The Enforceability of Unfair Arbitration Agreement in Consumer Disputes before Dubai Courts.

Omar Husain Qouteshat
University of Central Lancashire, Preston, UK
OHJQouteshat@uclan.ac.uk

Abstract

Online transactions in the Gulf Cooperation Council (GCC) region and particularly Dubai has undergone a phenomenal rise in recent times. However, reform is required to improve the legislation as it relates to consumers' right. Upon successful completion of online transactions, consumers often end up agreeing to unclear arbitration clauses among other terms and conditions, thereby bearing extra costs and expenses. They may also waive their right to litigate, which is a primary consideration and should be secured. This article seeks to examine current legislation and court approaches in Dubai, relating to consumer rights. Essentially, possible solutions directed at protecting consumers from referring to arbitration.

Keywords

consumer protection; arbitration; e-commerce; enforcement; United Arab Emirates

1 Introduction

E-commerce poses both risks and challenges that may be addressed by including arbitration clauses in online contracts. In other words, by completing and agreeing to the terms and conditions of the online contracts, consumers might agree to an arbitration clause among the general conditions. Hence, they might be compelled to arbitrate and waive their right to take legal action before local courts.[1] However, there is no certain or effective consumer protection policy against unfair arbitration clauses in Dubai. The main disadvantage regarding consumer protection from unfair arbitration clauses in Dubai is that the legal system and Dubai Courts lack provisions and cases that clearly protect consumers. Therefore, this article explores Dubai Courts' approaches in regards to arbitration clauses, in order to examine their ability to establish a control for arbitration agreements in consumer contracts under the current legal system.

The main concerns regarding consumer arbitration are that a large number of online transactions are based on adhesion contracts, and usually consumers are not allowed to amend or negotiate any of the terms and conditions. Essentially, consumers should be protected from referring to unfair arbitration; whether they concluded their transaction online or offline. This is because arbitration may represent a threat to consumers, especially if the cost is high or the consumers have to deal with foreign laws with which they are unfamiliar.

[1] See http://unctad.org/en/docs/edmmisc232add20_en.pdf, accessed 2 February 2016.

However, the validity of arbitration agreement in consumer contracts relates to two different aspects, concerning the type of agreement and the applicable law.[2]

The first part of this article starts by explaining the main differences between pre- and post-dispute arbitration agreement in consumer contracts, to highlight the importance of controlling the enforceability of pre-dispute rather than post-dispute arbitration agreements.

In the second part, the study examines Dubai Courts' approaches to the enforceability of arbitration clauses.

In the final part, due to the lack of consumer protection in Dubai, the study suggests several potential solutions to guarantee consumer protection based on the current law.

2 The Differences between Pre- and Post-dispute Arbitration Agreements

A pre-dispute arbitration agreement refers to settling any potential dispute by arbitration before the dispute arises. On the other hand, post-dispute means that the parties have agreed to refer their dispute to arbitration retroactively, after the dispute arose.

Another difference between pre- and post-dispute arbitration agreement is that the latter usually has more detailed clauses, as disputants may set out the comprehensive details of the agreement, including the applicable law, the arbitrators, the manner of exchanging documents, the place of arbitration and various other procedures. On the other hand, the pre-dispute agreement is just a short line usually included within the terms and conditions of the standard contract, indicating that any dispute that might arise in the future between the parties will be submitted to arbitration.

In regard to the enforceability of each type, post-dispute arbitration agreement is considered in most countries to be valid because parties have the choice to decide the most appropriate mechanism to settle their dispute after it arises, which clearly indicates that their real intention is to arbitrate, which none of the parties was compelled to arbitrate. In contrast, pre-dispute agreement or arbitration clauses are usually considered invalid and unenforceable by most legal systems, especially in contracts concluded between a weak party who has no choice in the terms of the contract and a strong party who usually sets the terms and conditions according to his interest. [3]

However, if the parties' intention was to arbitrate and they agree to refer their dispute to arbitration after it arises, then the clause shall be considered valid, especially when the consumer has the opportunity to choose between litigation and arbitration. Nonetheless, according to some laws this is not always the case in consumer contracts. The post-dispute arbitration agreement might be considered to be invalid even if the parties agreed to arbitrate after the dispute arises. For example, in the UK, if the amount of the dispute does not exceed £5000,[4] the clause will be considered invalid.

The New York Convention does not invalidate the pre-dispute arbitration agreement explicitly and there is no difference between the validity of pre- and post-dispute arbitration agreement according to the provisions of the convention. However, in some countries consumer arbitral awards may be set aside and considered to be invalid and unenforceable on the grounds that it is contrary to the public policy under Article V(2)(b) of the New York

[2] J. Hörnle, *Cross-border Internet Dispute Resolution* (Cambridge University Press, Cambridge, 2009), pp.171–185; R. Pablo Cortes & F. Esteban De la, 'Building a global redress system for low-value cross-border disputes', *International & Comparative Law Quarterly* 407 (2013): 435.

[3] G. Kaufmann-Kohler & T. Schultz *Online Dispute Resolution: Challenges for Contemporary Justice* (Kluwer Law International, The Hague, 2004), 173.

[4] Arbitration Act 1996, s. 91(1).

Convention. The restriction in Article V(2)(b) may apply to consumer disputes as long as the applicable law considers consumer protection part of the country's public policy.[5]

The main aim in controlling pre-dispute arbitration agreements in consumer contracts is states' intention to protect their domestic consumers from referring to arbitration instead of local courts, as it affects a vital right to litigate (in addition to the high costs of arbitration).[6] Besides the fact that pre-dispute arbitration agreement affects a vital right to litigate, consumers may not appreciate the importance of this clause initially as they are not expecting any disputes to arise in the future, and they may not consider the effect of this clause at the time of the agreement.[7] According to Hörnle,[8] the issue of arbitration clauses found in consumer contracts is that the consent of the weaker party (consumer) is not clear compared to other types of contract. These contracts are offered on a take-it-or-leave-it basis, and the consumer has limited choices between leaving and accepting the contract as it stands.

In conclusion, post-dispute arbitration agreement in consumer contracts is usually enforceable, with some exceptions. On the other hand, due to the lack of international regulation regarding the enforceability of pre-dispute arbitration agreements, enforcing pre-dispute arbitration agreements depends on the country's approach.

3 The Enforceability of Pre-dispute Arbitration Agreement in Consumer Contracts in Dubai and Dubai International Financial Centre (DIFC)[9]

Several countries aim to protect their consumers from referring to arbitration by introducing strict laws that invalidate this type of arbitration agreement.[10] However, the courts' approach in Dubai toward the enforceability of pre-dispute arbitration agreement in consumer contracts is uncertain, due to the lack of explicit provisions in this regard. Moreover, no study has examined consumer protection against pre-dispute arbitration agreements under the laws of Dubai and DIFC. Therefore, this section examines the approach applied toward the enforceability of consumer arbitration in DIFC and Dubai, and suggests solutions to protect consumers from pre-dispute arbitration clauses in consumer contracts based on the established law.

3.1 *Consumer Protection under the DIFC Arbitration Law*

DIFC Arbitration Law states clearly the issue of consumer arbitration along with the issue of employment arbitration. Article 12(1) states clearly that parties may agree on arbitration which might be concluded at any stage, either prior or subsequent to a dispute arising. Nevertheless, Article 12(2) of the same Law states the circumstances under which the pre-dispute arbitration agreement shall be invalid if it was concluded in an employment or consumer contract.

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[5] UNCITRAL Working Group III (Online Dispute Resolution) twenty-sixth session (Vienna, 5-9 November 2012). A/CN.9/WG.III/XXIII/CPR.1/Add.1 para 21.

