

Consultation Paper No.13

Introduction

1. Why are we issuing this paper?

The Astana International Financial Centre Authority (the “AIFC Authority”) has issued this Consultation Paper to invite public feedback and comments on the proposed amendments to the AIFC Contract Legal Framework (the “Proposed Framework”).

The proposed framework aims at supplementing existing provisions with elements necessary to strengthen protection of rights of parties and adding new provisions necessary in modern world.

The proposed amendments are developed in accordance with best international practices and up-to-date demand of market and time.

2. Who should read this paper?

This Consultation Paper may be of interest to the current and prospective AIFC Participants, as well as all the AIFC Bodies and their organisations, as well as legal advisors and human resources departments of the abovementioned entities, all persons concluding contracts indicating Acting law of the AIFC as a governing law and consequently them in accordance with the Proposed Framework and generally, to all interested in providing their feedback to the Proposed Framework.

3. How to provide comments?

AIFC Authority encourages interested parties to provide their views and comments in writing on the issues outlined in the Consultation Paper.

All comments should be provided to the following person:

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You may as well identify your organisation in the provided comments.

By submitting your comments to the AIFC Authority you expressly consent to the processing by the AIFC Authority of the personal data pertaining to you, including, but not limited to the collection, recording, organisation, storage, adaptation or alteration, retrieval, use, disclosure by transmission, dissemination or otherwise making available, alignment or combination, blocking, erasure or destruction of thereof, as per the AIFC Data Protection Regulations 2017.

The AIFC Authority reserves the right to publish, including on its website, any comments you provide, unless you expressly request otherwise at the time of making comments. Comments supported by reasoning and evidence will be given more weight by AIFC Authority.

4. What happens next?

The deadline for providing comments on the proposals in this Consultation Paper is 11 May 2022.

Once we receive your comments, we will consider if any further refinements are required to the Proposed Framework annexed to this Consultation Paper at Annex 1 and 2. Once the task is complete, the draft of the Proposed Framework will be further processed in accordance with the requirements, stipulated in the AIFC Regulations on AIFC Acts 2017.

The Proposed Framework is in draft form only and is, therefore, subject to change following consultation as mentioned above. Consequently, you should not act on it until the Proposed Framework is formally enacted.

Legislative proposal

Annex 1 – Policy paper

Annex 2 – Proposed amendments to the AIFC Contract Legal Framework

Policy Paper

Nur-Sultan

Date 11.04.2022

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2. Proposal type

a) New Regulations Rules Policy Procedure Other: _____
 b) Amendment of Regulations Rules Policy Procedure Other: _____

3. Introduction***AIFC Contract Regulations 2017***

The AIFC Contract Regulations 2017 (the “Contract Regulations”) have been developed with the purpose to provide minimum contract standards, highlight approaches that need to be used when drafting, concluding and performing contracts. The Contract Regulations contain provisions regarding conclusion and performance/non-performance of contracts covering formation, validity, interpretation, contents, rights of third parties, damages and agency.

AIFC Implied Terms in Contracts and Unfair Terms Regulations 2017

These AIFC Implied Terms in Contracts and Unfair Terms Regulations 2017 (Implied and Unfair Terms Regulations) apply to every contract governed by the Acting Law of the AIFC including contracts of transfer, contracts of hire, contracts for supply of services. Auctions, implied terms, unfair terms are covered by these Implied and Unfair Terms Regulations.

4. Purpose and scope of the proposed AIFC Act

The purpose of the proposals is to improve quality of contracts and strengthen the protection of parties' rights.

AIFC Contract Regulations 2017

- 1. Current time, growth and development of different fields as digitalisation, optimisation of different processes call for the second proposal to the Contract Regulations. The proposal is related to electronic contracts. Number of contracts concluded by electronic means grows yearly. Contract Regulations cover contracts but does not mention anything about electronic contracts. Electronic contract may have differences with written or oral contracts. In order to deal with this issue and prevent possible disagreements and disputes, it is proposed to add in the Contract Regulations provisions related to electronic contracts.*

