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### **The arbitrability of international online consumer disputes**

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**THE ARBITRABILITY OF INTERNATIONAL  
ONLINE CONSUMER DISPUTES**

**MOHAMMAD A. ALADASEEN**

**Thesis Submitted to the University of Bangor for the Degree of Doctor  
of Philosophy**

**September 2015**

## **Abstract**

Private arbitration is often made possible by pre-dispute clauses and agreements whereby parties waive the right to solve their disputes by court. The doctrine of arbitrability addresses the questions of what matters may be referred to arbitration and who will be party to it. This thesis is a comparative study that explores the theory and practice of the arbitrability of international online consumer disputes as they function in two legal systems, that of England and Wales and that of the United States of America.

The purpose of this exploration is to analyze comparatively and to discuss critically the role of arbitrability, and also the problematic areas of that doctrine in international online consumer disputes. The thesis will propose ways of overcoming the problems encountered in the arbitrability of international online consumer disputes owing to the different policies regarding the arbitrability of such disputes that are to be found in the two legal systems named above. This objective is met by exploring the theory, methods, functions and purpose of arbitrability in international online consumer disputes. The thesis also examines the common ground between the different policies of the two jurisdictions. The overall aim is to strengthen the role of arbitration as an effective means of dispute resolution for international online consumer disputes.

The thesis demonstrates that the arbitrability of international online consumer disputes is relevant at three different stages of international arbitration. These stages are: at the outset of proceedings, when the arbitrators determine their jurisdiction; during the arbitration, where they control the law and procedure applicable to the arbitration; and at the stage of enforcement of the final award. The thesis demonstrates that the lack of uniformity in arbitration law damages the arbitrability of international online consumer disputes. It also shows that a new method for reconsidering the issue of the arbitrability of such disputes is required in order to lend support to the consumer as the weaker party, specifically at the outset and in the course of the arbitration proceedings. It concludes that an adequate transnational standard for determining the arbitrability of international online consumer is by no means an impossibility.

The thesis furthermore asserts that a verification method is needed in order to establish the status of the consumer as the weaker party in online disputes. Such a verification method should be transnational and should be carried out by the arbitrator so as to

establish a balance between party autonomy and the reinforcement of the consumers' protection internationally. This reform is particularly necessary in view of the continuing worldwide expansion of internet used.

*This thesis is dedicated to*

*My Parents*

*For their endless love, support and encouragement*

## **Acknowledgement**

Praise be to Allah, the Lord of the worlds, whom all people praise in different languages.  
He is the Most Bounteous and the Most Beneficent

*"Those who do not thank people, they do not thank Allah."*

*The Prophet Muhammad Peace and blessings be upon him*

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Thank you

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## **List of Abbreviations**

AAA	American Arbitration Association
B2B	Business-to-Business
B2C	Business-to-Consumer
CISG	International Sale of Goods Convention 1980
CJEU	Court of Justice of the European Union
CPR	Civil Procedure Rules 1998
CUECIC	United Nations Convention on the Use of Electronic Communications in International Contracts 2005
EU	European Union
FAA	United States Federal Arbitration Act 1925
IBA	International Bar Association
OECD	Organisation for Economic Co-operation and Development
UCC	Uniform Commercial Code 2001
UCTA	Unfair Contract Terms Act 1977
UTCCD	Unfair Terms in Consumer Contracts Directive 1993
UTCCR	Unfair Terms in Consumer Contracts Regulations 1999

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# Chapter 1: Introduction

## 1. Introduction

The aim of this thesis is to evaluate arbitrability in international online consumer disputes in the jurisdictions of England and Wales and the USA. It will consider both the legal and factual aspects of the practices in these countries in the context of international arbitration.

England and Wales and the USA are contracting states to the Convention on the Recognition and Enforcement of Foreign Arbitral Awards 1958, (hereafter the New York Convention).<sup>1</sup> According to the New York Convention, contracting states shall recognize an arbitration agreement or clause signed by parties wishing to submit their disputes to arbitration in respect of a defined legal relationship and when the subject matter is capable of settlement by arbitration.<sup>2</sup> Online consumer disputes are arbitrable in principle.<sup>3</sup> However, a difficulty may be encountered in regard to the freedom of the parties and their power to agree and conclude an arbitration in cases where one of the parties is a consumer using the internet as a platform for entry into an international online contract. Such cases may be seen as inarbitrable. Online consumer contracts often contain very limited possibilities with regard to the choice of arbitration as a form of private justice. This creates a tension between the principles of consumer protection and the principles of party autonomy when parties enter into an international online consumer contract. Furthermore, arbitration is not just a private proceeding: it also has public consequences.<sup>4</sup> It can be argued that the existing legal norms and principles governing international

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<sup>1</sup> The New York Convention was prepared and opened for signature on 10 June 1958 and entered into force on 7 June 1959 through the United Nations Conference on International Commercial Arbitration, with 24 Signatories and 149 parties of the 193 United Nations Member States. Both the United Kingdom of Great Britain and United States of America are Contracting parties: available at [http://www.uncitral.org/uncitral/en/uncitral\\_texts/arbitration/NYConvention\\_status.html](http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/NYConvention_status.html) (Accessed 17/04/2014).

<sup>2</sup> The New York Convention Article II “*Each Contracting State shall recognize an agreement in writing under which the parties undertake to submit to arbitration all or any differences which have arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not, concerning a subject matter capable of settlement by arbitration*”.

<sup>3</sup> Gabrielle Kaufmann-Kohler, ‘Online Dispute Resolution and its Significance for International Commercial Arbitration’ (2005) Publicatio ICC International Chamber of Commerce, 44.

<sup>4</sup> Nigel Blackaby, Alan Redfern and Martin Hunter, *International Arbitration* (5<sup>th</sup> edn., Oxford University Press 2009) 123.

online consumer disputes and the legal consequences resulting from them have created many questions and doubts, and a perception that the consumer is the weaker party.

Some of these questions relate to the concept of the international online consumer, while others relate to the methods that the international arbitrator should rely upon in order to uphold the essential values of the international online consumer community. The principles of consumer protection have a negative function in the way they shield consumers from arbitration. In contrast, the principles of party autonomy have a positive function insofar as they act authoritatively in applying fundamental rules to the resolution of the dispute through arbitration. Of course, when the applicable standards in international online consumer disputes are determined, any conflict of laws, traditional rules, legal norms and legal principles, especially the applicable law and the rules of jurisdiction of arbitration tribunals, will affect the arbitrability of such disputes.

## ***2. Research Question(s)***

This thesis considers whether international arbitration, as both an autonomous procedure and a judicial procedure, ought to uphold transnational standards in its procedure for international online consumers as the weaker parties. It is argued that failure to do so may prevent these consumers from having a reasonable opportunity to access justice in disputes involving the jurisdiction of England and Wales and the USA. It should be made clear that this thesis is not concerned with the question of whether arbitration is more or less appropriate than a court as an instrument for the settlement of online consumer disputes. The author believes that it is impossible to say which of the two is best suited to this function. Nonetheless it is clear that, for international cases, giving the parties an opportunity to settle their disputes internationally through arbitration can provide a more appropriate solution than a court. It is true that arbitration has disadvantages and might pose certain problems due to its lack of uniformity in terms of consumer protection rules. Overall, however, it succeeds in serving the interests of the parties involved.

