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Citation: Collins, D. A. (2008). Compulsory Arbitration Clauses in Domestic and International Consumer Contracts. King's Law Journal, 19(2), pp. 335-355. doi: 10.1080/09615768.2008.11423672

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Permanent repository link: https://openaccess.city.ac.uk/id/eprint/604/

Link to published version: https://doi.org/10.1080/09615768.2008.11423672

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COMPULSORY ARBITRATION AGREEMENTS IN DOMESTIC AND INTERNATIONAL CONSUMER CONTRACTS

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I. INTRODUCTION

Clauses in contracts which specify that all disputes will be decided by arbitration have become common both in transactions between commercial parties, and also in contracts with consumers. This article will examine the way in which a compulsory arbitration clause will be regarded by a UK court in the consumer contract context. It will attempt to argue that a protectionist mentality may be misplaced because disadvantages associated with consumer arbitration, primarily related to cost, may be illusory and are often outweighed by benefits. The first part of the discussion will focus on domestic contracts and will examine the Unfair Terms in Consumer Contracts Regulations 1999, which prohibit 'unfair' clauses in consumer contracts. This will led to an evaluation of the public funding and cost controls that are available for consumers who use arbitration. The second part of this article will explore international consumer arbitration from the perspective of the UK courts and touch upon some of the specific concerns raised by this process, including enforcement of arbitration awards under the New York Convention. The article will conclude with a brief discussion of recent law and economics literature which has identified hidden

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Electronic copy available at: http://ssrn.com/abstract=1577136

functions served by standard form contracts containing such terms as arbitration clauses, which can benefit both consumers and suppliers.[1]

WHEN CONSUMER ARBITRATION ISSUES WILL ARISE

Clauses which require that all disputes will be submitted to arbitration may be found in standard form contracts which are seldom read by consumers, or if read at all, probably misunderstood.[2] Even if the terms are read and comprehended before the contract is concluded, few consumers have adequate bargaining power to negotiate changes to them. Standard form consumer contracts, or boilerplate contracts as they are referred to in American scholarship,[3] have accordingly been viewed with derision by courts.[4] They are typically viewed as a tool by which a stronger party exploits informational and resource imbalances to impose terms which are favourable to itself upon the weaker party, normally the consumer. Businesses, who as repeat players may determine the forum, the applicable law, and even the third party, can consequently gain control of the arbitration process to the disadvantage of 'one-shot' consumers.[5] Oppression resulting from a clause in a standard form contract which mandates arbitration for the resolution of all future contractual disputes is linked to the potential for high costs of this procedure relative to litigation. This is especially so

[1] The approach taken towards consumer arbitration clauses by other nations or courts in the European Union or elsewhere in the world will not be considered. For an excellent overview of these topics see Susan Schiavetta, 'Does The Internet Occasion New Directions In Consumer Arbitration in the EU' Journal of Information Law and Technology 2004 (3) <http://www2.warwick.ac.uk/fac/soc/law/elj/jilt/2004_3/schiavetta/> (last accessed November 2006)

[2] Sometimes known as '*Scott v Avery* clauses': see *Scott v Avery* (1855) 5 HLC 811.

[3] Ewan McKendrick has drawn a distinction between the terms 'boilerplate' and 'standard form contracts', claiming that the former are arrived upon by negotiation between the parties and are common to most commercial contracts, whereas the latter are supplied exclusively by one party and are unique to their contracts: *Contract Law: Text, Cases, and Materials*, 2 ed (OUP, Oxford, 2005) at 427. However, the terms will be used interchangeably in this article for the purpose of simplicity.

[4] See e.g. *Schroeder Music Publishing Co v Macaulay* [1974] 1 WLR 1308 (per Lord Diplock at 1316); *Suisse Atlantique Societe d'Armement Maritime SA v NV Rotterdamsche Kolen Centrale* [1967] 1 AC 361 (per Lord Reid at 406).

[5] Carrie Menkel-Meadow, 'Do the "Haves" come out ahead in Alternative Justice Systems: Repeat Players in ADR' 15 Ohio St. J. on Disp. Resol. 19 (1999-2000).

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in the United States, where it is believed that arbitration is frequently abused by traders who compel consumers into dispute settlement proceedings which are prohibitively expensive.[6] Many European states have taken a severely restrictive approach towards pre-dispute arbitral clauses in consumer contracts for similar reasons.[7] Compulsory arbitration clauses do not actually oust the jurisdiction of the court but rather provide that the court does not have jurisdiction until the arbitration award has been rendered.[8] Still, this does prohibit initial recourse certain legal remedies and a claim brought first in the courts in violation of an arbitration clause could result in a stay or even an action in damages for breach of the agreement to arbitrate. Refusal of access to the courts may accordingly be viewed as a denial of the right to a fair trial as enshrined in Article 6(1) of the European Convention on Human Rights, although courts have noted that individuals are free to waive this right via an arbitration clause, as long as the waiver is voluntary and informed,[9] conditions which lie at the root of judicial scrutiny of such clauses.

Concerns regarding the unfairness that may result to consumers via compulsory arbitration must be tempered by the narrow scope of situations in which the validity of such clauses will ever incur judicial analysis. First, the Unfair Terms in Consumer Contracts Regulations define 'consumer' as 'any natural person who is acting for purposes outside his trade, business or profession.'[10] This is a fairly restrictive definition which contemplates only transactions for goods and services intended for final, personal consumption by the individual who buys them. Second,

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[6] F.C. Miller, 'Arbitration Clauses in Consumer Contracts: Building Barriers to Consumer Protection' (1999) 78 Michigan Business Journal 302.
[7] See generally Schiavetta note 1.
[8] J Beatson, *Anson's Law of Contract*, 28th ed (OUP, Oxford, 2002) at 364. At common law any agreement which purports to oust the jurisdiction of the courts is contrary to public policy and void: *Czarnikow v Roth Schmidt* [1922] 2 K.B. 478.
[9] *Stretford v Football Association Ltd* [2006] EWHC 479 (Ch) at [44]
[10] Reg 3(1). A full discussion of the concept of a consumer is beyond the scope of this article.

the Arbitration Act 1996 prohibits the upholding arbitration clauses for disputes worth less than £5000.[11] This will exclude most day-to-day consumer transactions, including most of those conducted via standard form contracts. Accordingly it seems that only mandatory arbitration clauses in contracts for the purchase of goods such as automobiles or luxury items would ever reach the stage where their validity could be asserted by a supplier. However a wide range of service contracts of this quantum may specify arbitration as the mechanism for dispute resolution, especially in the building and removal industries.[12] Therefore, in practical terms, although a relatively narrow band of disputes may be encompassed, compulsory consumer arbitration clauses before the courts remain an important issue.

Disputes regarding the enforceability of a consumer arbitration clause will arise in one of four cases.[13] First the consumer may refuse to honour the arbitration clause by not participating in the arbitral hearing. This could result in a judicial action to compel arbitration. In the absence of that party, the arbitral tribunal might pronounce a default award. The validity of the arbitration clause may then be raised by the losing party in either a defence to judicial enforcement of the award brought by the winning party, or in a judicial action to annul the award. Secondly, the consumer might commence litigation in a national court, violating the arbitration agreement. This could be done concurrently with the supplier's effort to initiate arbitration and could be combined with the supplier's motion to stay judicial proceedings – during which proceeding the court will still inquire into the validity of the arbitration clause.

