

WRIGLEYS

— SOLICITORS —

NATIONAL UNION OF STUDENTS

(the "NUS")

BRIEFING PAPER – STUDENTS' RIGHTS AS CONSUMERS IN
RELATION TO THE UCU STRIKE

FEBRUARY-MARCH 2018

www.wrigleys.co.uk



1. Index

- Background – page 2
- Executive summary – page 3
- Are students protected by consumer rights legislation? – page 5
- How might consumer rights legislation help? – page 5
- Could the Office of the Independent Adjudicator assist? – page 10
- What about students studying in Scotland or Northern Ireland if they can't complain to the OIA? – page 14
- Could the Competition and Markets Authority assist? – page 14
- What should students' union advice centres be checking? – page 15
- What should students' union advice centres be asking affected students? – page 18
- Appendix One: Questions for students – page 20
- Appendix Two: Students' rights as consumers: a step-by-step guide – page 23
- Appendix Three: Schedule 2 to the Consumer Rights Act 2015 – page 24
- Appendix Four: Schedule 2 to the Unfair Terms in Consumer Contracts Regulations 1999 – page 26
- Appendix Five: Checking the terms of the contract between the Institution and the student – page 28

2. Background

- 2.1 At the time of writing this briefing paper, over 60 UK universities are being directly affected by strike action by University and College Union ("UCU") members over proposed changes to the Universities Superannuation Scheme ("USS").
- 2.2 UCU posted [an article on 20 February 2018](#) indicating that the strike action will affect over 1 million students and see 575,000 teaching hours lost. The strike days are:
- 2.2.1 Week one – Thursday 22 and Friday 23 February (two days)

- 2.2.2 Week two – Monday 26, Tuesday 27 and Wednesday 28 February (three days)
- 2.2.3 Week three – Monday 5, Tuesday 6, Wednesday 7 and Thursday 8 March (four days)
- 2.2.4 Week four – Monday 12, Tuesday 13, Wednesday 14, Thursday 15 and Friday 16 March (five days)
- 2.3 These dates may change, depending on the outcome of the strike action in the earlier weeks.
- 2.4 Information on the UCU website indicates that, alongside strike action, there will also be ['action short of a strike'](#). This will involve UCU members working to contract, not covering for absent colleagues, not rescheduling lectures or classes cancelled due to strike action, and not undertaking any voluntary activities, all of which may have an impact on students.
- 2.5 There are a number of hyperlinks in this document (identified by underlined text, except where the underlined text is to indicate a heading or for emphasis). If you click on them, you should be redirected to the relevant website page.

3. **Executive summary**

- 3.1 There are a number of steps which students who have been adversely affected by the strike action and action short of strike can take:
 - 3.1.1 Fill in the questionnaire (in Appendix One), as this will help to frame their complaint.
 - 3.1.2 Follow the internal complaints procedure at their Institution.
 - 3.1.3 If dissatisfied with the outcome of the internal complaints process, complain to the Office of the Independent Adjudicator (OIA) (in England and Wales), Scottish Public Services Ombudsman (SPSO) (Scotland), or Northern Ireland Public Services Ombudsman (the Ombudsman) (Northern Ireland).
 - 3.1.4 If still dissatisfied, pursue a legal claim through the courts. This would most likely be a claim for breach of contract.
- 3.2 The steps would generally be taken in order, so students would be expected to follow the internal complaints procedure before contacting the OIA, SPSO or Ombudsman.
- 3.3 Individual students' unions could also consider making a complaint to the Competition and Markets Authority (CMA). The CMA's guidance also mentions Citizens Advice (England, Wales and Scotland) and

Consumerline (Northern Ireland), which can help students to report problems to trading standards, where appropriate.

- 3.4 Bringing legal action can be stressful, time-consuming and costly. We anticipate that for the vast majority of students, going through the internal complaints procedures and potentially (if that does not resolve the matter satisfactorily) also complaining to the Office of the Independent Adjudicator (England and Wales), Scottish Public Services Ombudsman (Scotland), or Northern Ireland Public Services Ombudsman (Northern Ireland) will be sufficient to voice their dissatisfaction and seek some form of resolution, if they are minded to do so. Other students may prefer not to pursue any official complaints process at all. Much will depend on how an individual student has been affected by the strike action.
- 3.5 There will be a balancing act for students to achieve in terms of waiting to see what impact the strikes have on them, and making sure that they are not 'timed out' for the purposes of any complaints procedures.
- 3.6 Students who do wish to pursue a legal claim may be able to bring a class action with other students. This is not something we can advise on, as we do not as a firm advise on litigation (with the limited exception of some employment-related matters). If you would like general advice on this, we can instruct a barrister to provide his or her opinion on it in general terms. It would be advisable for any students who are considering whether to bring a legal claim to conduct a cost-benefit analysis before doing so, and to consider what the prospects of success are, and what the potential outcomes would be (in the event of a successful claim or otherwise).
- 3.7 The exact options, processes and potential remedies available to each student will depend on amongst other things:
 - 3.7.1 Their individual circumstances and the nature of any loss they may have suffered.
 - 3.7.2 The terms of their contract with their Institution.
 - 3.7.3 The date when they entered the contract with the Institution. This is because consumer rights legislation changed on 1 October 2015. This means that slightly different rules apply for contracts made on/after 1 October 2015 compared to those entered into before that date.
 - 3.7.4 Where they are studying (England and Wales, Scotland or Northern Ireland), as there are some slight regional variations in consumer protection law e.g. there are different ombudsmen in the different jurisdictions.
- 3.8 Appendix Two provides a summary of rights for students who entered into contracts with their Institution on or after 1 October 2015.

3.9 You have not asked us to advise on the involvement of students' unions in relation to the strike action, but as charities they will need to be mindful of the need to act within their objects and powers and within the restrictions on political campaigning by charities in promoting the interests of students as students at their particular Institution.

4. **Are students protected by consumer rights legislation?**

4.1 Most university students will be regarded as 'consumers' for the purposes of the consumer rights legislation. The CMA issued a [statement in July 2016](#) saying that "The CMA expects all higher education providers to comply with consumer protection law..."