AIFC Implied Terms in Contracts and Unfair Terms Regulations 2017

- 2. AIFC Implied Terms in Contracts and Unfair Terms Regulations as for now does not cover matters which arose after the extensive reform of UK legislation on unfair contract terms now in the Consumer Rights Act 2015, Part 2, but previously in Regulations implementing a European Community Directive of 1993 (93/13/EEC). All members of the European Union have already included these amendments in their legislations, and they are ahead of the DIFC or other financial centres in this respect. It is proposed to implement new approaches contained in UK legislation to maintain Acting law of the AIFC up to date.*

5. Operation of the proposed AIFC Act

AIFC Contract Regulations 2017

1. *It is proposed to start e-commerce regulation in AIFC from adding e-contracts provisions in Contract Regulations. DIFC Law on Electronic Transactions may be taken as a very good example and basis. These amendments will cover questions of legal recognition of e-contracts, requirements for formation and validity, offer and acceptance details, effectiveness and so on.*

AIFC Implied Terms in Contracts and Unfair Terms Regulations 2017

2. *When deciding whether a term/notice is fair, the nature of the subject matter of the contract will be considered by reference to all the circumstances existing when the term was agreed, and to all of the other terms of the contract or of any other contract on which it depends.*

6. Best practice

AIFC Contract Regulations 2017

1. *Every day thousands of commercial transactions occur via the internet, with no face-to-face connection between the parties involved. Electronic contract is an essential part of e-commerce, which is developing rapidly now. And there is an impressing and growing number of legal cases arising from e-commerce. Despite the prevalence of electronic transactions, many individuals are confused if electronic signatures and electronic contracts are secure, legitimate, and legal.*

The Contract Regulations cover many aspects of contract law but is it applicable to e-contracts? Electronic contracts are digital versions of the old paper contracts. The same essential laws govern them. However, there may be issues typical for electronic contract only that are not covered and governed by the Contract Regulations.

There are several jurisdictions regulating e-commerce, e-contracts matters. For example, UK (The Electronic Commerce (EC Directive) Regulations 2002), DIFC (Electronic Transactions Law 2017), US (Uniform Electronic Transactions Act, UETA 1998), China (Telecommunications Regulations of the People's Republic of China, 2000), some European countries etc.

In the United States, California's Electronic Commerce Act (1984), enacted by the Legislature, and the more recent California Privacy Act (2020) enacted through a popular election proposition, control specifically how electronic commerce may be conducted in California. In the US in its entirety, electronic commerce activities are regulated more broadly by the Federal Trade Commission (FTC). These activities include the use of commercial e-mails, online advertising and Consumer privacy.

Internationally there is the International Consumer Protection and Enforcement Network (ICPEN), which was formed in 1991 from an informal network of government customer fair trade organisations. The purpose was stated as being to find ways of co-operating on tackling Consumer problems connected with cross-border transactions in both goods and services, and to help ensure exchanges of information among the participants for mutual benefit and understanding. From this came EConsumer.gov, an ICPEN initiative since April 2001. It is a portal to report complaints about online and related transactions with foreign companies. Conflict of laws in cyberspace is a major hurdle for harmonisation of legal framework for e-commerce around the world. In order to give a uniformity to e-commerce law around the world, many countries adopted the UNCITRAL Model Law on Electronic Commerce (1996).

These examples demonstrate successful attempt in protection of private transactions and trade, the development of legal norms that allow the state as much as possible control electronic commercial flows and procuring a cybersecurity in e-commerce sector.

AIFC Implied Terms in Contracts and Unfair Terms Regulations 2017

2. *The Consumer Rights Act 2015 – which revoked the Unfair Terms in Consumer Regulations 1999 – consolidated the unfair contract terms in the Consumer contracts regime. The definition of an 'unfair term' remains the same as that originally outlined in the Unfair Contract Terms Act 1977; i.e. a term is unfair if, "contrary to the requirement of good faith, it causes a significant imbalance in the parties' rights and obligations under the contract to the detriment of the Consumer." However, terms that express the main subject matter of the contract are not subject to this fairness test, provided that such terms are both transparent and prominent in the contract. Section 71 places a duty on the court to consider the fairness of contractual terms even where neither party raises the issue.*

This Act demonstrates approaches facilitating better safeguarding of parties' interests.

