

Consumer Arbitration

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Abstract

This article compares four jurisdictions and their differing approaches to consumer arbitration. This particular subject raises questions of access to justice, fairness, and public policy. As stated by the Chartered Institute of Arbitrators¹ the issues with regard to consumer arbitration are:

- the imbalance between the parties in terms of resources; and
- the ability to afford professional help for the presentation and making of legal cases.

The jurisdictions focussed on in this article are (i) the United Kingdom, (ii) the European Union, (iii) the United States of America, and finally (iv) Thailand.

For each jurisdiction, statutory provisions are considered, as well as case law or legal analysis when the jurisdiction in question does not have a precedent case. The article therefore demonstrates the variance in approaches a court might take in London compared to Verona and highlights similar themes faced by all consumers when engaged in arbitration.

The United Kingdom

Statutory

Under English law, the Consumer Rights Act 2015 maintained the rule previously found in Section 91(1) of the Arbitration Act 1996.² This rule provides that any Arbitration Agreement found in a consumer contract is deemed unfair provided it relates to a modest amount in damages. Such amount is currently set at £5,000.³ The Act provides that ‘any contract term submitting to arbitration an existing or future dispute insofar ’as it relates to a claim for a pecuniary remedy which does not exceed the amount specified by order for the purposes of this section.’⁴

¹ ‘Practice Guideline 17: Guidelines for Arbitrators dealing with cases involving consumers and parties with significant differences of resources’ <https://acica.org.au/wp-content/uploads/2020/04/2011-consumers-and-parties-with-significant-differences-of-resources.pdf>

² Chitty on Contracts 34th Ed. Incorporating First Supplement, 40-426

³ Unfair Arbitration Agreements (Specified Amount) Order 1999 (SI 1999/2167)

⁴ <https://acica.org.au/wp-content/uploads/2020/04/2011-consumers-and-parties-with-significant-differences-of-resources.pdf>

It should be noted, however, that the £5,000 figure is not an absolute rule. Put simply, (i) should a claim under a consumer contract be subject to arbitration and (ii) the amount in question is over £5,000, that arbitration agreement will be assessed for its fairness under Section 62 of the Consumer Rights Act 2015.⁵

Section 62 of the Consumer Rights Act 2015 provides the following:

- (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 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 is fair is to be determined—
 - (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 of the other terms of the contract or of any other contract on which it depends.
- (6) A 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 notice is fair is to be determined—
 - (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—
 - (a) section 31 (exclusion of liability: goods contracts),
 - (b) section 47 (exclusion of liability: digital content contracts),
 - (c) section 57 (exclusion of liability: services contracts), or
 - (d) section 65 (exclusion of negligence liability).

In addition, Schedule 2 provides a list of consumer contract terms that may be considered unfair. This includes, at paragraph 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 ... '⁶

⁵ Julia Hörnle Legal Controls on the Use of Arbitration Clause in V2C E-Commerce Contracts pp. 32-33; Chitty on Contracts 34th Ed. Incorporating First Supplement, 40-426

⁶ Consumer Rights Act 2015, Schedule 2, paragraph 20

The UK's Competition and Markets Authority ("CMA") has also stated that:

*'If an arbitration clause is to be used with consumers, it must be free from the element of compulsion, and in the view of the CMA this is necessary to meet the requirement of fairness even if it relates to claims higher than the £5,000 threshold sum in the 1996 Act. When entering contracts, ordinary consumers are most unlikely to consider detailed legal issues connected with the possibility of a dispute arising unless they have the benefit of legal advice on this issue. The consequences of the inclusion of such a clause are thus liable to surprise them unfairly if such a dispute does arise.'*⁷

Mylcrist Builders Limited v Mrs G Buck [2008] EWHC 2172 TCC is a case that illustrates this. Despite the fact that this case was resolved before the Consumer Rights Act of 2015 was passed, it demonstrates an important point in regard to the approach in England and Welsh courts will take in terms of access to justice. The Claimant had undertaken building work at the Defendant's home.⁸ There was a disagreement over whether amounts owed by the Defendant had been factored into the estimate.⁹ The agreement signed by both parties included an Arbitration Agreement.¹⁰ The Claimant, despite being warned that the terms would likely be deemed unfair, was successful in arbitral proceedings and subsequently sought to enforce the arbitrator's award in court.¹¹ At paragraph 55 Mr Justice Ramsay held the following:

*'... the arbitration clause is a requirement which prevents Mrs Buck from having access to the courts and causes an imbalance between the Claimant as a professional builder and Mrs Buck as a layperson, to her detriment. Whilst the sum at stake in this case does not lead to the automatic unfairness imposed by ss. 89 to 91 of the 1996 Act, there is a further element of imbalance to the detriment of the consumer where the claims are small and where the fees payable to the arbitrator are comparatively significant. In this case the fees properly payable to the arbitrator of over £2000 illustrate this point.'*¹²

This brings into question the definition of "consumer". Section 61 of Part 2 of the Consumer Rights Act 2015 provides the following:¹³

- (1) This Part applies to a contract between a trader and a consumer.
- (2) This does not include a contract of employment or apprenticeship.
- (3) A contract to which this Part applies is referred to in this Part as a "consumer contract".
- (4) This Part applies to 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.

⁷ Unfair contract terms guidance, Guidance on the unfair terms provisions in the Consumer Rights Act 2015, 31 July 2015, 5.29.3

⁸ *Mylcrist Builders Limited v Mrs G Buck* [2008] EWHC 2172 TCC, paragraphs 2-3

⁹ *Mylcrist Builders Limited v Mrs G Buck* [2008] EWHC 2172 TCC, paragraph 8

¹⁰ *Mylcrist Builders Limited v Mrs G Buck* [2008] EWHC 2172 TCC, paragraph 7

¹¹ *Mylcrist Builders Limited v Mrs G Buck* [2008] EWHC 2172 TCC, paragraphs 10, 14-15

¹² *Mylcrist Builders Limited v Mrs G Buck* [2008] EWHC 2172 TCC, paragraph 55

¹³ Section 61, Consumer Rights Act 2015

(5) This does not include a notice relating to rights, obligations or liabilities as between an employer and an employee.