[6] *Iberia Credit Bureau* v. *Cingular Wireless LLC, Sprint Spectrum Company, Centennial Wireless* 379 F3d 159, 168-169 (5 h Cir 2004).

[7] *Supra* note 2.

[8] J. Hornle, 'Legal Controls on the Use of Arbitration Clauses in B2C E-commerce Contracts', *Electronic Business Law* 8(8) (2006): 9.

[9] DIFC courts are based on an autonomous common law jurisdiction that is geographically located within the UAE, but retains judicially independent courts and law-making powers with its own body of law, including arbitration law, corporate law, contracts law and employment law, as well as its own court system.

[10] *Supra* note 3 at 173. French Civil Code, Art.2061 states that domestic pre-dispute arbitration agreements with consumers are invalid.

However, arbitration agreement in employment contracts within the meaning of the DIFC Employment Law 2005 will not be enforceable except where the employee has given written consent or submitted to arbitration proceedings under the arbitration agreement.[11] A similar approach is applied in relation to consumer contracts. DIFC Arbitration Law states the exceptions when the court may validate the arbitration agreement in this type of contract. These exceptions are stated in Article 12(2)(b) as follows:

> a. with his written consent given after the dispute in question has arisen; or
> b. where he has submitted to arbitration proceedings commenced under the Arbitration Agreement, whether in respect of that dispute or any other dispute; or
> c. where the DIFC Court has made an order disapplying this Article on the grounds that the DIFC Court is satisfied that it is not detrimental to the interests of the employee or consumer for the dispute in question to be referred to arbitration in pursuance of the Arbitration Agreement instead of being determined by proceedings before a Court. For the purposes of this Article, 'consumer' means 'any natural or legal person who is acting for purposes which are outside his trade, business or profession'.

Article 12(2)(b) implies that the real intention of the consumer is important and it should be expressed explicitly by one of the three situations below:

First, post-dispute arbitration agreement is always valid. Article 12(2)(b) states that the consumer or employee should provide the court with written consent to arbitrate after the dispute has arisen.

Secondly, whether the employee or consumer purposely and wilfully commenced a proceeding before the arbitral tribunal or not. In other words, the law is required to ensure that the consumer was not forced to arbitrate and he consents to arbitration.

Finally, the DIFC Courts shall examine the pre-dispute arbitration agreement before enforcing it. In this case, the court has to determine the enforceability of the arbitration agreement according to the court's convenience, whether it finds that the arbitration shall be for the benefit of the consumer or not. However, applying the final exception in the absence of a specific control or standard may lead to inappropriate decisions.

Under the DIFC legal system, consumers obtain greater protection when referring to alternative dispute resolutions, especially arbitration. This might be considered as an ideal approach in regard to consumer protection, for the reasons explained earlier in this article, which are the high costs of arbitration, the uncertainty of the real intention to arbitrate and the possibility that the consumer might find himself dealing with a foreign legal system that he is not familiar with.

3.2 *Enforceability of Pre-dispute Arbitration Agreements in Dubai*

Unlike the DIFC Arbitration Law, the Civil Procedure Code does not differ between pre- and post-dispute arbitration agreement and does not provide any protection for consumers.

Before pre-dispute arbitration agreements and the issuing of the Civil Procedure Code, traditional Arab-Islamic law in the polities of the modern United Arab Emirates (UAE) was silent in regard to pre-dispute arbitration agreements, which silence was interpreted as a prohibition.[12] Thus, the courts that examine the validity of pre-dispute arbitration agreements in consumer contracts according to the Islamic law consider it null and void.

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[11] C. Mainwaring-Taylor, 'Amended Arbitration Law for the Dubai International Financial Centre: DIFC as the seat of arbitration', *International Arbitration Law Review* 11(6) (2008): 90.

[12] D. Brawn, '*Commercial Arbitration in Dubai'*, Arbitration 80(2) (2014): 156.

However, there is no rule that explicitly invalidates consumer arbitration agreements, whether pre- or post-dispute, under the current Civil Procedure Code and the new federal arbitration draft law. However, few writers have been able to examine the consumer arbitration issue under the Dubai legal system.[13]

As explained earlier, consumers in Dubai do not gain any protection according to the applicable law. Consequently, the enforceability of pre-dispute arbitration agreements in general shall be examined by Dubai Courts on a case by case basis. Therefore, the next part examines the Dubai Courts' general approach toward pre-dispute arbitration agreements.

Usually in consumer contracts, consumers might agree to an arbitration clause incorporated by reference.[14] However, the Dubai Courts' approach is uncertain toward this type of arbitration agreement, whether it be found in commercial or consumer contracts. Therefore, it is important to examine the Courts' approach toward this type of arbitration clause in general.

The next part examines the Dubai Courts' criteria in enforcing an arbitration clause incorporated by reference. The Civil Procedure Code does not state explicitly that the enforcement of arbitration clauses is incorporated by reference in a contract; consequently, the enforceability might differ according to its form (whether it was by reference to a standard unchangeable document, or by reference to unsigned terms and conditions that may be available on request or publicly).

3.2.1 Dubai Courts' Approach toward Arbitration Clauses

In general, parties tend to include arbitration clauses in the main body of a contract. However, this situation might vary as contractual parties may find it more convenient to agree on the specific terms and conditions of a contract in one document, and then refer to another document for the standard terms. For example, parties may make a reference to the arbitration agreement in a standard unchangeable document, by reference to unsigned terms and conditions that may be available on request or publicly and by reference to a clause included in a third-party contract. However, consumers might deal with similar types of contract, and accordingly this article will examine the enforceability of arbitration clauses incorporated by reference to other documents in order to clarify the criteria applied by Dubai Courts.

3.2.1.1 *Enforcement of Arbitration Clauses Incorporated with the General Contract*

Article 203(2) of the Civil Procedure Code states that the only requirement of arbitration validity is that it be in writing. Saloni Kantaria[15] added that Dubai Courts require a clear intention of the parties to submit their dispute to arbitration.

The Courts in Dubai may invalidate the arbitration agreement on grounds clearly stated in the Civil Procedure Code to be invalid, such as that the party who signed the arbitration agreement does not have authority to bind the company.[16] For example, the Dubai Court of Cassation in Petition No. 273 of 2006 issued on 5 March 2007 stated that:

> According to the provisions of Article 203(4) of the Civil Procedure Code, as well as what is established in the adjudication of this Court, the agreement to resort to

[13] R. Ashmore & H. Smith. 'Unilateral Option to Arbitrate: Valid in the UAE?', see http://kluwerarbitrationblog.com/blog/2015/03/04/unilateral-option-to-arbitrate-valid-in-the-uae/, accessed 4 January 2016; P. Punwar & M. Musika, 'The United Arab Emirates ('UAE')', *Yearbook of Islamic and Middle Eastern Law Online* 16(1) (2010): 229.

[14] *Walker* v. *BuildDirect.com Technologies, Inc.*, 2015 OK 30 (2015) (on certification from 10th Cir).

[15] S. Kantaria, 'Is your Arbitration Agreement Valid in the United Arab Emirates?', *Arbitration* 80(1) (2014): 16.

[16] Civil Procedure Code Article 203(4) & 58(2).

> arbitration may only be made by the party having capacity to dispose of the disputed right and not by those who have the capacity to resort to litigation.

In another case, the Dubai Court of Cassation in Petition 537 of 1999 on 23 April 2000 enforced an award despite the argument of the petitioner to set the award aside on the grounds of lack of capacity to agree to arbitration on behalf of the company.

