

AGREEMENT AND UNDERTAKING



The National Consumer Agency ("the Agency")

putting consumers first

-and-

Nurendale Limited ("Panda")

This Agreement and Undertaking is made by and between the National Consumer Agency and **Panda** on the date set forth below. The Undertaking of **Panda** contained herein is accepted by the Agency pursuant to section 73 of the Consumer Protection Act, 2007. The Agency and **Panda** are referred to collectively herein as the "Parties".

WHEREAS FOR THE PURPOSES OF THIS UNDERTAKING:

- A. Panda is engaged in the waste collection and disposal of domestic waste. It provides a complete set of written terms and conditions for consumers who engage with the services of the company. These terms have been drawn up by the trader in advance and are presented as a standard form. The consumer is not presented with an option as to the terms upon which s/he may contract. None of the terms are individually negotiated.
- B. It is the function of the Agency pursuant to section 8(1) of the Consumer Protection Act 2007 ("the Act") to, *inter alia* –
 - i. Promote and protect the interests and welfare of consumers;
 - ii. Enforce the relevant statutory provisions, including by the prosecution of offences, by way of summary proceedings
 - iii. Encourage compliance with the relevant statutory provisions,
 - iv. Investigate instances of suspected offences under any of the relevant statutory provisions.
- C. The Agency has examined the standard contract terms described at "A" herein and considered whether any of the terms and conditions as presented by Panda constitute an unfair term in a contract concluded between a seller or supplier and a consumer as measured against the provisions contained within the EC Directive 93/13 on Unfair Terms in Consumer Contracts given effect in Ireland by S.I. 27 of 1995.
- D. As a result of the findings of its examination, the Agency has reason to believe that particular terms and conditions of the standard form contract as presented by Panda to consumers are unfair and considers that a particular provision is in breach of the Sale of Goods and Supply of Services Act 1980. The particular terms and conditions are as follows;

Under the Sale of Goods and Supply of Services Act 1980 (“the 1980 Act”)

- Under the heading “Warranty”

6.1. To the extent permitted by statute, no warranty is given by Panda as to the quality or suitability of the Services and/or Bins for any purpose and any implied warranty is expressly excluded. Panda shall not be responsible for any loss or damage to the Bins, or caused by the Bins, or any part thereof however arising.

The Agency understands that Section 41 of the 1980 Act deals with statements purporting to restrict the rights of recipients of services. It is an offence for a person in the course of a business to make statements in various forms which are likely to be taken as indicating that a right or the exercise of a right conferred by, or a liability arising by virtue of section 39, is restricted or excluded other than as provided for in Section 40.

Under the EC (Unfair Terms in Consumer Contracts) Regulations 1995 (“the Regulations”)

- under the “Charges and Payment” heading

3.1. The price of the Service provided shall be at the sole discretion of Panda at the date of the application by the Customer.

The Agency considers this provision to be unfair as it is unclear as to what is actually meant in practice (contrary to the requirement listed in Regulation 5(1) of the aforementioned Regulations).

3.2. Panda reserves the right to change the Price in the event of government levies, VAT increases, increase of fuel costs or other unexpected increase in Panda’s costs.

The Agency considers this provision to be unfair as it seeks to allow the service provided to increase price without giving the consumer the corresponding right to cancel (as listed in Schedule 3.1(1) of the Regulations).

3.3. Where the Customer includes hazardous waste for disposal Panda will include additional charges on the invoice of the Customer which will require immediate payment.

The Agency is of the view that this term requires further clarification to describe the nature of hazardous waste and to protect consumers acting in good faith but without sufficient information as to the nature of waste that is not allowed. Furthermore, there is a need to protect compliant consumers from the actions of other parties.

- under the "Provision of Service" heading

4.2. The failure of Panda to deliver the Services shall not entitle either party to treat to repudiate this agreement.

The Agency considers this provision to be unfair as it is unclear as to what is actually meant in practice (contrary to the requirement listed in Regulation 5(1) of the aforementioned Regulations). The Agency also considers this provision seeks to limit the legal rights of the consumer (as listed in Schedule 3, 1(b) and (o) to the Regulations).

