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## Consumer Arbitrations in the European Union

Andreas von Goldbeck

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## Consumer Arbitrations in the European Union

Andreas von Goldbeck\*

**Abstract:** The main argument of this paper is that the law should generally enforce pre-dispute consumer arbitration clauses. If the consumer is given a choice between litigation and arbitration at the time of contracting and she chooses arbitration, that choice should generally be enforceable, provided appropriate safeguards are in place guaranteeing access to justice. Consumer protection comes at a cost, which the consumer ultimately pays in the price of the product or service purchased: assuming arbitration is the more cost-efficient dispute-resolution mechanism, consumers choosing arbitration would, in theory, pay a lower price than those choosing litigation. The blanket hostility towards pre-dispute arbitration clauses under the present law is not in the interest of the *entire* group of consumers, as, in the current system, the majority subsidises the few who litigate. A new, ‘bespoke’ approach for different sub-groups of consumers is needed. Provided appropriate safeguards are in place guaranteeing access to justice, consumers would benefit from the freedom to agree to pre-dispute arbitration clauses waiving their right to litigation. Giving consumers a choice between arbitration and litigation would allow particularly the weak consumers—who may prefer a cheaper product over a more expensive one—access to the market.

**Keywords:** arbitration, consumer protection, pre-dispute arbitration clauses, regressivity, economic analysis, Directive on Unfair Contract Terms, European Court of Consumer Arbitration.

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## Introduction

The main argument of this paper is that pre-dispute, arbitration clauses agreed between consumers and traders should be enforceable, provided that consumers have a choice between arbitration and litigation at the time of entering into the contract and provided that the arbitration offered by the trader contains appropriate safeguards guaranteeing access to justice. In a pre-dispute arbitration clause, the parties promise to arbitrate rather than litigate disputes that may arise in the future. This paper is written on the assumption that arbitration is a more cost-efficient method to solve disputes between consumers and traders than court litigation.<sup>1</sup> Thus, consumers choosing arbitration over litigation at the time of entering into the contract would, in theory, pay a lower price for the service or product purchased. Nevertheless, consumer rights advocates are strongly opposed to the enforceability of pre-dispute, arbitration clauses,<sup>2</sup> and in the European Union, despite recent initiatives to boost alternative dispute-resolution in the consumer context,<sup>3</sup> pre-dispute, arbitration clauses remain specifically excluded.<sup>4</sup> In the United States, where in the wake of the Supreme Court decision in *Rent-A-Center, West, Inc v Jackson*,<sup>5</sup> judicial review of pre-dispute arbitration clauses can be avoided by delegating questions on the

<sup>1</sup> See Christopher Hodges, *Consumer Redress: Implementing the Vision*, in THE NEW REGULATORY FRAMEWORK FOR CONSUMER DISPUTE-RESOLUTION 351, 353 (Pablo Cortés ed., 2016).

<sup>2</sup> Consumer rights advocates are less opposed to post-dispute, arbitration clauses where consumers expressly agree to arbitration in full awareness of all facts after the dispute has actually arisen. See, e.g., Commission Recommendation 98/257/EC of 30 March 1998 on the Principles Applicable to the Bodies Responsible for Out-of-Court Settlement of Consumer Disputes, art. 6(2), 1998 O.J. (L115) 31 [hereinafter Recommendation 98/257/EC]; Pablo Cortés, *The Consumer Arbitration Conundrum*, in THE NEW REGULATORY FRAMEWORK FOR CONSUMER DISPUTE-RESOLUTION 65, 72-73 (Pablo Cortés ed., 2016).

<sup>3</sup> Council Directive (EC) 2013/11/EU of 21 May 2013 on Alternative Dispute-resolution for Consumer Disputes and Amending Regulation No. 2006/2004 and Directive 2009/22/EC, 2013 O.J. (L165) 63 [hereinafter Directive on Consumer ADR]; Commission Regulation (EU) 524/2013 of 21 May 2013 on Online Dispute-resolution for Consumer Disputes and Amending Regulation (EC) 2006/2004 and Directive 2009/22/EC, 2013 O.J. (L165) 1 [hereinafter Regulation on Consumer ODR]. See also Pablo Cortés, *The New Landscape of Consumer Redress*, in THE NEW REGULATORY FRAMEWORK FOR CONSUMER DISPUTE-RESOLUTION 17 (Pablo Cortés ed. 2016).

<sup>4</sup> Directive on Consumer ADR, *supra* note 3, at art. 10(1); Recommendation 98/257/EC, *supra* note 2; Maud Piers, *Consumer Arbitration and European Private Law: A Seminal Consumer Arbitration Model Law for Europe*, 21 EUR. REV. PRIV. L. 247, 268-70 (2013); Cortés, *supra* note 2, at 72-73; Christopher Hodges et al., *Consumer-to-Business Dispute-Resolution: The Power of CADR*, 13 ERA FORUM 200, 201 (2012); Maud Piers, *Consumer Arbitration in the EU: A Forced Marriage with Incompatible Expectations*, 2 J. INT. DISPUTE SETTLEMENT 209, 215 (2011).

<sup>5</sup> 561 U.S. 63 (2010).

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scope or validity of arbitration clauses to arbitrators.<sup>6</sup> The opposition to binding pre-dispute, arbitration clauses involving consumers has been steadily growing.<sup>7</sup> The topic has even reached the mainstream media—recently, *The New York Times* devoted a three-part series to the issue, describing the detrimental effect of arbitration on consumer rights.<sup>8</sup>

This paper argues the opposite: pre-dispute, arbitration clauses are not necessarily bad for consumers, provided they have a choice between arbitration and litigation when they agree on the contract and provided the arbitral process contains appropriate safeguards guaranteeing similar access to justice. It will be argued that pre-dispute, arbitration clauses can unlock an economic benefit for consumers. Allowing consumers to choose between arbitration and court litigation at the time of entering into the contract is preferable to prohibiting pre-dispute, arbitration clauses altogether, because, as will be explained, it reduces regressivity—i.e. the poor have to pay for a benefit that is disproportionately used by the rich. Once the consumer has exercised her choice and has opted for arbitration, the agreement should generally be mandatory, in the sense that any future dispute arising from the legal relationship with the trader can only be resolved in arbitration.

It should be noted at the outset that, in Europe, the stakes involved in allowing consumer arbitrations are not nearly as high as in the U.S.<sup>9</sup> By agreeing to arbitration, American consumers waive their right to court proceedings, including the right to bring class actions against traders.<sup>10</sup> In

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<sup>6</sup> See David Horton & Andrea Cann Chandrasekher, *After the Revolution: An Empirical Study of Consumer Arbitration*, 104 GEO. L. J. 60, 70-76 (2015).

<sup>7</sup> See, e.g., Brian T. Fitzpatrick, *The End of Class Actions?*, 57 ARIZ. L. REV. 161, 163 (2015); RICHARD A. LORD, WILLISTON ON CONTRACTS § 15:11, Westlaw (database updated May 2017); Charles W. Tyler, *Lawmaking in the Shadow of the Bargain: Contract Procedure as a Second-Best Alternative to Mandatory Arbitration*, 122 YALE L.J. 1560, 1562 (2013); Russell D. Feingold, *Mandatory Arbitration: What Process Is Due?*, 39 HARV. J. ON LEGIS. 281, 281-82 (2002); David S. Schwartz, *Enforcing Small Print to Protect Big Business: Employee and Consumer Rights Claims in an Age of Compelled Arbitration*, 1997 WIS. L. REV. 33, 36 (1997).

<sup>8</sup> Jessica Silver-Greenberg & Robert Gebeloff, *Arbitration Everywhere, Stacking Deck of Justice*, N.Y. TIMES, Nov. 1, 2015, at A1; Jessica Silver-Greenberg & Michael Corkery, *In Arbitration, a Privatization of the Justice System*, N.Y. TIMES, Nov. 2, 2015, at A1; Michael Corkery & Jessica Silver-Greenberg, *In Religious Arbitration, When Scripture Is the Rule of Law*, N.Y. TIMES, Nov. 3, 2015, at A1.

<sup>9</sup> See generally, Christopher R. Drahozal & Raymond J. Friel, *Consumer Arbitration in the European Union and the United States*, <http://scholarship.law.unc.edu/cgi/viewcontent.cgi?article=1730&context=ncilj>.

<sup>10</sup> But see *Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp.*, 559 U.S. 662, 698 (2010) (Ginsburg, J., dissenting) (“If the Court is right that arbitrators ordinarily are not equipped to manage class proceedings [...] then the claimant should retain its right to proceed in that format in court.”); Hans

other words, the arbitration agreement deprives American consumers of class actions in courts, one of the most potent weapons available to them. Moreover, the U.S. Supreme Court has held that an arbitration agreement that is silent on the issue of whether class arbitrations are available cannot usually be interpreted as allowing them.<sup>11</sup> Where the arbitration agreement contains a so-called class arbitration waiver—a provision explicitly excluding class arbitrations—the waiver is generally enforceable.<sup>12</sup> This is even true when the claimant can show that the cost of individually arbitrating a federal statutory claim would exceed any potential recovery.<sup>13</sup> In sum, arbitration agreements in the U.S. have the effect of precluding consumers not only from bringing class actions in court but also from seeking collective redress in the form of class arbitrations.<sup>14</sup> In Europe, by contrast, consumer collective redress generally is not (yet) available at a similar level.<sup>15</sup> Thus, arbitration agreements cannot deprive consumers in

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Smit, *AT&T Mobility v. Concepcion: Can Class Actions Be Brought in Arbitration?*, 20 AM. REV. INT'L ARB. 469, 471 (2009).

<sup>11</sup> Stolt-Nielsen S.A., 559 U.S., *supra* note 10, at 684 (holding that “a party may not be compelled under the FAA [Federal Arbitration Act] to submit to class arbitration unless there is a contractual basis for concluding that the party agreed to do so.”).

<sup>12</sup> *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 347 (2011); *American Express Co. v. Italian Colors Restaurant*, 133 S.Ct. 2304, 2306 (2013). *See also* Judith Resnik, *Diffusing Disputes: The Public in the Private of Arbitration, the Private in Courts, and the Erasure of Rights*, 124 YALE L.J. 2804, 2885-2893 (2015).

<sup>13</sup> *See* *Italian Colors*, 133 U.S., *supra* note 12, at 2313 (Kagan, J. dissenting) (“[The arbitration clause] imposes a variety of procedural bars that would make pursuit of the antitrust claim a fool’s errand. So if the arbitration clause is enforceable, Amex has insulated itself from antitrust liability—even if it has in fact violated the law.”); *see also* J. Maria Glover, *Disappearing Claims and the Erosion of Substantive Law*, 124 YALE L.J. 3052, 3092 (2015).

<sup>14</sup> *DIRECTV, Inc. v. Imburgia*, 136 U.S. 463, 477 (2015) (Ginsburg, J. dissenting) (“These decisions have predictably resulted in the deprivation of consumers’ rights to seek redress for losses, and, turning the coin, they have insulated powerful economic interests from liability for violations of consumer-protection laws.”); Robert H Klonoff, *Class Actions in the Year 2026: A Prognosis*, 65 EMORY L.J. 1569, 1592 (2015); Myriam Gilles & Gary Friedman, *After Class: Aggregate Litigation in the Wake of “AT&T Mobility v. Concepcion”*, 79 U. CHI. L.REV. 623, 627 (2012). (“[M]any—indeed, most—of the companies that touch consumers’ day-to-day lives can and will now place themselves beyond the reach of aggregate litigation.”); Judith Resnik, *Fairness in Numbers: A Comment on AT&T v. Concepcion, Wal-Mart v. Dukes, and Turner v. Rogers*, 125 HARV. L.REV. 78, 133 (2011). (“The providers won the power to impose a mandatory, no-opt-out system in their own private ‘courts’ designed to preclude aggregate litigation.”).