7. Outcomes

AIFC Contract Regulations 2017

1. *Inclusion of provisions on electronic contracts are necessary because electronic commerce is developing very fast and calls for wider regulation in order to manage existing uncertainty and tackle future problems. Coverage of Acting law of the AIFC the elements of electronic commerce will be an advantage and an effective tool for attracting new companies and investors to AIFC Jurisdiction.*

AIFC Implied Terms in Contracts and Unfair Terms Regulations 2017

2. *The amendments will include provisions connected to consumer contracts, which are not covered by the Regulations. For example, there will be a fairness test to the terms of a contract between a Consumer and a Trader (apart from a contract of employment or apprenticeship) and any notice (written or oral) issued by the Trader which relates to rights or obligations between a Trader and a Consumer, or will try to exclude or restrict a Trader's liability to a Consumer.*

It will be set out that an unfair term of a Consumer contract or notice is not binding on the Consumer, although where a clause is not binding because it is unfair, the rest of the contract will take effect as far as possible.

Also, it will be clear that the requirement of good faith means the contract should be created in a course of fair and open dealings. All the terms of the contract should be expressly stated, written in clear, legible terms and that there are no hidden traps or clauses that either party has no knowledge of.

8. Financial implications

The proposed amendments do not require an additional expenditure from the AIFC budget.

9. Legislative amendments

AIFC Contract Regulations 2017

1. *To add provisions on electronic contract*

AIFC Implied Terms in Contracts and Unfair Terms Regulations 2017

2. *To add provisions on unfair terms.*

**AIFC CONTRACT LEGAL FRAMEWORK
AMENDMENT REGULATIONS 2022**

AIFC REGULATIONS No. ____ of 2022

_____ **2022**
Nur-Sultan, Kazakhstan

PART 1: GENERAL

1. Name

These Regulations are the *AIFC Contract Legal Framework Amendment Regulations 2022*.

2. Commencement

These Regulations commence on ____ 2022.

3. Application

- (1) The *AIFC Contract Regulations 2017* and *AIFC Implied Terms in Contracts and Unfair Terms Regulations 2017* (the **amended Regulations**), as amended by these Regulations, apply in relation to contracts concluded on or after the commencement of these Regulations.
- (2) Despite the amendments made by these Regulations, the amended Regulations, as in force immediately before the commencement of these Regulations, continue to apply to contracts concluded before the commencement of these Regulations.

4. Legislative Authority

These Regulations are adopted by the Governor under paragraph 3 of article 4 of the Constitutional Statute and subparagraph 3) of paragraph 9 of the Management Council Resolution on AIFC Bodies.

5. Interpretation of terms used in these Regulations

Unless the contrary intention appears, terms used in these Regulations have the same meanings as they have, from time to time, in the following Regulations, or the relevant provisions of them:

- (a) the *AIFC Contract Regulations 2017*;
- (b) the *AIFC Implied Terms in Contracts and Unfair Terms Regulations 2017*.

PART 2: AMENDMENTS OF AIFC CONTRACT REGULATIONS 2017

6. This Part amends *the AIFC Contract Regulations 2017*.

7. After section 34 (Battle of forms), insert:

“PART 4-1: ELECTRONIC CONTRACTS

48-1. Legal recognition of electronic contracts

A contract must not be denied legal effect, validity or enforceability only because an Electronic Record was used in its formation.

48-2. Formation and validity of contracts using Electronic Communications

- (1) To remove any doubt, in the formation of a contract, an offer and the acceptance of an offer may be made by Electronic Communication.
- (2) If an Electronic Communication is used in the formation of a contract, the contract must not be denied legal effect, validity or enforceability only because an Electronic Communication was used in its formation.

48-3. Effectiveness between parties

As between the Originator and the Addressee of an Electronic Communication, a declaration of intent or other statement must not be denied legal effect, validity or enforceability only because it is in the form of an Electronic Communication.

48-4. Invitation to make offer

- (1) This section applies to a proposal to conclude a contract made using 1 or more Electronic Communications if the proposal is not addressed to 1 or more specific parties but is generally accessible to parties making use of Information Systems, including a proposal that makes use of interactive applications for the placement of orders through the Information Systems.
- (2) The proposal is taken to be an invitation to make offers, unless it clearly indicates the intention of the party making the proposal to be bound if the proposal is accepted.

48-5. Use of automated message systems for contract formation

A contract formed by the interaction of an automated message system and a natural person, or by the interaction of automated message systems, must not be denied legal effect, validity or enforceability only because a natural person did not review or intervene in each of the individual actions carried out by the automated message system or systems or the resulting contract.