Under the provisions of the Civil Procedure Code, if the party failed to provide the court with the arbitration agreement, it is not a ground for refusal. Nevertheless, the courts' judgments approved that this might not be the situation. The Dubai Court of Cassation in 1997 accepted an appeal from the lower court's ratification of an award on the grounds that the award did not contain either the arbitration agreement or terms of reference.[17] This requirement has since been applied by the Federal Supreme Court as follows:

> The lawmaker mandates that provisions relating to arbitration should be followed such as that the arbitration agreement must be attached to a copy of the award, with an addendum of the statements and documents of the parties, grounds, pronouncement, date and place of issue of the award and signatures of the arbitrators.[18]

Moreover, Dubai Courts do not necessarily require the arbitration agreement to be physically attached to an award, but the Dubai Court of Cassation in its decisions stated that compliance can be achieved by quoting the arbitration agreement in an award, rather than including a full copy.[19] However, if the parties failed to evidence such an agreement it might be a ground for challenge. In a recent court decision, the Dubai court of Cassation stated that the legislator required the arbitration agreement to be attached to the award in order to able the court to ensure that the arbitral tribunal did not exceed its authority, and failing to do so will lead to invalidation of the award.[20] Michael Grose[21]explained that the rational for this requirement is that a court, in the exercise of its residual supervisory jurisdiction, must be able to ensure that the scope of an arbitration agreement has not been exceeded,[22] one of the prescribed grounds for annulment.[23]

Accordingly, the Dubai Courts are generally willing to enforce the arbitration clause,[24] unless there is an article that states clearly the prohibition or invalidity of such an agreement that the party can prove is applicable to the matter in his case. Moreover, the party who is seeking the enforcement should provide the court with a valid arbitration agreement to guarantee the enforcement. However, even if the party provided the court with the arbitration agreement, still the court may refuse to enforce the final award as explained in the section below.

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[17] Dubai Cassation No. 173/1996 dated 16 March 1997. The court held that this was a breach of the requirements of UAE Civil Procedure Code, Article 212.

[18] Federal Supreme Court No. 449/21 dated 11 April 2001.

[19] Dubai Cassation No. 277/2002 dated 13 October 2002 and 32/2014 dated 31 March 2014.

[20] Dubai Cassation No.282/2012 dated 3 February 2013.

[21] Michael Grose, *Construction Law in the United Arab Emirates and the Gulf* (John Wiley & Sons, New York, 2016), p. 274.

[22] Dubai Cassation No.39/2005 dated 16 April 2005 in which the court allowed the appeal and reinstated the arbitration award on the basis that this recited the agreement to arbitrate, Dubai Cassation No. 486/2008 dated 30 October 2008; and Abu Dhabi cassation No. 519/2013, dated 2 July 2013.

[23] UAE Civil Procedure Code, Article 216(1)(a).

[24] *Supra* note 15 at 16.

3.2.1.2 *Arbitration by Reference to a Standard Unchangeable Document*

In order to avoid repetition, the parties may refer to an arbitration clause that is included in a different unchangeable contract or document which is not part of the original contract. For example, parties would sign a customised contract that is made for a particular matter then refer to the arbitration agreement stipulated in another contract.

Arbitration agreements by reference to a different standard document are generally widespread in construction contracts, which might occur in consumer contracts. The ruling of the Courts of Dubai toward this type of arbitration clause can be found in the Dubai Court of Cassation decision in Petition No. 462/2002 in 2/3/2003. The Court decided that arbitration agreements incorporated by reference to the International Federation of Consulting Engineering (FIDIC) Conditions of Contract for Electrical and Mechanical Works is valid and recognised. In this case, parties referred to clause 50.2 of the FIDIC Conditions of Contract for Electrical and Mechanical Works, which provides that any disputes arise between parties will be referred to arbitration under the rules of the International Chamber of Commerce.

However, there are different ways for parties to incorporate the arbitration clause into their contract. For example, parties may state that 'Clause 50.2 of the FIDIC Conditions of Contract for Electrical and Mechanical Works is hereby included in this contract', or they may state that 'if any dispute arises Clause 50.2 of the FIDIC Conditions of Contract for Electrical and Mechanical works, shall apply…'.

This was confirmed by the Dubai Court of Cassation in a similar case wherein an arbitral award was ratified whereby the parties agreed to settle their disputes in accordance with the FIDIC:

> The tender documents included the tender terms and conditions which referred to FIDIC general terms and conditions, specifically clause 67(1) that deals with arbitration in accordance with Dubai Chamber of Commerce rules and FIDIC.[25]

Generally, an arbitration clause that was not specifically signed by one of the contracting parties might be considered valid and enforceable according to Dubai Courts, if the parties referred to it in a standard and unchangeable document.

3.2.1.3 *Arbitration by Reference to Unsigned Terms and Conditions that May Be Available on Request or Publicly*

In this case, parties may refer to an arbitration clause that is contained in a variable and/or unilateral document that is unsigned. However, Dubai Courts may refuse to enforce this type of agreement unless parties explicitly refer to the arbitration in their agreement. In a Dubai Court of Cassation case in 2012 (Real Estate appeal 153 of 2011, issued on 19 February 2012) the court held that:

> Reference made in the main agreement to an arbitration clause can be construed as an arbitration agreement only if such reference is incorporated explicitly in the main agreement. However, in the event the reference is generally made to incorporate general terms and conditions without including an explicit reference to arbitration to indicate that both parties have agreed to the arbitration, the reference then does not extend to include the arbitration clause.

[25] See http://www.tamimi.com/en/magazine/law-update/section-5/april-5/uae-ratification-of-a-domestic-arbitral-award-and-the-issue-of-arbitration-clauses-incorporated-by-r.html, accessed 3 January 2016.

Dubai Courts invalidate this type of arbitration agreement; it provides that this type of agreement would be valid if the parties explicitly make reference to the arbitration clause. Moreover, an arbitration clause that is located in an external document such as a company's terms and conditions might also be considered invalid, for the reason that it is not signed by the parties, which makes it subject to modification in the future. In this circumstance, even though the parties may not be able to amend the terms and conditions, the courts may refuse to validate the arbitration agreement on the grounds that the parties failed to refer to an arbitration agreement explicitly.

Consequently, this type of arbitration agreement is still valid if the parties stated explicitly the arbitration clause, regardless of the document being unsigned.

3.2.1.4 *Arbitration by Reference to a Clause Included in a Third-party Contract*

Parties may agree to arbitrate by referring to an arbitration clause found in an external contract that is related to one of the parties only (with a third party). However, the Dubai Courts took the same approach by invalidating this type of arbitration agreement unless the parties made an explicit reference to arbitration.[26] Otherwise, they are unlikely to validate the arbitration agreement.

The Dubai Courts consider reference to an external arbitration agreement to be wholly and procedurally deficient. Moreover, the party will not bind himself into an external arbitration agreement in a contract that is subject to amendments and modification by third parties. In short, the Dubai Courts will invalidate this type of arbitration agreement as it falls far short of the unequivocal and steadfast certainty, unless the parties explicitly referred to an arbitration agreement.

In Petition No. 51 (18/5/2003), the Dubai Court of Cassation enforced an arbitration agreement despite its having referred to an arbitration agreement existing in a charter-party contract. The case facts were that the respondent (a ship owner) agreed to transit and ship a consignment of sulphur fuel oil on board his vessel from Saudi Arabia to the UAE, to be delivered to a third party. However, upon delivery it was found that the consignment had become contaminated in transit. Nevertheless, under the insurance policy the consignment owner was to be compensated for any damage arising from the transport or shipment. The parties agreed to appoint a loss adjuster to compensate the loss; the loss adjustors' survey held the respondent responsible for the damage affecting the consignment, and assessed the loss to amount to US$2,340,065.45. The appellant paid the amount to the third party and then brought a claim against the respondent for compensation.