<sup>15</sup> *See* Commission Recommendation 2013/396/EU of 11 June 2013 on Common Principles for Injunctive and Compensatory Collective Redress Mechanisms in the Member States Concerning Violations of Rights Granted under Union Law, recitals 8, 12, 2013 O.J. (L201) 60 [hereinafter Commission Recommendation 2013/396/EU]; Christopher Hodges, *Mass Collective Redress: Consumer ADR and Regulatory Techniques*, 5 EUR. REV. PRIV. L. 829, 831 (2015); Christopher Hodges & Naomi Creutzfeldt, *Transformations in Public and Private Enforcement*, in THE

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Europe of collective redress. Moreover, by agreeing to arbitration, consumers in the U.S. waive their constitutionally guaranteed right to trial by jury.<sup>16</sup> While juries may not be “*consistently* moved by sympathy for plaintiffs or against deep pocket defendants,”<sup>17</sup> they tend to judge corporate action against a higher standard than individual action.<sup>18</sup> In Europe, there is no similar right to trial by jury that could be precluded through the use of arbitration agreements.<sup>19</sup> Lastly, punitive damages are available in the U.S. as a tool for protecting consumers from deceptive trade practices by punishing and deterring traders’ unlawful conduct.<sup>20</sup> Arbitration agreements may have the effect of depriving consumers of punitive damages.<sup>21</sup> In Europe, punitive damages are generally not available in the first place.<sup>22</sup> The U.S. consumer enjoys protections—typically related to court proceedings (i.e. class actions, jury trials, punitive damages)—that are generally unavailable to the EU consumer. As the arbitration agreement channels the resolution of the dispute away from the courts, the U.S.

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TRANSFORMATION OF ENFORCEMENT (H-W Micklitz & A Wechsler eds., 2016); IM NAMEN DER VERBRAUCHER? KOLLEKTIVE RECHTSDURCHSETZUNG IN EUROPA (Martin Schmidt-Kessel et al. eds., 2015).

<sup>16</sup> Jane Spencer, *Companies Ask People To Waive Right to Jury Trial*, THE WALL STREET JOURNAL, <https://www.wsj.com/articles/SB109269232752592826> (last updated Aug. 17, 2004).

<sup>17</sup> Neil Vidmar, *The Performance of the American Civil Jury: An Empirical Perspective*, 40 ARIZ. L.REV. 849, 898 (1998) (emphasis added).

<sup>18</sup> Vidmar, *supra* note 15, at 898; Valerie P. Hans & Stephanie Albertson, *Empirical Research and Civil Jury Reform*, 78 NOTRE DAME L.REV. 1497, 1522 (2003).

<sup>19</sup> Christopher R. Drahozal & Raymond J. Friel, *Consumer Arbitration in the European Union and the United States*, 28 N.C. J. INT’L L. & COM. REG. 357, 389 (2002).

<sup>20</sup> See, e.g., *State Farm Mut. Auto Ins. Co. v. Campbell*, 538 U.S. 408, 416 (2003) (“Punitive damages may properly be imposed to further a State’s legitimate interests in punishing unlawful conduct and deterring its repetition.”) (quoting *BMW of N. Am., Inc. v. Gore*, 517 U.S. 559, 568); *Johnson v. Ford Motor Co.*, 35 Cal. 4th 1191, 1206 (2005).

<sup>21</sup> *Mastrobuono v. Shearson Lehman Hutton, Inc.*, 514 U.S. 52, 59 (1995) (holding that the FAA pre-empts the Garrity rule according to which New York law prohibits arbitrators from awarding punitive damages but acknowledging that the parties can exclude punitive damages in their arbitration agreement); *Garrity v. Lyle Stuart, Inc.*, 40 N.Y.2d 354, 356 (1976); *Larry’s United Super, Inc. v. Werries*, 253 F.3d 1083, 1084 (8th Cir. 2001) (waiver of punitive damages in light of RICO’s treble damages provision); GARY BORN, *INTERNATIONAL COMMERCIAL ARBITRATION* 2487 (Kluwer Law International 2nd ed. 2014).

<sup>22</sup> Commission Recommendation 2013/396/EU, *supra* note 14, at recital 15 (“Elements such as punitive damages, intrusive pre-trial discovery procedures and jury awards, most of which are foreign to the legal traditions of most Member States, should be avoided as a general rule.”); Regulation (EC) 864/2007 of 11 July 2007 on the Law Applicable to Non-Contractual Obligations (Rome II), recital 32, 2007 O.J. (L199) 40; Helmut Koziol, *Punitive Damages - a European Perspective*, 68 LOUISIANA L.REV. 741, 748 (2008). But see *Rookes v. Barnard*, (1964) A.C.1129, 1203 (UK).

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consumer finishes in the same place as the EU consumer, but the U.S. consumer loses more protections. Thus, it can be argued that, in Europe, the stakes involved in allowing consumer arbitrations are not as high as in the U.S.

Conversely, if the stakes for consumers are not as high in Europe as they are in the U.S., the potential cost savings for traders in arbitration are likely not as significant in Europe as they are in the U.S. If U.S. traders can, through the use of arbitration clauses, successfully avoid class actions, class arbitrations, jury trials, and punitive damages, arbitration can shield traders not only from liability but also from the potentially enormous costs involved in defending class actions or class arbitrations. As Judge Posner pointed out: “[t]he *realistic* alternative to a class action is not 17 million individual suits, but zero individual suits, as only a lunatic or a fanatic sues for \$30.”<sup>23</sup> On the other hand, as the cost savings through arbitration are less significant in Europe than in the US, it would seem there is a smaller potential for European consumers to participate in these savings.

Building on research by Omri Ben-Shahar and Oren Bar-Gill, this article begins by arguing that an *ex ante* choice between arbitration and court litigation is in the interest of consumers. However, rather than arguing in favour of arbitration over litigation, it is submitted that giving consumers a choice is a better approach. This takes into consideration the co-existence of different sub-groups within the group of consumers, as well as their different respective preferences. At the same time, this reduces regressivity: the problem that arises if poorer consumers are forced to pay for a benefit—e.g. court litigation—that is disproportionately used by wealthier consumers.

Second, this paper explores whether a pre-dispute choice in favour of arbitration could be accommodated within the existing legal framework by analysing the current position of Union law on pre-dispute, arbitration clauses in the consumer context. While consumers are free and perhaps, under the recent Union instruments,<sup>24</sup> even encouraged to agree to arbitration after a dispute has arisen, Union law appears hostile towards the idea of allowing consumers to choose arbitration over court litigation at the time of entering into the contract.<sup>25</sup> This article analyses the Directive on

<sup>23</sup> *Carnegie v. Household Int’l, Inc.*, 376 F.3d 656, 661 (7th Cir. 2004) (original emphasis). *See also* *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 365 (2011) (Breyer, J., dissenting) (“[T]he maximum gain to a customer for the hassle of arbitrating a \$30.22 dispute is still just \$30.22.”); Resnik, *supra* note 12, at 2900-2910.

<sup>24</sup> *See* Directive on Consumer ADR, *supra* note 3; Regulation on Consumer ODR.

<sup>25</sup> Directive on Consumer ADR, *supra* note 3, at art. 10(1); Cortés, *supra* note 2, at 19; Hodges, et al., *supra* note 4, at 201.



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Unfair Contract Terms,<sup>26</sup> and the rulings of the Court of Justice of the European Union (CJEU), particularly its decisions in *Mostaza Claro*,<sup>27</sup> and *Asturcom*.<sup>28</sup> It is argued that these rulings shift the balance between consumer protection and arbitral efficiency to such an extreme level of consumer protection that any notion of arbitral efficiency is completely eradicated.<sup>29</sup>

Third, this article proposes a range of safeguards that should be put in place to guarantee access to justice for consumers choosing arbitration. First, it is proposed that a European Court of Consumer Arbitration (ECCA) should be created whose main functions would be to assist consumers and to administer consumer arbitrations across Europe. Independent arbitrators appointed by the ECCA would decide the disputes. The ECCA should also be able to refer questions on the interpretation of EU law to the CJEU. Second, drawing from the discussions of the rulings of the CJEU, different tools available to adjust the balance between consumer protection and arbitral efficiency are identified. Using these tools, a default rule is construed allowing either consumers or the ECCA to challenge the validity of pre-dispute, arbitration clauses in certain situations. Third, arbitral proceedings must be designed in a way that guarantees access to justice. Here, one of the most important issues is to ensure fairness in the selection of arbitrators. The ECCA will be entrusted with this task.

### Desirability of Choice

This section will discuss the benefits of pre-dispute, arbitration clauses under the present regime of ex ante pricing. It will then discuss the findings of Bar-Gill and Ben-Shahar with respect to the regressivity of the policy rule of open court access. Finally, this section proposes offering consumers a choice between arbitration and litigation, rather than streamlining all disputes through arbitration.

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<sup>26</sup> Council Directive 93/13/EEC of 5 April 1993 on Unfair Terms in Consumer Contracts, 1993 O.J. (L 95) 29.

<sup>27</sup> Case C-168/05, *Elisa María Mostaza Claro v. Centro Móvil Milenium SL*, 2006 E.C.R. I-10421.

<sup>28</sup> Case C-40/08, *Asturcom Telecomunicaciones SL v. Cristina Rodríguez Noguiera*, 2009 E.C.R. I-09579.

<sup>29</sup> Andrew Dickinson, *Unfair arbitration clause before the ECJ*, CONFLICT OF LAWS. NET <http://conflictoflaws.net/2009/unfair-arbitration-clause-before-the-ecj/>, (last updated Nov. 1, 2009).

## 1. Pre-Dispute Arbitration Clauses and Pre-Dispute Pricing

The arbitration agreement can be concluded before or after the dispute has arisen. Where the parties agree to submit to arbitration a future dispute their agreement is referred to as *clause compromissoire* or pre-dispute, arbitration clause; where the parties commit to submit an existing dispute to arbitration their agreement is referred to as a *compromis*. This article is concerned with pre-dispute, arbitration clauses. Presently, the dispute-resolution mechanism is priced before a dispute arises:<sup>30</sup> when traders calculate the price of a product or service they take into account the estimated costs of future disputes. As the dispute-resolution mechanism is priced ex ante,<sup>31</sup> only pre-dispute, arbitration agreements have the potential of unlocking an economic benefit for consumers.<sup>32</sup> Agreeing to arbitration after a dispute has arisen fails to result in the same savings that can be achieved by using pre-dispute, arbitration clauses. The reason is that in the case of such a compromise, the price for the product or service has already been determined and cannot, therefore, reflect the amount the trader may now save by going to arbitration rather than litigation. Assuming that arbitration allows traders to save costs, the sub-group of consumers who choose arbitration over litigation after the dispute has arisen has already paid the higher price reflecting the estimated costs of litigation.

