model' Touro Law Review (Vol. 29, No. 3, 2013) <<https://digitalcommons.tourolaw.edu/lawreview/vol29/iss3>> accessed on 1 January 2024.
- FCC, 1st Quarter Performance Report of the Consumer Protection Section of the Financial Year,2023/2024.
- FCC, 2nd Quarter Performance Report of the Consumer Protection Section in the Financial Year,2023/2024.
- FCC, 3rd Quarter Performance Report of the Consumer Protection Section in the Financial Year,2023/2024.
- Finkle P and Cohen D, 'Consumer Redress through Alternative Dispute Resolution and Small Claims Court: Theory and Practice' Windsor Yearbook of Access to Justice (Vol.13, 1993)87 <<https://heinonline.org/HOL/welcome>> accessed on 7 January 2023.
- Gardiner, C Standard Form Consumer Contracts: The Background and Context, (The Online Platform for Elgar publication, 2022) <<https://www.elgaronline.com/configurable/content/book>> accessed on 28 June 2024).
- Giorgi M and Hupffer MH, 'A Behavioural Law and Economics Approach to Standard Form Contract,' Scientia Iuris, Londrina (Vol. 21, No. 1, 2017)
- Kanyabuhinya FB, 'Legal Challenges in Addressing Counterfeit Goods in Tanzania Mainland: The Right of Consumers to Redress' (PhD Thesis, University of Dar es Salaam 2014) X.
- Kisyombe M, 'Emerging Issues in Consumer Protection: Complementarities and Areas of Tension', paper presented at the interface between

competition and consumer policies, UNCTAD ad-hoc expert group meeting, Geneva (2012).

Ministry of Industry, Trade and Investment, *Blueprint for Regulatory Reforms to Improve the Business Environment* (2018).

Mniwasa EE, 'The Protection of Rights of Consumers of Goods in Tanzania: A Law-based Approach' *The African Journal of Finance and Management* (Vol .25, No. 1 of 2016).

Mouuttoto N, 'Control of Unfair Terms Under Cypriot Contract Law' *Liverpool Law Review* (2022) <<https://doi.org/10.1007/s10991-022-09304-8>> accessed on January 2024.

Mugyabuso E, 'The Industrialisation of the Economy in Tanzania: A Case for Reforms of the Consumer Protection Legal and Institutional Frameworks' *The Tanzania Lawyer Journal* (Vol. 1 No. 2, 2019).

Mwenegoha T, 'The Development of Consumer Protection Laws in Tanzania for Electronic Consumer Contracts' (PhD Thesis, Bond⁹University 2015) <https://pure.bond.edu.au/_Thesis>.

Nangela D J, 'The Adequacy of the Tanzanian Law on E-commerce and E-contracting: Possible Solutions to be Found in International Models and South African Legislation' (PhD Thesis, University of Cape Town 2011) <https://open.uct.ac.za/bitstream/handle/11427/11497/thesis_law_2011> accessed on 17 December 2021.

Nangela J.D, 'Safeguarding Consumers' Interests against Misleading and Deceptive Business Conduct in Tanzania' (2019).

Nditi NNN, the Open University of Tanzania course Materials for the LL. B Degree Programme Law of Contract (2004)5 <https://www.academia.edu/39697129/LAW_OF_CONTRACT_IN_TANZANIA> accessed on 1January 2024.

Riefa C and Gamper H, 'Economic Theory and Consumer Vulnerability: Exploring an Uneasy Relationship', in Riefa C & Saintier S, (Eds.), *Vulnerable Consumers and the Law, Consumer Protection and Access to Justice* (Routledge Publication, 2021).

Rutgers J & Sauter W, 'Promoting Fair Private Governance in the Platform Economy: EU Competition and Contract Law Applied to Standard Terms' *Cambridge Yearbook of European Legal Studies* (Vol. 23 2021)343 <<https://www.cambridge.org/core/journals/cambridge-yearbook-of-european-legal-studies/article/promoting-fair-private-governance-in-the-platform-economy-eu-competition-and-contract-law-applied-to-standard-terms/4D6259A62D7E49EA18631960465F7E89>> accessed on 11 January 2024.

Sur D, et al, Consumer and Consumer Protection Legislations, (Indira Gandhi National Open University, 2018) 10.

The Fair Competition Commission (FCC) Annual Report of the year ended 30 June 2018, available at [Fair Competition Commission \(fcc.go.tz\)](http://fcc.go.tz) accessed on 29 December 2023.

The Fair Competition Commission (FCC) Annual Report of the year ended 30th June 2019, available at [Fair Competition Commission \(fcc.go.tz\)](http://fcc.go.tz) accessed on 29 December 2023.

The fair Competition Commission (FCC) Annual Report of the year ended 30 June 2022

Winn KJ, 'Is Consumer Protection an Anachronism in the Information Economy?', in Winn K J (Ed.), Consumer Protection in the Age of the 'Information Economy' (Ashgate Publishing Limited Gower House Croft Roa Aldershot, 2006).

Woker T, 'Evaluating the Role of the National Consumer Commission in Ensuring That Consumers Have Access to Redress', South African Mercantile Law Journal (Vol. 29, No. 1, 2017) <<https://heinonline.org/HOL/welcome>> accessed on 16 December 2022.