The author will argue that international consumers should be able to benefit from arbitration as an autonomous and judicial procedure. However, the attainment of such a benefit raises the issue of an imbalance, on the one hand, between the legal protection offered through the arbitration with respect to autonomy of the parties and, on the other hand, the judicial protection of a weaker party afforded by the court. How, then, can a

balance between contractual autonomy and the protection of the consumer as a weaker party be assured? The question cannot be answered without an accurate analysis of consumer protection and an enquiry as to whether the consumer is in need of protection from arbitration because of the nature of arbitration or because of the position of the consumer in the contract. These questions have different answers and different approaches, depending on which jurisdiction is involved. It is argued that a new method for reconsidering the question of the arbitrability of international online consumer disputes is required in order to uphold the consumer as weaker party and to tackle the middle ground between different policies regarding the arbitrability of such disputes.

In accordance with the New York Convention, England and Wales and the USA, as contracting states, are obliged to recognize and enforce foreign arbitral awards as binding judgments of their own national courts unless the subject matter of the dispute is not capable of settlement by arbitration or is contrary to the public policy under the law of that country.<sup>5</sup> Thus there is a second core question in relation to the use of arbitrability in international online consumer disputes. Specifically, how the arbitrability is determined and to what extent it is binding on both consumers and businesses in resolving their disputes by arbitration under the current legal systems of England and Wales and the USA.

In this research, the arbitrability of international online consumer disputes is an important issue because of the tension between the protection of the weaker party and party autonomy. This imbalance has an impact on the arbitrability of consumer disputes and presents a challenge to the validity of arbitration agreements and awards. It may be contended that the contract and/or dispute between parties falls within the exclusive jurisdiction of the national courts.<sup>6</sup> Moreover, the issue of arbitrability can arise at different stages, before both the arbitral tribunal and the state court, in the context of challenging the validity of the arbitration agreement at the beginning of arbitration; or at the enforcement stage, where it may be challenged as being in violation of public policy. The arbitration tribunal or national court before which the issue of arbitrability is invoked must decide how to determine this issue. When the issue of arbitrability arises in international disputes, it is necessary to have regard for relevant laws of the different

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<sup>5</sup> The New York Convention, Article V (2).

<sup>6</sup> Edward Morgan, 'Contract Theory and the Sources of Rights: An Approach to the Arbitrability Question' (1986) 60 S. Cal. L. Rev. 1059.

states that are involved.<sup>7</sup> Arbitrability can therefore be considered as playing an important role in the operation of justice.

For the purposes of this thesis, England and Wales will be considered as a single unit which for most purposes of the thesis, cover two of the four countries home nations of the United Kingdom, in comparison with the United States of America (USA) as a federal single unit. These two jurisdictions operate a common law system, so that the same principles can be applied to similar facts even if they do not necessarily yield similar outcomes. Their respective legal systems have different approaches towards the determination of the arbitrability of online consumer disputes and the limits of the principle of party autonomy.

### **3. Background Justification**

Since the emergence of the Internet, e-commerce has been used to conduct business over the Internet. E-commerce covers many activities including financial and commercial transactions, electronic data interchange (EDI), electronic funds transfers (EFT) and all credit/debit card activities.<sup>8</sup> For the purpose of this thesis, e-commerce is limited to the conduct of commerce in goods and services with the assistance of the Internet.<sup>9</sup> For that purpose, an e-commerce contract is related to the production, distribution, marketing, sale or delivery of goods and services by electronic means, i.e. the Internet.<sup>10</sup> However, the nature of the e-commerce contract is another problematic issue in regard to the terms ‘consent’ and ‘choices’.

The increasing use of the Internet to conduct business has increased the use of non-negotiated adhesion contracts. They are especially prevalent in the sale of goods, in particular online B2C transactions where the online consumer, whether a legal person or a natural person, is usually in the position of the weaker party and treated unequally based

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<sup>7</sup> Blackaby, Redfern, and Hunter, *International Arbitration* (n 4), 123.

<sup>8</sup> See The Organisation for Economic Co-operation and Development (OECD) Working Party on Indicators for the Information Society, ‘Defining and Measuring E-Commerce: a Status Report’ DSTI/ICCP/IIS (99)4/FINAL, 8-9.

<sup>9</sup> The term “Internet” refers to “[A] telephony-based system that links computers and computer (the user of computers) to worldwide networks to permit distribution of data, e-mail, messages and visual and audio materials by using browsers to access information, graphics, photography, video and audio materials made available to specific individuals, groups of individuals, or the public”; See Lucy Kung, Robert G. Picard, and Ruth Towse, *The Internet and the Mass Media* (Sage Publications Ltd. 2008) 4, 46.

<sup>10</sup> The world Trade Organisation (WTO), Work programme on electronic commerce, adopted by the General Council on 25 September 1998.

on the lack of bargaining power.<sup>11</sup> The problem here is that online information is often presented without making any distinction between online users. In addition, the way of concluding an online contract is no different. This raises a question here as is it possible that the information requirement would change the notion of consumer as a weaker party in the online contract from the natural person only to include also the legal person as an online weaker party when they are dealing as a consumer.

The notion of consumer arbitration has been addressed, with varying degrees of analytical depth, in a number of articles and conference reports. The appropriateness of arbitration as a mechanism for resolving online disputes, particularly ‘B2C’ (business-to-consumer) disputes, has been a subject of debate between scholars of e-commerce.<sup>12</sup> Whilst no treaty has ever been concluded between the two jurisdictions concerning consumer transactions and internet disputes over the internet,<sup>13</sup> consumer complaints constitute a subject matter that is capable of being resolved by arbitration. Furthermore, due the New York Convention, arbitration is the only international dispute resolution method that has an effective enforcement structure shared by the two jurisdictions.

The New York Convention is one of the most important, if not the most important, means of settling international commercial disputes. It seeks to provide common legislative standards for the recognition and enforcement of arbitration. It facilitates the recognition and enforcement of foreign arbitral awards by establishing uniform rules and standards to be applied within the contracting states. In addition, it provides grounds on which the enforcement of international arbitration awards may be refused. One of these is Article V (2)(a), which sets out a ground related to the arbitrability of disputes.<sup>14</sup>

It is useful to consider here the differences in the concept of arbitrability in the EU and the USA. In the EU, arbitrability refers to the suitability of specific claims to be regarded

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<sup>11</sup> Immaculada Barral, ‘Consumer and New Technologies: Information Requirement in E-Commerce and New Contracting Practice in the Internet’ (2009) 27 Penn State International Law Review, 609.

<sup>12</sup> Faye Fangfei Wang, *Internet jurisdiction and choice of law: legal practices in the EU, US and China* (Cambridge University Press 2010), 156.

<sup>13</sup> Peter Swire, ‘Elephants and Mice Revisited: Law and Choice of Law on the Internet’ (2005) 153 University of Pennsylvania Law Review 1975.