(6) It does not matter for the purposes of subsection (4) whether the notice is expressed to apply to a consumer, as long as it is reasonable to assume it is intended to be seen or heard by a consumer.

(7) A notice to which this Part applies is referred to in this Part as a “consumer notice”.

(8) In this section “notice” includes an announcement, whether or not in writing, and any other communication or purported communication.

The Consumer Rights Act 2015 clearly draws a distinction between the “Consumer” and “Trader”. The Directive did not include (as had been the case in the 1999 Regulations) individuals whose purpose for entering into the contract was mainly outside of their trade.¹⁴ This was introduced on the recommendation of the Law Commission in response “to a concern that many consumers occasionally use products such as mobile phones or home computers for work purposes”.¹⁵

According to *Chitty*, ‘this followed the substance of the earlier position under the 1993 Directive and the 1999 Regulations (which both restricted their controls to “natural persons”), but the 2015 Act also deleted the protections provided for persons “dealing as consumer” contained in the Unfair Contract Terms Act 1977’.¹⁶ An example of those who previously fell under the definition of consumer but now did not included companies signing agreements for goods and services which were not integral to its business.

Crucially, according to the Consumer Rights Act 2015, the burden of proof falls on the trader to demonstrate that a party seeking to rely on the Consumer Rights Act 2015 is not a “consumer”.¹⁷

Case law

A recent and demonstrative case on consumer arbitration under English law is *Payward Inc and Others v Chechetkin* [2023] EWHC 1780 (Comm). In this case, the Defendant had used the Claimant’s cryptocurrency trading platform from March 2017 to 16 October 2020 (when he closed the account) and lost more than £600,000.¹⁸ The Defendant’s terms of service included a requirement to refer disputes to arbitration in San Francisco.¹⁹ It therefore required the Defendant to use US lawyers which, as noted by Justice Bright, was expensive and inconvenient.²⁰ The Claimant was successful in arbitral proceedings

¹⁴ *Chitty on Contracts* 34th Ed. Incorporating First Supplement, 40-244

¹⁵ *Chitty on Contracts* 34th Ed. Incorporating First Supplement, 40-244; Law Com. Advice (2013), paragraph 7.100

¹⁶ *Chitty on Contracts* 34th Ed. Incorporating First Supplement, 40-244

¹⁷ 2015 Act s.2(4) as applied to Pt 2 by s.76(3).

¹⁸ *Payward Inc and Others v Chechetkin* [2023] EWHC 1780 (Comm), paragraphs 23, 30

¹⁹ *Payward Inc and Others v Chechetkin* [2023] EWHC 1780 (Comm), paragraph 53

²⁰ *Payward Inc and Others v Chechetkin* [2023] EWHC 1780 (Comm), paragraph 114

and was granted an award, subject to Californian law.²¹ Notably in regard to jurisdictional issues, Section 74 of the Consumer Rights Act 2015 provides that the legislation applies even where a consumer contract merely has a “close connection” to the United Kingdom.²²

As such, Justice Bright found that the court had jurisdiction to apply the protections afforded within the Act.²³ Pursuant to Section 62 of the Consumer Rights Act 2015, the arbitration clause was unfair.²⁴ Justice Bright cautioned, however, that an arbitration agreement in a consumer contract will not be deemed unfair automatically. Rather, it was the unfair nature of the term itself, for instance the restriction on the Defendant to only use US lawyers and the additional costs associated, that led to the clause being deemed as such.²⁵

The imposition of financial strain on a consumer was also material in *Zealander & Zealander v Laing Homes Ltd* (2000) 2 T.C.L.R. 724. In this case, the Claimant had bought, among other things, a house from the Defendant (a builder).²⁶ The house was subject to a National House Builders Council “Build Mark” Agreement which contained an arbitration agreement.²⁷ The Technology and Construction Court found that such an agreement was unfair due to (i) the “significant imbalance” it caused and (ii) the financial disadvantage imposed upon the Claimant.²⁸

Another clear example of the court’s tendency to avoid instances where forcing a consumer to engage in arbitral proceedings would lead to the imposition of a financial disadvantage was in *Picardi v Cuniberti* [2002] EWHC 2923 (QB). In this case, the Technology and Construction Court stated that ‘... a procedure which the consumer is required to follow, and which will cause irrecoverable expenditure in either prosecuting or defending it, is something which may hinder the consumer’s right to take legal action’.²⁹ Clearly, therefore, access to justice is a key concern for the courts when hearing issues relating to consumer arbitration.

However, despite the abovementioned approach of the English courts, there are instances where an arbitration agreement in a consumer contract have been upheld. For example, in *Westminster Building Co Ltd v Andrew Beckingham* [2004] EWHC 138 (TCC), Defendant had instructed the Claimant (a building company) to undertake refurbishment on his house.³⁰ The agreement under which the works were

²¹ *Payward Inc and Others v Chechetkin* [2023] EWHC 1780 (Comm), paragraph 62

²² *Payward Inc and Others v Chechetkin* [2023] EWHC 1780 (Comm), paragraph 111

²³ *Payward Inc and Others v Chechetkin* [2023] EWHC 1780 (Comm), paragraph 113

²⁴ *Payward Inc and Others v Chechetkin* [2023] EWHC 1780 (Comm), paragraphs 132-145

²⁵ *Payward Inc and Others v Chechetkin* [2023] EWHC 1780 (Comm), paragraphs 134, 140-145

²⁶ *Zealander & Zealander v Laing Homes Ltd* (2000) 2 T.C.L.R. 724, page 724

²⁷ *Zealander & Zealander v Laing Homes Ltd* (2000) 2 T.C.L.R. 724, page 724

²⁸ *Zealander & Zealander v Laing Homes Ltd* (2000) 2 T.C.L.R. 724, pages 725, 727-728