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[11] s. 91 and Unfair Arbitrations Agreement (Specified Amount) Order 1999, s.1 1999/2167. This is the same as the current Small Claims Court limit.

[12] Geraint Howells, 'Consumer Arbitrations Agreement Act, 1988' 10(1) Company Lawyer 1989 at 20. Builders and contractors who hire them have also not been seen to fit the seller and consumer model: *Byren & Langley v Boston* [2004] EWHC (QB) at [28]. Another typical consumer contract that might lawfully invoke arbitration is a packaged holiday.

[13] As noted by Gary Born, *International Commercial Arbitration: Commentary and Materials* (Kluwer Law International, London, 2001) at 75.

A third situation could involve both parties participating in the arbitral process. The consumer might then assert that the arbitral tribunal lacked jurisdiction because of an invalid arbitral clause. The arbitral tribunal will consider an interim challenge to its own jurisdiction. The losing party could seek to have the jurisdictional award annulled in court, which will again involve the consideration of the validity of the arbitration clause. Finally, the parties could arbitrate on the merits of their disputes, with one party attempting to reserve its rights as to jurisdiction, or failing to argue lack of jurisdiction[14]. The losing party might then attempt to have the award annulled in national courts. The loser may refuse to honour the award which will lead to the winning party seeking judicial enforcement. Subject to claims that jurisdictional objections have been waived, the proceedings to annul or enforce the final award might raise the issue of the validity of the arbitral clause. It is also possible, as noted above, that the supplier might bring an action for damages in the courts for the consumer's failure to honour an arbitration clause by initially suing in the courts. This article will not consider each of these situations individually, but rather will look at the process by which arbitration clauses will be evaluated once a court has been called upon to do so. Before engaging in this analysis, it will be suggested that arbitration can actually offer practical advantages to consumers.

II. Domestic Consumer Arbitration

A. Advantages and Disadvantages

The advantages to resolving contractual disputes via arbitration rather than litigation in courts are numerous and have been summarized effectively by McKendrick.[15]

[14] The ECJ recently ruled that a national court seized of an action for annulment must consider the validity of the arbitration clause even though its invalidity was not pleaded in the arbitration proceeding itself: *Mostaza Claro v Centro Movil Milenium*, Case C – 168/05, 26 October 2006.
[15] See e.g. Ewan McKendrick, *Contract Law* note 3 at 437-439.

Briefly, because it does not take place in public court, arbitration is confidential and this can be desirable for parties who wish to avoid the stress or financial repercussions on the negative publicity engendered by court proceedings. The privacy of arbitral hearings is normally viewed as preferable for business parties but not for consumers who may wish to harness publicity to pressure settlement. But confidentiality may also be attractive to a wealthy consumer or public figure[16] who fears that the publicity of litigation could damage his or her reputation. Indeed public litigation could compromise the privacy of all varieties of consumers. Secondly, the flexibility of the arbitration process, which is less formal than that of ordinary courts, can be attractive to both parties, but particularly so to less sophisticated consumers, who might be intimidated by judges or lawyers. Depending on the language used in the clause, parties can choose when and where to arbitrate as well as the identities of the arbitrators and to an extent what form the arbitration will take. This helps to ensure the neutrality of the arbitral process, which, as we shall see below, is particularly important in international disputes. Most importantly, consumers may not wish to (or be able to) incur the high legal costs associated with the myriad of processes endemic to civil litigation. Arbitration is believed to be, in some circumstances, quicker and cheaper than litigation in the courts.[17]

There can be inherent disadvantages in the arbitration of consumer disputes. Arbitration can be expensive and is not always fast, but increased time and cost will often depend upon the degree of subsequent involvement by the courts. Court intervention, in the appeal of an award for example, could raise costs beyond those which would have occurred had the dispute been heard by a court initially. Appeals are permitted by the Arbitration Act 1996 on points of law arising out of an

[16] Recall that the good or service to which the dispute relates will have cost more than £5000, see above note 11.
[17] Ewan McKendrick, *Contract Law*, note 3 at 437-439.

arbitrator's award.[18] The parties may agree to exclude the possibility of appeal, but in domestic arbitration such an agreement will only be upheld if it is entered into during arbitration proceedings, not beforehand.[19] This rule operates as a safeguard to parties' rights and should comfort consumers in domestic arbitration. Apart from the cost of appeals, while arbitration itself can be cheaper, it is not always so. The potential for high costs associated with arbitrator's fees and the hiring of premises[20] could lead to the conclusion that arbitration is unduly onerous upon consumers. Consequently, clauses in consumer contracts which specify that all contractual disputes must be referred to arbitration will incur the scrutiny of courts and, according to the Arbitration Act[21], this will now be performed via a specific piece of legislation, the Unfair Terms in Consumer Contracts Regulations.

B. Arbitration Clauses and the Unfair Terms in Consumer Contracts Regulations

The Unfair Terms in Consumer Contracts Regulations 1999[22] ('UTCCR') came into force on 1 October 1999 and implement an EC Directive on Unfair Terms in Consumer Contracts.[23] The Directive was implemented by means of Regulations made under s.2(2) of the European Communities Act 1972. No effort has been made by the UK Parliament to integrate the UTCCR with existing legislation on unfair contractual terms, specifically the Unfair Contract Terms Act 1977, and the interaction of the two instruments has been viewed with dismay by some.[24] There appears to be no immediate plan to reform the law in this area, despite

[18] s. 69(1). Unless both parties agree to the appeal then leave of the court is required, s. 69(2)-(3).
[19] Arbitration Act 1996 ss.69 and 87(1)
[20] Alan Redfern and Martin Hunter, *Law and Practice of International Commercial Arbitration* 4th ed (Thomson, Sweet & Maxwell, London, 2004) at 14.
[21] s. 89
[22] SI 1999/2083
[23] 93/13 EEC
[24] See e.g. Elizabeth Macdonald, 'Unifying Unfair Terms Legislation' (2004) 67(1) MLR 69 and Jesse Elvin, 'The Application of the Unfair Terms in Consumer Contracts Regulations 1999' 14(1) KCLJ 39

recommendations by the Law Commission and the Scottish Law Commission to harmonize the existing legislation.[25] The UTCCR apply to contracts between consumers[26] and suppliers, a 'supplier' being 'any natural or legal person who…is acting for purposes relating to his trade, business or profession, whether publicly or privately owned.'[27]The key feature of the UTCCR is its application of a 'fairness' test to non-individually negotiated terms in contracts between private buyers and businesses, the purpose of which is to protect consumers, as opposed to businesses.[28] As noted above, this protection is based upon the premise that such terms are either not read or not understood and consequently do not actively inform the consumer's decision to contract. This represents a dramatic departure from the doctrine of freedom of contract and supplements common law principles such as unconscionability and duress. The UTCCR can be invoked by individual consumers in actions against a particular seller, but it also grants powers to the Director General of the Office of Fair Trading ('OFT') to apply to court for injunctions to prevent the continued inclusion of unfair terms in general usage. These enforcement powers have been extended to numerous other 'qualifying bodies', including several utility regulators, the Financial Services Authority and the Consumer's Association. The OFT remains the only body that is obliged to hear complaints regarding the implementation of the UTCCR. The OFT has stated that an exclusive arbitration agreement in a consumer contract *might* amount to an unfair term.[29] This caution has