48-6. Time and place of dispatch and receipt

- (1) The time of dispatch of an Electronic Communication is:
 - (a) the time it leaves an Information System under the control of the Originator or the Person who sent it on behalf of the Originator; or
 - (b) if the Electronic Communication does not leave an Information System under the control of the Originator or the Person who sent it on behalf of the Originator—the time the Electronic Communication is received.
- (2) The time of receipt of an Electronic Communication at an electronic address designated by the Addressee is the time the Electronic Communication becomes capable of being retrieved by the Addressee at the address.

- (3) The time of receipt of an Electronic Communication at an electronic address that has not been designated by the Addressee is the time the Electronic Communication becomes capable of being retrieved by the Addressee at the address and the Addressee becomes aware that the Electronic Communication has been sent to the address.
 - (4) For subsection (3), an Electronic Communication is presumed to be capable of being retrieved by the Addressee at an electronic address when it reaches the address.
 - (5) An Electronic Communication is taken to be dispatched at the Originator's place of Business and is taken to be received at the Addressee's place of Business.
 - (6) Subsections (2), (3) and (4) apply even though the Information System supporting an electronic address is located at a different place from the place where the Electronic Communication is taken to be received under subsection (5).
 - (7) Subsections (1), (2), (3) and (5) apply unless otherwise agreed between the Originator and the Addressee.”.
8. Section 2 of Schedule 1 (Interpretation), insert the following definitions in the appropriate alphabetical position (worked out on a letter-by letter basis):

“Addressee, for an Electronic Communication, means a party who is intended by the Originator to receive the Electronic Communication, but does not include a Person acting as an intermediary for the Electronic Communication.

Electronic means relating to technology having electrical, digital, magnetic, wireless, optical, electromagnetic, or similar capabilities.

Electronic Communication means any communication made using Electronic Records.

Electronic Record means a Record created, generated, sent, communicated, received, or stored, by Electronic means.

Information means data, text, images, sounds, codes, computer programs, software, databases, or similar things.

Information System means a system for creating, generating, sending, communicating, receiving, storing, or otherwise processing, Electronic Records.

Originator, for an Electronic Communication, means a party by whom, or on whose behalf, the Electronic Communication has been generated, sent or communicated before storage (if any), but it does not include a Person acting as an intermediary for the Electronic Communication.

Record means Information that is inscribed on a tangible medium, or that is stored in an Electronic or other medium, and is retrievable in perceivable form.”.

PART 3: AMENDMENTS OF AIFC IMPLIED TERMS IN CONTRACTS AND UNFAIR TERMS REGULATIONS 2017

9. This Part amends the *AIFC Implied Terms in Contracts and Unfair Terms Regulations 2017*.
10. Section 36 (Exclusion of implied terms), omit 'Part 4 (Unfair terms)', substitute 'Part 4 (Unfair contract terms and consumer notices)'.
11. Part 4 heading (Part 4: Unfair Terms), substitute '**PART 4: UNFAIR CONTRACT TERMS AND CONSUMER NOTICES**'.
12. Before section 38, in Part 4 insert:
'CHAPTER 1: INTRODUCTORY'
13. In section 38 (Application of Part 4), insert:
“(3) This Part also applies to any Consumer Notice given in relation to any contract governed by the Acting Law of the AIFC.”
14. After section 38 (Application of Part 4), insert:
“CHAPTER 2: CONTRACTS OTHER THAN CONSUMER CONTRACTS
38-1. Chapter 2 does not apply to Consumer Contracts etc.
(1) This Chapter does not apply to a Consumer Contract.
(2) To remove any doubt, this Chapter does not apply to a Consumer Notice.”.
15. Section 39 heading (Scope of Part 4), substitute '**Scope of Chapter 2**'.
16. Section 39(1) (Scope of Chapter 2), omit 'This Part', substitute 'This Chapter'.
17. Section 40 heading (Liability for negligence), substitute '**Liability for Negligence**'.
18. Section 40 (1) (Liability for Negligence), omit 'personal injury', substitute 'Personal Injury'.
19. Section 40 (1), (2) and (3) (Liability for Negligence), omit 'negligence', substitute 'Negligence'.
20. Section 40 (1),(2),(3) and(4) (Liability for Negligence), omit 'notice', substitute 'Notice'.
21. Section 43(2)(e) (The reasonableness test), omit 'goods', substitute 'Goods'.
22. Section 43(4) and (5) (The reasonableness test), omit 'notice', substitute 'Notice'.
23. Section 44 (1) and (2) (Varieties of exemption clause), omit 'this Part', substitute 'this Chapter'.
24. Section 44(1) (Varieties of exemption clause), omit 'negligence', substitute 'Negligence'.
25. After section 44, insert in Part 4:
“CHAPTER 3: CONSUMER CONTRACTS AND CONSUMER NOTICES
45. Chapter 3 applies to Consumer Contracts and Consumer Notices