²⁹ *Picardi v Cuniberti* [2002] EWHC 2923 (QB), paragraph 131

³⁰ *Westminster Building Co Ltd v Andrew Beckingham* [2004] EWHC 138 (TCC), paragraph 1

carried out featured an adjudication agreement.³¹ Whilst the facts suggested that the clause would be deemed unfair, the court noted the following factors:³²

- The terms were drafted with clear language;
- The Defendant’s advisors (chartered surveyors) had decided upon the terms of the agreement; and
- The clause did not
 - (at the time of making the contract) present a significant imbalance to the Defendant;
 - or
 - Prevent the consumer’s right to take legal action

By its very nature, it was found that the adjudication clause (on the facts) was not unfair and was binding on the Defendant.³³

Separately, in *Colleen Althea Du Plessis v Fontgary Leisure Parks Limited* [2012] EWCA Civ 409, 2012 WL 1067754, the court found that an arbitration agreement which was invoked only when at least 51% of caravan owners sought to dispute pitch fees was not unfair. The Court of Appeal noted that there was ‘... good sense of permitting arbitration only if it was requested by a substantial body of caravan owners. Pitch fees had to be set consistently for the whole park. It would not be practicable to administer the leisure park if pitch fees were negotiated or determined on an individual basis.’³⁴

Similarly, Justice Bright (as discussed above) delivered a further judgment on this issue more recently, in *Eternity Sky Investments Ltd v Mrs Xiaomin Zhang* [2023] EWHC 1964 (Comm). In this case, Mrs. Zhang, resident in London at the material time, owned minority interest in a company called Chong Sing, run from Hong Kong.³⁵ In 2016, Chong Sing made a bond issuance (of which HKD 5 million were subscribed for by Eternity Sky Investments Ltd) and Mrs. Zhang signed a personal guarantee.³⁶ In 2019, Chong Sing defaulted on its obligations to redeem the bonds and Eternity Sky Investments Ltd sought to enforce the terms of the Subscription Agreement (which included an arbitration agreement under the rules of the Hong Kong Arbitration Centre).³⁷ Chong Sing suspended trading in 2019 and Eternity Sky Investments Ltd subsequently

³¹ *Westminster Building Co Ltd v Andrew Beckingham* [2004] EWHC 138 (TCC), paragraph 2

³² *Westminster Building Co Ltd v Andrew Beckingham* [2004] EWHC 138 (TCC), paragraph 31

³³ *Westminster Building Co Ltd v Andrew Beckingham* [2004] EWHC 138 (TCC), paragraph 32

³⁴ *Colleen Althea Du Plessis v Fontgary Leisure Parks Limited* [2012] EWCA Civ 409, 2012 WL 1067754, paragraph 57

³⁵ *Eternity Sky Investments Ltd v Mrs Xiaomin Zhang* [2023] EWHC 1964 (Comm), paragraph 4

³⁶ *Eternity Sky Investments Ltd v Mrs Xiaomin Zhang* [2023] EWHC 1964 (Comm), paragraph 4

³⁷ *Eternity Sky Investments Ltd v Mrs Xiaomin Zhang* [2023] EWHC 1964 (Comm), paragraphs 16, 18-19

demanded payment from Mrs. Zhang under the Guarantee.³⁸ Arbitration proceedings then followed, Eternity Sky Investments Ltd was successful, and the company subsequently sought enforcement of the award in London under Section 101 of the Arbitration Act 1996.³⁹

Before Justice Bright, Mrs. Zhang argued that she contracted as a “consumer” and Eternity Sky Investments Ltd as a “trader”, within the meaning of the Consumer Rights Act 2015.⁴⁰ Mrs. Zhang argued (among other things) that the arbitration agreement in the Guarantee was unfair within the meaning of Schedule 2, paragraph 20 of the Consumer Rights Act 2015.⁴¹ Justice Bright rejected this submission for the following reasons:⁴²

(1) an appropriate test was one that a properly informed consumer, with a competent lawyer acting on their behalf, might reasonably be expected to agree to or to seek to have deleted;

(2) the provision for arbitration in Hong Kong did not itself have any bearing on the applicable law or (therefore) Mrs. Zhang’s consumer rights. Indeed, the arbitration clause avoided certain jurisdictional issues;

(3) The Guarantee was only one part of the overall transaction, and it appeared that all related contracts were also subject to Hong Kong law and arbitration.

(4) Mrs. Zhang’s command of English was limited and arbitrating in Hong Kong meant that she could use lawyers with whom she could communicate more easily.

This case therefore serves as an important reminder that the English courts will examine the balance of fairness against individual facts in any case.

The European Union

Statutory

The European Union protects consumers in a variety of ways. For present purposes, a key-way consumers are afforded protection under the Unfair Contract Terms Directive (93/13/EEC).⁴³ Another integral part of legislation, relevant to the below discussion is Article 47 of the EU Charter of Fundamental Rights (EUCFR) which protects access to justice in regard to actions taken in contravention of EU rights.⁴⁴

³⁸ Eternity Sky Investments Ltd v Mrs Xiaomin Zhang [2023] EWHC 1964 (Comm), paragraphs 16-17

³⁹ Eternity Sky Investments Ltd v Mrs Xiaomin Zhang [2023] EWHC 1964 (Comm), paragraphs 19, 21, 30-31, 33

⁴⁰ Eternity Sky Investments Ltd v Mrs Xiaomin Zhang [2023] EWHC 1964 (Comm), paragraph 55

⁴¹ Eternity Sky Investments Ltd v Mrs Xiaomin Zhang [2023] EWHC 1964 (Comm), paragraphs 55

⁴² See Practical Law Arbitration, ‘Court rejects public policy challenge to enforcement of international arbitration award alleged to engage consumer protection (English Commercial Court)’

⁴³ Ola Svensson, ‘The Unfair Contract Terms Directive: Meaning and Further Development’, page 24

⁴⁴ https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3186531 (abstract)

As per Directive 93/13/EEC of 05/03/1993, it states that if a term is no individually negotiated and results in a considerable imbalance between the parties in term of rights and obligations (to the disadvantage of the consumer), it must be considered unfair.⁴⁵ The Directive provides that a term can be deemed as unfair if it has either the object or effect of ‘... 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’.⁴⁶