[25] Letter from the Minister For Trade Investment and Foreign Affairs to the Chairman of the Law Commission, 24 July 2006 <http://www.dti.gov.uk/files/file34128.PDF> (last accessed Dec 2006). The reforms were suggested in The Law Commission Report no 292 and the Scottish Law Commission Report no 199.
[26] See definition above note 10.
[27] UTCCR Reg 3(1).
[28] 'Non-individually negotiated' will include any terms that have been drafted in advance and the consumer was therefore not able to influence the substance of the term: s. 5(2). If the supplier claims that the term must be individually negotiated, it bears the burden of proving so: s. 5(4).
[29] Referring expressly to Paragraph 1(q) of Schedule 2 of the UTCCR (see below), the OFT advises that 'Terms are liable to challenge if they tend to prevent consumers taking disputes to court, or require

is reflected in MacLeod's sweeping statement that 'a consumer arbitration agreement has generally been unenforceable, even with the consumer's consent.'[30] The OFT is empowered to approve Codes of Practice involving low-cost consumer arbitration schemes, although these envision arbitration as chosen by the parties after the dispute has arisen.[31]

Regulation 5(1) of the UTCCR provides that a term will be regarded as unfair if, 'contrary to the requirement of good faith, it causes significant imbalance in the parties' rights and obligations arising under the contract, to the detriment of the consumer.' The concept of 'significant imbalance' is unclear and has attracted a good deal of commentary. McKendrick holds that it involves a consideration of the content of the term rather than the procedure which led to the conclusion of the contract.[32] Macdonald believes that the 'significant imbalance' test contemplates more than a simple 'weighing of the parties rights and obligations as a whole' but also must involve an assessment of any 'unfair surprise' resulting from an arbitration clause.[33] This view echoes that of Beale, who adds that imbalance will involve a disproportionate allocation of risk between the parties.[34] In the leading case on the application of the UTCCR, *Director General of Fair Trading v First National Bank*,[35]which examined the continuance of a contractual interest rate after default judgment, Lord Bingham elaborated that there will be 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', and this can either be a benefit to

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them to go to remote or inappropriate courts.' OFT, Unfair Contract Terms Guidance, February 2001, at 15

[30] John MacLeod, *Consumer Sales Law* (Cavendish, London, 2002) at 98.

[31] See Geraint Howells and Stephen Weatherill, *Consumer Protection Law* (Ashgate Publishing Limited, Aldershot, 2005) at 631-632.

[32] McKendrick, *Contract Law* note 3 at 507.

[33] Elizabeth Macdonald, 'Unfair Terms in Consumer Contracts' 121 L.Q.R. 38 at 40.

[34] Hugh Beale, 'Unfair Contracts in Britain and Europe' [1989] 42 C.L.P. 197 at 202.

[35] [2001] UKHL 52; [2002] 1 AC 481 (HL) [hereinafter *First National Bank*]

supplier or the 'imposing on the consumer of a disadvantageous burden'.[36] Thus, with respect to a compulsory arbitration clause, the imbalance would evidently be the exploitation of unequal resources through an unnecessarily expensive procedure. Other potential advantages to the supplier and corresponding burdens to the consumer could be familiarity with a particular tribunal's procedure or knowledge of the panel of arbitrators from which particular arbitrator's could be chosen – the upper hand supposedly available to repeat players at the expense of 'one-shotters'.[37] This second set of concerns, which would be equally applicable to repeat litigators, effectively amounts to the same problem: burdensome expense resulting from the retaining of the proper legal counsel.

The requirement of good faith from 5(1) is similarly nebulous, in particular because English contract law does not recognize a doctrine of good faith, a difficulty recognized by the House of Lords in *First National Bank.* The appearance of this concept in the UTCCR, which is indicative of the European origin of the legislation, has been criticized because it is antithetical to the technical, rule-oriented style of legal reasoning that is common to the English courts.[38]In attempt to resolve the ambiguity, Lord Bingham described good faith as 'fair and open dealing.'[39] Lord Steyn felt that 'good faith' largely overlapped with 'significant imbalance' as they both encompass substantive, rather than procedural, fairness.[40] The Regulation itself may provide better clarity. In assessing the unfairness of a term, consideration must be given to: the nature of the goods or services for which the contract was concluded

[36] *Ibid* at [17]. 'Disadvantageous burden' seems to be a redundant expression.
[37] Schiavetta note 1.
[38] See generally Gunther Teubner, 'Legal Irritants: Good Faith in British Law' (1998) 61(1) MLR 11 at 19.
[39] At [17].
[40] At [37].

as well as the circumstances attending the conclusion of the contract.[41] Inquiring into the extent to which the offending term was brought to the attention of the party echoes the common law's 'Red Hand' rule.[42] A term that is held to be unfair shall not be binding on the consumer. However, the contract will continue to bind the parties if the offending term can be severed without impairing the functioning of the rest of the contract.[43] Thus if an arbitration clause is held to be unfair, then the rest of the contract will remain in operation and disputes will be settled by conventional litigation.

The UTCCR is silent with respect to the burden of proof for unfairness. However, Schedule 2 to the UTCCA provides an Indicative and Non-Exhaustive List of Terms Which May be Regarded as Unfair, raising the likelihood that if one of the mentioned terms exists, it is up to the party asserting the term to prove that it is not unfair. Item I (q) of Schedule 2 deals expressly with arbitration clauses, referring to:

> terms which have 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 applicable law, should lie with another party to the contract.

Trietel has suggested that the term 'not covered by the legal provisions' is meant to narrow the category of unfair arbitration clauses to those in which the parties have expressly agreed to exclude the powers of the courts to control the arbitrator's decision.[44] This interpretation cannot apply to domestic arbitrations, as the

[41] S. 6(1)
[42] *J Spurling Ltd v Bradshaw* [1956] 1 WLR 461 (per Denning LJ), although the Red Hand rule referred to the incorporation of exemption clauses.
[43] s. 8(1) and (2).
[44] Guenter Treitel, *The Law of Contract*, 10th ed (Sweet & Maxwell, London, 2005) at 274

Arbitration Act disallows such agreements unless entered into during the arbitration proceedings.[45] Others have argued that this term may refer to special statutory schemes in certain EU countries (Portugal and the Netherlands) that facilitate access to justice for consumers.[46] In assessing item I(q) of the European Directive, which uses identical wording to the UTCCR, the German Court of Appeal ruled that consumer contract clauses that mandate arbitration and which are valid under national arbitration legislation are unobjectionable.[47] This approach suggests that any arbitration clause that does not fall afoul of the UK Arbitration Act, will be lawful in the UK. The problem with this view is that it seems to render the UTCCR essentially redundant.

Term I (q) also appears to be related to term (i) in the 'indicative list', which covers those clauses that bind the consumer to terms with which they had no real opportunity to become acquainted. Therefore in order for an arbitration clause to be binding, it would be necessary to establish the degree of notice that the consumer was given with regards to that clause before the contract was signed, embracing considerations of both substantive and procedural 'fairness'. The Red Hand rule again comes to mind. Or perhaps where consent was actually manifest, irrespective of the reasonableness of the notice, then the consumer should be bound by it.[48]

Case law on arbitration clauses under the UTCCR suggest that the primary concern of the courts is that arbitration is prohibitively expensive and will result in

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[45] s. 69.