4.2 Depending on when an individual student started their studies with the Institution, the legislation they are relying on may vary, as the law changed on 1 October 2015. Most of the principles are the same, although there are some important differences as explained below.

5. **How might consumer rights legislation help?**

5.1 There are various sources of consumer rights legislation. The date on which a student entered into their contract with the Institution will affect which legislation governs that contract.

5.2 For contracts entered into **on or after 1 October 2015**, the most relevant piece of legislation is the Consumer Rights Act 2015. The most helpful sections of the Consumer Rights Act 2015 in this context are:

5.2.1 If the Institution makes a **pre-contract statement** which the student relies on, it is treated as being written into the contract...

5.2.1.1 Did the Institution tell the student something about the Institution or course *before* the student accepted a place?

5.2.1.2 If Yes, is it relevant to the students' complaint about the strike action?

5.2.1.3 If Yes, did the Institution make any qualification to that statement?

5.2.1.4 If No, did the student and Institution subsequently agree anything different (e.g. in the offer letter or the terms and conditions)?

5.2.1.5 If No, did the student take what the Institution had told them into account when deciding to accept a place?

This may help a student where there have been statements made before they entered the contract about the provision of services where (i) those services have been adversely

affected by the strike, and there is no specific wording in the contract about those services.

For example, this might include statements about:

- *contact hours*
- *topics to be covered in lectures*
- *the provision of other services or support, library opening hours, etc.*

It will be easier to prove the statements if they are in writing e.g. in a prospectus, but oral statements are also covered by this provision.

5.2.2 **Unfair terms and notices are not binding on the student.**

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 [student]'. In determining whether a term is fair, the nature of the contract and the circumstances and other terms of the contract need to be taken into account.

The [CMA guidance](#) on this predates the Consumer Rights Act 2015, but does provide some helpful hints on what the CMA regards as fair/unfair. We have summarised some of the key points below, but you may find it helpful to refer to the fuller guidance.

Key points to look for include whether:

- *The Institution's terms (T&Cs) are easily located and accessible and whether important terms are drawn to the attention of prospective students before they accept an offer. Consider whether the T&Cs are:*
 - *easily located and accessible – to prospective students as well as current students.*
 - *available for the student to read and understand before they accept them.*
 - *brought to the students' attention before they accept an offer (at the latest when they get their offer letter). Only making them available at the time the student meets the requirements of their conditional offer, or when they enrol, or only on the student intranet available to existing students may be unfair.*
 - *are located in one place – the CMA says that locating the T&Cs in a number of documents and in different places on a website will make them harder to find and review, which may make them unfair.*
 - *very lengthy – if so, this may make them unfair.*

- *written in language that is difficult to understand. Jargon or unfamiliar expressions may make them unfair.*
- *Any particularly surprising T&Cs are specifically brought to the student's attention up front, especially where the student might miss their significance. This might be done within the offer letter or within explanatory material accompanying the offer letter or in a factsheet, as well as earlier on (i.e. pre-offer) in the Institution prospectus and on the University website.*
- *The T&Cs are clear and unambiguous – Institutions are more likely to achieve this where they are written in plain English, intuitively laid out, with meaningful headings, and explanations of any terminology used.*
- *The T&Cs are fair and balanced. Institutions should not be taking advantage of students' weaker bargaining position and lack of experience in dealing with contracts. The CMA indicates that it would view terms seeking to limit an Institution's liability for non-performance or sub-standard performance of the educational service as being open to potential legal challenge.*
- *The T&Cs allow a wide discretion to vary the service, unless for a valid reason which is specified in the contract. For example, a term which allowed the Institution to change the location of a course, or the core content of a syllabus (which may well be a side effect of strike action) at their complete discretion, is likely to be unfair.*
- *The T&Cs seek to limit liability e.g. terms that seek to exclude or limit the liability of the Institution if it fails to or is unable to provide the educational service it has agreed to provide (or if it only provides partial performance).*
- *The Institution's complaint handling processes and practices are accessible, clear and fair to students.*

Appendix Three sets out terms which may be regarded as unfair under the Consumer Rights Act 2015. Term 2 from that list may be of interest, as it means that if the Institution *inappropriately* tried to exclude or limit the legal rights of students in the event of total or partial non-performance or inadequate performance of its contractual obligations, this may be regarded as unfair. The strike action may result in partial non-performance by Institutions.

- 5.2.3 The Institution is required to ensure that the written terms of the contract with student consumers are **'transparent'**. This means that the terms must be expressed in plain and intelligible language and be legible.

This may help students where relevant terms (e.g. 'force majeure' clauses allowing the Institution to suspend some of its obligations in the event of certain circumstances which are outside its control) are not expressed in plain English.

- 5.2.4 **Any ambiguous terms should be read in the best light for the student.** Where a term in the contract between the Institution and the student consumer could have different meanings, the meaning that is most favourable to the student will prevail.

This may help students whose contracts include ambiguous terms. It is hard to give examples here, but if you come across a clause in the contract which could be interpreted in different ways, the ambiguity provision may apply.

- 5.3 For contracts entered into **before 1 October 2015**, there are various sources of legislation to consider.

- 5.3.1 The most relevant piece of legislation is likely to be 'The Unfair Terms in Consumer Contracts Regulations 1999 (the "**1999 Regulations**")' which apply in England, Wales, Scotland and Northern Ireland:

5.3.1.1 These contain similar requirements around fairness as set out at paragraph 5.2.2 above (and the CMA guidance referred to in that paragraph pre-dates the Consumer Rights Act 2015). Schedule 2 of the 1999 Regulations (see Appendix Four) contains an indicative (non-exhaustive) list of terms which may be considered unfair, and which would not be binding on the consumer. The key principle is that any term (which has not been individually negotiated) shall be considered unfair if it causes a significant imbalance in the parties' rights and obligations under the contract, to the detriment of the consumer.

5.3.1.2 A contract should also be expressed in 'plain, intelligible language', which is similar to the 'transparency' requirement under the Consumer Rights Act 2015 as mentioned at paragraph 5.2.3 above.