<sup>14</sup> In relation to the limited grounds Article (II) and (V) provides a list in which the foreign arbitral awards should be set aside or denied enforcement; Article V (2) “Recognition and enforcement of an arbitral award may also be refused if the competent authority in the country where recognition and enforcement is sought finds that: (a) the subject matter of the difference is not capable of settlement by arbitration under the law of that country”.

as subject matter capable of settlement by arbitration.<sup>15</sup> In the USA, however, arbitrability is a far broader concept, and one that favours arbitration. It includes the jurisdictional question of who should be the initial decision-maker on the arbitrability issue.<sup>16</sup> The US Supreme Court recently granted arbitrators more autonomy in deciding whether a dispute is within their jurisdiction. Arbitrators are also permitted to take a decision as a result of a contract.<sup>17</sup>

Consumer transactions in e-commerce continue to grow quickly. For instance, according to Amazon's annual report for 2013, international sales grew by 14%, 23%, and 38% in 2013, 2012 and 2011 respectively.<sup>18</sup> Likewise, eBay's annual report for 2013 stated that 'Our international expansion has been rapid and our international business, especially in Germany, the UK and Korea [...] Net revenues outside the U.S. accounted for approximately 52% and 53% of our net revenues in the years ended December 31, 2012 and 2011, respectively'.<sup>19</sup>

However, it can be argued such growth can easily be damaged if parties cannot resolve their disputes. Although every state wants to be able to ensure the protection of their citizens, whether as consumers or businesses,<sup>20</sup> none can provide a tool to manage litigation beyond their borders.<sup>21</sup> The global reach of the internet means that the existing power over jurisdiction is of little consequence. Courts always consider whether they have jurisdiction to hear a dispute, that is to say, jurisdiction over both the subject-matter and the disputants in terms of location. Currently, there is no specific law dealing with internet jurisdiction in cases of international consumer transactions that provide enforcement power for a foreign court judgment. Thus, the internet is where contractual and jurisdictional natures will frequently collide at the international level with different

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<sup>15</sup> Ilias Bantekas, 'The Foundations of Arbitrability in International Commercial Arbitration' (2008) 27 *Aust. YBIL*. 193.

<sup>16</sup> Laurence Shore, 'The United States' Perspective on 'Arbitrability'' in Loukas A Mistelis and Stavros L. Brekoulakis (eds.), *Arbitrability: International & Comparative Perspectives*, (Kluwer Law International, 2009) 82.

<sup>17</sup> *ibid.* 70 ; See also *Case Rent-A-Center, West, Inc. v. Jackson* (No. 09-497) 581 F. 3d 912, reversed. Argued April 26, 2010—Decided June 21, 2010.

<sup>18</sup> Amazon annual reports 2013, (export sales from international Amazon websites to customers in the USA and Canada but excluding export sales from USA and Canadian websites) available at <<http://phx.corporate-ir.net/phoenix.zhtml?c=97664&p=irol-reportsannual>> (Accessed 01/08/2014).

<sup>19</sup> See eBay annual report 2013, available at <<http://investor.ebayinc.com/annuals.cfm>> (Accessed 01/08/2014).

<sup>20</sup> Faye Fangfei Wang, 'Obstacles and Solutions to Internet Jurisdiction A Comparative Analysis of the EU and US laws' (2008) 3 *Journal of International Commercial Law and Technology*, 233–241

<sup>21</sup> Michael Cordera, 'E-consumer Protection: A Comparative Analysis of EU and US Consumer Protection on the Internet' (2001) 27 *Rutgers Computer & Tech. LJ*, 231–266.

national laws of consumers and businesses. The conflict of laws and the absence of clear rules for international consumers to pursue e-commerce disputes through the courts mean that the court ‘may not be the most effective way to protect consumer interests’.<sup>22</sup> The existing frameworks for consumers may provide only illusory protection because of the varying levels of consumer protection ‘even at the regional level of the European Union or the US’.<sup>23</sup> The foregoing indicates that resorting to a court is not likely to be very effective at the international level. To this extent, it is fair to say that there is a legal vacuum between making a complaint to a trader and going to court. A legal solution is required to fill the gap at the international level.

Arbitration gives the parties an alternative option for the resolution of their disputes. It is effective in international disputes because it can avoid the conflicts of jurisdiction and law that delay court proceedings.<sup>24</sup> Arbitration can also serve to avoid the problems resulting from parties from different legal and cultural backgrounds being forced to submit to foreign courts.<sup>25</sup> In addition, the arbitrator acts as a private judge, and although the hearing of evidence presented by the parties involved is similar to a court hearing, the proceedings are far less formal.<sup>26</sup>

Conducting business over the Internet requires the use of an online contract. The issue with these contracts is that one party often presents terms of contract in advance, thus giving limited bargaining power to the other party. Some of these contracts include terms such as arbitration clauses. Agreeing to these terms means that the parties give up the

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<sup>22</sup> Organization of American States Committee on Juridical and Political Affairs, United States Response to Proposals for a Convention and Model Law on Jurisdiction and Applicable Law, (OEA/Ser. GCP/CAJP-2837/10) 21 April 2010.

<sup>23</sup> Alternative Dispute Resolution Guidelines, agreement reached between Consumers International and the Global Business Dialogue on Electronic Commerce (November 2003), available at: [http://www.gbd-e.org/pubs/ADR\\_Guideline.pdf](http://www.gbd-e.org/pubs/ADR_Guideline.pdf) (Accessed 3/05/2014).

A similar statement was identified in a November 14, 2007 document of the European Parliament “Final Compromise Amendments” to the Regulation. European Parliament for consumer contracts during the negotiations about the effectiveness of the protection afforded by conflict-of-laws for consumers: “... the protection afforded to consumers by conflict-of-law’s provisions is largely illusory in view of the small value of most consumer claims and the cost and time consumed by bringing court proceedings. The conflicts rule should be backed up by easier and more widespread availability of appropriate online alternative dispute resolution (ADR) systems...”, Final Compromise Amendments 66, Recital 10 a (new), 14 Nov. 2007, available at: [http://www.europarl.europa.eu/meetdocs/2004\\_2009/documents/dv/juri\\_oj\(2007\)1119\\_romei\\_am/JURI\\_OJ\(2007\)1119\\_RomeI\\_AM\\_en.pdf](http://www.europarl.europa.eu/meetdocs/2004_2009/documents/dv/juri_oj(2007)1119_romei_am/JURI_OJ(2007)1119_RomeI_AM_en.pdf) > (Accessed 21/07/2014).

<sup>24</sup> Faye Fangfei Wang, *Law of Electronic Commerce*, (Routledge 2010), 151.

<sup>25</sup> Richard Garnett et al., *A Practical Guide to International Commercial Arbitration* (Oceana TM 2000)

<sup>26</sup> Sean Keefer, ‘The Path to Alternative Dispute Resolution’ (2010) 11 Resolved: J. Alternative Disp. Resol. 15–29.

right to have their disputes decided by a natural judge. Such arbitration clauses normally favour the supplier over the consumer, who not only has a lack of choice but also generally a lack of awareness of its consequences.<sup>27</sup> This causes a significant imbalance between the parties.<sup>28</sup> The consumer and the business ought to be in an equal position with regard to the clauses in the contract and the agreement to resort to arbitration.