[46] Bruce Harris, Rowan Planterese, Johnathan Tecks, *The Arbitration Act 1996: A Commentary* (3rd ed, Blackwell, London, 2003) at 392. A third interpretation has been raised: these terms may refer to ad hoc arbitration schemes: Schiavetta, note 1 at 3.

[47] Ref 6U 114/95, CLAB Europa Card no. DE000767, 23 May 1996 <https://adns.cec.eu.int/CLAB/SilverStream/Pages/pgCardFrame.html> (last accessed December 2006). A similar decision was reached by the Tribunali de Roma under the EC Directive Annex I (q); CLAB Europa Card no. IT000725, 5 October 2000 <https://adns.cec.eu.int/CLAB/SilverStream/Pages/pgCardFrame.html> (last accessed December 2006)

[48] Schiavetta note 1 at 3.

many consumers abandoning legal claims against suppliers because the costs will outweigh the benefits. This worry appeared to occupy the court in *Zealander & Zealander v Laing Homes*,[49] a case decided under the 1994 UTCCR, legislation that was substantially similar to the 1999 Regulations that replaced it. The court held that the arbitration clause was inapplicable because the claimant consumer was faced with a significant imbalance under the UTCCR with respect to the defendant builder, in that the consumer would be required to instigate separate proceedings for the matters covered in the contract and some other matters falling outside of it, namely certain tortious claims and this would lead to 'injustice through lack of resources'[50]. This amounted to unfair financial hardship to the consumer, who already had inferior resources relative to his opponent. While this decision has been applauded by some commentators for strengthening consumer protection[51] it was arguably beyond the court's purview in ruling on the validity of the contract to consider matters that were not encompassed by the contract – the additional claims in tort. Whether or not the fairness analysis should extend this far may depend on whether a court should examine the *contract* as a whole, as advocated by Lord Bingham in *First National Bank*[52]or the *transaction* as a whole, as advocated by Lord Millet in the same case.[53] The former approach must be preferable because otherwise the court will be effectively compelled to inquire into whether the consumer has obtained a good deal in the circumstances, which strays dangerously close to encompassing an evaluation of the 'core terms' which is prohibited under the UTCCR[54]. Perhaps more clearly flawed was the *Zealander* court's apparent dismissal of the arbitration clause despite

[49] (2000) 2 T.C.L.R. 724 (QB) [hereinafter *Zealander*]
[50] At 3 (a).
[51] Harris, Planterese, Tecks, note 46 at 393.
[52] Note 35 at [17]
[53] *Ibid* at [54]
[54] Art 6(2). Consumers are likely to be aware of the existence and significance of core terms.

the fact that it was not proved that the claimant's bargaining position was weaker – it was merely not stronger, seemingly an over-zealous interpretation of unfairness.[55]

The approach courts have taken with respect to adjudication clauses may help illustrate the way in which Schedule 2 s. 1 (q) will be interpreted with respect to arbitration clauses. In *Picardi v Cuniberti*[56]the court considered the effect of a provision in a contract for architectural services which required that the resolution of disputes be brought before an adjudicator specialized in handling disputes within that profession, rather than in the courts. In concluding that the adjudication clause was unfair under the UTCCR, Toulmin J stated that 'a procedure which the consumer is required to follow, and which would cause irrecoverable expenditure in either prosecuting or defending it, is something which may hinder the consumer's right to take legal action…Costs in an adjudication can be very significant. Unless it is properly explained to the consumer [this] …also may give the appearance of unfairness.'[57] Toulmin felt that useful test for unfairness was to ask if the clause had been drawn to the attention of the consumer, would they obviously not have accepted it.[58] The requirement of obviousness sets a high standard; only patently imbalanced arbitration clauses would be caught. But the key point for Justice Toulmin appears to have been that under the terms of the contract, if there had been no agreement as to the appointment of a particular adjudicator, then the architects' (the suppliers) professional body would appoint one on their own, implying that such an appointment would be self-interested and thus result in a higher probability of bias in favour of the

[55] At 7(d), 5 (c) and 3 (a) noting that the Claimant's had insurance to cover costs – up to an unspecified limit.
[56] (2002) 94 ConLR 81 [hereinafter *Picardi*]
[57] *Ibid* At [131]
[58] *Ibid* at [129]. This view was echoed in *Westminster Building Co Ltd v Beckingham* 2004) 94 ConLR 107 where the existence of independent advice regarding the presence and meaning of an adjudication clause was considered to be a relevant factor in the determination of its fairness.

appointing party, a tenuous inference on which to base a judgment.[59] Furthermore, any allegation of bias in the arbitration would be properly the subject of judicial review.

More helpful factors to be considered by the court when weighing the unfairness of an adjudication provision in a contract were suggested in by Judge Mosely in *Lovell Projects v Legg*[60]and included: 1. The adjudication does not provide for a final determination of the dispute, i.e. that additional costs would be incurred; 2. The sum awarded by the adjudicator is payable to the supplier who can hold it pending a final determination, giving him a cash flow advantage; 3. The costs of adjudication are not recoverable even if the consumer is ultimately proved right;[61] 4. The costs of the adjudication are considerable; and 5. The timescale of the adjudication is short and the consumer is less likely to have the resources to deal with the timetable than the supplier. Admittedly, any of these factors should rightly be viewed with suspicion by a court and this is because they all relate to a primary concern: the exploitation of a financially weaker party's inability to pursue a legal remedy because of the potential expense associated with arbitration. This key component of unfairness in relation to adjudication clauses was re-iterated by the court in *Byren & Langley v Boston*,[62] Observing that '[compulsory consumer arbitration] provisions do effect a significant imbalance in the parties' relationship by altering their modes of dispute resolution,'[63] the court found an imbalance in the

[59] At [130]
[60] [2003] BLR 452 at [28]. This case involved a contractor / employer contract.
[61] A Swedish court held that a compulsory arbitration clause was fair because the consumer was protected against costs even in the event that it was unsuccessful in its claim: *Jan och Inger H v AB Ekebybyggen*, NJA 1983 s 510, CLAB Europe card no. SE000079, 28 June 1983. <https://adns.cec.eu.int/CLAB/SilverStream/Pages/pgCardFrame.html> (last accessed December 2006) Consumer costs in the arbitration were limited to 10% of total costs, even if the consumer was unsuccessful. This case was not decided under the EC Directive.
[62] [2004] EWHC 2450 [hereinafter *Byren*].
[63] At [41].

burden of enormous costs associated with adjudication.[64] It is noteworthy that such expense was not actually demonstrated by the *Byren* court. Thus the risk alone of high costs in arbitration emerges as the primary concern in relation to any clause that removes the dispute from conventional litigation.