- 5.3.2 The Supply of Goods and Services Act 1982 (which applies to England, Wales and Northern Ireland, but not Scotland) requires services to be provided under a contract with 'reasonable skill and care'. However, this is unlikely to be of much assistance to students affected by strike action. It only relates to the way in which services are carried out, and not the outcome of the services. There is also no definition of skill and care.

- 5.3.3 The key omission for contracts entered into before 1 October 2015, is that there is no equivalent legislative provision which provides that pre-contract information on which a consumer relies when entering into a contract is binding (as explained at paragraph 5.2.1 above). This means that information given in a prospectus or at an open day would not form part of a student's contract with the Institution, unless it is explicitly included elsewhere. Pre-1 October 2015 students may be able to rely on the law around misrepresentation, but this is harder to establish, and

they will need to take specific legal advice. This difference may be relevant if the student brings court action (in which case specific legal advice should be taken), but need not stop them from referring to any discrepancies between what they were told to expect from the University and what the Institution has actually provided when using the internal complaints system or when making a complaint to the OIA. If any students do take court action, it may be that their lawyers explore misrepresentation with them.

- 5.4 For contracts entered into on or after 13 June 2014, the Consumer Contracts (Information, Cancellation and Additional Charges) Regulations 2013 (the '2013 Regulations') also apply. The 2013 Regulations apply in addition to other consumer rights legislation, whether the contract is entered into before or after 1 October 2015. They provide that certain information must be given to consumers before they enter into a contract, as set out in the Schedules to the 2013 Regulations. This includes a requirement to provide information about the main characteristics of the services (or goods or digital content) to be provided under the contract. Any such information provided is to be treated as a term of the contract. This only applies to the information set out in the schedule. Unlike for consumer contracts entered into on or after 1 October 2015, it does not include any voluntary information which the Institution may have provided.

5.5 Using the consumer rights legislation

- 5.5.1 Ultimately, consumer rights legislation will be useful when assessing whether a student's contract with their Institution has been breached in some way, and whether the terms of the contract are fair. The legislation sets out certain terms which may be implied into a contract, and sets out standards which contracts are expected to uphold in terms of fairness and transparency.
- 5.5.2 A student's remedy through the courts (if they take their complaint that far) is likely to be for breach of contract. It is unlikely that a contract between a student and an Institution will contain an express contractual term which has been breached through strike action (such as a condition which explicitly sets out the amount of contact time a student will have each term, or specific topics that will be covered within a module). However, consumer rights legislation could help a student identify implied terms which may have been breached. For example, was a student (whose contract with their Institution started on or after 1 October 2015) told at an open day how much contact time they would receive, or that certain facilities and support would be available? Was a student told what the content of a module or course would be, and some of that is being omitted because of strike action?

- 5.5.3 In practical terms, a student could use consumer rights legislation to build a case that their contract with the Institution has been breached. This could form the basis of a complaint to the Institution (or the OIA or relevant Ombudsman, as explained in paragraph 6). It may also form the basis of a complaint to the CMA or local trading standards board.
- 5.5.4 Ultimately, if none of these provide a satisfactory remedy, a student would need to consider taking legal action against the Institution. As explained above, advice from a litigation expert would be needed to confirm the appropriate way of making such a claim.

6. **Could the Office of the Independent Adjudicator assist?**

- 6.1 The OIA is relevant for students studying in **England and Wales**.
- 6.2 The first step for many students affected by strikes would be to submit a complaint to the Institution, using the Institution's internal complaints procedure. Once the internal complaints process is exhausted, and if students are still dissatisfied with the outcome, they could apply to the Office of the Independent Adjudicator ("**OIA**") for a review of the Institution's decision.
- 6.3 What does the OIA do?
- 6.3.1 The OIA reviews complaints made by students against higher education providers, where the student is dissatisfied with the outcome of the provider's own complaints process.
- 6.3.2 The OIA only has jurisdiction to look at certain things, which relate to acts and omissions of member providers:
- 6.3.2.1 it can look at complaints concerning academic practices, including academic appeals, teaching and facilities, maladministration and procedural irregularities; but
- 6.3.2.2 it cannot look at matters concerning student employment, admissions, academic/professional judgment or where a matter is currently being, or has been, considered by a court or tribunal.
- 6.3.3 It could almost certainly look at complaints which relate to disruption to courses caused by strikes, provided these complaints don't involve matters of academic judgment. This may mean questions about whether a course should have covered a particular topic, or was up to a sufficient academic standard, would be excluded from the remit of the OIA.
- 6.3.4 The NUS may wish to approach the OIA to clarify their position in relation to the impact of strike action on students, and to ascertain the nature of complaints which they will and won't consider.

6.4 Who can appeal to the OIA?

- 6.4.1 The complainant student must be (or have been) a student at a provider which is a member of the OIA scheme. The OIA website has a list of all its members.
- 6.4.2 Under the Higher Education Act 2004 (as amended by the CRA 2015), all providers with degree awarding powers, and those which have one or more courses designed to receive student support funding, must be members of the OIA scheme.
- 6.4.3 This means the OIA is only relevant to providers of higher education, including HE institutions, FE colleges providing higher education, alternative providers and providers of School-Centred Initial Teacher Training.
- 6.4.4 Any higher education student at a member institution has the right to bring a complaint to the OIA.

6.5 How should an approach be made to the OIA?

- 6.5.1 A student needs to have first exhausted the provider's internal complaints or appeals procedure, and have obtained a 'Completion of Procedures Letter'.
- 6.5.2 The OIA will only consider a complaint without the Completion of Procedures Letter in exceptional circumstances, such as where a provider has refused to provide a Completion of Procedures Letter or has refused to progress a complaint.
- 6.5.3 Students should submit requests for the OIA to review a complaint via their online portal, or contact them via email, post or telephone for a form. The form contains useful guidance notes about how to frame the request. A copy of the complaint or appeal should be included with the request, as well as the Completion of Procedures Letter.
- 6.5.4 The OIA prefers to be approached by students themselves, in their own words, instead of being approached through an intermediary e.g. a lawyer or even students' union. However, students can appoint a representative to act on their behalf, such as a students' union representative, if they prefer. There is space to do this on the complaints form.
- 6.5.5 It is possible for students to submit group complaints, as highlighted in the 'case studies' section below.
- 6.5.6 A review is paper-based and would not normally involve an oral hearing.