There is a certain degree of complexity, however, whereas the arbitration clause is contained in a company’s standard terms. Article 3(1) of Council Directive 93/13/EEC ‘provides that a contractual term which has not been individually negotiated shall be regarded as unfair if, contrary to the requirement of good faith, it causes a significant imbalance in the parties’ rights and obligations arising under the contract, to the detriment of the consumer’.⁴⁷ In addition to this, Article 3(3) directs the reader to the Annex of the Directive which provides ‘an indicative and non-exhaustive list of the terms which may be regarded as unfair’.⁴⁸ As per clause 1(q) of the Annex and according to Karin Sein, ‘a term which has the object or effect of excluding or hindering the consumer’s right to take legal action, particularly by requiring the consumer to take disputes exclusively to arbitration, can be regarded as unfair’.⁴⁹

Having said that, there are varying approaches taken by Member States’ domestic courts in the application of the abovementioned legislation. An example includes whether the inclusion of an arbitration clause in a company’s standard terms should automatically be deemed unfair. In German law, such clauses are not automatically deemed as such, however other factors such as cost of the procedure and distance the consumer would have to travel to participate in the arbitral proceedings are considered.⁵⁰

⁴⁵ <http://arbitrationblog.practicallaw.com/consumer-class-arbitration-in-the-uk-where-we-are-and-what-next/> ‘Consumer class arbitration in the UK: where we are and what next?’

⁴⁶ <http://arbitrationblog.practicallaw.com/consumer-class-arbitration-in-the-uk-where-we-are-and-what-next/> ‘Consumer class arbitration in the UK: where we are and what next?’

⁴⁷ Karin Sein ‘Protection of Consumers against Unfair Jurisdiction and Arbitration Clauses in Jurisprudence of the European Court of Justice’ https://www.juridicainternational.eu/article_full.php?uri=2011_XVIII_54_protection-of-consumers-against-unfair-jurisdiction-and-arbitration-clauses-in-jurisprudence-of-the-european-court-of-justice

⁴⁸ Karin Sein ‘Protection of Consumers against Unfair Jurisdiction and Arbitration Clauses in Jurisprudence of the European Court of Justice’ https://www.juridicainternational.eu/article_full.php?uri=2011_XVIII_54_protection-of-consumers-against-unfair-jurisdiction-and-arbitration-clauses-in-jurisprudence-of-the-european-court-of-justice; Case 1.4.2004, C-237/02, Freiburger Kommunalbauten GmbH Baugesellschaft & Co. KG v. Ludger Hofstetter and Ulrike Hofstetter, paragraph 20. – ECR 2004, p. I-03403.

⁴⁹ Karin Sein ‘Protection of Consumers against Unfair Jurisdiction and Arbitration Clauses in Jurisprudence of the European Court of Justice’ https://www.juridicainternational.eu/article_full.php?uri=2011_XVIII_54_protection-of-consumers-against-unfair-jurisdiction-and-arbitration-clauses-in-jurisprudence-of-the-european-court-of-justice

⁵⁰ Karin Sein ‘Protection of Consumers against Unfair Jurisdiction and Arbitration Clauses in Jurisprudence of the European Court of Justice’ https://www.juridicainternational.eu/article_full.php?uri=2011_XVIII_54_protection-of-consumers-against-unfair-jurisdiction-and-arbitration-clauses-in-jurisprudence-of-the-european-court-of-justice

The European Court of Justice has voiced the opinion that Member States' domestic courts have an obligation to assess the unfairness of standard terms *ex officio*.⁵¹ The Court has also stated that where standard terms are used against a consumer, there exists both (i) a significant imbalance between the parties (i.e., the consumer and trader) and (ii) an associated public interest point to consider.⁵² The European Court of Justice went as far as to place this duty in regard to unfair arbitration agreements on a national court in a case where an “unfair arbitration term” argument had not been fully raised in terms of the course of the arbitration proceedings.⁵³

Case law

The following cases are good examples of this.

The case of *Asturcom Telecomunicaciones SL v. Cristina Rodríguez Nogueira* [C 40/08] concerned a subscription for a phone contract between the parties. The agreement contained an arbitration clause for any dispute arising under the contract.⁵⁴ The terms stipulated that the arbitral centre to hear such a dispute was Asociación Europea de Arbitraje de Derecho y Equidad (European Association of Arbitration in Law and Equity).⁵⁵ The seat of the arbitration (though not specified in the contract) was Bilbao.⁵⁶ The tribunal granted Asturcom Telecomunicaciones SL an award of EUR 669,60, and, notably, Cristina Rodríguez Nogueira did not take part in the proceedings.⁵⁷

Asturcom Telecomunicaciones SL then sought to enforce the award at Juzgado de Primera Instancia No 4 de Bilbao.⁵⁸ This court ruled that the arbitration clause was unfair but, it is noted by Karin Sein that Spanish Law does not permit arbitrators to determine whether such clauses are unfair.⁵⁹ The case was stayed and referred to the European Court of Justice.⁶⁰ It was held that national courts, in instances where

⁵¹ Karin Sein ‘Protection of Consumers against Unfair Jurisdiction and Arbitration Clauses in Jurisprudence of the European Court of Justice’ https://www.juridicainternational.eu/article_full.php?uri=2011_XVIII_54_protection-of-consumers-against-unfair-jurisdiction-and-arbitration-clauses-in-jurisprudence-of-the-european-court-of-justice; Oceano (Note 1), paragraph 29; Case 21.11.2002, C-473/00, Codifis, paragraph 38. – ECR 2002, p. I-10875.