This Chapter applies to contracts that are Consumer Contracts and to Notices that are Consumer Notices.

1.1.1. 46. What is a Consumer Contract or Consumer Notice

- (1) In these Regulations, a **Consumer Contract** is a contract between a Trader and a Consumer, other than a contract of employment or apprenticeship.
- (2) In these Regulations, a **Consumer Notice** is a Notice to the extent that it:
 - (a) relates to rights or obligations as between a Trader and a Consumer; or
 - (b) purports to exclude or restrict a Trader's liability to a Consumer.
- (3) However, a **Consumer Notice** does not include a Notice relating to rights, obligations or liabilities as between an employer and an employee.
- (4) For subsection (2), it does not matter whether the Notice is expressed to apply to a Consumer if it is reasonable to assume that it is intended to be seen or heard by a Consumer.

1.1.2. 47. Who is a Trader or Consumer

- (1) In these Regulations, a **Trader** is a Person (**A**) acting for purposes relating to A's trade, Business, craft or profession, whether acting personally or through another Person acting in A's name or on A's behalf.
- (2) In these Regulations, a **Consumer** is an individual acting for purposes that are wholly or mainly outside the individual's trade, Business, craft or profession.
- (3) A Trader claiming that an individual was not acting for purposes wholly or mainly outside the individual's trade, Business, craft or profession, must prove it.

1.1.3. 48. Requirement for contract terms and Consumer Notices to be fair

- (1) An unfair term of a Consumer Contract is not binding on the Consumer.
- (2) An unfair Consumer Notice is not binding on the Consumer.
- (3) This does not prevent the Consumer from relying on the term or Notice if the Consumer chooses to do so.
- (4) A term of a Consumer Contract is unfair if, contrary to the requirement of good faith, it causes a significant imbalance in the parties' rights and obligations under the contract to the detriment of the Consumer.
- (5) Whether a term of a Consumer Contract is fair is to be decided:
 - (a) taking into account the nature of the subject matter of the contract; and
 - (b) by reference to all the circumstances existing when the term was agreed and to all the other terms of the contract or of any other contract on which it depends.
- (6) A Consumer Notice is unfair if, contrary to the requirement of good faith, it causes a significant imbalance in the parties' rights and obligations to the detriment of the Consumer.
- (7) Whether a Consumer Notice is fair is to be decided:

- (a) taking into account the nature of the subject matter of the Notice; and
 - (b) by reference to all the circumstances existing when the rights or obligations to which it relates arose and to the terms of any contract on which it depends.
- (8) This section does not affect the operation of section 51 (Bar on exclusion or restriction of liability for Negligence).

1.1.4. 49. Contract terms that may or must be regarded as unfair

- (1) Part 1 of Schedule 1-1 contains an indicative and non-exhaustive list of terms of Consumer Contracts that may be regarded as unfair for this Chapter.
- (2) Part 1 of Schedule 1-1 is subject to Part 2 of that Schedule; but a term listed in Part 2 of that Schedule may nevertheless be assessed for fairness under section 48 (Requirement for contract terms and Consumer Notices to be fair) unless section 50 (Exclusion from assessment of fairness) or section 58 (Disapplication of rules to mandatory terms and Notices) applies to it.

50. Exclusion from assessment of fairness

- (1) A term of a Consumer Contract may not be assessed for fairness under section 48 (Requirement for contract terms and Consumer Notices to be fair) to the extent that:
 - (a) it specifies the main subject matter of the contract; or
 - (b) the assessment is of the appropriateness of the price payable under the contract by comparison with the Goods, Digital Content or services supplied under it.
- (2) Subsection (1) excludes a term from an assessment under section 48 only if it is transparent and prominent.
- (3) For this Chapter, a term is transparent if it is expressed in plain and intelligible language and, for a Written term, is legible.
- (4) For this Chapter, a term is prominent if it is brought to the Consumer's attention in such a way that an average Consumer would be aware of the term.
- (5) In subsection (4):

average consumer means a consumer who is reasonably well-informed, observant and circumspect.