6.6 What remedies can the OIA provide?

- 6.6.1 The OIA has no power to punish or fine providers; all they can do is review individual complaints by students against their provider and make "recommendations". For example, the OIA can ask a provider to reconsider a complaint, change its procedures and in some cases can award financial compensation or other remedy.
- 6.6.2 They will state whether they think a complaint against a provider is "justified", "partly justified" or "not justified".
- 6.6.3 Points they will take into consideration include whether a provider applied its regulations properly and followed its own procedures correctly, and whether a decision made by the provider was reasonable in all the circumstances.
- 6.6.4 Providers can't be forced to comply with a recommendation: the OIA has no power to fine or otherwise punish universities or other similar institutions. However, providers which don't comply with a recommendation are reported to the OIA board and named in the OIA's annual report. There have only been three instances of this to date, so in the vast majority of cases, providers do comply with the OIA's decisions.
- 6.6.5 The OIA offers a relatively informal process by which complaints may be resolved. There is no charge to submit a complaint for review by the OIA.
- 6.6.6 Unlike a court process, the OIA will not make any award of costs. If a complaint against a provider is held to be justified, the OIA would not order the Institution to cover any legal or other fees which the student has incurred in bringing the claim to the OIA. For this reason, it is recommended that students normally submit requests to the OIA without involving paid professional advisors: it is designed to be a student-led process.

6.7 Timings and process

- 6.7.1 We suggest students begin the Institution's internal complaints process as soon as they are able. This may be after the year's assessment results have been received, so the student knows the substantive way (if any) in which the strikes have affected their studies. Of course, it may not be easy to prove that assessment results were directly affected by strikes, but disappointing exam results may be a useful piece of evidence in building a case.
- 6.7.2 Once the internal complaints process has ended, if the student is dissatisfied with the outcome, they should make sure they have a

Completion of Procedures Letter from the Institution before submitting this to the OIA via their website, together with the request form.

- 6.7.3 Requests must be received by the OIA within 12 months of the date of the Completion of Procedures Letter (3 months if the Letter is dated before 9 July 2015).
 - 6.7.4 The substantive event which is the subject of the complaint should normally have occurred no more than three years before the complaint form is received by the OIA.
 - 6.7.5 If a student is also pursuing court action, they should make sure this court action is formally stayed before submitting a request to the OIA. The OIA will not consider complaints which are the subject of current court or tribunal proceedings.
- 6.8 Examples of where the OIA has upheld a complaint
- 6.8.1 There are a number of case studies available on the OIA website, which are useful in illustrating complaints which the OIA has upheld, and recommendations which the OIA might make.
 - 6.8.2 Although we have been unable to find a case study which relates specifically to course disruption due to strike action, there are several cases which relate to students complaining about courses falling short of advertised standards.
 - 6.8.3 For example, in one scenario, a student complained about a lack of mentoring and support on her teacher training placements, which had led to her failing the placements and being withdrawn from the programme. The OIA upheld the complaint.
 - 6.8.4 In another scenario, final year students were affected when their course leader went on long term sick leave, affecting the delivery of the course. The OIA found that the university's provision of services fell short of that promised, and would have impacted on the student experience, awarding the students in question financial compensation. Note that, in this case, the OIA emphasised that it had not commented on the university's academic judgment that the replacement services it provided were of a suitable standard. Instead, the focus was on how the 'student experience' had been affected.
 - 6.8.5 Finally, the OIA upheld a complaint by a student who quit her course, claiming that the published material about the course was misleading, and that her experience did not reflect what had been discussed at her interview. The OIA found that there were discrepancies between the student's legitimate expectations of the course arising from the published material and her experience of it.

6.8.6 These case studies would be useful to students who are considering approaching the OIA with a complaint about the impact of strike action on their university experience.

7. **What about students studying in Scotland or Northern Ireland if they can't complain to the OIA?**

Scotland

- 7.1 Students studying in **Scotland** should refer to the Scottish Public Services Ombudsman (SPSO)'s [guidance](#) instead. The SPSO is the final stage for complaints about Institutions in Scotland, so students wishing to complain to the SPSO must complete their Institution's complaints procedure first. The SPSO will not normally look at issues that happened more than a year ago, and it will not look at complaints that have been dealt with in court.
- 7.2 What can the SPSO do? It can ask an Institution to apologise to the student, to take action to sort out a problem, to change how it does things, and/or to make sure they deal with complaints properly. SPSO cannot get a student's grades or final award changed, and it cannot award compensation.

Northern Ireland

- 7.3 Students studying in **Northern Ireland** should refer to the Northern Ireland Public Ombudsman's [guidance](#). The Northern Ireland Public Ombudsman (the Ombudsman) has been able to investigate complaints about further and higher education colleges and universities within Northern Ireland since 1 October 2016.
- 7.4 Students must normally have used their Institution's internal complaints procedure before complaining to the Ombudsman. The Ombudsman can only investigate complaints about maladministration. This would include amongst other things complaints of unfairness, failing to follow rules or policies, complaints about teaching and facilities, research supervision, failure to apologise, and mistakes in handling a complaint.
- 7.5 The Ombudsman will not generally accept complaints made more than 6 months after completing the Institution's complaints procedure, or where the student could have gone to court or has already begun legal action, or where the student has already complained to the Institution's visitor or board of visitors, or where the Ombudsman thinks that the Institution's action or decision was reasonable.
- 7.6 If the Ombudsman finds maladministration, they may make recommendations about what should be done to put things right.