The author notes that arbitration is often used in B2B (business to business) contracts and disputes without the need for specific legal protection for one against the other. This is the case even when one of them is in a weaker position than the other, as long as the weaker one is not considered to be a consumer. As long as not consider as consumer: The agreement nonetheless must be upheld with full legal responsibility. The difficulties in achieving such equality between a consumer and a business are mainly based on the conflict between freedom of contract and the protection of the consumer as the weaker party. Thus, the arbitrability of consumer disputes has a different function among the rules that have to be considered by an international arbitrator, the court at the seat of arbitration and/or the court at the enforcement stage. On the one hand, arbitrability functions as a defensive shield, where the capacity for arbitration is assessed in terms of the equality of the parties or when the will of each party has not met the basic requirement of fairness and equity necessary to preserve judicial access rights. On the other hand, arbitrability functions as an instrument of power: it assesses the disputes that are capable of arbitration settlement by applying fundamental principles and its judgments will be enforceable in accordance with the agreements between the parties within the relevant contractual boundaries. The means by which the online consumer as a weaker party is identified and the manner in which their consent is determined is of importance. In international cases, it is necessary to have regard for laws of the different jurisdictions that may be involved.<sup>29</sup> Thus, if there is an arbitration clause or agreement then the arbitrability will have different consequences, depending on which law is applied, as this law will be responsible for determining the notion of the consumer as the weaker party in need of protection and also the principle of party autonomy in the choice of arbitration.

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<sup>27</sup> Julia Hörnle, *Cross-border Internet Dispute Resolution* (Cambridge University Press 2009); Jonathan Hill, *Cross-border consumer contracts*, (Oxford University Press 2008) 207.

<sup>28</sup> Caroline Wilson, Lilian Edwards, *Redress & Alternative Dispute Resolution in Cross-Border E-commerce Transactions*, The European Parliament's Policy Department Economic and Scientific Policy, Briefing Note (IP/A/IMCO/IC/2006-31).

<sup>29</sup> Blackaby, Redfern, and Hunter, *International Arbitration* (n 4), 123.



#### ***4. The practical importance of raising the issue of arbitrability***

Arbitrability can be considered as a key concept of the arbitration process.<sup>30</sup> It is necessary to determine the characteristics of the dispute that are capable of being submitted to arbitration. It refers to the question of where the parties can settle their disputes and the question of whether ‘state or private justice’ will apply, given the facts of their dispute.<sup>31</sup> It also refers to the freedom of the parties and their power to agree and conclude an arbitration agreement.<sup>32</sup> This freedom depends upon the personal legal capacity of parties, whether individuals or corporate entities, to agree to enter into an arbitration agreement or to agree to an arbitration clause.<sup>33</sup> As a result, arbitrability comes down to the heart of the arbitration legal system; it identifies the freedom of parties to arbitrate as well as imposing exclusive jurisdiction as to whether the party will have access to a court or arbitral tribunal for the purposes of resolving the merits of their legal dispute.<sup>34</sup>

However, in both jurisdictions, arbitration laws are in general silent with regard to the issue of arbitrability. Hence, the courts are required to draw a line between arbitrable and non-arbitrable consumer disputes. Internationally, however, this involves consideration of two distinct policy objectives, those of England and Wales and those of the USA.

1. Under English law, consumer disputes are a sensitive matter of public interest and should be debatable and resolved before the national court.
2. American federal law favours and promotes arbitration as an alternative means of dispute resolution for consumer disputes.

It would be difficult to claim that all consumer disputes are, a priori, suitable for resolution by arbitration rather than by litigation, or vice versa.<sup>35</sup> Although there is no doubt that consumers deserve a certain degree of specific protection, the need for this

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<sup>30</sup> Karim Youssef, ‘The Death of Inarbitrability’ in Loukas A Mistelis and Stavros L Brekoulakis (eds.), *Arbitrability: International and Comparative Perspectives* (Kluwer Law International, 2009) 48.

<sup>31</sup> *ibid.*

<sup>32</sup> *ibid.*, 49.

<sup>33</sup> *ibid.*

<sup>34</sup> Richard C. Reuben, ‘First Options, Consent to Arbitration, and the Demise of Separability: Restoring Access to Justice for Contracts with Arbitration Provisions’ (2003) 56 SMUL Rev. 819.

<sup>35</sup> Alexander J. Belohlavek, ‘Arbitrability Limitation in Consumer (B2C) Disputes?: Consumers’ Protection as Legal and Economic Phenomenon’ (2012) 1 Journal of Governance and Regulation, 156.

protection is mainly due to the characteristics of the consumer as the weaker party to the contract who suffers from a lack of information and from non-negotiated terms. It is also difficult not to argue that a consumer voluntarily and equitably chooses arbitration and opts out of litigation, especially where the contract was conducted through the internet. Conversely, it is hard to claim that the resolution of consumer disputes in court would be more suitable than arbitration, given that there is no empirical evidence to demonstrate that a consumer fares worse in arbitration than in court.<sup>36</sup> Therefore, those different approaches may raise a complicated tension between contractual autonomy and the protection of the weaker party in the international consumer contract. This issue clearly affects the arbitrability of international online consumer disputes.

Arbitrability imposes exclusive jurisdiction and fundamental and substantive principles that determine the conduct of the arbitration process and the content of the arbitration agreement and award.<sup>37</sup> These principles may influence the determination of the arbitration agreement and/or the award. Therefore, arbitrability matters - including the lack of arbitrability – can be encountered at different stages of international arbitration, before both the arbitral tribunal and the state court in the context of enforcement proceedings and setting-aside proceedings. It can be relevant at the early stages when the arbitration clause is triggered, or even at the final stage of the proceedings when the winning party needs to enforce its award, or when the decision is made as to whether the award should be either enforced or denied enforcement. Hence, the issue of arbitrability can raise challenges and problems at four different stages:

1. The issue of arbitrability can be invoked by a party before the arbitral tribunal and at the beginning of arbitration, and arbitrators will have to decide whether or not they have jurisdiction
2. The issue of arbitrability can also be invoked by a party before the state court at the beginning of arbitration, and the court will be requested to determine the validity of the arbitration agreement as a subject matter that is arbitrable

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<sup>36</sup> Omri Ben-Shahar, 'How Bad are Mandatory Arbitration Terms?' (2008) 41 *University of Michigan Journal of Law Reform* 777, "We simply do not know enough facts to pass a judgment on arbitration as a mandatory procedure", 779.

<sup>37</sup> Julian D.M Lew and Oliver Marsden, 'Arbitrability' in Julian D.M Lew and Harris Bor (eds.), *Arbitration in England, with chapters On Scotland and Ireland* (Kluwer Law International 2013), 402.

3. The issue of the lack of arbitrability can be raised in setting-aside proceedings before the state court and during the arbitration, usually by the court at the seat of arbitration;
4. The issue of lack of arbitrability can also be invoked before the court decides on the recognition and enforcement of the award.<sup>38</sup>

If the issue of arbitrability is raised at the end of the arbitration process, the relevant state court will decide the matter; whether that is the court at the seat of arbitration or the enforcement court.<sup>39</sup> However, where the issue of arbitrability is invoked at the beginning of or during the arbitration process, a fundamental question may arise as to which of the two bodies - the court or the arbitral tribunal - should have the power to determine the arbitrability of international online consumer disputes, normally on the ground that there was no valid arbitration agreement or clause.<sup>40</sup> To some extent, these challenges are similar to those existing within the domain of international business contracts. However, the special characteristics of consumers give them a different flavour.

According to Article II(3) of the New York Convention, the basic requirement where there is an arbitration agreement or clause is that the competent Court must refer parties to arbitration unless it finds that the agreement is null and void, inoperative, or incapable of being performed.<sup>41</sup> Due to the autonomous nature of arbitration, each of these aspects brings to the fore the question of arbitrability. However, there is no standard to apply to determine the above aspects in international online consumer disputes. As a result, the issue of arbitrability may be reviewed under different standards in England and Wales and the USA at beginning of arbitration and also during set-aside and enforcement proceedings. One of the main concerns is that one of the parties, usually the consumer, is unable to refer the dispute to arbitration because of its status or role as a weaker party.<sup>42</sup> The author notes that there is no special or uniform definition of ‘consumer’ in either of these jurisdictions. Determining the principle of party autonomy will depend on the way

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<sup>38</sup> Yves Forties L, ‘Arbitrability of Disputes’ in Gerald Aksen and others (eds.), *Global Reflection on International Law, Commerce and Dispute Resolution* (International Chamber of commerce (ICC) 2005) 271.