The insurance company brought judicial procedures against the ship owner, claiming US$2,364,065 (AED 8,676,120.20). The respondent argued that the dispute should be referred to arbitration, and the court proceedings should be dismissed, stating that 'arbitration clauses contained in the vessel's charter party are herewith incorporated and form a part hereof'. Nevertheless, the Court of First Instance held that the court had jurisdiction over the dispute and dismissed the objection of the respondent in regard to the existence of an arbitration clause, and ordered the respondent to pay the amount of US$ 2,340,065.45, plus interest.

Notwithstanding, the Court of Appeal overturned the lower court's decision and decided that there was an arbitration clause, and the dispute should be referred to an arbitration tribunal. This decision was upheld by the Dubai Court of Cassation, as it stated that the arbitration clauses in charter-party agreements are often incorporated by reference to the bill of lading. While mere reference in a bill of lading to the validity of all the conditions of a charter party is not sufficient to incorporate the arbitration provisions into the bill, a

[26] Dubai Court of Cassation, Petition No. 51 (18/5/2003).

charter-party arbitration clause that is clearly referred to in the bill will be incorporated. It follows that the parties to the bill of lading intended to refer their dispute to arbitration according to the arbitration clause contained in the charter-party contract.

Nevertheless, in order to obtain a valid and effective arbitration agreement by reference to a standard unchangeable document, parties should clearly verify their intention by stating the word 'arbitration' in their contracts, and not just write the number of the article indexing the arbitration agreement. The reason for this is to state with certainty that the party who is waiving his right to litigate has a real intention to arbitrate and recognise the effect of such a clause.

In another recent case *Al Buhaira National Insurance Co.* v. *The Shipping Corporation of India Limited*,[27] the court held that, where the words of incorporation in a bill of lading include a clear reference to the arbitration clause of a charter party, then that arbitration clause will be deemed to be incorporated into the bill of lading. Mere reference in a bill of lading to the conditions of a charter party, without express reference to the arbitration clause, is not sufficient to incorporate the arbitration provisions into the bill of lading, as was noted by the Dubai Court of Cassation in this case.

In conclusion, according to the discussion above, if the parties stated the arbitration clause clearly in their agreement or referred to it explicitly then the arbitration clause shall be enforceable. However, the lack of provisions implies that the courts are intended to enforce an arbitration clause in consumer contracts as long as the parties referred to the arbitration clause explicitly, whether it was in the main contract or by reference.

Furthermore, consumer disputes are not one of the circumstances under which an award is set aside, as stated clearly in Article 216 of the Civil Procedure Code. Moreover, under the Federal Law No. (24) of 2006[28] on Consumer Protection in Dubai, it is not stated that the consumer may gain any protection from referring his dispute to arbitration. Therefore, it is assumed that the court will enforce the arbitration clause in consumer contracts.

The approach under the provisions of the new Federal Arbitration Law is the same as the current approach under the Civil Procedure Code, as it states clearly that if parties referred to an arbitration clause in another document, the parties should explicitly refer to the arbitration clause. Article 8(2)(b) states:

> The reference in a contract to the provisions of a standard contract or to an international convention or any other document containing an arbitration clause constitutes an arbitration agreement in writing, provided that the reference to such clause is clear in regarding that clause as a part of the contract.

Indeed, in consumer contracts it is not enough to examine whether the arbitration clause was stated clearly in the contract or if the parties made reference to the clause explicitly. This approach is not appropriate in examining the real intention of the parties, as the arbitration clause might be included among the terms and conditions of the original contract, or made by reference to a standard unchangeable document, although the real intention of the consumer was not to arbitrate. Therefore, under the terms of the new law there shall be more consumer protection, and the Courts in Dubai shall apply stricter rules to examine the arbitration agreement.

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[27] (Cassation No. 363 of 2011, Civil Appeal). http://www.incelaw.com/en/knowledge-bank/publications/dubai-court-of-cassation-rules-on-incorporation-of-charterparty-terms-into-a-bill-of-lading, accessed 13 June 2016.

[28] See Http://www.ded.rak.ae/en/customerprotection/protection/Documents/Federal%20Law%20No%20(24)%20of%202006%20on%20Consumer%20Protection.pdf, accessed 3 January 2016.

4 Suggested Solutions to Grant More Protection for Consumers in Dubai

There is a lack of cases in Dubai Courts regarding pre-dispute arbitration agreement in consumer contracts, and the provisions that regulate arbitration in Dubai do not contain clear prohibition against submitting any dispute to arbitration. This article consequently explores the approaches applied in different countries and examines whether they might be applied in Dubai according to the current legal system; it offers solutions for other grounds that Dubai Courts may rely on in order to set pre-dispute arbitration agreements aside.

As explained earlier, it is not clear whether the Dubai Courts will refuse to enforce a pre-dispute arbitration agreement in adhesion contracts according to the Civil Procedure Code. In addition, the Civil Procedure Code does not distinguish between the two types of arbitration agreement, and both types are treated equally under the provisions of the Code. Conversely, the DIFC Arbitration Law states clearly that the circumstances in which consumers are held to arbitration agreement in consumer contracts are enforceable.

This section examines the grounds for refusal that are applied by the courts in different countries to negate and invalidate arbitration agreement, and whether they might be applied by Dubai Courts. The grounds examined consider that arbitration agreements in consumer contracts might be considered contrary to public policy on one of these grounds: the uncertainty of the agreement, the agreement being unconscionable and the unfairness test.

4.1 *The Ability to Apply Public Policy on Consumer Contracts in Dubai*

In the case of *Mostaza Claro* v. *Centro Movil Milenium SL*,[29] the Court of Justice of the European Union considered the consumer protection part of the public policy and required that the consumer should be acknowledged of the binding nature of arbitration. Moreover, the Court found that Spanish law did not require the consumer to contest the arbitration proceedings during those proceedings in order to have the award set aside for being contrary to public policy. Therefore, the award might be set aside pursuant to Article V(2)(b) of the New York Convention, which implies that the recognition and enforcement of an award may be refused where the competent authority of the country where the recognition is sought finds that such recognition and enforcement would be contrary to the public policy of that country.[30]

In Dubai, if the court finds that the award is contrary to public policy then it is obliged to set the award aside. This was stated by the Federal Supreme Court, Petition No. 32 of the 23rd Judicial Year issued on 8 June 2003: the Court provides that according to its adjudication, it may set the award aside on the grounds that the Court may not have jurisdiction to examine the merits of the award unless it is contrary to public policy, further stating that 'The arbitrator's decision shall be according to the rules of the law unless if it were authorized with the reconciliation, then it shall not be obliged with such rules except with those to the public order'.

This means that when the award is considered by the Court for ratification, the Court shall not discuss the subject matter of the award and the extent to which it conforms to the provisions of the law, except with respect to public order. It should be noticed that in Dubai, courts may refer to 'public policy' as 'public order'; however, it is not clear that a difference exists between these concepts.[31]

[29] [2007] Bus. L.R. 60.
[30] *Supra* note 5.
[31] M. Al-Nasair, I. Bantekas & M. Bantekas, 'The Effect of Public Policy on the Enforcement of Foreign Arbitral Awards in Bahrain and UAE', *International Arbitration Law Review* (3)(2013): 88.

This approach has been applied in other cases. For example, the Dubai Court of Cassation, Petition No. 72 of 2007 issued on 10 June 2007 stated that it cannot review the merits of the award unless it breaches a rule relating to public order. However, the question that arises is whether consumer arbitration is considered to violate public policy in Dubai and the UAE, which has not been considered in any particular case or study. Therefore, this section examines whether consumer arbitration is contrary to public policy in the UAE.