C. Legal Aid and Cost Controls

Given the above noted judicial preoccupation with arbitration costs, the extent to which public funding is available for arbitration must be evaluated in order to arrive upon a full understanding of imbalance between the parties and unfairness under the UTCCR. The Funding Code[65] outlines the situations in which the Legal Services Commission of England and Wales ('the Commission') will provide legal aid for proceedings before arbitrators. The Commission will extend funding for arbitration disbursements, including, most importantly, payment of an arbitrator's fees.[66] However, the fact that lawyer's fees are not covered in arbitration could discourage impecunious consumers from advancing a claim through via arbitration. Conditional Fee Arrangements ('CFA')s, in which lawyers are paid only in the event of success, might address this problem and courts should be mindful of the ability of such arrangements to neutralize resource imbalances between parties. The Access to Justice Act 1999 permitted CFAs for arbitration as part of an overall objective of reducing barriers to litigation.[67] Miller has noted accordingly that CFAs will commonly be used in arbitration by claimants who are short on funds but who expect

[64] At [47]
[65] Established under the Access to Justice Act 1999 c 22.
[66] The Funding Code Criteria Part 1 s 2.1., The LSC Manual, Volume 3, Part A, 2002.
[67] CFAs were permitted for 'any sort of proceeding for resolving disputes' S. 27, amending s. 58(4) of the Courts and Legal Services Act 1990, but see discussion *Bevan Ashford v Geoff Yeandle Ltd* [1998] 3 All ER 238 at 249 where it was held that CFAs would be permitted in arbitration only if it was not contrary to public policy.

to win their case.[68] Furthermore, the Arbitration Act 1996 specifies that, unless parties agree otherwise, costs will follow the event, meaning that the losing party pays for the winner's costs in arbitration, as well as its own[69] which should comfort consumers with meritorious claims. The availability and cost of after the event litigation insurance to cover the opponent's arbitration expenses in the event of failure should likewise be taken into account by the courts when assessing the impact of arbitration clause on the consumer's right to access to justice.[70] The mere incapacity of a consumer to finance a claim would not be sufficient justification for a court to strike out an exclusive arbitration clause. Rather it would need to be demonstrated that the consumer failed to obtain arbitration funding because of the arbitral procedure itself and that some form of funding could have been obtained had the action proceeded in the courts. Otherwise the court would effectively be making a determination on the merits of the dispute rather than on the fairness of the process.

There may be reason to expect that the Commission would be less likely to grant legal aid for a matter that would be heard before an arbitral tribunal than it would a similar matter before the courts. The Funding Code's guidelines, which are used by the Commission in order to decide which applications for legal aid will receive funding, provide that one of the factors that will be considered is whether the matter is one of widespread public interest. This is taken to refer, *inter alia*, to claims that will potentially provide real benefits to a larger segment of society, not just the individual claimant,[71] as well as matters which will establish a new legal precedent.[72] It is admittedly difficult to see how either of these considerations is applicable to

[68] Francis Miller, 'Conditional Fees and s. 65 of the Arbitration Act 1996' 149 NLJ 530 (1999) at 531.
[69] S. 61(2)
[70] That the claimants had cost insurance seemed to be unimportant to the court in *Zealander* note 49 at 3 (a).
[71] Funding Code, note 66 at 5.7.5
[72] *Ibid* at 5.2.

arbitration. First, as arbitration is essentially confidential, any notoriety that could potentially shame the losing company would be lost, such that future benefits in terms of consumer awareness would be minimal.[73] Of course a supplier might have learnt its lesson from a lost arbitration and discontinue the behaviour that lead to the dispute in the first place and this represents a benefit to other consumers. Second, arbitration cannot result in a new legal precedent as arbitration does not operate under a system of precedent; there are generally no records of judgments and no duty upon arbitrators to rely upon past decisions. Arbitral awards may be appealed, ultimately generating a precedent or invoking the public interest. However, such considerations likely extend the scope of public interest too far when assessing the merit of a legal aid application. It should also be noted that a consumer party to an arbitration would need to fulfil the Funding Code's eligibility requirements in order to receive legal aid, such as low personal income (which may be unlikely given the £5000 threshold) and high probability of success, but these obstacles would be faced equally by consumers who seek public assistance for claims in the courts.

The court's legitimate concern that some arbitration procedures, particularly international ones, may be prohibitively expensive could be rectified by through the control of costs by the arbitral tribunal. The Arbitration Act grants the arbitral tribunal the discretion not to award costs to the winner if the winner had conducted itself in a way that was unreasonable or oppressive – either in the hearing or in the transaction itself.[74] The imposition of an exclusive arbitration clause resulting in a hearing the costs of which exceeded those which would have accrued at court could exemplify this type of behaviour, although it seems improbable that an arbitration tribunal would view the selection of itself as unreasonable. The tribunal could compel

[73] If the matter comes is pursued by the OFT then it will be disseminated in one of their bulletins.
[74] s. 61(1)

the commercial party which had generated the standard form contract containing the arbitration clause (the implication of which may not have been fully understood by the consumer) to pay the consumer's costs even if the commercial party was the victor on the merits. Further cost protections are extended by the Arbitration Act. A pre-dispute agreement which requires that one party is to pay all or part of the costs of the arbitration regardless of the outcome is invalid.[75] Arbitrators also have cost-capping powers, allowing them to limit the costs recoverable in respect of the arbitration, a provision that may also be readily invoked by losing defendants where the claimants have engaged in a CFA.[76] These provisions, which recognize that consumers may also wish to invoke arbitration to assert their rights, have the effect of 'creat[ing] a level playing field…and not deter[ing] a party from commencing arbitration proceedings'[77] because of the fear of excessive or improperly allocated expenses in the process. The availability of Legal Aid and these cost controlling mechanisms tempers resource imbalances between consumers and suppliers that may be generated by the domestic arbitral process. We will now turn our attention to the second main part of this article which concerns arbitration agreements in consumer contracts that have an international dimension.

III. INTERNATIONAL CONSUMER ARBITRATION

A. Advantages and Disadvantages

The popularity of the Internet has resulted in more consumers seeking goods and services abroad and likewise arbitration has begun to play an important role in the resolution of international disputes. The rise in prominence of several leading commercial arbitral institutions such as the American Arbitration Association, the

[75] s. 60
[76] s. 65, see Francis Miller, 'Conditional Fees', note 68 at 531.
[77] Michael J Cook, *Cook on Costs*, (Lexis Nexis Butterworths, London, 2006) at 249.

International Chamber of Commerce and the London Court of International Arbitration International has contributed to the centralization of arbitral procedure and the legitimization of arbitral awards worldwide.[78] The advantages of international arbitration in the commercial sphere have been observed by many commentators, notably Redfern and Hunter.[79] Some of these can be applied to the consumer context. The most important benefit is the neutrality of the forum, which is assistive if the consumer is resident in a different jurisdiction from that of the supplier and fears that a foreign court will have a different understanding of justice than that of his home jurisdiction and this would unfairly prejudice his case. Reduced costs relative to litigation are another possible advantage. Gary Born urges that the expenses of international arbitration 'will usually pale in comparison with the costs of legal representation if there are parallel or multiplicitous proceedings in the national courts,' and that costs 'will typically not approach those that are incurred if there is re-litigation of factual issues in national and appellate courts.'[80] This view is echoed by Redfern and Hunter who contend that the finality of arbitral awards is preferable to a court ruling which may simply be 'the first step on a ladder of appeals.'[81] The scope of appeal from international arbitrations is limited by the Arbitration Act 1996, which grants parties to a non-domestic arbitration agreement the absolute freedom to exclude the jurisdiction of the courts.[82] Born adds that the flexibility of international arbitration, like its domestic counterpart, usually limits the potential for 'costly, scorched-earth discovery and other procedural steps that may exist in some common