⁵² Karin Sein ‘Protection of Consumers against Unfair Jurisdiction and Arbitration Clauses in Jurisprudence of the European Court of Justice’ https://www.juridicainternational.eu/article_full.php?uri=2011_XVIII_54_protection-of-consumers-against-unfair-jurisdiction-and-arbitration-clauses-in-jurisprudence-of-the-european-court-of-justice; Mostaza Claro (Note 2), 25, 26, 38

⁵³ Karin Sein ‘Protection of Consumers against Unfair Jurisdiction and Arbitration Clauses in Jurisprudence of the European Court of Justice’ https://www.juridicainternational.eu/article_full.php?uri=2011_XVIII_54_protection-of-consumers-against-unfair-jurisdiction-and-arbitration-clauses-in-jurisprudence-of-the-european-court-of-justice; Mostaza Claro (Note 2), 39

⁵⁴ *Asturcom Telecomunicaciones SL v. Cristina Rodríguez Nogueira* [C 40/08], paragraph 2

⁵⁵ *Asturcom Telecomunicaciones SL v. Cristina Rodríguez Nogueira* [C 40/08], paragraph 20

⁵⁶ *Asturcom Telecomunicaciones SL v. Cristina Rodríguez Nogueira* [C 40/08], paragraph 20

⁵⁷ *Asturcom Telecomunicaciones SL v. Cristina Rodríguez Nogueira* [C 40/08], paragraphs 22, 33

⁵⁸ *Asturcom Telecomunicaciones SL v. Cristina Rodríguez Nogueira* [C 40/08], paragraph 24

⁵⁹ Karin Sein ‘Protection of Consumers against Unfair Jurisdiction and Arbitration Clauses in Jurisprudence of the European Court of Justice’ https://www.juridicainternational.eu/article_full.php?uri=2011_XVIII_54_protection-of-consumers-against-unfair-jurisdiction-and-arbitration-clauses-in-jurisprudence-of-the-european-court-of-justice; *Asturcom Telecomunicaciones SL v. Cristina Rodríguez Nogueira* [C 40/08], paragraph 26

⁶⁰ *Asturcom Telecomunicaciones SL v. Cristina Rodríguez Nogueira* [C 40/08], paragraph 27

an arbitral award in a consumer contract is being enforced, are ‘required, where it has available to it the legal and factual elements necessary for that task, to assess of its own motion whether an arbitration clause in a contract concluded between a seller or supplier and a consumer is unfair, in so far as, under national rules of procedure, it can carry out such an assessment in similar actions of a domestic nature. If that is the case, it is for that court or tribunal to establish all the consequences thereby arising under national law, in order to ensure that the consumer is not bound by that clause’.⁶¹

An interesting case in regard to the European Court of Justice’s approach in regard to legislation which requires consumers to undertake alternative dispute resolution procedures is *Menini v Banco Popolare Societa Cooperativa* [C-75/16]. In this case two consumers, Mr Livio Menini and Ms Maria Antonia Rampanelli (Italian nationals) engaged in proceedings against Banco Popolare in regard to an ‘order for payment obtained against them by a credit institution’.⁶² Italian national legislation required the parties to first engage in mediation.⁶³ The national court (the Verona District Court) stated that such an action brought by Mr Livio Menini and Ms Maria Antonia Rampanelli required preliminary mediation and thus stayed the proceedings.⁶⁴ This was despite the fact that they were consumers. In addition, the law stipulated that Mr Livio Menini and Ms Maria Antonia Rampanelli (i) must be assisted by a lawyer and (ii) could not withdraw from the mediation without a valid reason.⁶⁵

In reviewing the Directive, the European Court of Justice pointed out the purpose of the Directive is to ‘enable consumers to submit, on a voluntary basis, complaints against traders by using alternative dispute resolution (ADR) procedures’.⁶⁶ In light of this, it found that the following should be maintained in national legislation:

- (1) *‘it must have been initiated by a consumer against a trader concerning contractual obligations arising from a sales or service contract;*
- (2) *it must be independent, impartial, transparent, effective, fast and fair; and*
- (3) *it must be entrusted to an entity established on a durable basis which is entered on a special list notified to the European Commission’.*

In reviewing the mandatory mediation procedure, the European Court of Justice held the following:

- (1) *The mandatory nature of the mediation procedure was not material. Rather, it was more important that the parties’ maintained their access to the justice;*

⁶¹ Andrew Dickinson, ‘Unfair arbitration clause before the ECJ’ <https://conflictoflaws.net/2009/unfair-arbitration-clause-before-the-ecj/>; *Asturcom Telecomunicaciones SL v. Cristina Rodríguez Nogueira* [C 40/08], paragraph 59

⁶² *Menini v Banco Popolare Societa Cooperativa* [C-75/16], paragraph 1

⁶³ *Menini v Banco Popolare Societa Cooperativa* [C-75/16], paragraph 15

⁶⁴ *Menini v Banco Popolare Societa Cooperativa* [C-75/16], paragraph 28

⁶⁵ ‘National law can provide for compulsory mediation before court action’; *EU Focus* 2017, 357, 14-15, page 14; *Menini v Banco Popolare Societa Cooperativa* [C-75/16], paragraph 28

⁶⁶ ‘National law can provide for compulsory mediation before court action’; *EU Focus* 2017, 357, 14-15, page 14

(2) A mandatory mediation or alternative dispute resolution procedure might not be incompatible with Directive 2013/11 on alternative dispute resolution for consumer disputes ([2013] OJ L165/63), provided the procedure:

- a. does not result in a decision which is binding on the parties (although the Directive establishes the possibility for national legislation to provide that the outcome of ADR procedures is binding on traders, on condition that the consumer has previously agreed to the proposed solution);
- b. does not cause a substantial delay for the purposes of bringing legal proceedings;
- c. suspends the period for the time-barring of claims; and
- d. does not give rise to high costs, and only if:
- e. electronic means are not the only means by which the settlement procedure may be accessed; and
- f. urgent interim measures are possible'.⁶⁷

The ECJ did caution, however, (i) that the national legislation should not require the consumer to have assistance from a lawyer and (ii) the consumer should not face unfavourable consequences should they disengage in the proceedings.