## 2. Pre-Dispute Choice Between Arbitration and Litigation

Building on the idea developed by Bar-Gill and Ben-Shahar that access to litigation is regressive,<sup>33</sup> this article reaches a different conclusion from the two authors. Instead of removing access to litigation for all consumers, it is proposed that consumers be given a pre-dispute choice between litigation and arbitration.

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<sup>30</sup> One could also imagine a model that prices the dispute-resolution ex post—after the dispute has arisen. This ‘pay as you go’ type of pricing would have the greatest potential for savings but also raises a range of difficult issues. For example, the loss of cross-subsidies from the entire group of consumers may render the resolution of individual disputes prohibitively expensive.

<sup>31</sup> See Oren Bar-Gill & Omri Ben-Shahar, *Regulatory Techniques in Consumer Protection: A Critique of European Consumer Contract Law*, 50 COMMON MKT L.REV. 109, 110 (2013).

<sup>32</sup> For other benefits that can be obtained through ex ante ADR agreements, see Steven Shavell, *Alternative Dispute Resolution: An Economic Analysis*, 24 J. LEGAL STUD. 1, 5-9 (1995).

<sup>33</sup> Gill & Ben-Shahar, *supra* note 31, at 110.

**(a) Regressive Effects of Litigation Access**

The starting point is the consideration that no dispute-resolution is free. The costs associated with any dispute-resolution mechanism have to be borne by someone. Assuming that at least some of these costs will be borne by traders, they will most likely include their costs in the price of the product or service they sell. Because disputes generally arise after the conclusion of the contract, and thus after the price has been determined, traders do not know at the time of entering into a contract whether a relationship with a particular customer will result in a dispute. Traders will calculate a price for dispute-resolution based on their prior experience, estimating the likelihood of a dispute's occurring and the average costs they will incur to resolve it.

Suppose that a trader considers that he will be able to sell a particular product to 1,000 consumers. He estimates that ten instances of the product will turn out to be defective. If the average cost to solve one dispute caused by a defect in this product is calculated at 1,000, the estimated costs for the trader to solve all disputes that may arise in relation to the sale of this product is 10,000. Therefore, when calculating the price for the product, the trader will include ten for the estimated cost of the dispute-resolution with respect to this product.

Now suppose, as well, that the trader's estimate was accurate and that a defect occurs in ten products; we would expect the ten consumers concerned to make use of the dispute-resolution mechanism they have paid for—provided that the expected benefit of bringing the claim is greater than the (additional) costs for the consumers. We know that rational decision-makers assert a claim if the cost associated with making the complaint is less than the expected benefit.<sup>34</sup> The main problem here is that we are not dealing with rational decision-makers.<sup>35</sup> In the group of consumers, there will be different sub-groups: a few will be wealthy, sophisticated, and informed; while the majority will likely be poor, under-educated, and under-informed. The smaller elite group of consumers is more likely to assert their legal claims than the majority of consumers. Due to their lack of sophistication, the majority may not even be aware of the inadequacy of the trader's performance. Ben-Shahar and Bar-Gill have demonstrated that mandatory, pro-consumer arrangements, particularly the prohibition of pre-dispute,

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<sup>34</sup> Robert D Cooter & Daniel L Rubinfeld, *Economic Analysis of Legal Disputes and Their Resolution*, 27 J. ECON. LITERATURE 1067, 1082 (1989).

<sup>35</sup> See Russell B Korobkin & Thomas S Ulen, *Law and Behavioral Science: Removing the Rationality Assumption from Law and Economics*, 88 CAL. L.REV. 1051, 1051 (2000).

arbitration clauses, benefit the sophisticated elite of consumers disproportionately, at the expense of the majority of consumers who, because of their weakness, are most in need of protection.<sup>36</sup> Ben-Shahar develops his argument on the assumption that consumers fare better in court litigation than arbitration. This means that allowing access to courts is costlier for traders than arbitration.

These higher costs, like all costs associated with any dispute-resolution mechanism, are divided equally among all consumers. However, the small elite sub-group of consumers is more likely to take advantage of the policy that provides open access to courts, while the poorer sub-groups pay more than the proportional benefit they derive from having access to courts.<sup>37</sup> This means that a policy that keeps access to courts open by prohibiting pre-dispute, arbitration agreements is unintentionally regressive. Regressivity has two aspects: expenditure can be regressive, in the sense that poorer sub-groups use the public good financed by the expenditure at a less proportional rate compared to other sub-groups of the general population.<sup>38</sup>

Here, the distribution of the good is uneven among the general population. However, regressivity can also take into consideration who pays for a public good: if the poor not only use a public good at a less proportional rate compared to the wealthy but together with the wealthy also pay the same share, it can be said that the poor pay for a benefit that is used by the wealthy.<sup>39</sup> Prohibiting pre-dispute arbitration agreements leads to regressive effects in the latter sense; poor consumers pay for a benefit mostly used by more affluent consumers. Moreover, as there is no evidence that forcing traders to guarantee access to courts is a response to systematic market failure, it cannot be said that the prohibition of pre-dispute arbitration clauses has a welfare-enhancing effect.<sup>40</sup> A legal intervention of this sort would be legitimate only if the market had failed in providing efficient resource allocation.<sup>41</sup>

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<sup>36</sup> Omri Ben-Shahar, *Arbitration and Access to Courts: Economic Analysis*, in REGULATORY COMPETITION IN CONTRACT LAW AND DISPUTE-RESOLUTION 447 (Horst Eidenmüller ed., 2013); Bar-Gill & Ben-Shahar, *supra* note 31, at 114-15. The following observations are based on findings by Ben-Shahar & Bar-Gill.

<sup>37</sup> Ben-Shahar, *supra* note 36, at 456.

<sup>38</sup> *Id.* at 451.

<sup>39</sup> *Id.*

<sup>40</sup> See Bar-Gill & Ben-Shahar, *supra* note 31, at 110, 115, 121.

<sup>41</sup> Gerhard Wagner, *Mandatory Contract Law: Functions and Principles in Light of the Proposal for a Directive on Consumer Rights*, 3 ERASMUS L.REV. 47, 68 (2010).

## **(b) Choice Between Arbitration and Litigation**

Before we continue building on the idea that access to litigation has unintended regressive effects, we need to examine that idea critically: first, can we assume that the sub-group of elite consumers uses the open access to courts exclusively for their own benefit? Would the analysis change if we came to the conclusion that the few sophisticated consumers who assert claims in court render a service to the entire group of consumers? Second, removing access to courts may reduce the problem of regressivity but does not eliminate it. The majority of consumers are unlikely to use their open access to court because the process needs to be actively triggered. The same, however, is true for arbitration. It is therefore likely that the same consumers who de facto waive their right to go to court will also waive their right to assert legal claims in arbitration. Only a complete removal of all avenues of dispute-resolution would eradicate the regressivity problem. However, in light of Article 47 of the Charter of Fundamental Rights,<sup>42</sup> and Article 6(1) of the European Convention on Human Rights, this is difficult to imagine. Thus, regressivity can be reduced but not entirely eliminated. However, the aim of reducing regressivity cannot be an aim in itself, but must be balanced with other objectives: most importantly, the need to ensure consumers' access to justice. It will be argued that a better balance can be achieved by giving consumers a choice between arbitration and litigation rather than eliminating litigation altogether.

### ***1) Analysis of the notion of regressivity***

The argument that mandatory access to litigation is regressive is based on the notion that the policy benefits stronger consumers disproportionately—at the direct expense of the weak.<sup>43</sup> The underlying assumption is that asserting a claim in court only has effects *inter partes*: the benefits of litigating exclusively accrue to the party winning the case, not to the entire group of consumers that paid an equal price for access to the courts. Only if this assumption holds true does the policy of open access to courts increase inequality in income and welfare.<sup>44</sup> By contrast, if the entire

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<sup>42</sup> Charter of Fundamental Rights of the European Union 2012/C 326/02, 2012 O.J. C326/391.

<sup>43</sup> Ben-Shahar, *supra* note 36, at 449–50.

<sup>44</sup> *Id.* at 461.

group of consumers benefit from litigation pursued by a few sophisticated consumers, the regressive effect of litigation would at least be mitigated. How might the entire group of consumers benefit from claims asserted by a few? After all, any recoveries go directly into the pockets of those succeeding in the litigation. The entire group of consumers may nonetheless benefit in two indirect ways: first, asserting legal claims in court could contribute towards the development of consumer-friendly legal rules; second, the threat of litigation may deter socially undesirable trader behaviour, thereby raising the general level of consumer protection.

As to the first potential benefit, it is true that asserting claims in national courts gives judges the opportunity to interpret legal norms and develop consumer protection rules at a national level. Moreover, the preliminary reference procedure under Article 267 Treaty of the Functioning of the European Union (TFEU) allows national courts to refer preliminary questions concerning the interpretation of EU law to the Court of Justice of the European Union (CJEU). This fosters an important dialogue between national courts and the CJEU, which is instrumental in shaping EU law. Presently, there is typically no similar dialogue between arbitral tribunals and the CJEU, as tribunals generally do not have the power to make preliminary references.<sup>45</sup>

However, even if we assume that litigation conducted by a few consumers contributes towards raising the general level of consumer protection, with respect to the entire group of consumers that effect still appears too intangible to conclude that the regressive effect of litigation is mitigated. The possibility of consumer protections being enhanced at an abstract level as a result of a few consumers bringing court cases seems too elusive to provide a solid foundation for an attack on Ben-Shahar and Bar-Gill's analysis.<sup>46</sup>

As to the second potential benefit, we must examine whether the entire group of consumers, who paid an equal price for the policy of open access to courts, may indirectly benefit from that policy because the threat of litigation

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<sup>45</sup> Case 102/81, *Nordsee Deutsche Hochseefischerei GmbH v. Reederei Mond Hochseefischerei Nordstern*, 1982 E.C.R. 1095, para. 7–10; Case C-126/97, *Eco Swiss China Time Ltd. v. Benetton International NV*, 1999 E.C.R. I-3055, para. 34; Case C-125/04, *Guy Denuit and Betty Cordenier v. Transorient - Mosaique Voyages et Culture S.A.*, 2005 E.C.R. I-925, para. 12; Case C-555/13, *Merck Canada v. Accord Healthcare*, CJEU (Feb. 13, 2014) para. 17; Case C-377/13, *Ascendi Beiras Litoral e Alta, Auto Estradas das Beiras Litoral e Alta* CJEU (June 12, 2014) para. 23; Jürgen Basedow, *EU Law in International Arbitration: Referrals to the European Court of Justice*, 32 J. INT. ARB. 376, 371 (2015).

<sup>46</sup> Bar-Gill & Ben-Shahar, *supra* note 31, at 110.

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deters socially undesirable trader behaviour.<sup>47</sup> The level of deterrence depends on the seriousness of the threat posed by litigation. If traders have much to lose in litigation, there may be a real deterrent effect: the benefit of which could be felt by the entire group of consumers. The seriousness of the threat depends on the likelihood of traders being sued and on the potential recoveries for consumer claimants. However, in the European Union, both factors point towards a rather low level of deterrence. In the absence of a Union-wide class-action device,<sup>48</sup> the principled preference at EU level for opt-in collective redress,<sup>49</sup> and the prohibition of contingency fees,<sup>50</sup> the likelihood of traders being sued is rather small:<sup>51</sup> particularly when the amount in dispute is insignificant.<sup>52</sup> Moreover, potential recoveries compared with the U.S. tend to be modest: not least because punitive damages are generally unavailable.<sup>53</sup> Therefore, it is unlikely that the threat litigation poses for traders is serious enough to provide a measurable benefit for the entire group of consumers. To conclude, the assumption underlying the analysis of the regressive effects of litigation that asserting a claim in court only has measurable effects *inter partes* is convincing.