[78] Florian Grizel, 'Control of Awards and Re-Centralization of International Commercial Arbitration' (2006) 25 CJQ 166-180.
[79] Redfern and Hunter, note 20 at 22-46. Redfern and Hunter note that arbitration is generally more advantageous for international disputes than domestic ones at 26.
[80] Gary Born, *International Arbitration and Forum Selection Agreements*: *Planning Drafting and Enforcing* (Kluwer Law International, London, 1999) at 8. Parallel proceedings are often the result of finding that an arbitration clause is unenforceable.
[81] Redfern and Hunter note 20 at 23.
[82] Arbitration Act 1996 s. 69(1)

law jurisdictions.'[83] National court proceedings in some jurisdictions are subject to equally significant delays and expense as are proceedings in the UK.[84] Confidentiality remains an advantage in international arbitration, which, as suggested above, could also be attractive to a wealthy consumer or public figure who wishes to shield the nature of their purchases from public scrutiny, although this is probably less secure with respect to international disputes because there is no clear duty of confidentiality for most international arbitral institutions. Awards can sometimes be made public if this is stipulated by government regulation.[85] This could be equally attractive to a consumer who wants to benefit from the pressure placed upon a supplier by unfavourable media attention.

Disadvantages of international arbitration have been observed as well, notably the potential for high costs.[86] While arbitration appears to offer a less expensive resolution for more complex matters (for example, when assets are located in multiple jurisdictions), this advantage may be less pronounced in smaller, more straightforward claims. The limited powers of arbitrators, such as the lack of joinder, which is a useful mechanism in larger multi-party disputes, has similarly been cited with concern.[87] There may be reason to fear that international arbitration will be more biased against consumers than domestic arbitration. Parties to international arbitration will usually be corporations or state entities rather than private individuals. Consequently the local courts of the forum can afford to take a more lenient approach towards

[83] Born, note 80 at 8.
[84] *Ibid* at 8.
[85] *Ibid* at 11.
[86] Redfern and Hunter note 20 at 24.
[87] *Ibid* at 24.

arbitrations when called upon to intervene. Indeed, international arbitration is expressly designed to limit the extent to which a national court may intervene.[88]

When challenging the validity of an arbitration clause in an international contract (where one or more of the elements of the transaction takes place outside the UK) the English consumer must bring proceedings either in the court of his domicile (a UK court) or in the jurisdiction of the seat of arbitration prior to the arbitration taking place. A UK court, once that court has taken jurisdiction, will then consider the existence and material validity of the clause, which will first require the court to reach a conclusion as to which system of law it will use to answer those questions. Thus, in assessing the enforceability of an arbitration clause in an international consumer contract, unlike a domestic arbitration clause, the UK court will have to determine which law governs the analysis of that clause's validity. Arbitration clauses are excluded from the material scope of the Rome Convention on the Law Applicable to Contractual Obligations[89] and consequently the construction of an arbitration clause will be governed by its proper law as ascertained by common law principles. The proper law of the arbitration clause will normally be the law applicable to the contract as a whole. Therefore, if the contract contains an express choice of law, that chosen law will usually govern the arbitration clause.[90] If the contract does not include an express choice of law, the law governing the contract (and the arbitration agreement within it) is normally inferred by the court from the seat of arbitration.[91] While a discussion of courts' interpretation of choice of law agreements is outside the scope of this article, it must be recognized that UK courts may be unwilling to use a system of

[88] *Ibid* at 12-13. Restricting the involvement of local courts is a significant feature of many Model Laws implemented by arbitration tribunals.
[89] Art 1(2)d
[90] For example UK courts will find a different law applicable to the arbitration agreement than the contract as a whole when the arbitration clause itself mentions a statute from a different jurisdiction: *XL Insurance Ltd. v. Owens Corning* [2000] 2 Lloyd's Rep 500 (QB).
[91] *Hamlyn & Co. v Talisker Distillery* [1894] AC 202.

law with which to evaluate the validity of an arbitration clause in a consumer contract if it lead to an imbalance between the parties. This is reflected in the Brussels Regulation,[92] which does not directly apply to arbitration agreements[93] but requires that in deciding upon choice of law, the courts cannot deprive consumers of the protections afforded to them by the mandatory rules of their country of their habitual residence.[94] Article 16 of the Brussels Regulation provides that any claims brought against consumers must be brought in the country of the consumer's domicile. Article 17 permits departure from this requirement only by consent from the consumer after the dispute has arisen. Thus even in proceedings before foreign courts, an English consumer's reliance upon the mandatory rules of his home jurisdiction will lead the court to consider the UTCCR. Furthermore, section 89(3) of the Arbitration Act states that the UTCCR is applicable whatever the law applicable to the arbitration agreement, as long as there is a 'close connection' between the contract and the European Economic Area (EEA). Unfortunately, no definition of 'close connection' is provided in the Arbitration Act. Some assistance may be found in the Rome Convention's use of the term 'close connection', which involves one party being resident or having a main place of business in that country.[95] Similarly, the Unfair Contract Terms Act 1977 requires that for there to be a close connection, the party was habitually resident in the UK at the time of entering into the contract, and the essential steps of making the contract were taken in the country of their habitual

[92] Council Regulation (EC) 44/2001, governing jurisdiction and enforcement in civil and commercial disputes with elements in more than one EU state [hereinafter 'The Brussels Regulation']
[93] Art 1(2)d. Thus, strictly speaking, no prohibition is placed on the ability to contract out of the terms offered by the instrument if the parties wish to use arbitration to resolve any subsequent disputes: Schiavetta note 1 at 4.
[94] Art 3
[95] Art 7(1)

residence.[96] Thus UK consumers should be afforded the protection of the UTCCR regardless of the location of the supplier.

B. Consumer Protection under the New York Convention

The protections offered by the UTCCR are also engaged at the enforcement stage of the arbitral procedure through the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards (also known as the New York Convention). The Convention, now ratified by more than 120 states, was designed to enhance the enforceability of international arbitration agreements and awards. Its virtual universal adoption throughout the industrialized world is widely considered as having contributed to the significant increase in the use of international commercial arbitration.[97] The Convention requires national courts of signatory states to both recognize and enforce written agreements to resolve disputes via international arbitration[98] with the exception that a national court may ignore an arbitration clause if it finds that the agreement is 'null and void, inoperative or incapable of being performed.'[99]The national court will make such determinations pursuant to its own rules, and for consumer contracts before UK courts this should now involve a consideration of the UTCCR. Moreover, although the New York Convention is associated with the enforcement of arbitral *awards*, it has been suggested that it contemplates the enforcement of arbitral *agreements* as well.[100] Under Article V(1)a of the Convention, the enforcement of an award can be refused if the arbitral agreement is not valid under its applicable law as chosen by the parties, or if no law is

[96] S. 27(2)b
[97] Born note 80 at 98.
[98] Art II.2.
[99] Art II.3.
[100] See Albert Jan van den Berg, *The New York Convention of 1958, Toward a Uniform Interpretation*, (Kluwer Law and Taxation Publishers, Deventer/The Netherlands, 1981) at 126.

chosen, then the law of the country where the award was made.[101] This has been interpreted also to mean the law of the country where the award will be made, which can be determined by the seat of arbitration before the arbitration has begun.[102] The New York Convention offers several additional safeguards that protect weaker parties such as consumers, irrespective of where the arbitration is conducted. The most important of which are these. First, national courts may refuse to enforce international arbitral awards where the parties were under some incapacity, or the agreement to arbitrate was not valid (under the law to which the parties subjected it, or if no law was chosen, under the law where the award was made).[103] Second, enforcement may be denied if the party against whom the award was made was not given proper notice of the appointment of the arbitrator or of the arbitration proceedings or was otherwise unable to present his case.[104] This provision seems to contemplate, *inter alia*, the lack of legal aid which may affect a party's ability to represent itself properly in an arbitral hearing.