With regard to the notion of public policy under Article V(2)(b), it is debatable whether it refers to international or local public policy. There is a view that suggests the courts in international arbitration disputes should apply international public policy.[32] However, applying international public policy means that the court has a narrower meaning for public policy compared to the local public policy, as explained by the International Law Association as a notion that must be understood in its private international law context, namely:

> That part of the public policy of a State which, if violated, would prevent a party from invoking a foreign law or foreign judgment or foreign award. … It is not to be understood in these Recommendations as referring to a public policy which is common to many States (which is better referred to as 'transnational public policy') or to public policy which is part of public international law. International public policy is generally considered to be narrower in scope than domestic public policy.[33]

There is no particular approach that should be applied by the courts; some courts may apply the international public policy, and others the local public policy. However, in Dubai the courts apply the local public policy to examine the award. For example, in Petition No. 146 of 2008 issued on 9 November 2008, the Dubai Court of Cassation provided that the court shall verify the breach of public policy in light of the applicable rules in the judge's country and not in any other country, which means that the Court shall apply the local public policy. Therefore, this article will explore the meaning of public policy in the UAE and examine whether consumer arbitration is determined within the meaning of public policy.

In Dubai, local public policy was defined in Article 3 of the UAE Civil Code[34] in the following manner:

> Rules relating to personal status such as marriage, inheritance, descent, and rules concerning governance, freedom of commerce, trading in wealth, rules of personal property and provisions and foundations on which the society is based in a way that do not violate final decisions and major principles of Islamic Sharia.

Furthermore, in the Dubai Court of Cassation, Petition No. 14 of 2012 issued on 16 September 2012, the Court gave an unprecedentedly wide interpretation of the concept of public policy as something that: 'relates to the fundamental interests of a society and forms the basis for the social, political, economic and ethical rules that are issues by the state'. According to this definition, consumer arbitration is not considered to be contrary to public policy; however, according to the case above Dubai courts may expand the meaning of public policy itself. Therefore, the court may consider consumer arbitration contrary to public policy and rely on the aspect that it values citizens' right to settle their disputes before their local

[32] *Renusagar Power Co Ltd* v. *General Electric Co*, reported in (1995) XX Y.B. Comm. Arb., p.700.
[33] ILA, New Delhi Conference, Final Report on Public Policy as a Bar to Enforcement of International Arbitral Awards (2002), para.11.
[34] Federal Law No.5/1985.

courts, considering it as a path to protection and justice. In support of this approach, the Dubai Court of Cassation ruled that the right to use the judicial system is available to all.[35]

Accordingly, the Dubai Courts may refuse to enforce the arbitration award in consumer contracts, as it might be considered contrary to public policy, especially as parties will sacrifice their right to refer to local courts. However, there must be grounds to consider an arbitration agreement invalid and contrary to public policy before Dubai Courts that might affect the fundamental interests of society,[36] such as the uncertainty of the agreement, the agreement being unconscionable, and the unfairness test, especially as the Courts in Dubai have the authority to interpret the meaning of public policy widely, in a way that includes consumer arbitration.[37]

4.2 *Uncertainty of the Arbitration Agreement*

The uncertainty of arbitration agreements was considered in Turkey, as the Turkish 11th Civil Division Court in case No. 16901/2013 held that the arbitration clause is an exceptional way to settle disputes; therefore, the arbitration agreement should state clearly and unequivocally whether all or certain disputes will be submitted to arbitration. In this case, the parties agreed that if disputes could not be resolved by arbitration, they should be settled by the courts of Istanbul. However, the court invalidated the arbitration agreement on the basis that it was incompatible with Turkey's International Arbitration, Law due to a lack of clear and definitive intent to arbitrate.

These grounds for setting the arbitration agreement aside have been applied clearly by Dubai Courts. Dubai Court of Cassation No. 51/1992 stated explicitly that arbitration is an alternative path to litigation, therefore both parties must expressly agree to arbitrate. As arbitration is an alternative dispute resolution to litigation, issues might arise if parties give jurisdiction to arbitration on certain disputes, over courts. Therefore, parties should be clear in their arbitration agreement, as it will be an exceptional way to settle their dispute. In other words, if the clause does not state clearly whether a particular dispute will be submitted to arbitration or court, this may lead to invalidating the arbitration agreement under the Civil Procedure Code due to a lack of clear and definitive intent to arbitrate.

In addition, Dubai Courts require the clear consent of both parties in order to enforce the arbitration agreement, which is a matter of both parties, who are required to prove that their real intention was to submit the potential disputes to arbitration. This was stated by the Dubai Court of Cassation in Petition No. 220 of 2004:

> The arbitration agreement can only be valid when it is proved that the parties had the joint intention to refer their dispute to arbitration, which can be inferred from the existence of an arbitration clause within the agreement or from both parties signing a subsequent arbitration agreement.

Special requirements might be emphasised in relation to pre-dispute arbitration agreements. For example, the Dubai Court of Cassation stated that the pre-dispute arbitration agreement will be considered void if it was unreadable and printed in a small font that a regular person would not be able to read.[38] Hence, parties are not required to agree on all the conditions and terms of the arbitration in the pre-dispute agreements in order to be valid, as the dispute has not arisen at the time the contract is signed.[39]

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[35] Dubai Court of Cassation on January 21 2001 in Appeal 31 February2000.
[36] Dubai Court of Cassation, Petition No.14 of 2012 dated 16 September 2012.
[37] *Ibid*.
[38] Dubai Court of Cassation No.87 of 2003 dated 10 May 2003.
[39] Dubai Court of Cassation No.91 of 1992 dated 21 November 1992.

Consequently, Dubai Courts may require stricter rules in order to enforce pre-dispute arbitration agreements, such as explicit agreement to arbitrate, the consent of both parties and other formal requirements; essentially, this means that the real intention of the parties to arbitrate should be clear. According to the preceding discussion, it can be established that uncertainty of arbitration agreements might be applied by Dubai Courts to invalidate arbitration agreements in consumer disputes.

4.3 *Unconscionability of Arbitration Agreement*

The doctrine of unconscionability is widespread in the US. Drahozal and Friel[40] defined it as: 'A certain provision of the arbitration agreement is so unfair that the provision, or the arbitration agreement as a whole, is unenforceable'. This means that the unconscionability was recognised in order to protect consumers from any non-meaningful choice to arbitrate, and where the arbitration is favourable for one party rather than the other.

A study of court decisions regarding the unconscionability of the arbitration agreements between 1990-2008 found that US courts prefer to invalidate the arbitration clause and are willing to uphold the unconscionability defence against the arbitration clause.[41] In conclusion, the doctrine of unconscionability is based on the court's assessment, and there are no particular standards by which to consider the arbitral clause unconscionable.

The general rule is that the arbitration clause is valid under the Federal Arbitration Act, which is the same in Dubai. Both countries have the same approach as there is no difference between the enforceability of the arbitration agreement in B2B and B2C contracts, as long as they are considered 'valid, irrevocable, and enforceable'.[42]

In addition, the US Supreme Court has encouraged a pro-arbitration policy;[43] however, it failed to limit the application of the doctrine of unconscionability. According to Posner,[44] the Supreme Court's pro-arbitration stance refers to the Law and Economics (L&E) movement, which played a major role in producing efficient contract terms that are favourable to contract drafters and consumers. The L&E analysis held that the courts would not need to undertake any unconscionability test, i.e. looking at bargaining power, consent or fairness, and strict enforcement of contract terms became a requirement.[45] Additionally, the 'Turn Against Law' movement in the 1970s favoured arbitration instead of litigation, which was criticised as excessively procedural and socially and economically damaging.[46]

However, the application of the unconscionability doctrine may differ from one case to another. The next section examines practical cases in the US courts in order to understand the core of the doctrine of unconscionability.