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<sup>47</sup> Christopher Hodges, *The Consumer as Regulator*, in *THE IMAGES OF THE CONSUMER IN EU LAW* 245, 247 (Dorota Leczykiewicz & Stephen Weatherill eds., 2016).

<sup>48</sup> European Law Institute, *Statement on Collective Redress and Competition Damages Claims*, ELI 17 (2014), [http://www.europeanlawinstitute.eu/fileadmin/user\\_upload/p\\_eli/Publications/S-5-2014\\_Statement\\_on\\_Collective\\_Redress\\_and\\_Competition\\_Damages\\_Claims.pdf](http://www.europeanlawinstitute.eu/fileadmin/user_upload/p_eli/Publications/S-5-2014_Statement_on_Collective_Redress_and_Competition_Damages_Claims.pdf); Iris Benöhr, *Collective Redress in the Field of European Consumer Law*, 41 *Legal Issues Econ. Integration* (2014).

<sup>49</sup> *Id.* at 15; Commission Recommendation, 2013 O.J. (L201/60) 21–24.

<sup>50</sup> Commission Recommendation, 2013 O.J. (L201/60) 29–30. Contingency fees may increase the risk of unnecessary litigation but they can also be an effective way to fund legal actions—particularly where the claimant would otherwise not be able to enforce her rights. European Law Institute, *supra* note 48, at 50–51.

<sup>51</sup> See Conference Report, *EU Collective Redress Project 2016* (Dec. 12, 2016), <https://www.law.ox.ac.uk/events/empirical-evidence-collective-redress-europe> (responding to the lack of collective litigation across Europe).

<sup>52</sup> A. Stadler, *Group Actions as a Remedy to Enforce Consumer Interests*, in *NEW FRONTIERS OF CONSUMER PROTECTION – INTERPLAY BETWEEN PRIVATE AND PUBLIC ENFORCEMENT* 305, 325–27 (F. Cafaggi & H.W. Micklitz eds., 2009); Benöhr, *supra* note 4, at 244. See *Carnegie v. Household Int'l, Inc.*, 376 F.3d 656, 661 (7th Cir. 2004).

<sup>53</sup> Bernhard A. Koch, *Punitive Damages in European Law*, in *PUNITIVE DAMAGES: COMMON LAW AND CIVIL LAW PERSPECTIVES* 197 (Helmut Koziol & Vanessa Wilcox eds., 2009).

## 2) *Proposal*

Stressing the positive effects of mandatory arbitration on weak consumers, Ben-Shahar concludes his economic analysis of arbitration and access to courts as follows:

“[i]n an unintended and unappreciated way, the surrender of the right to sue in court and its replacement by mandatory arbitration, while detrimental to small groups among the elite, serves best the interest of the weaker echelons of consumers.”<sup>54</sup>

Ben-Shahar proposes to deal with the regressive effect of litigation by making arbitration the exclusive dispute-resolution mechanism in the consumer context—by blocking access to courts for *every* consumer.<sup>55</sup> Of course, removing litigation as an option to solve disputes between traders and consumers is one way of avoiding the regressive effects of litigation. However, the problem of regressivity still persists at a reduced level. The reason is that the open access policy litigation has now been replaced with another open access policy—i.e. arbitration. Here again, all consumers share in the traders’ costs for providing arbitration as a dispute-resolution mechanism. Yet the same individuals who would have brought claims in court will now use arbitration, whereas the poorest and weakest will de facto again waive their right to bring claims in arbitration because the process needs to be actively triggered. Again, there is a cross-subsidy from the weak and poor to the strong and wealthy elite who will make disproportionate use of arbitration.

There is a better, more nuanced solution, which eliminates the regressive effect of litigation while still keeping litigation as an option for those consumers who prefer having access to courts. Litigation is regressive because it is disproportionately used by the elite sub-group but funded by all consumers: the poor pay an equal share for a benefit that is disproportionately used by wealthier, more sophisticated consumers. If consumers could choose between arbitration and litigation, the prices that traders charge for their goods and services would depend on the dispute-resolution mechanism chosen by consumers. For example, a vacuum cleaner would cost less if the consumer opted for arbitration instead of litigation.

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<sup>54</sup> Ben-Shahar, *supra* note 36, at 466.

<sup>55</sup> *Id.*



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A choice between arbitration and litigation would eliminate the regressive effect of litigation because access to courts would no longer be funded by the entire group of consumers—only by those who are prepared to pay for it and who are thus more likely to use it. By removing the regressive cross-subsidy, our proposal would eliminate the regressive effects of litigation. However, it would do so in a better way than precluding litigation entirely because a consumer who values access to courts would continue to have that option. Conversely, a consumer who is unlikely to assert a claim in case of a dispute and prefers a lower price over access to litigation should be able to choose arbitration in exchange for a discount, provided that the arbitral process offered by the trader guarantees access to justice. In other words, some consumers may want to continue flying first class while others prefer economy, if this gives them access to tickets for a lower fare.<sup>56</sup> The advantage of our proposal is that it addresses the regressivity problem in relation to court litigation without taking away access to courts from those consumers who want to continue having it.

### Proposal and Existing Legal Framework

This section addresses the question of whether our proposal is compatible with the existing legal framework. To this end, the Directive on Unfair Contract Terms,<sup>57</sup> and the rulings of the CJEU in *Mostaza Claro*,<sup>58</sup> and *Asturcom*,<sup>59</sup> will be examined. The rulings will be criticized on the ground that the Court failed to strike a reasonable balance between consumer protection and arbitral efficiency.<sup>60</sup>

This paper argues that the proposal would fit within the existing legal framework: first, when evaluating the unfairness of pre-formulated contractual terms, national courts are required to take into account all the circumstances attending the conclusion of the contract.<sup>61</sup> The fact that the

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<sup>56</sup> Bar-Gill and Ben-Shahar evoked this image in a different context. Bar-Gill & Ben-Shahar, *supra* note 31, at 114.

<sup>57</sup> Unfair Terms in Consumer Contracts, *supra* note 26, at Article 4(1).

<sup>58</sup> *Id.*

<sup>59</sup> *Id.*

<sup>60</sup> In Case C-126/97, *Eco Swiss China Time Ltd v. Benetton International NV*, 1999 E.C.R. I-3055, para. 35, the Court merely observed that 'review of arbitration awards should be limited in scope and that annulment of or refusal to recognise an award should be possible only in exceptional circumstances.' Elsewhere the Court protected the finality of decisions: see Case C-234/04, *Kapferer*, 2006 E.C.R. I-2585; Case C-455/06, *Heemskerk BV*, 2008 E.C.R. I-8763; Case C-2/08, *Fallimento Olimicclub Srl*, 2009 E.C.R. I-7501.

<sup>61</sup> Unfair Terms in Consumer Contracts, *supra* note 26, at Article 4(1).

consumer had a choice between litigation and arbitration is a factor that weighs in favour of the fairness of the arbitration agreement. However, a pre-formulated arbitration clause would only be regarded as fair if the consumer had been fully informed about the implications of her choice and if other safeguards were met.<sup>62</sup> Second, it might be argued that the Directive itself gives consumers a choice, where the term in question is considered to be unfair. Pursuant to Article 6(1), unfair terms shall not be binding on the consumer.<sup>63</sup> While the trader cannot enforce an unfair arbitration clause, the consumer may well decide to enforce it.<sup>64</sup> Thus, an unfair arbitration agreement becomes a unilateral arbitration clause in favour of the consumer, giving her the choice to enforce an arbitration clause that under the Directive is considered to be 'unfair'.<sup>65</sup> The paper will discuss to what extent, if any, the consumer's choice under the Directive is similar to the pre-dispute choice here proposed.

## 1. Existing legal framework

### (a) Directive on Unfair Contract Terms

The centrepiece of the Directive on Unfair Contract Terms is Article 6(1),<sup>66</sup> which provides the sanction for unfair terms:

Member States shall lay down that *unfair terms* used in a contract concluded with a consumer by a seller or supplier *shall*, as provided for under their national law, *not be binding on the consumer* and that the contract shall continue to bind the parties upon those terms if it is capable of continuing in existence without the unfair terms.<sup>67</sup>

The crucial question is: what is an unfair term? The answer can be found in Article 3(1). A contractual clause, drafted by the trader in advance, 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*." (emphasis added). In

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<sup>62</sup> See section IV below.

<sup>63</sup> Unfair Terms in Consumer Contracts, *supra* note 26.

<sup>64</sup> *Id.*

<sup>65</sup> *Id.*

<sup>66</sup> *Id.*

<sup>67</sup> *Id.*

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its annex, the Directive includes an indicative and non-exhaustive list of terms,<sup>68</sup> which *may* be regarded as unfair. Pursuant to paragraph 1(q) annex, a term may be regarded as unfair if it has 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*, 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.<sup>69</sup>

The Directive does not define the phrase 'arbitration not covered by legal provisions' and to date the CJEU has not interpreted it.<sup>70</sup> The meaning of the phrase is not immediately obvious, as most arbitrations are governed by national arbitral statutes.<sup>71</sup> The phrase has been read in different ways:

For the Bundesgerichtshof,<sup>72</sup> an arbitration clause that exclusively refers a consumer to statutorily permitted arbitral proceedings is not caught by paragraph 1(q) annex, because, in that case, the arbitration would actually be 'covered by legal provisions', i.e. the applicable arbitration law. This reading, however, is problematic because in Germany it is the territorial criterion of 'place of arbitration' that exclusively determines the application of German arbitral law.<sup>73</sup> Pursuant to §1025(1) Zivilprozessordnung (ZPO),

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<sup>68</sup> See Case C-478/99, *Commission v Sweden*, 2002 E.C.R. I-4147 (rejecting the Commission's application that Sweden had failed to fulfil its obligations under the Directive on Unfair Contract Terms by not reproducing the annex to the Directive in its national law).

<sup>69</sup> Unfair Terms in Consumer Contracts, *supra* note 26, at paragraph 1(q). (emphasis added).

<sup>70</sup> Unfair Terms in Consumer Contracts, *supra* note 26.

<sup>71</sup> William W Park, *Amending the Federal Arbitration Act*, 13 AM. REV. INT'L ARB. fn 225 (2002) (listing three possible constructions of the phrase); Guido Alpa, *La Clausola Arbitrale Nei Contratti Dei Consumatori*, *Rivista dell'Arbitrato* (1997) (suggesting four constructions); Wolfgang Wurmnest, §§307-309, in MÜNCHENER KOMMENTAR ZUM BGB (Franz Jürgen Säcker ed. 2015).

<sup>72</sup> Bundesgerichtshof [BGH] [Federal Court of Justice] Jan. 13, 2005, 162 Entscheidungen des Bundesgerichtshofs in Zivilsachen [BGHZ] 9 (15). For the lower court in this case, the arbitration was covered by legal provisions because the arbitration clause did not modify the form, nature and content of the arbitral proceeding as provided by the applicable German arbitration statute (§§ 1025ff Zivilprozessordnung (civil procedure statute) [ZPO]. Oberlandesgericht [OLGZ] [Court of Appeals] Düsseldorf, May 23, 1996, *Neue Juristische Wochenschrift*, Rechtsprechungs-Report Zivilrecht, NJW-RR 372, (374), 1997.