The United States

The use of consumer arbitration agreements is far more prevalent in the United States. In a 2019 study, the following was revealed:

- 'Eighty-one companies in the Fortune 100, including subsidiaries or related affiliates, have used arbitration agreements in connection with consumer transactions.
- Of the eighty-one companies in the Fortune 100 with consumer arbitration agreements, seventy-eight companies include class waivers in their arbitration agreements.
- At least a majority of the households in the United States (and possibly almost two-thirds) are covered by broad consumer arbitration agreements.
- More than sixty percent of United States retail e-commerce sales are covered by broad consumer arbitration agreements.
- In 2018, at least 826,537,000 consumer arbitration agreements were in force, based on estimates from just a few companies for which information was readily available. The actual number of consumer arbitration agreements is likely higher. For a point of comparison, the U.S. population is about 328,000,000.'⁶⁸

⁶⁷ National law can provide for compulsory mediation before court action; EU Focus 2017, 357, 14-15, pages 14-15

⁶⁸ Imre Stephen Szala, 'The Prevalence of Consumer Arbitration Agreements by America's Top Companies', UC Davis Law Review Online, 52, 233-259, page 234

The main piece of legislation in connection US arbitration is the Federal Arbitration Act, 9 U.S.C. §§ 1-16. This Act states that (i) arbitration agreements are binding and (ii) provides courts with authority to confirm arbitral awards.⁶⁹

Unlike the UK and EU, American courts are for more reluctant to strike down consumer arbitration agreements as unfair. This is due to the precedent set by the United States Supreme Court in *Green Tree Financial Corp. v Randolph* 531 U.S. 79 (2000). In this case, the claimants were unable to persuade the court that they were unable to pay arbitration costs and as such would be precluded from pursuing their TILA claims due to (i) the arbitrators' discretion to limit their own fees and (ii) the defendant had offered to pay any prohibitive costs.⁷⁰

However, the aforesaid law is applied exclusively on the federal level, states are free to pass their own legislation. For example, the state of New York has banned consumer arbitration. The New York Consolidated Laws, General Business Law - GBS § 399-c provides the following at paragraph 2:

- a) *'Prohibition. No written contract for the sale or purchase of consumer goods, entered into on or after the effective date of this section, to which a consumer is a party, shall contain a mandatory arbitration clause. Nothing contained herein shall be construed to prohibit a non-consumer party from incorporating a provision within such contract that such non-consumer party agrees that the decision of the arbitrator or panel of arbitrators shall be final in its application to such non-consumer party and not subject to court review.*
- b) *Mandatory arbitration clause null and void. The provisions of a mandatory arbitration clause shall be null and void. The inclusion of such clause in a written contract for the sale or purchase of consumer goods shall not serve to impair the enforceability of any other provision of such contract'.*

The issues faced by American consumers at a federal level is summarised by the National Association of Consumer Advocates:⁷¹

- *'Individuals are often unaware they've agreed to forced arbitration. Most Americans have accepted good or services or a job with forced arbitration as a condition; and yet, very few individuals report having noticed a forced arbitration clause in the terms of agreements or contracts they've accepted.*

⁶⁹ Imre Stephen Szala, 'The Prevalence of Consumer Arbitration Agreements by America's Top Companies', UC Davis Law Review Online, 52, 233-259, page 235

⁷⁰ Amy J. Schmitz, 'American Exceptionalism in Consumer Arbitration', Loyola University Chicago International Law Review Volume 10, Issue 1 (2012) 81-103, page 87; *Green Tree Financial Corp. v Randolph* 531 U.S. 79 (2000) 91-2

⁷¹ <https://www.consumeradvocates.org/for-consumers/arbitration/>

- *Forced arbitration severely limits consumer options for resolving a dispute. Before any problem arises, you lock yourself into only one option—forced arbitration—for resolving all future disputes or problems. The contract typically also names the arbitration institute that must be used: the one preferred by the company.*
- *Forced arbitration clauses generally bind the consumer—not the company. The way many forced arbitration clauses are written, the seller retains its rights to take any complaint to court while the consumer can only initiate arbitration.*
- *Arbitration is a private system without a judge, jury, or a right to an appeal. Arbitrators aren't required to take the law and legal precedent into account in making their decisions. There is no appeal or public review of decisions to ensure the arbitrator got it right.*
- *Employees cannot sue for discrimination, harassment, abuse, retaliation, or wrongful termination. In forced arbitration, the laws that protect us from discrimination based on age, sex, religion, race, disability, and unequal pay for equal work, such as the Civil Rights Act and the Equal Pay Act, become meaningless and unenforceable. Employees lose important protections for blowing the whistle on waste or fraud or for fighting retaliation for taking family medical leave.*
- *Consumers cannot sue for negligence, defective products, or scams. Just by buying a product or service, consumers can lose their right to hold a company accountable. Even if a retirement account disappears, a home is dangerous and defective, or a loved one suffers harm in a nursing home, a forced arbitration clause means there is no right to take the company responsible to court.'*

Thailand

Statutory

The Kingdom of Thailand has practically adopted a civil or codified law system. The Arbitration Act B.E. 2545 is the main statutory to consider for matters related to arbitration. As for the aspects of consumer protections, the key statutory provisions include the Consumer Protection Act B.E. 2522 (“CPA”), the Unfair Contract Terms Act B.E. 2540 (“UCTA”) and the Consumer Case Procedure Act B.E. 2551 (“CCPA”). The main objective of the CPA is to affirm the rights of the consumers, namely the right to information including a correct and adequate description of the quality of the goods or services, the right to enjoy freedom in selection of goods or services, the right to be afforded safety in the use of goods or services, the right to fairness in concluding contracts and right to have injury considered and compensated for.⁷² The UCTA focuses on ruling the terms of contracts between the consumers and the business operators in a sense that the terms should be enforceable only if it is fair. Finally, the CCPA, as the name implied, expands consumer protection in court proceedings.

⁷² Consumer Protection Act B.E. 2522, Section 4

In term of resources and ability to obtain professional support for the presentation and making of legal cases, the following requirements are deemed relevant:

Arbitration Act B.E. 2545, Section 14

“In the case where any contractual party institutes an action in relation to a dispute which is the subject of an arbitration agreement without submitting such dispute to the arbitral tribunal under the agreement, the party against whom the action is instituted may, not later than the date of submitting his statement of defence or within the period of time allowed by law for filing a statement of defence, file with the competent Court a motion requesting an order striking the case in order for the parties to proceed with arbitration proceedings and the Court shall, upon conducting an inquiry and finding no ground rendering such arbitration agreement to be void, inoperative or incapable of being performed, issue an order striking the case.”