As we have seen, legal aid is available for some aspects of arbitration in the UK. There appears to be no obvious reason to expect that the same level of Legal Aid would not be available to a UK consumer with respect to a hearing before a tribunal located outside the UK. However, as the Funding Code weighs cost against probability of success, the potential for higher costs in an international arbitration (including travelling, accommodation, translations etc) might render Legal Aid assistance in such a matter unlikely, especially in uncertain claims. This drawback is mitigated by the possibility of obtaining process funding through a CFA or a

[101] *Ibid* at 127.
[102] US Courts have used this interpretation to enforce international arbitration agreements that would not normally have been permitted in a domestic context: E.g. *American Safety Equip. Corp. v. J.P. Maguire & Company* 391 F.2d 821, 824 (2d Cir. 1968).
[103] Art III.1.a). Note the plurality of 'parties' suggesting that both the seller and the consumer would need to be incapacitated for this exception to operate.
[104] Art III.1.b)

contingency fee arrangement (in which the lawyer is paid a portion of the award), the latter of which is prohibited for most types of domestic hearings.[105] There is no prohibition against contingency fees in relation to international arbitration hearings in which UK lawyers are involved, provided that such arrangements are not prohibited by the law of the forum.[106] The availability of such arrangements might therefore result in greater access for legal representation in international consumer arbitrations, particularly large scale ones, where the prospect of a high fee will be enticing.

Finally, domestic courts may refuse enforcement of the arbitral award under the New York Convention if it is contrary to the public policy of their country.[107] It has been noted that public policy in this context has been taken to mean international public policy, which has been more narrowly construed than domestic public policy.[108] Arbitral tribunals must consider the public policy of both the seat of arbitration and that of the state or states where enforcement is sought. Still, the protections afforded by these exceptions should guide the courts of the UK towards a less restrictive interpretation of international commercial arbitration clauses in commercial contracts – any unfairness that has occurred in a consumer dispute may ultimately be caught at the enforcement stage rather than the initial evaluation of the contractual term. Of course, it may be preferable from a cost standpoint to prevent arbitration altogether from the outset by negating the arbitration clause rather than wait until an arbitral award has been rendered.

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[105] Rule 8 a), Solicitor's Practice Rules, The Law Society of England and Wales, 2006. The prohibition applies to any 'contentious proceeding' which should include arbitration.
[106] *Ibid* Rule 8 b). Contingency fees would thus be available for arbitration in the United States.
[107] Art III.2..b). The UK Arbitration Act 1996 also prohibits the granting of leave to enforce an award in England if the enforcement is contrary to public policy and an award may be set aside on the basis that the award (or the way it was obtained) is contrary to public policy: s. 68(2)g.
[108] Albert Jan van den Berg., *Distinction Domestic-International Public Policy*, New York Consolidated Commentary Cases, (1996) XXI Yearbook at 502.

Although courts have drawn a distinction between domestic and international arbitrability, suggesting that a court might not always apply its domestic law to questions arising from or relating to arbitration,[109] the UTCCR itself does not distinguish between domestic and international arbitration for consumers. The OFT does urge that 'it is not fair for the aggrieved consumer to be forced to travel long distances and use unfamiliar procedures'[110] which hints that an arbitration clause in a contract concluded by an UK consumer in favour of an arbitral institution outside the UK would fall afoul of the fairness test. Travelling, accommodation and possibly translation expenses could raise the cost of international arbitration beyond that of a domestic one, exacerbating the fear that arbitration was being used strategically to suppress the legal rights of consumers. Simmonds suggests that a contractual term is likely to be viewed as even more unfair if, apart from geographical inconveniences, it seeks to impose on the consumer a system of law providing substantially less protection than that given in the European Union by the EC Directive.[111] Thus the concern is not only between the process of arbitration versus courts, but fair applicable law versus unfair applicable law, a problem that is worsened by the fact that exclusive arbitration clauses in favour of specific institutions have been viewed by courts as indicative of choice of law.[112] The protection of mandatory laws of the place of the consumer's habitual residence should help mitigate any unfairness towards consumers engendered by foreign systems of law.

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[109] Schiavetta note 1 at 10, referring to *Audi-NSU Auto Union A.G. v. S.A. Adelin Petit And Cie* (Belgium No.2) Cour de Cassation (1st Chamber) June 28, 1979.

[110] Note 29 at 40. Forcing the consumer to travel a long distance to seek legal redress was identified as a potentially unfair burden by the ECJ: *Oceano Grupo Editorial SA v Quintero Salvat Editores SA v Prades and others* (Joined cases C-240-244/98) (27 June 2000) at [22].

[111] Jeremy Simmonds, 'Bankers' Documents and the Unfair Terms in Consumer Contracts Regulation 1999' (2002) 17(2) Journal of International Banking Law 205 at 214.

[112] Note 91. This applies even if the contract in which the arbitration clause is situate is governed by some other law: *Deutsche Schactubau v Shell International Petroleum Ltd* [1990] 1 A.C. 295 (CA), a judgment which was reversed on other grounds.

It is possible that an English court could tale a more liberal view of a compulsory arbitration clause in an international consumer contract than a similar clause in a wholly domestic contract because of perceived sophistication on the part of consumers who choose to transact internationally and are therefore deserving of a lower level of protection. This approach, which seems to have also found voice in the Arbitration Act's £5000 minimum for matters taken to compulsory arbitration, has already been taken by courts in the EU. A French court upheld an arbitration clause governed by English law relating to the purchase of a car by a French consumer who was seen as less entitled to protection because he had engaged in a cross-border transaction.[113] While this judicial attitude may have made more sense in the past when transacting internationally normally meant travelling internationally and conveyed a degree of *savoir faire*, the regularity of modern internet commerce has rendered international transactions the domain of all varieties of consumers. This concept of comparative consumer sophistication will now be addressed in relation to advantages engendered by arbitration agreements.