4.3.1 The Court Considered the Arbitration Agreement Unconscionable

The court has to examine each case to decide whether or not the arbitration clause is conscionable. In some cases, the court may not accept the arbitral clause as valid because of the high cost of arbitration. A similar case happened in *Brower* v. *Gateway Inc.*,[47] in which the fees of arbitration were $4,000 paid for the International Chamber of Commerce Court of

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[40] C. Friel & J. Raymond, 'A comparative View of Consumer Arbitration', *Arbitration* 71(2) (2005): 131.
[41] C. Knapp, 'Blowing the Whistle on Mandatory Arbitration: Unconscionability as a Signaling Device', *San Diego L Rev* 46 (2009): 609.
[42] *Allied-Bruce Terminix Co* v. *Dobson 513 U.S. 265 S. Ct. (1995).*
[43] *Mitsubishi Motors Corp* v. *Soler Chrysler Plymouth Inc* 473 U.S. 614, 105 S. Ct. 3346 (1985).
[44] R. Posner, *Economic Analysis of Law* (Boston: Little, Brown & Co, 1973).
[45] I. Ayres & R. Gertner, 'Filling Gaps in Incomplete Contracts: An economic Theory of Default Rules', *Yale Law Journal* 87 (1989): 92.
[46] M. Galanter, 'The Turn against Law: The Recoil against Expanding Accountability', *Tex L Rev* 81 (2002): 285.
[47] *Brower* v. *Gateway 2000 Inc* 676 N.Y.S. 2d 569, 572 (1998).

Arbitration in Paris, while the claim involved purchase of a personal case worth no more than $1,000. Therefore, the New York Appellate Court held that the arbitration agreement was not valid and was thus unenforceable.

In another case, *Campbell* v. *General Dynamics Government Systems Corp*,[48] the Court of Appeal held that the arbitration agreement is unconscionable, as one of the defendants failed to prove that the employees noticed the new policy of referring disputes that arise between them to arbitration. The Court noted that it is not enough to demonstrate that employees had checked their e-mails to determine that they were aware or had verified the new dispute resolution policy.

Furthermore, in *Ting* v. *AT&T*[49] the state and federal court of California considered an arbitration clause in which the adhesion contract had a standard-term contract whereby a party may gain bargaining advantages from class action rather than from arbitration. The Ninth Circuit Court of Appeals held the clause to be unconscionable and unenforceable. In *Bragg* v. *Linden Research Inc*.,[50] the court held that the arbitration agreement was invalid and void, as the stronger party in an adhesion contract allowed himself to choose the forum, imposing high costs on the weaker party by enforcing him to arbitrate, and moreover imposing confidentiality on arbitral proceedings.

4.3.1 The Court Held that the Arbitration Agreement Is Conscionable

In several cases, the court held that the arbitration agreement is valid and enforceable. In *Green Tree Financial Corp.* v. *Randolph*,[51] the court provided that the arbitration agreement is valid, as the plaintiff did not prove to the court how the arbitration would be prohibitively expensive. The court held that:

> Randolph's agreement to arbitrate is not rendered unenforceable simply because it says nothing about arbitration costs, and thus fails to provide her protection from potentially substantial costs of pursuing her federal statutory claims in the arbitral forum.

In another case, the California Court of Appeal in *Gutierrez* v. *Autowest*[52] held the arbitration agreement enforceable and stated that in order to consider the arbitration agreement invalid the fees of arbitration should be unaffordable, and there is no opportunity to seek a fee waiver according to the arbitration agreement.

In general, the main US approach toward consumer arbitration agreements is that they are considered valid and enforceable unless there are specific circumstances rendering such clauses unconscionable, and the cases mentioned above state good examples when the courts considered the arbitration clause unconscionable or otherwise.

Consequently, the courts in the US have to consider several points in order to assess the validity of the agreement when applying the doctrine of unconscionability, such as whether (if the agreement was obvious in the contract) the consumer had the opportunity to understand the terms of the contract, and the manner in which the contract was made. In other words, the courts shall examine effectiveness and equivalence aspects.

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[48] *Campbell* v. *General Dynamics Government Systems Corp* 407 F.3d 546 C.A.1 (Mass. 2005).
[49] *Ting* v. *AT&T* 319 F3d 1126, 1148 (9'h Cir Cal 2003).
[50] *Bragg* v. *Linden Research Inc*. 487 F. Supp. 2d 593, 605-11 (E.D. Pa. 2007).
[51] 531 U.S. 79, 90, 92 (2000).
[52] *Gutierrez* v. *Autowest, Inc*., 2003 Cal. App. LEXIS 1817 (Ct. App. 2003).

3.2.2 The Ability to Apply the Doctrine of Unconscionability by Dubai Courts

According to the discussion above, the doctrine of unconscionability examines both the effectiveness and equivalence aspects. However, the question that arises here is whether a similar approach might be applied in Dubai. Under the Civil Code, the rule of thumb is that the court is not allowed to interfere in what parties have agreed under the contract; hence, it presents some assurance that the terms agreed are enforceable. However, a Contract of Adhesion is excluded from this rule.

Dubai Courts may invalidate an arbitration agreement if it found that there is an inequality of bargaining power or the agreement allows the stronger party to choose the forum. The Civil Code aims to set a balance between parties; this concept is stated in Articles 145 and 248 of the Civil Code. Article 145 states that the contract of adhesion would be satisfied as: 'Acceptance in contracts of adhesion shall be by virtue of simple delivery on conditions similar to those made to all his customers by an offer or who does not accept any negotiation about those conditions'.

According to Article 145, adhesion contract requirements would be: the supplier provides customer with standard terms and conditions that are similar to the terms and conditions he/she offers to all other customers; and the terms and conditions within the contract are non-negotiable. However, in Article 145 both conditions are required to apply to e-commerce contracts and consumer contracts. If both requirements are fulfilled the court may intervene in adhesion contracts pursuant to Article 248 of the Civil Code, which states:

> If the contract is made by way of adhesion and contains unfair provisions, it shall be permissible for the judge to vary those provisions or to exempt the adhering party therefrom in accordance with the requirements of justice, and any agreement to the contrary shall be void.

Articles 145 and 248 of the Civil Code also provide that the court may set aside arbitration agreements in an adhesion contract if the court found that there is an imbalance of power between the parties, and the weak party has been forced to agree on the terms and conditions in the adhesion contract. Rather, the contract of adhesion stated that any uncertainty in the contract must be solved in favour of the customer.

Therefore, Dubai Courts have the right to amend oppressive provisions in adhesion contracts, to reduce the burden on the adhering party or to exempt him from it in accordance with the dictates of justice. Furthermore, Dubai Courts require the arbitration agreement to be effective, and parties should expressly agree to arbitrate in order for it to be enforceable, otherwise the court will invalidate the arbitration agreement. This was stated by the Dubai Court of Cassation[53] as follows:

> It is settled that arbitration is an exceptional path for disputes between parties and it must be expressly agreed upon because it involves a departure from the path of litigating before the competent courts of law and the guarantee bestowed by the ordinary courts.

As explained previously, this doctrine is widespread in the US, and there are several cases where the award has been set aside on the grounds that the arbitration agreement is unconscionable. Although there are no practical cases in Dubai, the core of the doctrine might be applied in the state, and the provisions examined above support the ability of the Dubai Courts to apply this doctrine.

[53] Dubai Court of Cassation No. 51/1992 dated 24/5/1992.