CPA, Section 35 bis

“In the operation of business involving sales of any particular goods or supplies of any particular service, if a contract of sale or a contract for a supply of such service is required by law to be made in writing or is customarily made in writing, the Committee on Contracts has the power to prescribe the business involving sales of such goods or supplies of such service as the contract-controlled business.

In the operation of a contract-controlled business, contracts which business operators make with consumers must be of the following descriptions:

(1) containing necessary contract terms the absence of which shall place consumers at an unreasonable disadvantage with business operators;

(2) not containing contract terms unfair to consumers;

provided that this shall be in accordance with such rules, conditions and details as prescribed by the Committee on Contracts, and the Committee on Contracts may, for the benefit of consumers at large, require business operators to prepare contracts in accordance with the forms prescribed by it.

The prescription under paragraph one and paragraph two shall be in accordance with the rules and procedures prescribed in the Royal Decree.”

CPA, Section 35 ter

“When the Committee on Contracts has required that contracts used in the operation of a contract-controlled business contain any contract terms or contain any contract terms with conditions concerning the use thereof under section 35 bis, if such contracts do not contain the said contract terms or contain the said contract terms without conforming to the conditions, it shall be deemed that such contracts contain the said terms or contain the said terms with such conditions, as the case may be.”

CPA, Section 35 quarter

“When the Committee on Contracts has required that contracts used in the operation of a contract-controlled business not contain any contract terms under section 35 bis, if such contracts contain such contract terms, it shall be deemed that such contracts do not contain such contract terms.”

UCTA, Section 4

“A term in a contract as between a consumer and a trader or a professional or in a standard-form contract or in a sale with the right of redemption which renders the trader or professional or the proferens of the standard form contract or the buyer to have an unreasonably excessive advantage over the other party is an unfair contract term and shall be enforceable only insofar as it is fair and reasonable in a particular case.

In case of doubt, a standard-form contract shall be interpreted in favour of the party not formulating such standard-form contract.

A term which possesses the character or produces the effect of requiring the other party to render a performance or assume a burden greater than usually expected by a reasonable person may be regarded as a term giving an advantage over the other party, such as:

- (1) a term excluding or restricting liability for breach of contract;*
- (2) a term imposing liability or a burden greater than that imposed by the law;*
- (3) a term allowing a contract to be terminated without justifiable reason or entitling termination of the contract without material breach by the other party;*
- (4) a term entitling non-performance of any of the terms of the contract or a delayed performance without justifiable reason;*
- (5) a term entitling one party to demand or require the other party to bear more burdens than those at the time of the contract;*
- (6) a term, in a sale with the right of redemption, under which the buyer fixes the price of redemption at a sum in excess of the price of the sale plus the interest at the rate of fifteen percent per annum;*
- (7) a term, in a hire-purchase, fixing an excessively high hire-purchase price or imposing on the hirer an excessively high burden;*
- (8) a term, in a credit card contract, requiring the consumer to pay interest, penalties, expenses or any other benefits in an excessively high amount in the event of default of payment or in connection therewith;*
- (9) a term fixing a method for the calculation of compound interest in a manner causing the consumer to bear excessively high burdens.*

In making the determination as to whether a term which gives an advantage over the other party under paragraph three renders an unreasonably excessive advantage, section 10 shall apply mutatis mutandis.”

UCTA, Section 10

“In making the determination as to such extent of enforceability of a term as to satisfy the requirement of fairness and reasonableness in a particular case, regard shall be had to all circumstances, including:

(1) good faith, bargaining powers, economic standing, knowledge and understanding, skills and expertise, expectation, previous practices, other alternatives and all advantages as well as disadvantages on the part of contractual parties in actual circumstances;

(2) ordinary usages applicable to that kind of contract;

(3) the time and place of the conclusion of the contract and of the performance thereunder;

(4) the assumption of far more onerous burdens on the part of one party when compared with those assumed by the other party.”

CCPA, Section 12.

“In the exercise of his or her own right, or in the performance of obligation, the Business Operator shall act in good faith, taking into account the appropriate trade standard under fair business system.”

Case Law/Analysis

It has been over 22 years since the enactment of the Arbitration Act, there is no record of the Supreme Court’s decision concerning the challenge of validity and enforceability of the arbitration agreement in the contract between the consumer and business operator due to the imbalance of parties in terms of the resource to resolve the dispute by arbitration or the unfairness of incorporating the arbitration agreement.

With regard to the validity and enforceability of arbitration agreement in the consumer contract, an academic thesis suggests that an arbitration agreement is void because of violating good morale if the arbitration agreement is concluded with an intention of disrupting the consumer’s right to proceed with the arbitration, such as requiring the arbitration to take place in other provinces or countries while the amount of claim is minimal and less than the arbitration would cost.⁷³ This approach seems to be favourable to the consumer in a sense that the consumer may refer the disputes to the court without necessity of having the disputes under the consumer contract resolved by arbitration. Nevertheless, the

⁷³ Ms. Duangkamon Sophonawat, “Problems Concerning to Arbitration Clauses in Adhesive Consumer Contract”, Thammarat University, 2003, Page 179.

approach could negatively prejudice the right of the consumer who intends to resolve the dispute in arbitration. This is because the void arbitration agreement does not bind the business operator and thus the arbitral tribunal may find it has no jurisdiction due to lacking the binding arbitration agreement.

Further consideration of the arbitration agreement's legal validity under Thai law reveals that the arbitration agreement does not restrict the contracting party from submitting the dispute to the court. Although a claim with an arbitration clause referred to the court could be rejected under Section 14 of the Arbitration, the provision on Section 14 does not limit the right to initiate a claim which consists of arbitration agreement to the court. Instead, the provision acknowledges the potential of a party referring the dispute with arbitration agreement to court, with the additional consequence that the opposing party can seek a court order to strike out the matter to be concluded by the arbitration. The court then could determine if the arbitration agreement is void, inoperative or incapable of being performed before issuing an order to reject the claim or dismiss the application to strike out the case. Following the analysis, it could be considered that the implementation of arbitration agreement in a consumer contract does not impede the consumer's right to refer the case to the court.