8. **Could the Competition and Markets Authority assist?**

- 8.1 The CMA [invites people to contact them](#) if they have any details about a market sector not working well or any issues related to poor competition. They specifically refer to consumer sales contracts (which relate to goods rather than services), but it may still be worth contacting them if the Institution's internal complaints procedure and OIA processes do not provide the desired result. You will need to know how the Institution in question intends to deal with the strike action before contacting the CMA, e.g. whether teaching sessions have been/will be rescheduled, whether students are being offered a discount on their fees, whether any accommodation is being made in terms of essay deadlines, etc.
- 8.2 The CMA's contact form is available [here](#).
- 8.3 The CMA does not deal with individual complaints, but this option may be useful if the NUS or individual students' unions wish to co-ordinate raising a group concern.
- 8.4 If the CMA thinks that the complaint merits it, it may contact the Institution in question to remind them about complying with competition and consumer protection law, investigate and take legal action against Institutions which it suspects are breaking competition or consumer protection law, and/or conduct studies or investigations into markets where there may be competition and consumer problems.
- 8.5 In 2016, the CMA told three institutions to improve the way that they deal with students in the areas of fees, course costs and progression.

9. **What should students' union advice centres be checking?**

- 9.1 Students' union advice centres should look at the contracts their Institutions have with their students, as the contract should set out what services (and, where relevant, digital content) the Institution will provide for the student i.e. what does the contract say the Institution will do for the student? This might include providing lectures, seminars, and library services, for example.
- 9.2 The contract may be made up of a number of different documents, including offer letters, Institution terms and conditions, and potentially Institution rules and regulations, policies and procedures and codes of practice as well. For a contract to be formed there needs to be offer and acceptance of identifiable terms, so where there are multiple sets of terms and conditions, it will be necessary to establish which ones apply to a particular student. It will not necessarily be the case that it is simply the latest set of terms and conditions that the Institution has produced which apply to every student – this will depend on what has been agreed.

- 9.3 For students whose contracts date on or after 1 October 2015, the Consumer Rights Act 2015 provides that anything the Institution told a student/prospective student is treated as being part of the contract if it was taken into account by the student when deciding to enter into the contract, subject to any qualifying statement the Institution made on the same occasion and any change to it that has been expressly agreed between the Institution and the student. This means that information in the prospectus and information given at open days (in writing or orally) may also be incorporated into the contract, depending on what the express terms and conditions say. Written information is generally better, as it is easier to prove.
- 9.4 Once they have the contract (including any other relevant information provided as per paragraph 9.3), advice centres will then need to consider what the contract says the Institution will do for the student (i.e. what services have they agreed to provide?).
- 9.5 In the context of strike action causing students to miss out on services which the Institution has agreed to provide under the terms of the contract, it would be worth highlighting any provisions in the contract and any other information provided as per paragraph 9.3 which relate to:
- the number of contact hours
 - topics to be covered in lectures
 - seminars and tutorials (especially where those topics are relevant to professional qualifications, or future career plans, or where the student chose the course partly because of those topics)
 - library opening hours
 - the opening hours of other services and facilities (e.g. the careers service, the student support service, etc.)
- 9.6 What any students who bring claims will be trying to establish is that the Institution has not provided them with the service that was agreed under the terms of the contract, and/or that in some other way the effect of the strike action and action short of strike is to breach their consumer rights.
- 9.7 It would also be worth checking whether the contract includes any provisions about student involvement in strike action, or encouragement of strike action, by Institution staff. It is *possible* that the Institution may seek to argue that students who have supported the strike have contributed to the situation, and students' unions and students' union advice centres should be mindful of this possibility.

'Force majeure' clauses

- 9.8 The Institution may seek to rely on a 'force majeure' clause in defending any claim for failure to perform its obligations under the contract. In order to do this, they will need to have included some 'force majeure' wording in the contract (which they are likely to have done). They may have called it something else, such as 'events beyond our control' or 'circumstances beyond our control'.
- 9.9 A 'force majeure' clause typically excuses one or both parties from performance of the contract in some way following the occurrence of certain events. Generally, force majeure events are defined as circumstances outside a party's reasonable control. There may be discussion about whether industrial action is really beyond the reasonable control of the Institution. They may well seek to argue that industrial action is beyond their control. The counter argument would be that they could have avoided it by continuing to contribute to staff pensions on the existing terms, or that they could have taken steps to mitigate the effects of the strike and action short of a strike.
- 9.10 'Force majeure' clauses are open to interpretation, and the clearer and more explicit they are about the specific events which will count as 'force majeure' events, the more likely they are to be effective. A clause stating that the 'usual "force majeure" clauses shall apply' has been held void for uncertainty. Students will be in a stronger position if any force majeure clause forming part of their contract with the Institution does not include specific reference to labour disputes, strikes, or industrial action.
- 9.11 The specific wording of a 'force majeure' clause is very important, not just in terms of what events are included, but also whether the event needs to 'hinder' or 'delay' performance (where performance needs to be substantially more onerous), or whether it needs to 'prevent' it (a much higher threshold) in order for the party in breach to be able to rely on it.
- 9.12 Does the 'force majeure' clause require the Institution to take all possible steps to avoid the event or the impact of its consequences? (Given that the Institution drafted it, we would be surprised if it does.) For example, Institution library facilities could potentially be run by student staff or temporary staff, the Institution could extend essay deadlines, change the content of exams, etc. Could the Institution have avoided the strikes by agreeing to staff demands (which are for their pension rights to remain as they are)?
- 9.13 The burden of proof is on the Institution to show that the strikes (and action short of a strike) fall within the 'force majeure' clause, and that non-performance of the contract was due to the strikes (and action short of a strike). If the Institution successfully prove this (and if the term is regarded

as 'fair' – see paragraph 9.14 below), it is likely to mean that a student's claim for breach of contract would fail.