Nevertheless, there are two main issue that might arise here. Firstly, the courts in Dubai are aiming to avoid applying article 248 unless the contract is obviously an ad hoc contract. In Petition No. 472 of 2005, the court held the rent agreement between the parties is not an ad hoc contract hence the court is not allowed to intervene in the terms of the contract.

Secondly, the issue that might arise here is that the supplier might make minor amendments to the terms and conditions of the contract in order to avoid the application of Article 145 of the Civil Code. In addition, he might negotiate the contract with the consumer in order to avoid applying this Article, to prevent the court from intervening in the arbitration clause. Therefore, it is hard to rely on Article 145 because of uncertainty whether the contract fulfils the requirements of the adhesion contract.

3.3 *The Unfairness Test*

In the UK, the control of unfair terms is applied to examine the validity of arbitration agreement in disputes exceeding an amount of £5,000.

The UK law in this area is largely based on EC Directive 93/13/EEC on unfair terms in consumer contracts, and it implements the Unfair Terms in Consumer Contracts Regulations (1999). The UK Office of Fair Trading (OFT) in its Unfair Contract Terms Guidance explains its interpretation of the English Arbitration Act (1996):

> 17.2 Under section 91 of the Arbitration Act 1996, a compulsory arbitration clause is automatically unfair if it relates to claims of £5,000 or less. This is currently the only instance of a term that is always unfair under the Regulations regardless of circumstances. A compulsory arbitration clause forbidden by the 1996 Act is both legally ineffective and open to regulatory action in all cases.
> 17.3 If such a term is not to be deleted, the element of compulsion should be removed, for instance by making clear that consumers (or both parties) have a free choice whether to go to arbitration or not. Arbitration in the UK is fully covered by legal provisions, and so non-compulsory arbitration clauses are unlikely to encounter objections provided they are in clear language and not misleading.[54]

The OFT provides that the arbitration clause in claims that do not exceed £5,000 is unenforceable and unfair. On the other hand, businesses should make it clear that consumers may still refer to court, and that arbitration is not compulsory, otherwise the arbitration clause should be deleted.

Under s. 91 of the English Arbitration Act (1996), if the amount of the claim exceeds £5,000 the agreement will be evaluated under the general standards of unfairness set out in Directive 93/13/EEC, implemented by the Unfair Terms in Consumer Contracts Regulations 1999.[55] Under ss. 89 and 91 of the English Arbitration Act, the application of Regulations 1999 has been extended to include arbitration clauses in consumer contracts.[56]

Nonetheless, several concerns have been raised regarding the application of the EC Directive and the implementing Regulations 1999 in international consumer disputes. Reg. 4(2)(b) of Regulations 1999 states that the contractual terms governed by international conventions do not apply to the Regulations 1999. In other words, arbitration clauses found in international consumer disputes that are covered by the New York Convention will not be governed by the application of Regulations 1999. In contrast, the European Court of Justice

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[54] Office of Fair Trading, *Unfair Contract Terms Guidance* (February 2001), paras. 17.2 and 17.3.
[55] M. Doyle, K. Ritters & S. Brooker, *Seeking Resolution: The Availability and Usage of Consumer-to-Business Alternative Dispute Resolution in the United Kingdom* (DTI, 2004).
[56] SI 1999/2083 implementing Council Directive 93/13 of April 5, 1993 on unfair terms in consumer contracts [1993] OJ L095/0029.

(ECJ) in *Mostaza* v. *Centro*[57] held implicitly that the consumer should be protected, whether the contractual agreement was national or international, and that the Directive should be applied to protect the interest of the consumers, whether the contract is governed by international conventions or not. This approach has been supported by the ECJ in *Eco Swiss*, which implemented the invalidation of arbitral awards 'founded on failure to comply with Community rules'.[58] Therefore, in consumer disputes, both national and international arbitration agreements that fulfil the requirements under Article II of the New York Convention shall be examined by the fairness test of the Directive 93/13/EEC and Regulation 1999.

The Annex to Directive 93/13/EEC provides an illustrative list of examples of unfair terms. However, the most relevant example for consumer arbitration is example (q), which discusses the issue of preventing or excluding the consumer's right to take legal action before the courts, referring to arbitration instead by means 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.
> The meaning of the term 'legal provisions' in the article above was not obvious, and several explanations were offered. For example, Hörnle[59] explained that this term might:
> Distinguish private arbitration from public forms of 'arbitration', such as small claims procedures or a statutory Ombudsman scheme. On the other hand, it could refer to a distinction between arbitration based on the applicable law and arbitration where the arbitrator does not base his or her decision on strict law.
> On the other hand, Treitel[60] argued that the purpose of this term:
> May be to narrow the category of unfair arbitration clauses to those in which the parties have agreed to exclude the powers of the courts to control the arbitrator's decision.

Moreover, Arnold[61] suggested that the term refers to the form of the procedure, for example, ad hoc arbitrations that are free of any mechanism of control of the arbitral process. In *Picardi* v. *Cuniberti*, the Queen's Bench provided that the term 'legal provisions' aims to distinguish between arbitration that is based on the applicable law, and arbitration whereby the arbitrator does not base his or her decision on the strict law.[62] However, all interpretations of the term 'legal provisions' state that this article should be applied if there is no particular monitor by the courts or the law on the arbitration procedures.

3.3.1 The Main Elements to be Considered when Applying the Unfairness Test

The court should apply three main elements to assess the fairness of the arbitration clause: good faith, significant imbalance, and obligations under the contract to the detriment of the consumer. In the UK this is stated clearly in the Consumer Rights Bill in s.62 as follows:

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[57] *Mostaza Claro* v. *Centro Móvil Milenium SL* (C-168/05) [2006] E.C.R. I-10421.
[58] *Eco Swiss China Time Ltd v. Benetton International NV* (C126/97) [1999] E.C.R. I-3055 at [32], [37] and [39].
[59] *Supra* note 8.
[60] G. Treitel & E. Peel, *Treitel on the Law of Contract* (Sweet and Maxwell, 2007), paras.7-105.
[61] A. Vahrenwald, 'Out-of-Court Dispute Settlement Systems for E-commerce', *Report on Legal Issues, Part IV: Arbitration*, 31 October 2000:149.
[62] *Picardi v. Cuniberti* [2002] EWHC 2923 (TCC); [2003] B.L.R. 487.

'A term is unfair if, contrary to the requirement of good faith, it causes a significant imbalance in the parties' rights and obligations under the contract to the detriment of the consumer'.[63]

Ramsey J., in the recent case of *Mylcrist Builders Ltd* v. *Buck*,[64] explained these elements. There is 'significant imbalance' if a term is so weighted in favour of the supplier as to tilt the parties' rights and obligations under the contract significantly in his favour. 'Detriment to the consumer' is interpreted in terms of there being a significant imbalance against the consumer, rather than the seller or supplier. However, the requirement of good faith is one of fair and open dealing in which:

> (a) Openness requires that the terms should be expressed fully, clearly and legibly, containing no concealed pitfalls or traps. Appropriate prominence should be given to terms which might operate disadvantageously to the customer.
> (b) Fair dealing requires that a supplier should not, whether deliberately or unconsciously, take advantage of the consumer's necessity, indigence, lack of experience or unfamiliarity with the subject matter of the contract.

3.3.2 Practical Cases from the English Courts

The English courts have applied two elements to examine fairness: 'significant imbalance' and 'contrary to good faith'.[65] Significant imbalance was explained by Lord Bingham in the *Director General of Fair Trading v First National Bank*,[66] in which he stated that: 'The requirement of significant imbalance is met if a term is so weighed in favour of the supplier as to tilt the parties' rights and obligations under the contract significantly in his favour'.