- (6) This section does not apply to a term of a contract listed in Part 1 of Schedule 1-1.

1.1.5. 51. Bar on exclusion or restriction of liability for Negligence

- (1) A Trader cannot by a term of a Consumer Contract or by a Consumer Notice exclude or restrict liability for death or Personal Injury resulting from Negligence.
- (2) If a term of a Consumer Contract, or a Consumer Notice, purports to exclude or restrict a Trader's liability for Negligence, a Person is not to be taken to have voluntarily accepted any risk only because the Person agreed to or knew about the term or Notice.
- (3) This section is subject to section 52 (which makes provision about the scope of this section).

1.1.6. 52. Scope of section 51

- (1) Section 51 (Bar on exclusion or restriction of liability for Negligence) does not apply to:
 - (a) any contract so far as it is a contract of insurance, including a contract to pay an annuity on human life; or
 - (b) any contract so far as it relates to the creation or transfer of an interest in land.
- (2) Section 51 does not affect the validity of any discharge or indemnity given by a Person in consideration of the receipt by the Person of compensation in settlement of any claim the Person has.

1.1.7. 53. Effect of unfair term on rest of contract

If a term of a Consumer Contract is not binding on the Consumer because of this Chapter, the contract continues, so far as practicable, to have effect in every other respect.

1.1.8. 54. Requirement for transparency

- (1) A Trader must ensure that a Written term of a Consumer Contract, or a Consumer Notice in Writing, is transparent.
- (2) For subsection (1), a Consumer Notice is transparent if it is expressed in plain and intelligible language, and it is legible.

1.1.9. 55. Contract terms that may have different meanings

If a term in a Consumer Contract, or a Consumer Notice, could have different meanings, the meaning that is most favourable to the Consumer is to prevail.

1.1.10. 56. Duty of the Court to consider fairness of term

- (1) Subsection (2) applies to proceedings before the Court that relate to a term of a Consumer Contract.
- (2) The Court must consider whether the term is fair even if none of the parties to the proceedings has raised that issue or indicated that it intends to raise it.
- (3) But subsection (2) does not apply unless the Court considers that it has before it sufficient legal and factual material to enable it to consider the fairness of the term.

1.1.11. 57. Application of rules to secondary contracts

- (1) This section applies if a term of a contract (the **secondary contract**) reduces the rights or remedies, or increases the obligations, of a Person under another contract (the **main contract**).
- (2) The term is subject to the provisions of this Chapter that would apply to the term if it were in the main contract.
- (3) For this section, it does not matter:
 - (a) whether the parties to the secondary contract are the same as the parties to the main contract; or

- (b) whether the secondary contract is a Consumer Contract.
- (4) This section does not apply if the secondary contract is a settlement of a claim arising under the main contract.

1.1.12. **58. Disapplication of rules to mandatory terms and Notices**

- (1) This Chapter does not apply to a term of a contract, or to a Notice, to the extent that it reflects mandatory statutory or regulatory provisions.
- (2) In subsection (1):

mandatory statutory or regulatory provisions includes rules that, according to the Acting Law of the AIFC, apply between the parties on the basis that no other arrangements have been established.”.

26. Before Schedule 1 (Interpretation), insert:

“SCHEDULE 1-1 CONSUMER CONTRACT TERMS THAT MAY BE REGARDED AS UNFAIR

PART 1: LIST OF TERMS

1 Exclusion of liability for death or Personal Injury etc.

A term that has the object or effect of excluding or limiting the Trader's liability in the event of the death of, or Personal Injury to, the Consumer resulting from an act or omission of the Trader.

2 Exclusion of liability for non-performance or inadequate performance etc.

A term that has the object or effect of inappropriately excluding or limiting the legal rights of the Consumer in relation to the Trader or another party in the event of total or partial non-performance or inadequate performance by the Trader of any of the contractual obligations, including the option of offsetting a debt owed to the Trader against any claim that the Consumer may have against the Trader.