- 9.14 Is it fair for the Institution to include 'force majeure' wording to cover industrial action? If an Institution has 22 teaching weeks a year, having strike action over 4 of them means that students are potentially losing out on 18% of the teaching they have paid for (depending on when their lectures fall in each week). The actual percentage is likely to be lower as there are 14 days of strike action planned (rather than the 20 days which would make up four full weeks, but even this could be 12-13% of the teaching time for the academic year). It may also mean that they miss teaching which is important for the exam, and the stress caused by the uncertainty may cause students to perform less well, or some students may have chosen a course or a module because of specific topics which were not covered because of the strike, or they may need those specific topics for vocational reasons.
- 9.15 Once the strikes and action short of a strike is over, there will then be questions about what the Institution does then e.g. does it make other arrangements for covering those teaching sessions and providing the resources which students would otherwise have had access to?
- 9.16 It may be helpful to consider these questions:
- Is there any force majeure wording (by whatever name it is called) in the contract?
 - If yes, does it specifically include strike action?
 - Is the force majeure wording clear, intelligible and unambiguous? Is it easy for a non-lawyer to understand it? For example, the term 'force majeure' is unlikely to be understood by the vast majority of students.
 - Where is the 'force majeure' wording? If the Institution is seeking to argue that the students should not receive any discount on fees or have classes rescheduled because of strike action, have they made this clear and prominent and taken steps to draw this specific term to the attention of students?
 - When did the USS pensions negotiations start? How long ago did the Institution know that there would be a proposal that the pensions arrangements of Institution staff should be changed? Should students have been warned (as pre-contract information) that changes to staff terms and conditions were being considered, and that these changes were likely to be unpopular and result in strike action? Is there a legitimate business case for changing staff pensions? The Institution is likely to argue that such information is commercially sensitive, and that it would be inappropriate to tell prospective students before telling staff.

9.17 We include a checklist of questions to ask at Appendix Five. You may wish to add to this list.

10. What should students' union advice centres be asking affected students?

10.1 We include a checklist of questions to ask at Appendix One. You may wish to add to this list.

10.2 It is important that students understand that they need to answer the questions honestly. Where they can support their answers with evidence, this will add weight to their case. For example, if a student's grades for the 2017-2018 academic year are on a par with those for previous years (or essays submitted earlier in the academic year), they may struggle to make the case that the strike action has had an adverse affect on their grades. Or, to give another example, a student who never uses the sports facilities may struggle to make the case that they have lost out from any closure of those facilities. Students may want to think about what their normal practice would be. For example, if they would normally be in the library every day, they could say that (if relevant).

10.3 It may also be helpful for students to work out what proportion of their contact hours for the academic year the strikes have caused them to miss (only counting contact hours which have been cancelled because of the strikes, not counting any contact time they have voluntarily missed), to demonstrate the tangible impact that the strikes have caused them. Similarly, they should list any key parts of their course content which will not be covered because of strike action, and identify what impact this is likely to have.

Please do not hesitate to contact Natalie Johnson or Laura Moss on the contact details below if you have any queries or would like to discuss this further.

Natalie Johnson

0113 204 5744

natalie.johnson@wrigleys.co.uk

Laura Moss

0113 204 1145

laura.moss@wrigleys.co.uk

Wrigleys Solicitors LLP

8 March 2018

This Briefing Paper has been prepared for the sole benefit of the National Union of Students, which may choose to share it with students' unions which are affiliated to the National Union of Students. It is not to be relied upon by anyone else. It provides general advice, and is not specific to any particular Institution or individual student. This Briefing Paper is not intended for circulation to individual students.