<sup>39</sup> *ibid.*

<sup>40</sup> *ibid.*

<sup>41</sup> The New York Convention 1958, article II (3) states: “The Court of a Contracting State, when seized of an action in a matter in respect of which the parties have made an agreement within the meaning of this article, shall, at the request of one of the parties, refer the parties to arbitration, unless it finds that the said agreement is null and void, inoperative or incapable of being performed”.

<sup>42</sup> Lew and Marsden, ‘Arbitrability’, (n 37) 400.

the term ‘consumer’ is defined. There is, therefore, a high possibility that an individual may be treated as a consumer in one jurisdiction and as a business in another jurisdiction in one and the same case, due to the wide scope of the internet. In other words, an international consumer dispute under the same specific conditions may not be able to be submitted to arbitration in England and Wales but may be able to be submitted in the USA.<sup>43</sup>

#### **4.1 Challenges and problems at the beginning of arbitration proceedings**

There has been a considerable rise in the number of consumer disputes stemming from internet commerce. Consequently, there has been uncertainty in the international online environment on the question of which court should assert its jurisdiction over a dispute and which law should apply when the parties belong to different jurisdictions that have different legal systems and ideologies. This is especially so when the contract involves an arbitration clause. The existence of different geographical locations, on which conflict of law relies, creates ambiguity. When the arbitration clause itself is attacked over its viability in international online consumer contracts, those conditions under Article II (3) of the New York Convention present a dilemma for the court and the arbitrator.

In general, when the issue of arbitrability arises at the beginning of arbitration proceedings, the competence-competence - *Kompetenz-Kompetenz* - principle denotes the power of the arbitral tribunal to determine its own jurisdiction, including the power to rule on the issue of arbitrability and any objections with respect to the existence or validity of the arbitration agreement.<sup>44</sup> However, this power is subject to a court’s judicial review.<sup>45</sup>

The notion of competence-competence has two aspects. It gives the arbitration tribunal the power to rule on their own jurisdiction, avoiding the need to wait for a court’s determination to decide the issue of arbitrability and/or any objections with respect to the existence or validity of the arbitration agreement. As a result, any challenge to the existence or validity of the arbitration agreement will not prevent the arbitrators from

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<sup>43</sup> This issue may also be seen in disputes such as: competition disputes, intellectual property disputes, family disputes and disputes between employers and employees.

<sup>44</sup> Andrew Tweeddale and Keren Tweeddale, *Arbitration of Commercial Disputes International and English Law and Practice* (Oxford University Press 2007) 172, 175.

<sup>45</sup> *ibid.*

proceeding with the arbitration. The other aspect is that the arbitrator's authority to make the initial determination, in terms of whether the parties had concluded a valid arbitration agreement, is subject to judicial review. This principle is found in English arbitration law and has been judicially established by the US Supreme Court. However, there is no standard for the judicial review of the arbitrator's determination upon the existence or validity of the arbitration clause and the consent of an online consumer to such a clause.

The principle of competence-competence has a place in the law of England and Wales under section 30 of the Arbitration Act 1996. This empowers the arbitral tribunal to ascertain the question of its jurisdiction, that is, 'as to (a) whether there is a valid arbitration agreement, (b) whether the tribunal is properly constituted, and (c) what matters have been submitted to arbitration in accordance with the arbitration agreement'.<sup>46</sup> It should be noted here that the parties are permitted to contract out of this provision if they choose to do so.<sup>47</sup> However, if they have not contracted out of this provision, Section 31 provides two possible ways in which the arbitration tribunal can render an award as to its jurisdiction. It can either rule on the matter in the form of a preliminary award as to jurisdiction or deal with the objection in its award on its merits.<sup>48</sup> Once the decision on jurisdiction is rendered, at any stage of the arbitration process, the aggrieved party, at any stage of the arbitration, may immediately appeal the decision to the court. Under Section 72(1), a party who denies that the tribunal has jurisdiction may also ignore the arbitral proceedings completely and then challenge the final award rendered by the tribunal.

However, this doctrine is not specifically mentioned anywhere under the USA Federal Arbitration Act 1925 (FAA). Section 4 of the Act provides that a court 'shall hear the parties' as to whether their dispute is subject to a valid arbitration agreement.<sup>49</sup> Section 9 provides that a court 'must grant'<sup>50</sup> a request for confirmation of an arbitral award unless vacated under Section 10. Section 10, however, provides different grounds to set aside proceedings; these being in cases where fraud, partiality, corruption or the arbitrator's misconduct has resulted in prejudice or an excess of the arbitrators' powers. In the recent

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<sup>46</sup> The Arbitration Act 1996, section 30.

<sup>47</sup> The Arbitration Act 1996, section 30.

<sup>48</sup> The Arbitration Act 1996, section 31.

<sup>49</sup> U.S. Code, Title 9, Chapter 1, section 4.

<sup>50</sup> U.S. Code, Title 9, Chapter 1, section 9.

decision in *Rent-A-Center v Jackson*,<sup>51</sup> the US Supreme Court delegated to the arbitrator the power to determine arbitrability and left any challenge as to the validity of the agreement as a whole to the arbitrator.<sup>52</sup> Only if the claim had been under Section 10, for example ‘fraud in the inducement of the arbitration clause itself,’<sup>53</sup> would the court have then considered it.

The arbitration clause may grants the arbitration tribunal its authority. However, the validity and the enforceability of the arbitration clause in an online consumer contract are subject to different standards of legal and judicial protection. Such validity is guaranteed by way of expressing consent; nevertheless, the outcome is not necessarily similar. Under the English Arbitration Act 1996, there is a special requirement for consumer autonomy and consent to the arbitration clause.<sup>54</sup> The Arbitration Act 1996 refers to the rules under the Unfair Terms in Consumer Contracts Regulations 1999 (UTCCR)<sup>55</sup> to determine the arbitration clause in a consumer contract. Any limitations upon consumer autonomy can also be a limitation upon the arbitrator’s authority to determine the dispute. However, there are no special protection rules for online consumer contracts.<sup>56</sup> Consequently, to the extent that the arbitrators have the power to rule on their own jurisdiction, the different jurisdictions have dealt with such arbitration clauses in consumer contracts through different approaches.

The first problem is that due to the special nature of international online consumer contracts, it is very difficult for an arbitrator to verify the identity of parties, i.e., whether they are businesses or consumers. In such situations, it is difficult to determine the legal validity and enforceability of the arbitration clause. It is very likely that a consumer does

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<sup>51</sup> Case *Rent-A-Center v. Jackson*, 130 S. Ct. 2772 (2010) (No. 09-497) (n 17).

<sup>52</sup> *ibid*, Ct. 2779.

<sup>53</sup> *ibid*, Ct. 2778.

<sup>54</sup> Arbitration Act 1996, section 89.