<sup>73</sup> Germany's arbitration law of 1998 is based on the UNCITRAL Model Law on International Commercial Arbitration 1985. Pursuant to Article 1(2) the Model Law applies (only) if the place of arbitration is in the territory of that State.

the German arbitral law always applies if Germany is the place of arbitration.<sup>74</sup> In other words, there is no arbitration in Germany to which the German arbitral law would not apply.<sup>75</sup> Thus, according to the Bundesgerichtshof's reading, the phrase 'arbitration not covered by legal provision' would be nugatory.<sup>76</sup> It is unlikely that the drafters of paragraph 1(q) annex would have included a phrase that does not apply in practice.<sup>77</sup> The Bundesgerichtshof's reading is therefore not entirely convincing.

According to another construction of paragraph 1(q) annex, a pre-formulated arbitration clause is *prima facie* unfair if the rules governing the form, nature and content of the arbitral process deviate from the otherwise applicable statutory provisions on arbitration.<sup>78</sup> This can be criticized in circumstances where the applicable arbitration law gives the parties the freedom to deviate from certain default rules. Conceivably, this could be considered as being 'covered by legal provisions': the applicable arbitration law confers on the parties the power to deviate from it. However, as we are here in a consumer context, the drafters of the Directive may have intended to exclude the generally granted freedom to deviate from national arbitration laws. It has also been suggested that the purpose of paragraph 1(q) annex is to narrow the scope of *prima facie* unfairness to those arbitration clauses in which the parties have shielded arbitral awards from judicial review.<sup>79</sup> However, it seems difficult to square this reading with the actual words used. There is nothing in the phrase "arbitration not covered by legal provisions" that would indicate that it is concerned with narrowing the scope of judicial review of arbitral awards.<sup>80</sup>

<sup>74</sup> Unfair Terms in Consumer Contracts, *supra* note 26.

<sup>75</sup> *Id.*

<sup>76</sup> Gerhard Wagner & David Quinke, *Ein Rechtsrahmen Für Die Verbraucherschiedsgerichtsbarkeit*, 19 Juristenzeitung [JZ], 934 (2005).

<sup>77</sup> Unless the drafters wished to avoid any arbitrations unregulated by national law: the objective is achieved if any criterion—place of arbitration or any other—produces the result that legal norms govern the arbitration.

<sup>78</sup> Bundesgerichtshof [BGH] [Federal Court of Justice] Jan. 13, 2005, 162 Entscheidungen des Bundesgerichtshofs in Zivilsachen [BGHZ] 9 (16); Oberlandesgericht [OLGZ] [Court of Appeals] Düsseldorf, May 23, 1996, Neue Juristische Wochenschrift, Rechtsprechungs-Report Zivilrecht, NJW-RR 372, (374), 1997.

<sup>79</sup> EDWIN PEEL, THE LAW OF CONTRACT para. 7-112 (Sweet & Maxwell 14th ed. 2015); *see also* Loukas A. Mistelis, *ADR in England and Wales: A Successful Case of Public Private Partnership*, in GLOBAL TRENDS IN MEDIATION 139-180, fn. 110 (Nadja Alexander ed. 2006). (The Consumer Rights Act 2015 Schedule 2(q) 'declares arbitration not covered by legal provisions unfair if there is no opportunity to review the decision in the courts.')

<sup>80</sup> Unfair Terms in Consumer Contracts, *supra* note 26, at Part 2, Schedule 2 1(q).

Perhaps the most convincing construction is based on the consideration that some Member States, such as the Netherlands, Portugal, and Spain, have put in place special statutory regimes for consumer arbitrations with the specific purpose of assisting consumers.<sup>81</sup> It is likely that paragraph 1(q) annex reflects these special circumstances in those Member States.<sup>82</sup> Thus, the most convincing reading of paragraph 1(q) annex is that a “clause providing exclusively for arbitration to the exclusion of the courts other than a special statutory scheme specifically designed to assist consumers”<sup>83</sup> may be considered to be unfair.

**(b) Court of Justice rulings—*Mostaza Claro* and *Asturcom***

This section discusses two important CJEU rulings in the area of consumer arbitration—*Claro*<sup>84</sup> and *Asturcom*.<sup>85</sup> Both originated from Spanish courts’ referring questions regarding the interpretation of the Directive in the context of pre-dispute consumer arbitration clauses. As to the national legal background, when Spain implemented the Directive, it provided that unfair terms in consumer contracts shall be *void*.<sup>86</sup> By contrast, under the Directive, unfair terms shall *not be binding* on the consumer.<sup>87</sup> Arguably, the Directive achieves a higher level of consumer protection than the Spanish implementation: the consumer is not bound by the unfair term but may enforce it.<sup>88</sup>

When it comes to arbitration, the objective of the Directive and the implementing Spanish law is to protect consumers from losing their right to go to court on account of unfair arbitration clauses contained in the traders’ standard contract terms.<sup>89</sup> But it was unclear how to enforce that objective as a matter of national procedure.<sup>90</sup> One important question was until what

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<sup>81</sup> Audley Sheppard, *English Arbitration Act*, in CONCISE INTERNATIONAL ARBITRATION 1111-1113 (Loukas A. Mistelis ed. 2015).

<sup>82</sup> *Zealander & Zealander v Laing Homes Ltd* (2000), 2 T.C.L.R. 724, 729 (quoting with approval B. HARRIS, R. PLANTEROS and J. TECKS, *THE ARBITRATION ACT 1996: A COMMENTARY* (1996)).

<sup>83</sup> BRUCE HARRIS, et al., *THE ARBITRATION ACT 1996: A COMMENTARY* 435 (5th ed. 2014).

<sup>84</sup> *Claro v. Milenium*, *supra* note 27.

<sup>85</sup> *Asturcom v. Noguiera*, *supra* note 28.

<sup>86</sup> Ley 7/1998 sobre Condiciones Generales de la Contratación Article 8(2), B.O.E. No. 89, April 13, 1998 [Law 7/1998 on general contractual conditions].

<sup>87</sup> Unfair Terms in Consumer Contracts, *supra* note 26 at Article 6 (1).

<sup>88</sup> Unfair Terms in Consumer Contracts, *supra* note 26.

<sup>89</sup> *Id.*

<sup>90</sup> *Id.*

stage in the arbitral proceedings consumers should be protected.<sup>91</sup> For our purposes, it is convenient to distinguish three phases: the commencement of proceedings, the annulment and the enforcement. Two interests compete here: consumer protection and arbitral efficiency.<sup>92</sup> The challenge is to find a reasonable balance between these two interests. As arbitration is a matter of contract, the validity of the arbitration award depends on the validity of the arbitration agreement.<sup>93</sup> The party that lost in the arbitration may challenge—i.e. seek to annul—the award in the courts but usually only on limited grounds.<sup>94</sup> If the award debtor does not comply with the award voluntarily, the award creditor may seek to enforce the award in the courts.<sup>95</sup> The award debtor may resist enforcement but the grounds on which enforcement can be refused are even narrower than the grounds on which the award may be set aside.<sup>96</sup> This protects the notion of arbitral efficiency: the more time and resources have been spent in the arbitral process, the more reasonable it should be to rely on the outcome of that process.

The conflict between consumer protection and arbitral efficiency can be solved in various ways. Arbitral efficiency would be given maximum effect if it were up to the consumer to challenge the unfairness of the arbitration agreement, and if she could only raise this challenge at the beginning of the arbitral proceedings.<sup>97</sup> By contrast, consumers would be protected to an extreme extent, if the fairness of the arbitration agreement had to be assessed

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<sup>91</sup> *Id.*

<sup>92</sup> Brenna A. Sheffield, *Pre-Dispute Mandatory Arbitration Clauses in Consumer Financial Products: The CFPB's Proposed Regulation and its Consistency with the Arbitration Study*, 20 N.C. BANKING INST. 219, 229-30 (2016).

<sup>93</sup> Imre S. Szalai, *The New ADR: Aggregate Dispute Resolution and Green Tree Financial Corp. v. Bazzle*, 41 CAL. W. L. REV. 1, 44-47 (2004).

<sup>94</sup> The New York Convention only indirectly deals with the possibility of annulling the award. Under Article V(1)(e) enforcement of the award may be refused if the award has been set aside. Importantly, the New York Convention does not provide for the grounds on which an award may be annulled. That is a matter of the national law of the 'country in which, or under the law of which, [the] award was made'. This means that the award can be set aside under whichever ground the national law deems appropriate. However, typically the grounds available under the national law for annulling an award are limited. *See also* Piers, *supra* note 4, at 227-28.

<sup>95</sup> United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards, June 10, 1958, art. V(1)(e), 330 U.N.T.S. 38, reprinted in *International Handbook on Commercial Arbitration*, Supp. 29 (J. Paulsson ed., 1999). (referred to commonly as the New York Convention, *See*: Noah Rubins, *The Enforcement and Annulment of International Arbitration Awards in Indonesia*, 20 AM. U. INT'L L. REV. 359, 360 (2005).).

<sup>96</sup> If the New York Convention applies enforcement can only be refused on the seven grounds contained in Article V. *See also* Piers, *supra* note 4, at 225-26.

<sup>97</sup> New York Convention, *supra* note 95.

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ex officio<sup>98</sup> and such an assessment could be made until a very late stage in the arbitration—perhaps even after the award has been rendered (annulment stage)—or even later, when under national procedural law the award could no longer be challenged, having acquired the force of *res iudicata* (enforcement stage).<sup>99</sup> It is argued that the Court in *Claro* and *Asturcom* did not strike a reasonable balance between the competing interests of consumer protection and arbitral efficiency.<sup>100</sup> Instead, the Court adopted an extreme level of consumer protection to the detriment—arguably even elimination—of arbitral efficiency.<sup>101</sup>

Both disputes arose from mobile phone contracts concluded with consumers. When Elisa María Mostaza Claro did not complete the minimum subscription period specified in her contract, the phone company started arbitration proceedings against her.<sup>102</sup> Under the arbitration agreement, Mostaza Claro had 10 days in which she could have refused arbitration proceedings and instead could have opted for court proceedings.<sup>103</sup> She did not avail herself of that option.<sup>104</sup> Rather, within the 10-day period she submitted arguments on the merits of the dispute.<sup>105</sup> While the time given to Mostaza Claro was not too short for her to present arguments in her defence on the merits, AG Tizzano opined that the period was too short for the consumer to opt for litigation.<sup>106</sup> However, even after the 10-day period had expired, the consumer did not assert that the arbitration agreement was unfair and void.<sup>107</sup> In fact, she failed to raise this issue throughout the entire arbitration proceedings.<sup>108</sup> Only when the arbitrator rendered an award against the consumer did she challenge the award in court, arguing that the arbitration agreement was unfair and void and that, as a consequence, the award should be annulled.<sup>109</sup> According to

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<sup>98</sup> The national court may have the *power* or even the *duty* to assess of its own motion the fairness of an arbitration agreement.

<sup>99</sup> New York Convention, *supra* note 95.

<sup>100</sup> Dickinson, *supra* note 29.

<sup>101</sup> *Id.*

<sup>102</sup> *Claro*, *supra* note 27, at para. 17.

<sup>103</sup> *Id.*

<sup>104</sup> *Id.*

<sup>105</sup> *See Id.*

<sup>106</sup> *Id.* at para. 48.