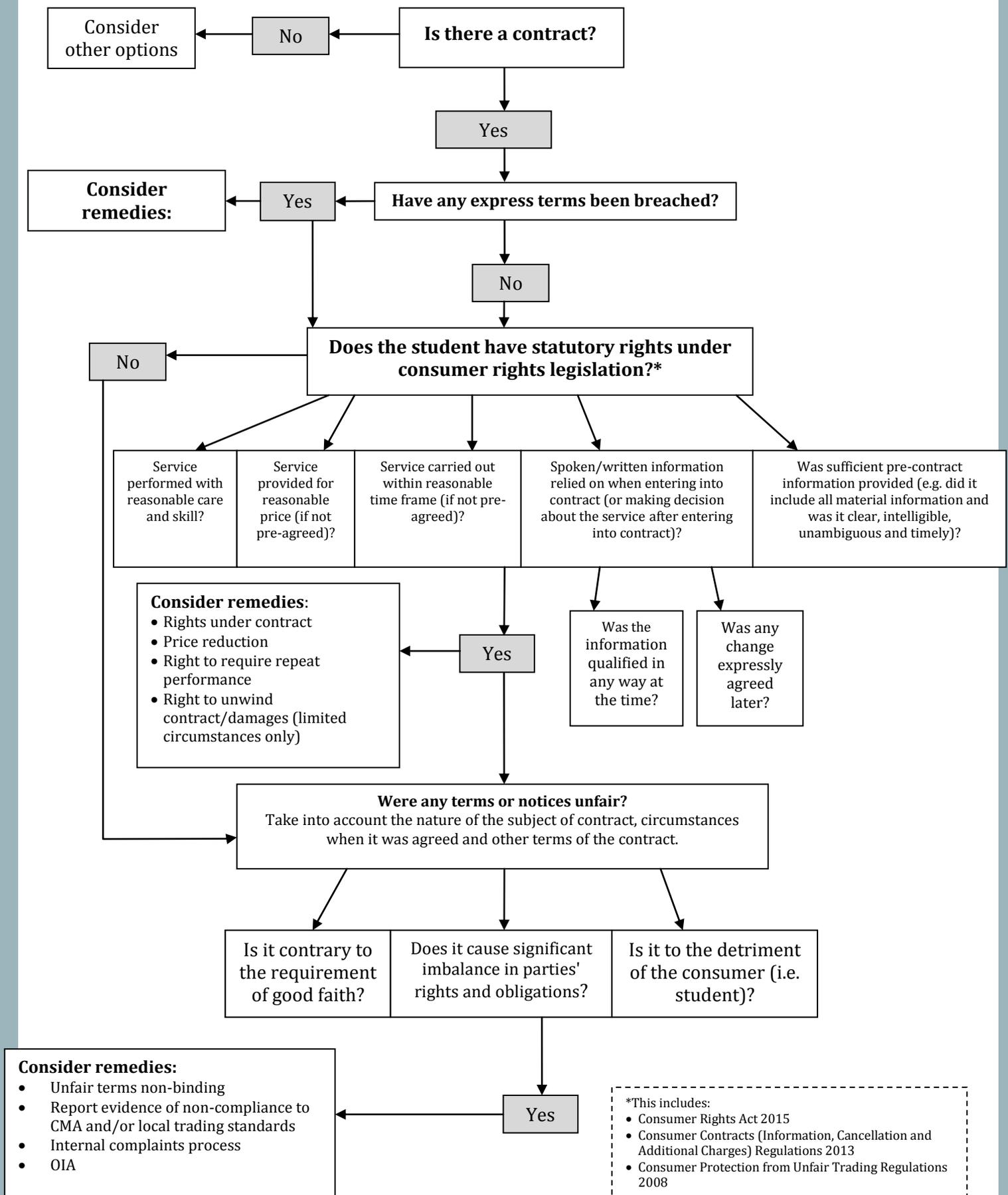
APPENDIX ONE: Questions for students

1.	What course are you doing?
2.	When did your course start? <i>For students whose courses started before 1 October 2015, the 'old' rules are likely to apply.</i> <i>For students whose courses started after 1 October 2015, it will depend on when they entered into the contract with the Institution. This may have been before the course date.</i>
3.	How long should your course last? E.g. 1 year, 2 years, 3 years, 4 years, etc.
4.	Are you a full-time, part-time, or distance learning student?
5.	What stage are you at? E.g. First Year Undergraduate, Second Year Undergraduate, Masters Student, etc
6.	What proportion of your final degree mark comes from this year? <i>At some universities, you only have to pass the first year, it does not count towards your final mark; at others it counts for a lower percentage than subsequent years.</i>
7.	How much have you paid for your course? Tuition fees: Accommodation costs (monthly): Other related costs (where relevant): <i>Accommodation costs may be relevant where rescheduled classes take place out of term-time, or where the student has to pay for additional accommodation.</i>
8.	What teaching has been cancelled for you because of the strikes? Do not include any teaching sessions which you missed voluntarily (e.g. if you missed lectures in support of those who were on strike). It would be helpful to list everything – name the lectures, etc: <ul style="list-style-type: none"> • Lectures • Seminars • Tutorials

	<ul style="list-style-type: none"> • Other
9.	<p>What would you have covered in those teaching sessions (where known)?</p> <p><i>Where speaking to a student after their exams, did this come up in the exams?</i></p>
10.	<p>What proportion is this of the total teaching time you should have received over the academic year?</p> <p><i>For students who are not in lectures every day, they may find that the strikes affect them to a greater or lesser extent.</i></p>
11.	Has the teaching time been rescheduled or have other arrangements been made?
12.	If it has been rescheduled, what has been rescheduled and when? Has anything not been rescheduled?
13.	Are you able to make the rescheduled times and/or make use of the other arrangements (if applicable)?
14.	If not, why not?
15.	<p>Are there other resources or support which you have been unable to access because of strike action or action short of a strike? For example, have you been able to access:</p> <ul style="list-style-type: none"> • the university library/libraries? • IT facilities? • Support services? • Career services? • Sports facilities? • Other student services e.g. the students' union? <p><i>Only include things which you personally would normally have accessed or would have wanted to access over the strike period.</i></p>
16.	What proportion is this of the total term-time access you should have had to these facilities and services this academic year?
17.	What have you lost because of the strike action? What impact has the strike had on

	<p>you?</p> <p><i>This might include lost opportunities e.g. if the student could not access the library facilities for the 14 days of the strike, or if they could only access the library facilities for very limited periods.</i></p>
18.	<p>What impact has the 'action short of a strike' had on you? For example, are there services which university staff would have provided before the strike action was called which they are not providing now?</p> <p><i>Be as specific as possible about those services.</i></p>
19.	<p>Has the strike action had a particular effect on you which it might not have on other students? <i>E.g. this might be the case if you are pregnant or expecting to become a parent and need to complete your studies before having your baby, or if you find uncertainty particularly anxiety-inducing (e.g. for people with certain disabilities or mental health conditions), or if you are an international student and this will cause you visa difficulties, or if you have a job lined up to start in the summer and the strike action delays you getting your results, or if you have a disability or require other special support and have been unable to access that support because of the strike), or if you have had to extend your accommodation because of rescheduled classes, or if you are applying for jobs or work experience placements (e.g. for law students) and need to disclose first and second year grades and you feel those grades have been affected by the strike..</i></p>
20.	<p>How do you feel about pursuing this further?</p> <p><i>It is important that students understand that making a claim could carry an element of stress, and that if they were to seek to make a legal claim through a solicitor, there may be legal fees to pay and that they may be personally responsible for those fees (depending on the fee structure agreed).</i></p>
21.	<p>Have you done anything which would in any way support the strike or encourage the staff who are on strike?</p>
22.	<p>Is there anything else you feel that it would be helpful for us to know?</p>

APPENDIX TWO: Students' rights as consumers: a step-by-step guide



APPENDIX THREE: Schedule 2 to the Consumer Rights Act 2015

CONSUMER CONTRACT TERMS WHICH MAY BE REGARDED AS UNFAIR

List of Terms

- 1** A term which 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** A term which 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 which the consumer may have against the trader.

- 3** A term which 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** A term which has the object or effect of permitting the trader to retain sums paid by the consumer where 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 where the trader is the party cancelling the contract.

- 5** A term which has the object or effect of requiring that, where 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 which have not been supplied.

- 6** A term which has the object or effect of requiring a consumer who fails to fulfil his obligations under the contract to pay a disproportionately high sum in compensation.

- 7** A term which has the object or effect of authorising the trader to dissolve the contract on a discretionary basis where the same facility is not granted to the consumer, or permitting the trader to retain the sums paid for services not yet supplied by the trader where it is the trader who dissolves the contract.

- 8** A term which 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.

- 9** A term which has the object or effect of automatically extending a contract of fixed duration where 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** A term which 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** A term which has the object or effect of enabling the trader to alter the terms of the contract unilaterally without a valid reason which is specified in the contract.