<sup>55</sup> It should be noted that Arbitration Act 1996, section 89, extend the application of the Unfair Terms in Consumer Contracts Regulations 1994 in relation to a term which constitutes an arbitration agreement. However, the Unfair Terms in Consumer Contracts Regulations 1994 has been revoked and replaced by the Unfair Terms in Consumer Contracts Regulations 1999 No.2083. Yet there is no move has been made to update the Arbitration Act 1996. The view of the Department of Trade and Industry is that it should be assumed the Unfair Terms in Consumer Contracts Regulations 1999 applied. See Fraser Davidson, *Arbitration* (1st edn, W. Green 2000) 121.

<sup>56</sup> Common contract law in the different states establishes a set of grounds that can be used to invalidate any contract and these are that waiver, duress, fraud, misrepresentation and unconscionability. Duress, waiver, fraud and misrepresentation are out of the scope of the author’s research because consumers rarely rely on them to strike out unfair arbitration clauses in online B2C adhesion contracts because they mostly fail to void an arbitration clause on these grounds; nevertheless, the author will focus on unconscionability which is the main means that consumers in the US use to invalidate unfair arbitration clauses.

not have the option to discuss and negotiate the contract's terms and conditions, including the arbitration clause, with the other party. This issue also extends to the choice of court and the choice of law clauses in the terms and conditions of the contract.

The second problem is related to the capacity of the court of competent jurisdiction to challenge the arbitrator's determinations and his jurisdiction in international contracts. Online contracts take place over the internet and they are concluded and performed in an intangible space with no physical borders. This goes against territory-based conflict of laws rules, where the rules of existing private international law are relied upon. It is equally difficult to determine who is to be charged.

#### **4.2 Challenges and problems during the arbitration proceedings**

During this stage, the problems and challenges relate to which law should be applied by the arbitrator to determine the arbitrability of international online consumer disputes. As mentioned above, consumer disputes are arbitrable unless the arbitration clause is invalid, inoperative or incapable of being performed. The determination of the applicable law that governs the arbitrability is important in international online consumer disputes. However, national arbitration laws in England and Wales and the USA do not determine which law governs the question of arbitrability. The New York Convention provides for the law of arbitrability. Article V directs the determination of arbitrability to the national court at the seat of arbitration and directs the national court at the enforcement stage to look to its own law to determine whether or not the dispute is arbitrable.<sup>57</sup> That means that the applicable law on arbitrability depends on where and when the question of arbitrability arises. The problem here is that when the dispute is before the arbitral tribunal, the arbitrator tends to apply the law of the seat of arbitration in order to avoid the award being annulled by the national court at the seat of arbitration. There are two ways to determine the applicable law governing arbitrability and to determine whether consumers can settle their disputes by arbitration. First, by the choice of law clause, which raises a problem regarding the consumer as the weaker party. Second, by reference to the conflict of law rules at the seat of arbitration, which may provide a different law for the determination of arbitrability, or an exclusive jurisdiction of its national court over a particular dispute.

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<sup>57</sup> The New York Convention, Article V.

This thesis argues that both ways raise concerns and doubts related to the consumer as the weaker party and the methods upon which that international arbitrator should rely. The two ways cited above indicate that arbitrability may differ from one country to another and differ from one party to another. Thus, arbitrability should aim both to protect the legal position of a consumer as a weaker party within the arbitration clause or agreement, and to prevent an unfair, unpredictable or unconscionable outcome.<sup>58</sup>

## **5. Research objectives**

This thesis aims to analyse arbitrability critically within the applicable laws in both jurisdictions to determine the extent to which international online consumer disputes may be arbitrable internationally. The intention is to analyse how the current legal systems deal with the lack of arbitrability in international online consumer disputes. The thesis will then consider how transnational standards on the arbitrability of international consumer disputes can be created. In doing so, it also aims to examine the degree to which online consumer disputes are arbitrable. It covers the laws of arbitration and other national laws which may be applied to consumer contracts and/or disputes or influence the determination of the arbitrability, including the determination of validity and the limitations of arbitration as autonomous and judicial procedure in English law and federal law in the USA. The purpose of this is to clarify the way that the arbitrability of consumer disputes is determined by both jurisdictions and to identify a balance point of the arbitrability in international online consumer contracts.

This thesis aims to identify, analyse and reflect upon the main differences and similarities between the target countries in order to detect key factors and to provide a balance point between the function of consumers as the weaker party and the interests of businesses at the international level.

Whilst the theoretical perspective of consumer arbitration has focused on the fairness of arbitration as an alternative dispute resolution in its terms and procedures, this research does not intend to call into question the appropriateness of those analytical positions which emphasize process concerns. The thesis argues that the priority is the arbitrability

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<sup>58</sup> In case of *Brower v. Gateway2000*, the court found that the particular arbitration chosen was not fair and was designed to deter the individual consumer from using the arbitration process, as the expense and inconvenience of that portion of the agreement would deter the consumer from seeking relief. *Brower v. Gateway 2000, Inc.* 246 A.D.2d 246, 676 N.Y.S.2d 569 (Supreme Court of New York, 1998).



issue. This is based on the view that arbitration is created contract based on the willingness of parties, but which also has public consequences. This thesis aims to assess the relationship between businesses and international online consumers in order to distinguish between legal rights that can be logically shaped and enforced in accordance with the will of the parties concerned and rights that are dependent upon the regime of the state. The observance of arbitrability principles and the rules of consumer protection should help to unify standards for international online consumer arbitration. In this way, arbitration can play the critical role that is expected of it in international consumer disputes. In international arbitration, the main problem to be overcome is the provision of an effective and attractive means for the recognition and enforcement of foreign decisions in respect to international commercial transactions under the New York Convention, as well as the avoidance of any breach of basic legal obligations.

## ***6. Scope and Research Methodology***

### ***The scope and limitations***

The issue of arbitrability of international online consumer disputes allows for an unlimited amount of analysis and discussion. As mentioned above, arbitrability imposes exclusive jurisdiction and fundamental and substantive principles which determine the conduct of the arbitration process and the content of the arbitration agreement and award. Those principles may influence the determination of the arbitration agreement and/or the award, ie whether it should be enforced or denied. It can be relevant at the early stages when the arbitration clause is triggered, or even at the final stage of the proceedings during award enforcement.<sup>59</sup> The limited scope of this thesis does not allow for an extensive treatment of the proceedings to enforce the award itself but it will deal with enforcement when the necessity of illustration is required to highlight a problem or to point to a solution concerning arbitrability. Therefore, the focus of this thesis will be directed at those issues of arbitrability that arise at the beginning and during the arbitration, and which, in the author's estimation, are most likely to represent the hard core of the arbitrability of consumer disputes in the regimes and courts of England and Wales and the USA.

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<sup>59</sup> See above section 4; Lew and Marsden, 'Arbitrability' (n 37) .

With regard to the target countries, the scope of this thesis is limited to the national laws of England and Wales, as they are a sole jurisdiction with regard to the Arbitration Act 1996 and the regulation of consumer protection,<sup>60</sup> and to the UK with regard to international conventions. On the other side of the Atlantic, this thesis focuses on the USA as a sole jurisdiction, and considers the FAA, which applies to all American states in regard to international disputes. In addition to the laws of these two jurisdictions, reference will be made to court decisions from both jurisdictions that are relevant to arbitrability and within the scope of the New York Convention. Furthermore, in order to clarify the arbitrability issues in international consumer disputes, reference will also be made to the European Court of Justice. The author will also refer to institutional arbitration and arbitral practice.