<sup>107</sup> *Id.* at para. 17.

<sup>108</sup> *Id.*

<sup>109</sup> *Id.* at para. 18.

the Spanish Arbitration Act in force at the time,<sup>110</sup> objections of this nature had to be raised at the time the parties made their initial submissions. The purpose of this requirement was to give effect to the notion of arbitral efficiency. The Spanish (annulment) court considered the arbitration clause to be unfair but was faced with the problem that the customer had not pleaded the invalidity of the arbitration agreement in the course of the arbitration proceedings—as required by Spanish law.<sup>111</sup> The Spanish court therefore asked the CJEU whether the protection of consumers under the Directive required the national (Spanish) court to annul the award if it found that the arbitration agreement was unfair—despite the fact that under the applicable national law the consumer had raised the unfairness of the arbitration agreement too late.<sup>112</sup> The CJEU answered in the affirmative—adding that, in order to provide consumers with an effective protection, national courts are even under an obligation to act of their own motion.<sup>113</sup> The Court observed that the national (Spanish) court had established that the arbitration clause in question was unfair,<sup>114</sup> and that under the Directive the assessment of the fairness of such a term was indeed an issue for the national court.<sup>115</sup>

The protection of consumers under Union law is enforced through national courts, using national procedural rules (principle of procedural autonomy), “provided that they are not less favourable than those governing similar domestic situations (principle of equivalence) and that they do not render impossible in practice or excessively difficult the exercise of rights conferred by the [Union] legal order (principle of effectiveness).”<sup>116</sup> The Court based its ruling on the principle of effectiveness. The result sought by Article 6 of the Directive could not be achieved if the annulment court was unable to determine whether the award was unfair solely because the consumer had not pleaded the invalidity of the arbitration agreement in the course of the arbitration proceedings. For the Court, consumer protection corresponds to such an important public interest that the national court is

<sup>110</sup> Ley 36/1988 de Arbitraje Article 23, B.O.E. No. 293, Dec. 7, 1988, 34605 [Law of 36/1998 on arbitration].

<sup>111</sup> Claro, *supra* note 27, at para. 14.

<sup>112</sup> *Id.* at para. 20.

<sup>113</sup> *Id.* at paras. 28, 30, 31, 38.

<sup>114</sup> *Id.* at para. 21.

<sup>115</sup> *Id.* at para. 23 (referring to Case C-237/02, *Freiburger Kommunalbauten*, 2004 E.C.R. I-3403, paras. 22, 25).

<sup>116</sup> *Id.* at para. 24 (referring to Case C-78/98, *Preston*, 2000 E.C.R. I-3201, para. 31, and Joined Cases C-392/04 and C-422/04, *i-21 Germany and Arcor*, 2006 E.C.R. I-0000, para. 57).



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required to assess the fairness of the arbitration agreement of its own motion.<sup>117</sup> In the Court's view, the imbalance between consumer and trader could only be corrected by positive action.<sup>118</sup>

It is interesting to observe that the Spanish court considered an arbitration clause that was non-binding on the consumer to be unfair in light of the Directive, this assessment may seem questionable. How can a term be unfair when it arguably corresponds to the sanction under Article 6(1) of the Directive, which provides that an unfair term shall not be binding on the consumer? Could it not be argued that the arbitration agreement in *Claro* conformed to the agreement the parties would have had, had Article 6(1) rewritten the clause with the purpose of restoring the balance<sup>119</sup> between them? After all, the arbitration agreement in *Claro* allowed the consumer to choose between arbitration and litigation and the Directive gives consumers the choice between arbitration and litigation because she has the option to enforce the arbitration agreement despite its unfairness.<sup>120</sup>

The decisive difference between the term in *Claro* and the hypothetical clause under the Directive may have been that the arbitration agreement in *Claro* was only non-binding on the consumer for 10 days, so that in *Claro* the default position was in favour of arbitration.<sup>121</sup> If the consumer within 10 days did not opt for litigation, she had to arbitrate.<sup>122</sup> By contrast, under the Directive, the default position would have been in favour of litigation.<sup>123</sup> In *Claro*, as well as under the Directive, the consumer has a choice between arbitration and litigation.<sup>124</sup> To what extent the different default positions matter will depend on distributive, paternalist and efficiency motives.<sup>125</sup>

In *Asturcom*, the consumer did not participate at all in the proceedings.<sup>126</sup> When Maria Cristina Rodriguez Noguiera failed to pay bills and terminated her phone subscription before the agreed minimum period,

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<sup>117</sup> *Id.* at para. 38.

<sup>118</sup> *Id.* at paras. 26, 30.

<sup>119</sup> See *Asturcom*, *supra* note 28, para. 30; *Claro*, *supra* note 27, para. 36; Case C-243/08, *Pannon GSM*, 2009 E.C.R. I-4713, para. 25.

<sup>120</sup> *Claro*, *supra* note 27, at para. 17.

<sup>121</sup> *Id.*

<sup>122</sup> *Id.*

<sup>123</sup> Directive on Consumer ADR, *supra* note 3.

<sup>124</sup> *Id.*

<sup>125</sup> See generally Duncan Kennedy, *Distributive and Paternalist Motives in Contract and Tort Law, with Special Reference to Compulsory Terms and Unequal Bargaining Power*, 41 MD. L. REV. 563 (1981).

<sup>126</sup> *Asturcom*, *supra* note 28, at para. 33.

her phone company commenced arbitration proceedings against her.<sup>127</sup> The consumer did not make any submissions.<sup>128</sup> When the arbitrator decided against her, she did not challenge the award, so that it became final, acquiring the force of *res iudicata*.<sup>129</sup> When the company brought an action before the national (Spanish) court to have the award enforced, Rodriguez Noguiera did not resist the enforcement of the award.<sup>130</sup> The (Spanish) enforcement court considered the arbitration agreement to be unfair under the Spanish law implementing the Directive.<sup>131</sup> The referring Spanish court observed that Spanish Arbitration Law<sup>132</sup> did not allow arbitrators to examine of their own motion whether unfair arbitration clauses were void and that the Spanish Code of Civil Procedure<sup>133</sup> did not address the question whether the *enforcement* court had the power to assess the fairness of the arbitration agreement.<sup>134</sup> So the Spanish court asked the CJEU whether a national court must assess of its own motion the fairness of the arbitration agreement as late as at the enforcement stage, when the final award has acquired the force of *res iudicata*.<sup>135</sup>

The Court decided that Article 6 of the Directive “must be regarded as a provision of equal standing to national rules which rank, within the domestic legal system, as rules of public policy.”<sup>136</sup> The Spanish Government clarified that under the applicable Spanish rules, the enforcement court had the power to assess the validity of the arbitration agreement as a matter of (domestic) public policy regardless of whether the concerned party had participated in the arbitration or court proceedings.<sup>137</sup> Under the principle of equivalence, the same procedural rules that applied to the enforcement of domestic public policy must be applied with respect to Union public policy, of which Article 6(1) forms a part.<sup>138</sup> As a Spanish enforcement court had

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<sup>127</sup> *Id.* at para. 21.

<sup>128</sup> *Id.* at para. 33.

<sup>129</sup> *Id.* at paras. 23, 33, 40.

<sup>130</sup> *Id.* at para. 34.

<sup>131</sup> *Id.* at para. 25.

<sup>132</sup> Ley 60/2003 de Arbitraje (Law 60/2003 on arbitration) of 23 December 2003 (BOE No. 309 of 26 December 2003) [hereinafter *Law 60/2003*].

<sup>133</sup> Ley 1/2000 de Enjuiciamiento Civil (Code of Civil Procedure) of 7 January 2000 (BOE No. 7 of 8 January 2000) [hereinafter *Law 1/2000*].

<sup>134</sup> *Asturcom*, *supra* note 28, at para. 26, 27.

<sup>135</sup> *Id.* at para. 27.

<sup>136</sup> *Id.* at para. 52.

<sup>137</sup> *Id.* at para. 26, 38.

<sup>138</sup> *Id.* at paras. 51, 52, 53.

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the power to assess its own motion whether an arbitration clause was void on the basis that it was contrary to *national* public policy, it must have the same power with respect to *Union* public policy (principle of equivalence). But the CJEU goes further: Whereas national (Spanish) enforcement courts *have the power* to assess the fairness of an arbitration agreement on the basis of national public policy, they are *required* to do so with respect to Union public policy.<sup>139</sup> The Court ruled that the enforcement court, must of its own motion, assess the validity of an arbitration clause in light of the Directive, because the enforcement court has the power to do the same with respect to domestic public policy.<sup>140</sup>

If *Claro* was a serious attack on the notion of arbitral efficiency, *Asturcom* dealt the final blow, shifting the balance towards an extreme level of consumer protection. There are good reasons why enforcement courts generally do not carry out a substantive examination of arbitration awards.<sup>141</sup> With *Claro* and *Asturcom*, the CJEU created an incentive for consumers not to raise the fairness of the arbitration agreement.<sup>142</sup> If the consumer wins in the arbitration, she will happily accept the outcome.<sup>143</sup> However, if she loses, she may seek annulment of the award on the ground that the arbitration agreement was unfair.<sup>144</sup> Now she does not even have to do that: she can simply wait and see because the enforcement court must determine of its own motion the fairness of the arbitration agreement.<sup>145</sup>

Generally, Union law penetrates deeper into national law through the channel of effectiveness.<sup>146</sup> In *Asturcom*, the Court relied on the principle of equivalence, which, in order to operate, requires a pre-existing national rule.<sup>147</sup> As a practical matter though, when consumer protection is elevated to Union public policy, the principle of equivalence becomes as sharp a sword as effectiveness, because Member States courts have the power to refuse enforcement of awards that violate their national public policy.<sup>148</sup> For

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<sup>139</sup> *Id.* at para. 59.

<sup>140</sup> *Id.*

<sup>141</sup> Piers, *supra* note 4, at 225-26.

<sup>142</sup> *Id.*

<sup>143</sup> *Id.*

<sup>144</sup> *Id.*

<sup>145</sup> *Id.*

<sup>146</sup> See Michal Bobek, *Why There Is No Principle of 'Procedural Autonomy' of the Member States*, THE EUROPEAN COURT OF JUSTICE AND THE AUTONOMY OF THE MEMBER STATES 305ff (Hans-W Micklitz & Bruno De Witte eds., 2012).

<sup>147</sup> *Asturcom*, *supra* note 28, at paras. 49, 52, 53.

<sup>148</sup> *Id.* at para. 55.

example, German courts have the power to refuse enforcing arbitral awards that violate German public policy (§§1060(2), 1059(2) Nr 2(b) ZPO), and pursuant to Art 36(1)(b)(ii) UNCITRAL Model Law on International Commercial Arbitration—which has been adopted in a number of EU Member States, including the United Kingdom—the enforcement of an award may be refused if it conflicts with the public policy of the enforcement court.<sup>149</sup> In France, a country which has not adopted the Model Law, a domestic award that manifestly violates French public policy cannot be enforced (Article 1488(1) Code de procédure civile (CPC)); the same applies to an international award contrary to international public policy (Article 1514 CPC).<sup>150</sup> The elevation of consumer protection to Union public policy, coupled with the omnipresent rule against the enforcement of awards violating national public policy, means that the Court's reliance on the principle of equivalence in *Asturcom* cuts as deeply into the domestic legal systems as the principle of effectiveness.