What happens if the arbitration agreement causes the customers undue hardship? Thai legislation includes safeguards to guarantee that consumers are sufficiently protected in this regard.

UCTA seems to be the main statutory instrument which reflects the above question. Section 4 of UCTA gives effect that the terms under the consumer contract which is unreasonably excessive advantage over the other party is an unfair contract term and shall be enforceable only insofar as it is fair and reasonable. In order to determine such a word is fair or not, Section 10 provides factors to be taken into account, namely (1) good faith, bargaining powers, economic standing, knowledge and understanding, skills and expertise, expectation, previous practices, other alternatives and all advantages as well as disadvantages on the part of contractual parties in actual circumstances; (2) ordinary usages applicable to that kind of contract; (3) the time and place of the conclusion of the contract and of the performance thereunder; and (4) the assumption of far more onerous burdens on the part of one party when compared with those assumed by the other party. The aforementioned legal requirements allow the court to consider the circumstances when determining and revising the enforceability of the arbitration agreement. These are examples of arbitration clauses that may be regarded as an unfair contract terms;⁷⁴

(1) "Any events of the liability of the Contract Drafter, the case shall be proposed to international or other provinces' arbitration."

(2) "If any disputes arise from the contract, it shall be settled by arbitration and merely the Business Operator is entitled to select arbitration tribunal."

⁷⁴ Ms. Duangkamon Sophonawat, "Problems Concerning to Arbitration Clauses in Adhesive Consumer Contract", Thammasat University, 2003, Page 64-65.

(3) *“If any disputes arise from the contract, it shall be settled by arbitration and the Consumer shall be responsible for the whole costs including arbitration fees.”*

Furthermore, the CPA establishes a Consumer Protection Committee to issue the measures in protecting the consumer’s rights. Concerning the protection of consumer’s right in contracts, the Committee on Contracts is empowered to stipulate the form of contracts for the business which its contract shall be controlled such as loan business,⁷⁵ car and motorbike hired-purchase business,⁷⁶ residential building rental business⁷⁷ etc. The statutory provisions reflect the authority of Committee on Contracts to implement the particular type of dispute resolution clause in the consumer contracts for controlled businesses in favourable to the consumer, such as including arbitration as an option for the consumer or set conditions which is suitable for the consumer to pursue the claim. Nevertheless, the research does not show that the Committee on Contracts imposed any arbitration agreement into any controlled businesses.

If the consumer submits the case to the court under the CCCA meanwhile the business operator requests that the action be dismissed due to the arbitration agreement, the court has the authority to do so under Section 12 of CCPA on a condition that the request to strike out the case is made in good faith. Given that the implementation of arbitration agreement was made with the purpose of abusing the consumer’s right to access to the justice which enables the business operator to request for the strike out of the case, the court may find that application to strike out the case is not acted in good faith.

Thailand seems to acknowledge the existence of the arbitration agreement in the consumer contract and Thai court can consider the circumstances to determine the fairness of arbitration agreement before ruling the enforceability. This is similar to the EU approach as in Directive 93/13/EEC of 05/03/1993. The statutory provide broad terms to support that the use of arbitration agreement in consumer contract may be unfair and it grants authority solely to the court to determine the issue on the enforceability of the arbitration agreement.

The US approach, basing on the above case, seems to leave the burden to customer to prove if such arbitration agreement causes any difficulties in prejudice to the consumer’s rights in accessing to justice. Although the court in this approach has the discretion to hear the evidence and determine the enforcement which is similar to the EU’ or Thailand’s approach, the consumers have to satisfy the tests as precedented in the previous court rulings.

⁷⁵ Announcement of the Committee on Contracts Re: Consumer Loan Business is a contract-controlled business B.E. 2565 (2022)

⁷⁶ Announcement of the Committee on Contracts Re: Car and motorbike hired-purchase business is a contract-controlled business B.E. 2565 (2022)

⁷⁷ Announcement of the Committee on Contracts Re: Residential building rental business is a contract-controlled business B.E. 2561

The UK approach seems to be more advance in specifying that the arbitration agreement is unfair provided that it relates to a modest amount in damages not exceeding than £5,000. The specification of the amount of damage is concrete factor, which does not require extensive interpretation. The UK also adopt a function to allow the court to determine the fairness of the arbitration agreement for the damages over £5,000 to maintain the flexibility in approaching to the question.

Conclusion

The arbitration is regarded as one of the most effective dispute resolutions however it may obstruct the disputing parties' right in accessing to justice. In the transactions between the consumer and the business operator, the business operator typically has greater bargaining power in articulating the format of arbitration, which may result in circumstances where the arbitration agreements are tailored to be less favourable to the consumer. The transactions therefore require legal control to ensure that the consumer's right is not unreasonably infringed. Although the legal control of each of the jurisdictions referred in this article has different approaches to consumer arbitration, the mutual positions of the countries are that they concern the necessity of tipping the balance in the consumer transactions and that they set adequate legal regimes to cope with the issue.

Although Thailand does not have specific statutory dealing with this subject matter, it is comprehensible that the Thai court could rely on the existing statutory to determine the fairness of enforcing arbitration agreement in the consumer protection regime. Having said that, the current statutory provides the conditions to determine the fairness in abstract which requires further interpretation. It is potential that the Thai court's interpretation in the future decisions can serve as a good sample on the approach to this question however Thailand should issue regulations or guidelines setting out the concrete conditions which can identify whether or not the arbitration agreement is unfair, similar to the UK's statutory which determines that the arbitration agreement in the consumer case is deemed unfair if the modest amount in damage is not exceeding that £5,000. Thailand can also consider adding authority to the court to consider the circumstances to justify the enforceability of arbitration agreement in additional to the stipulated concrete conditions.