4.3. Panda shall not be liable for any loss or damage whatever due to its failure to deliver the Services promptly or at all.

The Agency considers this provision to be unfair as it seeks to limit the legal rights of the consumer (as listed in Schedule 3, 1(b) to the Regulations).

- under the "Ownership of Bins" heading

5.2. The Customer authorises Panda's representatives to enter on to the Customer's premises upon which the Bins are situ for inspection of the Bins and or recovering possession of the Bins. In the event of non-payment of an account or in circumstances where the Bins are used for other purposes, Panda reserves the right to remove the Bins from the Customer's premises without prior notice.

The Agency is particularly concerned that Panda is seeking free entry to consumers' private property for the purposes of inspecting / recovering bins. The Agency considers that this provision is unfair as it causes a significant imbalance in the parties' rights, to the detriment of the consumer (contrary to the requirement listed in Regulation 3(2) of the aforementioned Regulations).

5.3 If any of the Bins are damaged or destroyed following delivery Panda is entitled to receive full recompense and/or all insurance proceeds payable for the Bins. The production of these terms and conditions by Panda is sufficient evidence of Panda's rights to receive the insurance proceeds without the need for any person dealing with Panda to make further enquiries.

The Agency considers this provision to be unfair as it is unclear as to what is actually meant in practice (contrary to the requirement listed in Regulation 5(1) of the aforementioned Regulations).

- under the "Customer's Obligations" heading

7.1 e) keep the Bins in their own possession and control and shall not assign the benefit of the agreement nor be entitled to a lien over the Bins and the Customer accepts full responsibility for the safekeeping of the Bins and indemnifies Panda for all loss theft or damage to the Bins howsoever caused and without limiting the generality of the foregoing whether or not such loss theft or damage is attributable to any negligence failure or omission of Panda;

7.1 h) accept full responsibility associated with any costs or liability due to the Bins obstructing any person/s or property. The Customer shall also accept full responsibility associated with any costs or liability due to the Bins being in a location that it shouldn't or if Panda incurs any fines, towage costs, seizure costs or impoundment costs while the Goods are in the custody of the Customer;

The Agency considers that these provisions are unfair as they cause a significant imbalance in the parties' rights, to the detriment of the consumer (contrary to the requirement listed in Regulation 3(2) of the aforementioned Regulations).

7.1 i) The Customer shall be responsible for free access by Panda to the site where the Bins are located. If there are any delays due to free access not being available then the Customer shall be responsible and shall reimburse Panda for all expenses and costs associated with the Bins being unavailable.

The Agency has concerns in relation to this provision similar to those set out earlier in relation to provision 5.2 regarding seeking access to private property. In addition, the Agency considers it unfair that the consumer is not made aware of the likely expenses and costs that might be imposed by this provision (as listed in Schedule 3, 1(b) to the Regulations).

- under the "Default" heading

8.1. Interest on overdue invoices shall accrue from the date when payment becomes due daily until the date of payment at a rate of 1% per calendar month and such interest shall compound monthly at such a rate after as well as before any judgment.

The Agency considers that this provision, seeking to apply a compound rate of interest after judgment, is unfair (contrary to the requirement listed in Regulation 3(2) of the aforementioned Regulations).

8.2. If the Customer defaults in payment of any invoice when due, the Customer shall indemnify Panda from and against all costs and disbursements incurred by Panda in pursuing the debt including legal costs on a solicitor and own client.

The Agency considers this provision to be unfair as it is unclear as to what is actually meant in practice (contrary to the requirement listed in Regulation 5(1) of the aforementioned Regulations).

8.4. Without prejudice to any other remedies Panda may , if at any time the Customer is in breach of any obligation (including those relating to payment), suspend or terminate the supply of Services to the Customer and any of its other obligations under the terms and conditions. Panda will not be liable to the Customer for any loss or damage the Customer suffers because it exercised its rights under this clause.