- 12** A term which 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.

- 13** A term which 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 A term which 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, where no price or method of determining the price is agreed when the consumer becomes bound.

15 A term which 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.

16 A term which has the object or effect of giving the trader the right to determine whether the goods, digital content or services supplied are in conformity with the contract, or giving the trader the exclusive right to interpret any term of the contract.

17 A term which 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 A term which has the object or effect of obliging the consumer to fulfil all of the consumer's obligations where the trader does not perform the trader's obligations.

19 A term which has the object or effect of allowing the trader to transfer the trader's rights and obligations under the contract, where this may reduce the guarantees for the consumer, without the consumer's agreement.

20 A term which has the object or effect of excluding or hindering the consumer's right to take legal action or exercise any other legal remedy, in particular by--
(a) requiring the consumer to take disputes exclusively to arbitration not covered by legal provisions,
(b) unduly restricting the evidence available to the consumer, or
(c) imposing on the consumer a burden of proof which, according to the applicable law, should lie with another party to the contract.

In force: 1 October 2015

APPENDIX FOUR: Schedule 2 to the Unfair Terms in Consumer Contracts Regulations 1999

INDICATIVE AND NON-EXHAUSTIVE LIST OF TERMS WHICH MAY BE REGARDED AS UNFAIR

1. Terms which have the object or effect of—

(a)excluding or limiting the legal liability of a seller or supplier in the event of the death of a consumer or personal injury to the latter resulting from an act or omission of that seller or supplier;

(b)inappropriately excluding or limiting the legal rights of the consumer vis-à-vis the seller or supplier or another party in the event of total or partial non-performance or inadequate performance by the seller or supplier of any of the contractual obligations, including the option of offsetting a debt owed to the seller or supplier against any claim which the consumer may have against him;

(c)making an agreement binding on the consumer whereas provision of services by the seller or supplier is subject to a condition whose realisation depends on his own will alone;

(d)permitting the seller or supplier to retain sums paid by the consumer where the latter decides not to conclude or perform the contract, without providing for the consumer to receive compensation of an equivalent amount from the seller or supplier where the latter is the party cancelling the contract;

(e)requiring any consumer who fails to fulfil his obligation to pay a disproportionately high sum in compensation;

(f)authorising the seller or supplier to dissolve the contract on a discretionary basis where the same facility is not granted to the consumer, or permitting the seller or supplier to retain the sums paid for services not yet supplied by him where it is the seller or supplier himself who dissolves the contract;

(g)enabling the seller or supplier to terminate a contract of indeterminate duration without reasonable notice except where there are serious grounds for doing so;

(h)automatically extending a contract of fixed duration where the consumer does not indicate otherwise, when the deadline fixed for the consumer to express his desire not to extend the contract is unreasonably early;

(i)irrevocably binding the consumer to terms with which he had no real opportunity of becoming acquainted before the conclusion of the contract;

(j)enabling the seller or supplier to alter the terms of the contract unilaterally without a valid reason which is specified in the contract;

(k)enabling the seller or supplier to alter unilaterally without a valid reason any characteristics of the product or service to be provided;

(l)providing for the price of goods to be determined at the time of delivery or allowing a seller of goods or supplier of services to increase their price without in both cases giving the consumer the

corresponding right to cancel the contract if the final price is too high in relation to the price agreed when the contract was concluded;

(m)giving the seller or supplier the right to determine whether the goods or services supplied are in conformity with the contract, or giving him the exclusive right to interpret any term of the contract;

(n)limiting the seller's or supplier's obligation to respect commitments undertaken by his agents or making his commitments subject to compliance with a particular formality;

(o)obliging the consumer to fulfil all his obligations where the seller or supplier does not perform his;

(p)giving the seller or supplier the possibility of transferring his rights and obligations under the contract, where this may serve to reduce the guarantees for the consumer, without the latter's agreement;

(q)excluding or hindering the consumer's right to take legal action or exercise any other legal remedy, particularly by requiring the consumer to take disputes exclusively to arbitration not covered by legal provisions, unduly restricting the evidence available to him or imposing on him a burden of proof which, according to the applicable law, should lie with another party to the contract.

2. Scope of paragraphs 1(g), (j) and (l)

(a)Paragraph 1(g) is without hindrance to terms by which a supplier of financial services reserves the right to terminate unilaterally a contract of indeterminate duration without notice where there is a valid reason, provided that the supplier is required to inform the other contracting party or parties thereof immediately.

(b)Paragraph 1(j) is without hindrance to terms under which a supplier of financial services reserves the right to alter the rate of interest payable by the consumer or due to the latter, or the amount of other charges for financial services without notice where there is a valid reason, provided that the supplier is required to inform the other contracting party or parties thereof at the earliest opportunity and that the latter are free to dissolve the contract immediately.

Paragraph 1(j) is also without hindrance to terms under which a seller or supplier reserves the right to alter unilaterally the conditions of a contract of indeterminate duration, provided that he is required to inform the consumer with reasonable notice and that the consumer is free to dissolve the contract.

(c)Paragraphs 1(g), (j) and (l) do not apply to:

transactions in transferable securities, financial instruments and other products or services where the price is linked to fluctuations in a stock exchange quotation or index or a financial market rate that the seller or supplier does not control;

contracts for the purchase or sale of foreign currency, traveller's cheques or international money orders denominated in foreign currency;

(d)Paragraph 1(l) is without hindrance to price indexation clauses, where lawful, provided that the method by which prices vary is explicitly described.

APPENDIX FIVE: Checking the terms of the contract between the Institution and the student

1.	What services should the Institution be providing under the terms of the contract? <i>The more specific the wording of the contract, the better from the student's perspective.</i>
2.	Have any express terms of the contract been breached?
3.	Does the contract say anything about strike action? If so, what does it say? Is it clear and unambiguous?
4.	Where are any 'force majeure' clauses in the contract (are they prominent)?
5.	Did the Institution take any special steps to bring the 'force majeure' clauses to the attention of students/prospective students?