There are several reasons for focusing on these jurisdictions. Firstly, arbitration is a private process of dispute resolution for the settlement of international commercial disputes in both of the target countries. Both countries were parties to the New York Convention before the internet was invented; and both use the term ‘consumer arbitration’ for this procedure.<sup>61</sup>

Secondly, both jurisdictions have different legal approaches in relation to consumer arbitration. In England and Wales, online consumers are precluded from being bound by arbitration unless they agree to it after the dispute arises. In the USA, however, consumers can agree to arbitration before or after a dispute arises.<sup>62</sup> In England and Wales, a higher degree of consumer protection is provided under the Arbitration Act 1996 and regulations such as the UTCCR by comparison to the USA courts, which consider consumer arbitration on a case-by-case basis through the FAA, with limited review. The USA also provides equal treatment to the parties in arbitration to both B2B arbitration and B2C disputes.<sup>63</sup>

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<sup>60</sup> This Act extends to England, Wales and Northern Ireland; See Section 2 of the Arbitration Act 1996; the position of Scotland in regard to arbitration is different as there is a different Act apply to arbitration in Scotland, Arbitration (Scotland) Act 2010. However, the Unfair Terms in Consumer Contract Regulation 1999 apply to Scotland. See, Fraser Davidson, *Arbitration* (2nd edn, W. Green 2012).

<sup>61</sup> Christopher R. Drahozal and Raymond J. Friel, ‘Consumer Arbitration in the European Union and the United States’ (2003) 28 N.C.J. Int’l L. & Com. Reg. 356.

<sup>62</sup> *ibid.*

<sup>63</sup> Amy Schmitz, ‘American Exceptionalism in Consumer Arbitration’ (2013) 10 Loy. U. Chi. Int’l L. Rev. 82.

Third, there is a difference between the target countries regarding the meaning of the arbitrability. In England and Wales, the arbitrability refers only to whether specific classes of disputes are barred from arbitration because of the subject matter of the dispute. While in the USA, the arbitrability means who should be the initial decision-maker on issues such as the validity of the arbitration agreement and whether an arbitrator has the authority to decide that a given dispute should be submitted to arbitration.<sup>64</sup> This aspect of what the USA calls “arbitrability” can be an exceedingly complicated question.<sup>65</sup>

Fourth, the public policy in both jurisdictions would not restrict consumers from arbitrating their disputes. However, England and Wales restrict the scope of the arbitrability in regard to the enforcement of the award.<sup>66</sup>

Fifth, online consumer transactions are highly developed and very popular in both the UK and the USA. Currently, the USA is the leader in online retailing compared to Europe, and has a population similar to that of the eight countries surveyed. 54.5% of the USA public were online shoppers compared to 45.6% in the Europe Union.<sup>67</sup> The UK is one of the leaders in B2C e-commerce markets in the EU, and spends 96 billion euros annually online, nearly double the amount spent by the EU country in second place

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<sup>64</sup> See Shore, ‘The United States’ Perspective on ‘Arbitrability’ (n 16).

<sup>65</sup> Laurence Shore, ‘Defining ‘Arbitrability’ The United States Vs. the rest of the world.’ (2009) New York Law Journal, available at: <<http://www.gibsondunn.com/publications/documents/shore-definingarbitrability.pdf>> (Accessed 21/07/2014).

<sup>66</sup> The English Arbitration Act 1996 clarifies that both contractual and non-contractual disputes (section 6(1)) may be submitted to arbitration. Commercial disputes arising under a valid arbitration agreement (including consumer disputes) are generally arbitrable. The Act does not list or delimit matters which are not capable of settlement by arbitration (section 81(1)(a)), However, the limitation of the parties’ autonomy is acknowledged (in (section 1(b)) of the Act: “*the parties should be free to agree how their disputes are resolved, subject only to such safeguards as are necessary in the public interest*”; The US Federal Arbitration Act provides that: “*A written provision in ... a contract evidencing a transaction involving commerce to settle by arbitration... shall be valid, irrevocable and enforceable*”, 9 USC § 2 (1988); Other arbitration laws define arbitrability by reference to “economic interest” or “property”, on this basis, the German Arbitration Act 1030(1) provides that: arbitrability generally extends to “any claim involving an economic interest”. A similar position is adopted in the Swiss Private International Law Act (PILA), Art. 177; However, there are still some arbitration laws that determine arbitrability through considerations of public policy. For example, Singapore’s International Arbitration Act Art. 11(1) provides that “Any dispute which the parties have agreed to submit to arbitration under an arbitration agreement may be determined by arbitration unless the arbitration agreement is contrary to public policy”: see Stavros Brekoulakis, ‘On Arbitrability: Persisting misconceptions and new areas of concern’ in Loukas A Mistelis and Stavros L Brekoulakis (eds.), *Arbitrability: International & Comparative Perspectives*, (Kluwer Law International, 2009), 40.

<sup>67</sup> See, Online Retailing: Britain, Europe and the US 2014. Centre for Retail Research, available at: <<http://www.retailresearch.org/onlineretailing.php>> (Accessed 1/08/2014).

(Germany, with 50 billion euros expenditure)<sup>68</sup> Both countries are in the list of the top 5 cross-border consumer complaints, received via the e-consumer.gov website<sup>69</sup> and are also in the top 5 list with regard to company locations.<sup>70</sup> One of the main concerns in online consumer transactions in both jurisdictions is the lack of a clear and adequate dispute resolution mechanism or a system of redress for consumers in the event of a problem.<sup>71</sup>

### ***Methodology***

The author will use black-letter law research, which mainly relies upon critical legal analysis of valid statutes and legislation as well as available case law and existing library-based literature on the topic.

Due to the special characteristics of the research subject, the author will use the doctrinal legal analysis methodology for the purposes of enriching the subject matter of the research and in order to cover all aspects, facts, details and the most recent developments in the subject area. Due to the different legal systems of the jurisdictions, the author will use a comparative law methodology in order to ascertain the similarities and differences between them.<sup>72</sup> There is no intention, in using these methodologies, to produce a finding that one of these jurisdiction is better than the other. There are differences and similarities, advantages and disadvantages that the two approaches help to identify and analyse.

This thesis will go on to examine how the different legal regimes have dealt with these problematic areas and how these jurisdictions have applied their laws to the problematic aspects in order to achieve their objectives.

The author, therefore, will examine different sources of law with the aim of discovering their different rules and principles, and in doing so will depend on the doctrinal legal analysis methodology in the presentation of the international agreements and

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<sup>68</sup> Europe B2C E-commerce Report 2013, available at: [http://www.retailexcellence.ie/images/uploads/downloads/members\\_resources/Europe\\_B2C\\_Ecommerce\\_Report\\_2013.pdf](http://www.retailexcellence.ie/images/uploads/downloads/members_resources/Europe_B2C_Ecommerce_Report_2013.pdf) (Accessed 1/08/2014).

<sup>69</sup> Econsumer.gov is a website responding to the challenges of multinational internet fraud and working to enhance consumer protection and consumer confidence in e-commerce in 30 countries.

<sup>70</sup> These are the latest trends observed from complaints received through econsumer.gov

<sup>71</sup> See, OECD (2012), "Report on Consumer Protection in Online and Mobile Payments", OECD Digital Economy Papers, No. 204, OECD Publishing. Available at: <<http://dx.doi.org/10.1787/5k9490gwp7f3-en>> (accessed 10/06/2014).