It is unclear what this provision is seeking to address apart from non-payment by the consumer. At the very least, additional clarity is required in this provision.

- under the "Termination" heading

9.1 Panda may terminate this agreement at any time by giving written notice. On giving such notice Panda shall repay to the Customer any sums paid in respect of the Price. Panda shall not be liable for any loss or damage whatever arising from such termination.

The Agency considers that the requirements on the company should be similar to those placed on the consumer – provision 7.1 requires a 30 day notice period for the consumer.

9.2. In the event that the Customer cancels their agreement with Panda the Customer is responsible:

d) any loss incurred by Panda (including, but not limited to, any loss of profits) up to the time of termination.

The Agency considers that this provision is unfair as it causes a significant imbalance in the parties' rights, to the detriment of the consumer (contrary to the requirement listed in Regulation 3(2) of the aforementioned Regulations).

- under the "General" heading

11.3. Panda shall be under no liability whatever to the Customer for any indirect loss and/or expense (including loss of profit) suffered by the Customer arising out of a breach by Panda of these terms and conditions.

11.4. In the event of any breach of this agreement by Panda the remedies of the Customer shall be limited to damages. Under no circumstances shall the liability of Panda exceed the Price of the Services

The Agency considers that these provisions are unfair as they seek to limit the legal rights of the consumer (as listed in Schedule 3, 1(b) to the Regulations).

11.5. Panda reserves the right to review these terms and conditions at any time. If, following any such review, there is to be any change to these terms and conditions, then that change will take effect from the date on which Panda notifies the Customer of such change.

The Agency considers this to be unfair as it considers that such a term seeks to unilaterally bind the consumer to future changes without valid reason (as listed in Schedule 3, 1(j) to the Regulations).

- E. As a result of the findings of its examination, the Agency is contemplating initiating a prosecution for a suspected breach of the provisions of the Sale of Goods and Supply of Services Act 1980.

In addition the Agency is also contemplating an application to the High Court wherein the Agency would seek an order prohibiting the use of the terms and conditions as outlined at 'D' herein.

- F. As a result of this investigation, the Parties have reached an agreement, as more particularly described below, wherein the Agency accepts Panda's undertaking of certain obligations in respect of its use of the subject terms and conditions.

IT IS HEREBY AGREED AS FOLLOWS:

1. Panda undertakes that:-
 - a) It will refrain from using terms and conditions in its standard form contract which are non-negotiated and cause a significant imbalance in the parties rights and obligations under the contract to the detriment of the consumer.
 - b) Within 7 days, from the date of this agreement, it will amend its standard form contract so as to address the unfair aspects of the terms and conditions contained at 'D' herein.
 - c) It will communicate the changes to its standard contract to its consumers at the earliest opportunity but no later than 7 days from the date of this agreement.
2. In consideration of the undertakings furnished by Panda as set out herein, the Agency agrees that it will not institute proceedings to prosecute for a breach of the Sale of Goods and Supply of Services Act 1980. It also agrees that it will not make an application to the High Court under S.I. 27 of 1995 for an order prohibiting the use of the terms and conditions described at "D" herein. Nothing in this agreement shall be construed so as to impair the Agency's right to institute civil or criminal proceedings for any matter not specifically described herein.

3. This Agreement and Undertaking shall be and is intended by the Parties to be a binding and enforceable agreement which may be enforced by action in any Court of competent jurisdiction in the State.
4. The Undertakings provided herein shall be binding on the directors, officers, employees, servants, agents, and successors and assigns of Panda.
5. The terms "and" and "or" as used herein have both conjunctive and disjunctive meanings.

dated this 6th day of February 2013 in Dublin, Ireland.

AGREED AND ACCEPTED BY:

Signed 

Mr/Ms Louise O'Neill (Block Capitals)
~~Director / Manager / Secretary~~ / other officer /* on behalf of Panda

Signed 

John Shine
Director of Commercial Practices for and on behalf of the National Consumer Agency

* Delete where appropriate