Also, in *Picardi* v. *Cuniberti* the Court required the consumer to be properly informed regarding the existence of an arbitration clause. In this case, the court held that the arbitration clause in a contract between an architect and the consumer imposed onerous terms as the arbitration clause had not been sufficiently drawn to the consumer's attention. Therefore, as the consumer was unaware of the adjudication provisions, the court held that this was a significant imbalance. The Queen's Bench decided that: 'The architect had failed to draw the consumer's attention to the onerous nature of the arbitration clause, which detrimentally affected the balance of a consumer's interest'.[67]

In an obiter dictum in *Spurling* v. *Bradshaw*,[68] Lord Denning went further, stating that the arbitration clause 'should be printed in red ink on the face of the document with a red hand pointing to it before the notice could be held to be sufficient'.

However, in regard to the good faith element, McKendrick provides that the good faith requirement embraces elements of both procedural and substantive fairness.[69] Lord Millett, in the *Director General of Fair Trading*, described the notion of good faith when he stated that it is not enough to draw the attention of the consumer to the arbitration clause, but also whether it is substantially fair in itself.[70] In other words, the assessment implied by the court had to assess twin procedural and substantive elements, which means that it is not enough that the consumer's attention is drawn to the term, but also whether it is substantially

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[63] Consumer Rights Bill, see http://www.publications.parliament.uk/pa/bills/cbill/2013-2014/0180/cbill_2013-20140180_en_1.htm accessed 20 January 2016.
[64] *Mylcrist Builders Ltd* v. *Buck* [2008] EWHC 2172 (TCC); [2009] 2 All E.R. (Comm) 259.
[65] K. Mechantaf, 'Balancing Protection and Autonomy in Consumer Arbitrations: An international Perspective', *Arbitration* 78 (2012):232.
[66] Director General of Fair Trading [2001] UKHL 52; [2002] 1 A.C. 481 at 17.
[67] *Supra* note 62.
[68] *Ibid*.
[69] E. McKendrick, *Contract Law* (Basingstoke: Palgrave Macmillan, 2011), p.314.
[70] *Ibid*.

fair.[71] Therefore, it is not enough to hold the pre-dispute arbitration agreement in consumer contracts valid by relying on the consumer's awareness of the arbitration clause. Hence, the element of good faith requires the court to examine whether the arbitration clause is substantially fair.

3.3.3 The Ability to Apply the Unfairness Test in Dubai

According to the application of the unfairness test in the UK, it has been explained that the courts apply two main elements, significant imbalance and good faith. According to the definition and the case interpretation of the element of significant imbalance, it can be seen that there are similar provisions in the Civil Code that could be applied to the test, for example under Article 248. According to this Article, that has been explained earlier in this article, the court should examine the terms of adhesion contract and if any of the terms was unfair it is the court's decision to consider it void.

On the other hand, the element of good faith is stated explicitly in the Civil Code under Article 246(1), providing that 'The contract must be performed in accordance with its contents, and in a manner consistent with the requirements of good faith'. In other words, if the parties failed to fulfil the requirement of good faith the arbitration clause might be challenged on the grounds that it has been made pursuant to a unilateral option clause that is exercised in bad faith. Furthermore, the contracting parties should perform everything deemed important in the contract based on the usage, fairness and rule of law. Fairness involves actions that will discourage breach of contract. Generally speaking, the Civil Code depends on the idea of good faith to assist the performance of contractual promises rather than as a way of escaping responsibilities stated in the contract.

The core of the unfairness test that is applied by the English Courts could be applied in Dubai, although the lack of clear provisions to apply the fairness test on consumer contracts might be an obstacle.

In conclusion, even though there is no explicit rule in the Civil Code that invalidates an arbitration agreement in consumer contracts, the Dubai Courts may rely on the current legal system to enforce the arbitration agreement. Furthermore, as discussed earlier, no particular approach is applied by the Dubai Courts. However, any of the approaches applied in different countries to examine and invalidate arbitration agreements in consumer contracts, namely uncertainty of the arbitration agreement, the doctrine of unconscionability and the test of unfairness, could be applied in Dubai.

Hence, the application of these approaches is uncertain and depends on the attitude of the courts themselves. Therefore, it is suggested that the law in Dubai should be reformed in order to provide extra protection for consumers, as indeed reflected in the approach of the DIFC Arbitration Law, which states clearly that pre-dispute consumer arbitration is unenforceable unless the consumer commenced the arbitration procedure or the Court finds that the arbitration would be more efficient for consumers.[72] Another approach that might be efficient in Dubai is to apply the same approach as in the UK, which is to set a minimum amount for consumer disputes that can be referred to arbitration, with the efficiency of potential arbitration being assayed by the court.[73]

4 Conclusion

[71] *Supra* note 65.
[72] DIFC Arbitration Law Article 12(2)(b).
[73] Arbitration Act 1996, s. 91 (1).

This paper began by explaining the main differences between pre- and post-dispute arbitration agreements, in order to explain why it is necessary to protect consumers from pre-dispute rather than post-dispute agreements.

The second section examined the validity of pre-dispute arbitration agreements under both the DIFC and Dubai legal system. It was found that the DIFC Arbitration Law distinguishes between the validity of pre- and post-dispute arbitration agreements, and it invalidates consumer arbitration agreements with several exceptions that offer extra protection for consumers.

On the other hand, the Civil Procedure Code does not distinguish between the two types of arbitration agreement, and there are no clear provisions to control their enforceability in consumer contracts, which gives consumers less protection under Dubai's legal system. Therefore, the author examined the approach of the Dubai Courts toward different forms of arbitration clause and the validity of each type. It was concluded that an arbitration clause is usually enforced if the parties agreed on it clearly in the main contract, or if they referred to the arbitration agreement explicitly in another contract. Moreover, there are no cases were the court invalidated the arbitration clause on the grounds that it is not efficient or that it results in imbalance between the parties. The Civil Procedure Code is also silent about the enforceability of arbitration awards concluded in consumer contracts.

However, the paper explored the grounds for refusal applied in different countries and examined the possibility of Dubai courts applying them, especially as they have authority to expand the meaning of public policy. The grounds examined here include considering consumer arbitration as contrary to public policy as a result of the uncertainty of the arbitration agreement, the doctrine of unconscionability and the unfairness test.

Concerning the uncertainty of the arbitration agreement, this might be efficient in Dubai, as the courts have already invalidated arbitration agreements on the grounds of the parties not making explicit reference to arbitration.

Unconscionability as applied in the US is based on the twin aspects of effectiveness and equivalence. On examining whether these aspects could be applied in Dubai, it was found that Articles 145 and 248 of the Civil Code have similar meanings to these aspects, and the Dubai Courts may rely on them to invalidate arbitration agreements. However, these Articles only apply in adhesion contracts, and businesses can make minor amendments to contracts based on consumer requests to exclude the contract from adhesion.

The test of unfairness as applied in the UK is used in consumer disputes exceeding the value of £5,000, and the two elements applied are significant imbalance and good faith. The former has already been examined. However, pursuant to Article 246(1) of the Civil Code, the parties should perform their contract on the basis of good faith.

In general, there are provisions in the Civil Code that might be applied to invalidate the arbitration agreement and awards in consumer contracts. However, the law in the Civil Procedure Code should be reformed in order to set a clear control to be applied by Dubai Courts. Otherwise, consumer protection cannot be guaranteed, and would be subject to the individual scope or approach of the court. Therefore, Article 145 of the Civil Code should be amended to include consumer contracts, regardless of whether the parties negotiated the terms and conditions, which would give the court the ability to examine the arbitration clause.