3 Provision of services dependent on Trader's will alone

A term that has the object or effect of making an agreement binding on the Consumer in a case where the provision of services by the Trader is subject to a condition whose realisation depends on the Trader's will alone.

4 Retention of sums paid by Consumer if Consumer decides not to conclude or perform

A term that has the object or effect of permitting the Trader to retain sums paid by the Consumer if the Consumer decides not to conclude or perform the contract, without providing for the Consumer to receive compensation of an equivalent amount from the Trader if the Trader is the party cancelling the contract.

5 Disproportionately high sum payable if Consumer decides not to conclude or perform

A term that has the object or effect of requiring that, if the Consumer decides not to conclude or perform the contract, the Consumer must pay the Trader a disproportionately high sum in compensation or for services that have not been supplied.

6 Disproportionately high sum payable if Consumer does not fulfil obligations

A term that has the object or effect of requiring the Consumer to pay a disproportionately high sum in compensation if the Consumer does not fulfil the Consumer's obligations under the contract.

7 Trader authorised to dissolve contract on discretionary basis or retain sums for unsupplied services

A term that has the object or effect of authorising the Trader:

- (a) to dissolve the contract on a discretionary basis if the same facility is not granted to the Consumer; or
- (b) to retain sums paid for services not yet supplied by the Trader if the Trader dissolves the contract.

8 Termination of contract by Trader without reasonable notice

A term that has the object or effect of enabling the Trader to terminate a contract of indeterminate duration without reasonable notice except where there are serious grounds for doing so.

Note: See also sections 21 (Financial services: unilateral termination without notice) and 24 (Sale of Securities, foreign currency etc.).

9 Automatic extension of contract of fixed duration

A term that has the object or effect of automatically extending a contract of fixed duration if the Consumer does not indicate otherwise, when the deadline fixed for the Consumer to express a desire not to extend the contract is unreasonably early.

10 Terms with which Consumer had no real opportunity of becoming acquainted

A term that has the object or effect of irrevocably binding the Consumer to terms with which the Consumer has had no real opportunity of becoming acquainted before the conclusion of the contract.

11 Unilateral alteration of terms by Trader

A term that has the object or effect of enabling the Trader to alter the terms of the contract unilaterally without a valid reason specified in the contract.

Note: See also sections 22 (Financial services: unilateral alteration of terms), 23 (Contracts that last indefinitely) and section 24 (Sale of Securities, foreign currency etc.).

12 Determination of characteristics of contract subject matter by Trader

A term that has the object or effect of permitting the Trader to determine the characteristics of the subject matter of the contract after the Consumer has become bound by it.

Note: See also section 23 (Contracts that last in definitely).

13 Unilateral alteration of characteristics of Goods etc. by Trader

A term that has the object or effect of enabling the Trader to alter unilaterally without a valid reason any characteristics of the Goods, Digital Content or services to be provided.

14 Discretion by Trader to decide price

A term that has the object or effect of giving the Trader the discretion to decide the price payable under the contract after the Consumer has become bound by it, if no price or method of determining the price is agreed when the Consumer becomes bound.

Note: See also sections 23 (Contracts that last indefinitely), 24 Sale of Securities, foreign currency etc.) and 25 (Price-indexation clauses).

15 Trader permitted to increase price without cancellation rights

A term that has the object or effect of permitting a Trader to increase the price of Goods, Digital Content or services without giving the Consumer the right to cancel the contract if the final price is too high in relation to the price agreed when the contract was concluded.

Note: See also sections 23 (Contracts that last indefinitely) and 25 (Price-indexation clauses).

16 Trader given right to determine whether supply in conformity with contract or exclusive right to interpret contract

A term that has the object or effect of:

- (a) giving the Trader the right to determine whether the Goods, Digital Content or services supplied are in conformity with the contract; or
- (b) giving the Trader the exclusive right to interpret any term of the contract.

17 Limitation of Trader's obligations for agent commitments or making Trader's commitments subject to compliance with formalities

A term that has the object or effect of limiting the Trader's obligation to respect commitments undertaken by the Trader's agents or making the Trader's commitments subject to compliance with a particular formality.

18 Consumer alone required to fulfil obligations

A term that has the object or effect of obliging the Consumer to fulfil all the Consumer's obligations even though the Trader does not perform the Trader's obligations.