### (c) Does the proposal fit within the existing legal framework?

This section argues that the proposal advocated in this paper would fit into the existing framework laid down by the Directive. As long as the consumer has a pre-dispute choice between arbitration and litigation and certain safeguards with respect to the exercise of that choice and with respect to the arbitral proceeding itself are guaranteed,<sup>151</sup> a pre-dispute consumer arbitration clause should pass the fairness test to which the Directive subjects all standard contract terms. The CJEU has confirmed that it is for the national courts to determine the fairness of standard contract terms, taking into consideration the particular circumstances of each case.<sup>152</sup> When a national court assesses the fairness of a standard term, it applies its domestic law implementing the Directive but the “court is bound to interpret national law, so far as possible, in the light of the wording and the purpose of the directive concerned in order to achieve the result sought by the directive.”<sup>153</sup> Article 4(1) of the Directive requires an assessment of the

<sup>149</sup> Nr2(b) ZPO, §§1060(2), 1059(2).

<sup>150</sup> Article 1488(1) Code de procédure civile.

<sup>151</sup> Kommunalbauten, *supra* note 115, at para. 22; *see* Section IV.

<sup>152</sup> Kommunalbauten, *supra* note 115, at para. 22; Claro *supra* note 27, at para. 22, 23; Basedow, *supra* note 45, at para. 43-50.

<sup>153</sup> Joined Cases C-397/01 to C-403/01, Pfeiffer v. Deutsches Rotes Kreuz, 2004 E.C.R. I-8835, para. 113; Case C-14/83, von Colson and Elisabeth Kamann v. Land Nordrhein-Westfalen, 1984 E.C.R.

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term in question on the basis of all the circumstances attending the conclusion of the contract.<sup>154</sup> A crucial aspect of the proposal is the consumer's choice between arbitration and litigation at the time of conclusion of the contract.

First, the hostility towards binding pre-dispute arbitration clauses is to a large extent founded on the assumption that the consumer is not aware of the importance of such clauses before an actual dispute has arisen.<sup>155</sup>

There is a valid concern that, at the time of entering into the contract, the consumer will not think about how to solve a potential future dispute, and may thus unknowingly waive her right to go to court. Contract law is based on the notion of party autonomy, the normative justification based on the idea that individuals know best what is good for them.<sup>156</sup> That idea is jeopardized if the consumer does not even consider what is good for him or her. Under the proposal here advanced, the consumer is free to choose between arbitration and litigation but must decide one way or another to conclude the contract. Assuming that a person who has to make a choice is more likely to think about his or her options, the proposal would reduce the risk of the consumer unknowingly opting for arbitration. Moreover, assuming that arbitration is the more cost-efficient way to solve disputes,<sup>157</sup> in a competitive market an 'arbitration' contract would be offered at a lower price compared to a 'litigation' contract. This indicates to the consumers that she gets 'less' when opting for arbitration, making it more likely that she understands that she waives her right to go to court. Additionally, it is proposed that the arbitration agreement should be contained in a separate document that must be signed or clicked—if the contract is concluded online—independently from the underlying contract.<sup>158</sup> Finally, the trader would have to provide easily understandable and comprehensive information to the consumer on the risks of arbitration. This would further raise the consumer's awareness of the risks associated with choosing arbitration and reduce the possibility that the consumer unknowingly waives her right to go to court.

Second, the Court heavily relies on the idea that the consumer is in a weak position vis-à-vis the trader, because she lacks bargaining power and

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1891, para. 26; *see also* Case C-106/89, *Marleasing v. La Comercial Internacional de Alimentacion*, 1990 E.C.R. I-4135; Case C-32/93, *Webb v EMO Air Cargo*, 1994 E.C.R. I-3567.

<sup>154</sup> *Kommunalbauten*, *supra* note 115, at para. 21.

<sup>155</sup> *See* Schwartz, *supra* note 7, at 114 ff.

<sup>156</sup> Wagner, *supra* note 41, at 47.

<sup>157</sup> Hodges, *supra* note 1, at 353.

<sup>158</sup> *See* Zivilprozeßordnung (civil procedure statute) [ZPO] §1031(5).

knowledge, leading her to agree to terms that have been pre-drafted by the trader without the ability for her to influence the content of those terms.<sup>159</sup> The Directive seeks to restore the balance between the parties, by protecting the consumer.<sup>160</sup> While the wholesale assumption of weak consumers has been convincingly criticized,<sup>161</sup> it is true that the consumer lacks bargaining power, in the sense that she is unlikely to be able to negotiate individual terms of the contract.<sup>162</sup> For example, in *Claro*<sup>163</sup> and *Asturcom*, the consumer had the option to either agree to arbitration or to go to a competitor.<sup>164</sup> An important aspect of the consumer's weakness stemmed from the fact that she had no choice as to arbitration or litigation.<sup>165</sup> By contrast, in the proposal advocated in this paper, the consumer would be able to choose the dispute-resolution mechanism she deems appropriate. However, it must also be recognized that a consumer who chooses arbitration will be unable to influence the actual content of the arbitration clause, so that the justification for court review continues to exist.

Third, it could be argued that the economic rationale for controlling standard contract terms is not as convincing where the consumer has a choice. The rationale for subjecting standard contract terms to judicial control is the risk of a partial market failure.<sup>166</sup> Standard contract terms tend to lead to an unbalanced distribution of risks between traders and consumers.<sup>167</sup> Instead of balancing the contractual risks between the parties, traders tend to draft standard contract terms exclusively in their own interests at the expense of consumers, shifting risks to consumers that, under the applicable default rules, would normally be borne by traders.<sup>168</sup> The shifting of risks to the consumer would not in itself be problematic if the

<sup>159</sup> *Claro*, 2006 E.C.R. I-10421, paras 25, 38; *Asturcom*, 2009 E.C.R. I-9579, paras. 29-30. See, e.g., Joined Cases C-240/98 to C-244/98, *Océano Grupo Editorial and Salvat Editores*, 2000 E.C.R. I-4941, para. 25; Case C-243/08, *Pannon GSM Zrt*, 2009 E.C.R. I-4713, para. 25; Case C-415/11, *Aziz*, March 14, 2013, para. 45; Case C-169/14, *Sánchez Morcillo*, July 17, 2014, para. 23; STEPHEN WEATHERILL, *EU SPORTS LAW* ch 2, text at fn. 85 (2017) (not yet published).

<sup>160</sup> *Claro*, 2006 E.C.R. I-10437, paras 36, 38; *Asturcom*, 2009 E.C.R. I-9579, para. 30.

<sup>161</sup> Wagner, *supra* note 41, at 67-68.

<sup>162</sup> *Id.* at 67.

<sup>163</sup> But the arbitration clause in *Mostaza Claro* gave the consumer the option to transfer the dispute to the courts.

<sup>164</sup> *Claro*, 2006 E.C.R. I-10437, para. 16; *Asturcom*, 2009 E.C.R. I-9579, para. 25.

<sup>165</sup> *Claro*, 2006 E.C.R. I-10437, para. 25; *Asturcom*, 2009 E.C.R. I-9579, para. 29-30.

<sup>166</sup> Basedow, *supra* note 45, at para. 5. See also Wurmnest, *supra* note 71, at §307 para. 41.

<sup>167</sup> *Claro*, 2006 E.C.R. I-10437, para. 16; *Asturcom*, 2009 E.C.R. I-9579, para. 25.

<sup>168</sup> Basedow, *supra* note 45, at para. 3.

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consumer's acceptance were an expression of her informed consent.<sup>169</sup> However, the concern is that the consumer submits herself to terms that have been pre-formulated by the trader because of the information and motivation gap between them. For consumers who enter into just one transaction of the sort, it is not economically reasonable to invest the time and money to try to change standard contract terms through negotiations or to compare standard contract terms used by one trader with those used by another or even to take legal advice about their scope and effect.<sup>170</sup> The trader, by contrast, concludes a multitude of similar transactions; for him, it is reasonable to invest time and money into the drafting of standard contract terms, with the objective of shifting some or most of the risks to consumers.<sup>171</sup> The problem is that the notion of freedom of contract, discussed above, which normally would lead to a 'fair result,' is unreliable because of the prohibitively high transaction costs<sup>172</sup> that the consumer would incur through the contract negotiations.<sup>173</sup> Crucially, competition between traders is no corrective here, because the consumer, by virtue of the complexity of the issues involved, cannot reasonably be expected to compare the standard terms used by different traders.<sup>174</sup> In the language of law and economics, the market for standard contract terms is an *Akerlof*-market.<sup>175</sup> It is impossible for a consumer to compare, for example, standard contract terms by trader X, which seek to exclude 'consequential loss' or 'indirect or consequential loss',<sup>176</sup> with standard contract terms used by trader Y containing a 'duty defining' clause.<sup>177</sup> Without legal advice, a consumer will be incapable of determining which set of standard contract terms may better serve her interests.

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<sup>169</sup> *Id.* at para. 4.

<sup>170</sup> *Id.* at para. 5.

<sup>171</sup> *Id.*

<sup>172</sup> Georg von Wangenheim & Sylvia Rückebeil, *Die Unterschiedlichen Grundlagen von deutschem AGB-Recht und Europäischer Klauselvertragsrichtlinie – Ökonomische und Rechtliche Überlegungen zu Systembrüchen in der Umsetzung von Europäischem Recht*, in *ÖKONOMISCHE ANALYSE DER EUROPÄISCHEN ZIVILRECHTSORDNUNG* 480-507, (Thomas Eger & Hans-Bernd Schäfer eds., 2007).

<sup>173</sup> Basedow, *supra* note 45, at para. 5.

<sup>174</sup> *Id.*

<sup>175</sup> George Akerlof, *The Market for Lemons: Qualitative Uncertainty and Market Mechanism*, 84 Q. J. ECON. (1970); Wurmnest, *supra* note 71, para. 41.

<sup>176</sup> *Cf.* PEEL, *supra* note 79, 247, para. 7-017.

<sup>177</sup> *Cf.* PEEL, *supra* note 79, 248, para. 7-020.

If the consumer is given the option to arbitrate she is dealing with one issue only. It would be relatively easy for her to compare the arbitration clauses used by different traders. Ideally, the European Union would establish an institution with the capacity to administer consumer arbitrations across the European Union. Traders would have the option to use that institution for their arbitrations. Provided it operates under procedural rules that seek to assist consumers, such an institution would increase the legitimacy of consumer arbitrations and strengthen consumer confidence in the arbitral process. Arbitrations administered by the institution would proceed according to the same procedural rules, wherever the place of arbitration in the European Union. The consumer would know that the standards she could expect in arbitrations administered by the institution would be the same. This would allow consumers to focus on a price comparison across borders. For example, a consumer who wants to buy a particular computer could compare the prices online—perhaps even helped by comparison sites (i.e. shopbots). It would be relatively easy for her to find out what different traders charge for ‘litigation’ and ‘arbitration’ contracts.