IV. HIDDEN FUNCTIONS OF ARBITRATION AGREEMENTS AND THE ARBITRAL PROCESS

The arguments in favour of a more lenient treatment of exclusive arbitration clauses extend beyond any practical cost advantages or confidentiality. It has been suggested that standard form contracts containing terms such as arbitration clauses achieve economic efficiency because they reduce the proffering party's transaction cost of negotiating with a large number of individual persons. This leads to an associated

[113] Cour d'Appel de Paris of 07/12/94, *Revue trimestrielle du droit commercial 1995/401*, as cited in Vahrenwald,, *Out-of-Court Dispute Settlement Systems for E-commerce, Report on Legal Issues*, Part IV: Arbitration, 31st October 2000 (revised 07/03/01) at 203.

increase in profits and ultimately a lower price to the client.[114] For example, implementing standard form contracts may facilitate control of contractual relations made by subordinate members of staff who are relatively unskilled and work for lower pay rates. Risks inherent to a particular business may also be standardized, enabling delegation of contracting to those who have less training.[115] The problem is that a more complex boilerplate contract may augment transaction costs born by the signing party as it may still be assiduously reviewed. This is an acceptable cost in a long term relationship, particularly if it is offset by a lower priced commodity, but not in a one-time consumer contract, especially if the consumer does not have the resources or the inclination to review a complex standard form contract to understand the implications of terms like an arbitration clause. The efficiency of standard form contracts has been further challenged because the inaccessibility of content results in consumers disregarding the boilerplate and shopping exclusively based upon price which leads them to lower cost, harsher term contracts which is inefficient because there are some customers who would select higher cost goods with better terms.[116] This reveals a flaw in economic theory generally, namely that all contractual parties are rational negotiators motivated by the desire to maximize their welfare which is expressed in their willingness to pay.[117] It ignores considerations of altruism and integrity, and perhaps most notably customer loyalty. Customers may choose to pay more for a good if they feel they have developed a relationship of familiarity and trust with a supplier, and may well be attracted to less formal transactions based upon these bonds, such as those where a 'handshake will do'. Statutory protections, like the

[114] The rise of the standard form contract has been linked to the growth of mass production in the 20th Century which necessitated a similarly mass-produced contract that could be re-used: George Gluck, 'Standard Form Contracts: The Contract Theory Re-Considered' (1979) 28 ICLQ 72 at 73.
[115] Elvin note 24 at 41.
[116] V.P. Goldberg, 'Institutional Change and the Quasi-Invisible Hand' (1974) 17 J of L and Economics 461 at 483-484.
[117] Mindy Chen-Wishart, *Contract Law* (OUP, Oxford, 2005) at 30.

UTCCR, can be seen to correct such market imperfections by offering the consumer more choice – such as the choice to pursue dispute resolution in the courts.

Recent work by Gilo and Porat has theorized that standard form contracts are used for reasons other than simple economic efficiency and the conventionally understood exploitation by the supplier of informational asymmetry between the supplier and the consumer.[118] Specifically, standard form contracts are especially useful in situations where the imbalance in information is not between the supplier and the consumer but between different kinds of consumers and between consumers and non-consumers, i.e. purchasers who are businesses. In such situations, a compulsory arbitration clause, and possibly also the transaction costs associated with reviewing one, can have beneficial repercussions for both parties. First, suppliers could use standard form contracts, containing a term like an arbitration clause, to screen out unwanted clients.[119] A supplier may view the willingness to engage in international arbitration as a proxy for client sophistication and might lead to contracts with other businesses (as desired) rather than consumers. Consumers might be viewed as less preferable because they purchase in lower quantity and with less regularity. Only clients who have read and understood the meaning of an arbitration clause and are willing to comply with it will enter into the transaction, and again these might likely be other businesses rather than consumers. Bulk discounts achieve a similar effect, as only non consumers tend to purchase in very large quantities. The customer-selection function is based upon the premise that the undesirable unsophisticated clients will decline a contract that contains an arbitration clause, or any similar small-

[118] David Gilo and Ariel Porat, 'The Hidden Roles of Boilerplate and Standard Form Contracts' 104 Michigan LR (March 2006, forthcoming) <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=798308> (last accessed December 2006).
[119] *Ibid* at 8-9.

print terms they do not understand.[120] Secondly, a supplier could use an arbitration clause to signal to sophisticated clients, either consumers or non-consumers, their level of expertise as a supplier, which is a way of defeating the supplier's competitors.[121] Thus an informed consumer, aware of the potential advantages of arbitration might interpret an arbitration clause as an indicative of the supplier's capability relative to other suppliers. Business acumen associated with familiarity with arbitration could inspire confidence. Lastly, boilerplate terms such as arbitration clauses could function as a means of establishing customer preferences.[122] If arbitration clauses are not rejected, suppliers could conclude that this is a contractual feature that consumers value, obviating the need for costly surveys. Thus suppliers can explore the viability of alternative means of dispute resolution by testing the term's acceptability. These often hidden, non exploitative benefits of standard form contract terms like arbitration clauses should be kept in mind when they are reviewed by courts.

As a final possible justification for a less restrictive view of arbitration clauses, courts should be mindful of the drive towards non-litigious resolution of disputes that has become endemic to our legal culture of extreme process-cost sensitivity.[123] The goal of reducing the burden on the courts through alternative means of dispute resolution is also a high priority of the European Parliament, which has sought to promote the use of arbitration for consumer disputes.[124] We have seen that arbitration often represents a less expensive alternative to court litigation, particularly

[120] The reality may be the precise opposite – unsophisticated clients may sign anything.
[121] Note 118 at 6.
[122] *Ibid* at 27-28.
[123] Schiavetta note 1 at 15 and Keith N Hylton, 'Agreements to Waive or to Arbitrate Legal Claims' (2000) 8 Supreme Court Economic R 209 at 263. Hylton notes also that there is a downside to reducing litigation – the development of the common law is inhibited because arbitration does not create a body of precedent, at 263.
[124] See further Resolution on the Promotion of Recourse to Arbitration for the Resolution of Legal Conflicts, 25/07/94, OJ C 205/519.

in the settlement of disputes that have an international element, but even where it is not less expensive the burden is still removed from the state, which is becoming increasingly ill-equipped to deal with the weight of disputes that are brought before it. Consequently courts should, when their discretion allows them to, curtail their eagerness to strike down arbitration clauses and respect parties' demonstrated willingness to seek resolution through arbitration unless there is manifest cause not to, such as a patent lack of consent or understanding. This should be reflected in a higher standard for 'unfairness' under the UTCCR and should also inform the definition of public policy under the New York Convention at the enforcement stage.

V. CONCLUSION

Consumer contracts that include clauses requiring compulsory dispute resolution via arbitration may raise concerns of oppression and consequently will be scrutinized under the Unfair Terms in Consumer Contracts Regulations 1999 and its 'fairness' test. Case law has shown that courts are willing to apply this test broadly and this may be unwarranted for several reasons. Costs can be lower in arbitration, particularly at the international level, largely due to the informality of the procedure and the limits on appeals. Legal Aid is available for some aspects of arbitration, and arbitrators have the power to control costs, both of which guard against the exploitation of consumers with inferior resources. International contracts involving UK consumers will be similarly subject to the 'fairness' analysis of the UTCCR and there are additional safeguards against oppression at the enforcement stage under the New York Convention. Some of the suspicion that courts have shown towards compulsory arbitration clauses in standard form contracts may be misplaced because such clauses serve other, legitimate business purposes that should not be hindered. Lastly, the

motivation to relieve the burden placed upon the court system in the UK should be reflected in an interpretation of arbitration clauses that is not hostile to non-court dispute resolution. Given these reasons it is hoped that in the future courts will adopt a more rigorous analysis of unfairness when examining arbitration clauses in consumer contracts.