19 Unilateral transfer of Trader's rights and obligations under contract

A term that has the object or effect of allowing the Trader to transfer the Trader's rights and obligations under the contract, if this may reduce the guarantees for the Consumer, without the Consumer's agreement.

20 Excluding or hindering Consumer's right to exercise legal remedies

A term that has the object or effect of excluding or hindering the Consumer's right to take legal Action or exercise any other legal remedy, including, for example, by:

- (a) requiring the Consumer to take disputes exclusively to arbitration not covered by legal provisions; or
- (b) unduly restricting the evidence available to the Consumer; or
- (c) imposing on the Consumer a burden of proof that, according to the applicable law, should lie with another party to the contract.

PART 2: SCOPE OF PART 1

21 Financial services: unilateral termination without notice

Section 8 (Termination of contract by Trader without reasonable notice) does not include a term by which a supplier of financial services reserves the right to terminate unilaterally a contract of indeterminate duration without notice if there is a valid reason and the supplier is required to inform the Consumer of the cancellation immediately.

22 Financial services: unilateral alteration of terms

Section 11 (Unilateral alteration of terms by Trader) does not include a term by which a supplier of financial services reserves the right to alter without notice the rate of interest payable by or due to the Consumer, or the amount of other charges for financial services, if:

- (a) there is a valid reason; and
- (b) the supplier is required to inform the Consumer of the alteration at the earliest opportunity, and
- (c) the Consumer is free to dissolve the contract immediately.

23 Contracts that last indefinitely

Sections 11 (Unilateral alteration of terms by Trader), 12 (Determination of characteristics of contract subject matter by Trader) and 14 (Discretion by Trader to decide price) do not include a term under which a Trader reserves the right to alter unilaterally the conditions of a contract of indeterminate duration if:

- (a) the Trader is required to inform the Consumer with reasonable notice; and
- (b) the Consumer is free to dissolve the contract.

24 Sale of Securities, foreign currency etc.

Sections 8 (Termination of contract by Trader without reasonable notice), 11 (Unilateral alteration of terms by Trader), 14 (Discretion by Trader to decide price) and 15 (Trader permitted to increase price without cancellation rights) do not apply to:

- (a) transactions in Securities, financial instruments and other products or services for which the price is linked to fluctuations in a stock exchange quotation or index or a financial market rate that the trader does not control; and
- (b) contracts for the purchase or sale of foreign currency, traveller's cheques or international money orders denominated in foreign currency.

25 Price-indexation clauses

Sections 14 (Discretion by Trader to decide price) and 15 (Trader permitted to increase price without cancellation rights) do not include a term that is a price-indexation clause, if the clause is otherwise lawful and the method by which prices vary is explicitly described.”.

28. Schedule 1 (Interpretation), insert before section 1:

“1-1. Meaning of **Negligence**

- (1) In these Regulations, **Negligence** means the breach of:

- (a) any obligation to take reasonable care or exercise reasonable skill in the performance of a contract if the obligation arises from an express or implied term of the contract; or
 - (b) any other duty under the Acting Law of the AIFC to take reasonable care or exercise reasonable skill.
 - (2) For this section, it is immaterial:
 - (a) whether a breach of obligation of duty was inadvertent or intentional; or
 - (b) whether liability for it arises directly or vicariously.”.
29. Section 1 of Schedule 1 , insert the following definitions in the appropriate alphabetical position (worked out on a letter-by letter basis):
- “Consumer.** see section 47 (Who is a Trader or Consumer).
- Consumer Contract.** see section 46 (What is a Consumer Contract or Consumer Notice).
- Consumer Notice.** see section 46 (What is a Consumer Contract or Consumer Notice).
- Digital Content** means data that is produced and supplied in digital form.
- Goods** means any tangible moveable items, and includes water, gas and electricity, but if and only if they are put up for supply in a limited volume or set quantity.
- Negligence.** see section 1-1 of this Schedule (Meaning of *Negligence*).
- Notice** includes an announcement, whether in Writing, and any other communication or purported communication.
- Personal Injury** includes any disease and any impairment of physical or mental condition.
- Trader.** see section 47 (Who is a Trader or Consumer).”.
30. Section 1 of Schedule 1, definition of **Writing**, paragraph (b), omit ‘notice’, substitute ‘Notice’.