Finally, we must discuss whether the option that the Directive gives to consumers to enforce a term despite its unfairness is similar to the pre-dispute choice between arbitration and litigation here proposed. It is suggested that giving consumers the choice to enforce an unfair term is a crucial concept under the Directive, the importance of which may have been underestimated in national legislation implementing the Directive.<sup>178</sup> The consumer’s option to enforce a term despite its unfairness achieves a higher level of consumer protection than would be achieved if the unfair term were simply invalid: first, if the consumer, having considered her options in a particular situation, comes to the conclusion that enforcing the clause is better for her than not enforcing it, the Directive allows her to enforce the term. She would not have that power if the unfair term were regarded as invalid. Second, in line with Article 7(1) of the Directive,<sup>179</sup> which provides that the future continued use of unfair terms should be prevented, the sanction imposed by the Directive may discourage traders from using unfair terms because of the uncertainty that this causes. Traders rely on pre-formulated standard contracts in order to achieve legal certainty in a cost-efficient way. Making unfair terms non-binding on consumers destroys that certainty.

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<sup>178</sup> For example, under Spanish law, unfair terms are void. Law 7/1998, *supra* note 72, at art. 8(2). In German law, unfair terms are invalid. *See* §§ 307, 308, 309 BGB.

<sup>179</sup> Unfair Terms in Consumer Contracts, *supra* note 26.



Under the Directive, an unfair arbitration agreement would be unenforceable unless the consumer chooses to enforce it. The default position is court litigation but the consumer can choose arbitration. It is arguable that the effect of our proposal would be similar. The crucial question, however, concerns the timing of the consumer's choice. Is a *pre-dispute* choice between litigation and arbitration similar to the regime laid down by the Directive? The Directive is silent as to when the consumer ought to exercise her choice. Article 6(1) of the Directive merely provides that unfair terms shall not be binding on consumers.<sup>180</sup> The Directive envisages a situation where the contract has been concluded. This is evident from the use of the word "terms" in Article 6(1). According to Article 2(a) of the Directive, "[u]nfair terms" are "contractual terms,"<sup>181</sup> which presupposes that the parties have reached an agreement. By contrast, in case of a *pre-dispute* choice the parties have not yet agreed and have not formed a contract composed of terms. Before the consumer has chosen arbitration there is no "term" in the sense of Article 6(1). Moreover, the purpose of Article 6(1) is to protect consumers from unfair terms fully. Before a dispute has arisen, the consumer may not be fully aware of the implications of her choice. So a *pre-dispute* choice between litigation and arbitration should not mean that the requirements laid down by the Directive are necessarily satisfied but that national courts will view it with favour when determining the fairness of the arbitration clause. The consumer's exercised choice for arbitration *may* be enforceable under the Directive but the final answer very much depends on all the circumstances attending the conclusion of the contract.<sup>182</sup>

### Safeguards

There is no reason to vilify arbitration as a method to solve disputes between consumers and traders; yet, it is obvious that consumer arbitration involves risks that need to be addressed.<sup>183</sup> While commercial arbitration and consumer arbitration share certain common features, there are important

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<sup>180</sup> *Id.*

<sup>181</sup> *Id.* at art. 6(1).

<sup>182</sup> See Case C-237/02, *Freiburger Kommunalbauten*, 2004 E.C.R. I-3403, ¶ 21 ("As to the question whether a particular term in a contract is, or is not, unfair, Article 4 of the Directive provides that the answer should be reached taking into account the nature of the goods or services for which the contract was concluded and by referring . . . to all the circumstances attending the conclusion of the contract").

<sup>183</sup> *Ein Rechtsrahmen*, *supra* note 76, at 934.

differences. In commercial arbitration, the parties operate more or less at arm's length, whereas consumers may face situations where their ability to make a rational choice is impaired.<sup>184</sup> For example, while designating Paris as the place of arbitration may be a perfectly reasonable choice in the context of a sales contract between Spanish and German companies, the same place would raise serious issues for a German consumer who bought a product online from a Spanish company.

The purpose of this section is to develop and discuss some of the safeguards that should be put in place in order to guarantee consumers' access to justice. The guiding principle is equality of arms.<sup>185</sup> It is suggested that consumer arbitrations require a special statutory regime assisting consumers. Standard arbitration clauses referring to such a regime would not be caught as potentially unfair terms by paragraph 1(q) annex of the Directive.

### 1. Arbitration agreement

As mentioned above, it is proposed that the arbitration agreement should be contained in a separate document that the consumer would have to sign or click independently from expressing consent to the underlying contract. Such a requirement would put emphasis on the importance of the arbitration clause, by drawing the consumer's attention to the matter specifically. Moreover, the trader must provide the consumer with easily understandable and comprehensive information on the risks involved in arbitration. In particular, the trader must stress that by agreeing to arbitration the consumer waives her right to go to court.

However, in order to readjust the balance between consumer protection and arbitral efficiency, it is suggested that, once the consumer has chosen arbitration, challenges to the fairness of the arbitration agreement—as distinct from the arbitration itself—can only be raised before the award is rendered. These challenges could be brought either by the consumer or, sua sponte, by the to-be-established European Court of Consumer Arbitration.

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<sup>184</sup> *Mandatory Contract Law*, *supra* note 41, at 61, 67-68.

<sup>185</sup> *Ein Rechtsrahmen*, *supra* note 76, at 936.

## 2. European Court of Consumer Arbitration

It is proposed that the European Union, using its powers under Article 352 of the Treaty of the Functioning of the European Union (TFEU),<sup>186</sup> should establish a European Court of Consumer Arbitration (ECCA), modelled on the ICC International Court of Arbitration<sup>187</sup> but with distinctive features taking into consideration the differences between consumer arbitration and international commercial arbitration. Traders offering arbitration to their consumers could opt into the ECCA and it may be in traders' interest to do so, as this would reassure consumers of the legitimacy of the process and perhaps reduce overhead costs.

Aided by a Secretariat, the ECCA's main role would be to administer consumer arbitrations across Europe. The ECCA would not decide any disputes itself; that would be the task of independent arbitrators appointed in accordance with the rules of the ECCA. In order to foster strong ties with the legal communities across Europe, the ECCA should work closely with national committees in each EU Member State. The members of the ECCA could be appointed for three-year terms on the nomination of national committees. Each national committee should propose to the ECCA two members—one nominated by national consumer associations, the other put forward by national traders' associations. In the performance of their functions, ECCA members should remain independent of national committees.

As to its specific functions, the ECCA should have the power to assess whether there is a *prima facie* arbitration agreement. The ECCA should also be able to assess of its own motion the fairness of the arbitration clause, paying particular attention to the information provided to the consumer at the time of concluding the contract on the risks of arbitration. The ECCA (or the arbitrator) would send to litigation disputes involving arbitration agreements that deemed to be unfair.

The ECCA would fix the place of arbitration, which should be as close as possible to the consumer's domicile.<sup>188</sup> The consumer should also be able

<sup>186</sup> Cf. Case C-436/03, *Parliament v. Council* (European Cooperative Society), 2006 E.C.R. I-3733.

<sup>187</sup> *Functions of the ICC International Court of Arbitration*, <http://www.iccwbo.org/About-ICC/Organization/Dispute-Resolution-Services/ICC-International-Court-of-Arbitration/Functions-of-the-ICC-International-Court-of-Arbitration/>.

<sup>188</sup> See discussion with respect to an exclusive forum selection clause in Joined Cases C-240/98 to C-244/98, *Océano Grupo Editorial*, 2000 E.C.R. I-4941, ¶¶ 21-24. Under no circumstances should the cost of travelling to the place of arbitration be greater than the amount in dispute. See *Asturcom supra* note 28, para 25.

to attend any hearings via videoconference from her own home, so as to ensure that travel costs do not deter her from participating in the proceedings—particularly in cases where the amount in dispute is small.

Moreover, the ECCA should appoint or replace the arbitrators, and decide on any challenges filed against the arbitrators. In appointing arbitrators, the ECCA should work closely with the national committee of the ECCA in the country of the consumer's residence. The ECCA should appoint the arbitrator upon proposal of the national committee, taking into consideration the nationalities of consumer and arbitrator, their mother tongues and their places of residence. The arbitrator must be able to speak the consumer's mother tongue. Whenever possible, the arbitrator should share the consumer's nationality. In order to guarantee neutrality of the proceedings, a 'repeat player' situation must be avoided where the same arbitrator is appointed in disputes involving a particular trader. To increase transparency, the names of arbitrators and the number of proceedings in which they have been appointed should be published on the ECCA's website.

The ECCA Rules must commit to a dispute-resolution mechanism that guarantees neutrality, speed and cost-efficiency. The ECCA should monitor the entire arbitral process to ensure that it proceeds in accordance with its Rules. In order to assure the quality and enforceability of awards each award should be scrutinized by the ECCA—in a similar way that the ICC International Court of Arbitration scrutinizes awards under Article 34 ICC Rules of Arbitration 2017: the ECCA "may lay down modifications as to the form of the award and, without affecting the arbitral tribunal's liberty of decision, may also draw its attention to points of substance."<sup>189</sup> This means that the ECCA may raise issues it deems relevant without, however, encroaching on the arbitrator's power to solve the dispute. In order to guarantee continuing improvement of the quality of awards and in the interest of transparency, anonymized awards should be published and archived on the ECCA website of the ECCA.

The ECCA should set and, where necessary, adjust the costs of the arbitration. The costs include the ECCA's administrative expenses, the fees and expenses of the arbitrators.<sup>190</sup> Here, traders ought to make concessions

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<sup>189</sup> ICC Rules of Arbitration 2017, art. 34.

<sup>190</sup> *Functions of the ICC*, *supra* note 187.

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and pay for the greater share of the costs. Finally, the ECCA should be able to make preliminary references to the CJEU under Article 267 TFEU.<sup>191</sup>

### Concluding remarks

The purpose of the article was to show that the hostility towards pre-dispute consumer arbitration clauses is unfounded where appropriate safeguards are put in place to guarantee access to justice. Assuming that arbitration is the more cost-efficient dispute-resolution mechanism for traders, pre-dispute arbitration clauses are even in the interest of consumers because, in a competitive market, those who agree to arbitration will be able to share in the traders' cost savings. In order for consumers to realize this cost-saving potential, pre-dispute arbitration clauses would have to be binding. At the time of entering into the contract, the consumer should have the choice between arbitration and litigation. Such a choice would better address the regressivity problem that is caused by open access policy litigation than would removing access to courts altogether.

The European Union, using its powers under Article 352 TFEU,<sup>192</sup> should establish a European Court of Consumer Arbitration as an optional institution whose purpose is to assist consumers. In their standard arbitration clauses traders could opt for ECCA administered arbitrations. This proposed system would have various benefits. Standard arbitration clauses referring to the ECCA would not be caught as potentially unfair terms by paragraph 1(q) annex of the Directive. The ECCA would have the power to challenge, of its own motion, the fairness of the arbitration clause at the beginning of the arbitral proceedings. The ECCA could attend to the unfortunate repercussions of *Claro* and *Asturcom* on arbitral efficiency, readjusting the balance between arbitral efficiency and consumer protection. In ECCA-administered arbitrations, national courts should no longer challenge the fairness of arbitration clauses of their own motion. That would strengthen arbitral efficiency. Moreover, the ECCA should be able to refer questions on the interpretation of EU law to the CJEU. The ECCA could set a new standard in consumer arbitrations raising the legitimacy of arbitration as a dispute-resolution mechanism between traders and consumers.

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<sup>191</sup> If the European Union establishes the ECCA, then TFEU art. 267 may have to be modified. Presently, Article 267 of the TFEU provides that "any court or tribunal of a Member State" may request the CJEU to give a ruling.

<sup>192</sup> *Cf.* Case C-436/03, *Parliament v. Council* (European Cooperative Society), 2006 E.C.R. I-3733.