<sup>72</sup> Konrad Zweigert and Hein Kötz, *An Introduction to Comparative Law* (3rd edn, Oxford University Press 1998) 2.

conventions, typical laws and national laws. The research analyses each part of the study at the national law or regional law level, and will also scrutinize case law in each jurisdiction in order to assess its suitability and predictability to accommodate arbitration in international online consumer disputes. Attention will also be given to the available sources, causes and conditions that called for the provision of such rules, and the extent of their appropriateness with regard to arbitration, consumer law and e-commerce rules and with the relevant national laws. In addition, there will be an analysis of the legal efforts made by international organizations and the relevant rules provided by them. These findings will be employed in a descriptive analysis and a normative evaluation. The intention here will be to highlight the inconsistent areas of these laws, to demonstrate their inappropriateness where necessary, and to suggest feasible alternatives.

The author will also rely on comparative law methodology, since it offers strong benefits for the assessment of the manner in which different legal systems deal with a particular issue.<sup>73</sup> The comparison begins by identifying the similarities and differences between legal systems or parts of the legal systems under comparison.<sup>74</sup> This enables the author to see what is special about an approach in one regime and the equivalent approach in another.<sup>75</sup> The comparative approach is also suitable for reaching conclusions about the distinctive characteristics of each individual legal system for the purpose of facilitating an international transaction or resolving a conflict of laws problem.<sup>76</sup> This study is focused on two common law countries with different law systems, and there is in each a different tradition in applying arbitration to consumer disputes. The similarities to be found between them are important when looking at the conflict of laws. The comparative law methodology satisfies the objective of the thesis as it enables an understanding of the current issues and clarifies the way that the arbitrability of consumer disputes is determined at the international level.

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<sup>73</sup> John C. Reitz, 'How to Do Comparative Law' (2014) 46 *The American Journal of Comparative Law*, 617.

<sup>74</sup> *ibid.*

<sup>75</sup> Ralf Michaels, 'The Functional Method of Comparative Law' in Mathias Reimann and Eds. Reinhard Zimmermann (eds), *The Oxford Handbook Of Comparative Law* (Oxford University Press 2005) 373.

<sup>76</sup> Reitz, 'How to Do Comparative Law' (n 73) 624.

## ***7. Synopsis of the chapters***

This thesis is divided into 7 chapters, including the present introductory chapter. The chapter following this one, Chapter 2, focuses on providing an overview of the existing jurisdiction and the applicable law rules, their applicability to online consumer disputes and the enforceability of these rules in the event of international online disputes. It highlights some selected issues that are considered as the foundation for settling international online consumer disputes from the perspective of two jurisdictions, England and Wales and the USA. Moreover, this chapter explains why the effectiveness of arbitration for dealing with international online consumer disputes is questionable. It also looks at the reasons why arbitration can be considered a viable dispute resolution approach for international online consumer disputes over litigation and mediation in disputes involving the jurisdictions of England and Wales and the USA.

Chapter 3 deals with different interpretations and definitions of arbitrability within the statutory rules of the New York Convention, English law and American federal law. It will identify the different approaches in determining the subjective and objective arbitrability of international online disputes.

Chapter 4 deals with the dichotomy in the notion of the online consumer in disputes involving the respective jurisdictions of England and Wales and the USA. It examines the reasons for the different views on the online consumer as the weaker party and the freedom of the online consumer to submit to arbitration.

Chapter 5 deals with the arbitrators' authority to determine the applicable law for governing the arbitrability of disputes when the contractual nature and the jurisdictional nature of international online consumers collide. It discusses and analyses the method that determines which laws govern the arbitrability, and explains the relationship between the seat of arbitration, the applicable law and the arbitrator. It considers the leading theories in this regard and determines which one would best serve consumer arbitration.

Chapter 6 will suggest a new method for reconsidering the question of the arbitrability of international online consumer disputes in order to tackle the middle ground between two different policies regarding the arbitrability of such disputes. It will attempt to justify the adoption of a transnational approach in determining the arbitrability of international

online consumer disputes as a legal method to be employed by an arbitrator at the pre-award stage.

Chapter 7 will constitute the conclusion. It will include supporting justifications and suggested recommendations.

## ***8. Conclusion***

In this chapter, the author has introduced the research problem and questions that are relevant to it, as well as the reasons for the author's attempts to answer them. The author has also briefly presented the justifications and the importance of this study; determined the nature of arbitrability; described how it is relevant to online consumer disputes; and the reasons why this research is relevant in England and Wales and the USA. The author has also introduced the methodology that will be used in this research

## **Chapter 2: Private Justice vs. State Justice in International Online Consumer Disputes**

### ***1. Introduction***

In order to tackle the topic of this thesis, it is first necessary to analyse arbitration from an international online consumer perspective. This is important in order to carry out a proper analysis on the arbitrability of international online consumer disputes, building up a general understanding about the role and the nature of arbitration in such types of disputes.

The court represents judicial protection for online consumers. However, the parties may also attempt to settle their disputes out-of-court by using an alternative disputes resolution approach (hereafter ADR), such as negotiation, mediation and arbitration that may be facilitated by an expert third party. Nevertheless, there often comes a point when attempts at negotiations or mediations fail as the outcome is not based on legal rules. In contrast, arbitration is the adjudication of a legal process according to laws and legal rules, and is the only binding form of out-of-court dispute resolution. International online consumers involved in disputes are in need of judicial protection internationally similar to the one in the domestic court, which gives a binding decision like a court judgment and is mandatory and enforceable upon both parties internationally. Thus, the focus will be on arbitration as alternative to courts in international disputes.

To some extent, it can be argued that arbitration is similar to litigation. It can only deal with the matter in dispute and the terms of the contract from which they arise, which are based on law.<sup>1</sup> In addition, the arbitrator will hear evidence to establish the facts and decide on the relevant law.<sup>2</sup> However, the effectiveness of arbitration for dealing with international online consumer disputes is still under debate and so the concern is whether the characteristics and/or the existing rules that governs arbitration can be successfully applied.<sup>3</sup> This debate will be the focus of this chapter.

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<sup>1</sup> See David Hollands, 'ADR, Arbitration, and Mediation in construction' in *Adr, Arbitration, and Mediation: A Collection of Essays* (CI Arb 2014)

<sup>2</sup> Nigel Blackaby, Alan Redfern, and Martin Hunter, *International Arbitration* (5<sup>th</sup> edn. Oxford University Press 2009); Julia Hörnle, *Cross-border Internet Dispute Resolution* (Cambridge University Press 2009) 58

<sup>3</sup> For example: In England and Wales, a number of legal and policy developments have enforced private parties to litigate disputes involving consumer in a national court. The parties have opportunity to arbitrate



It can be argued that if international online consumers wish to have their disputes decided in a way that is binding and enforceable, they should seek recourse to a court of law rather than arbitration. After all, why should international online consumers choose to go to arbitration rather than an established national court? This chapter focuses on the legal ‘ability’ of a court to exert jurisdiction over international online consumer disputes. A consideration of private international law, jurisdiction and applicable law will be given sufficient significance in order to define the problems facing international online consumer disputes.

Accordingly, this chapter will deal with a crucial issue that is connected to international online consumer disputes from the perspective of two different jurisdictions. This will be done in order to introduce the nature of international online consumer disputes and arbitration, and to prepare a path for the following chapter about the different approaches regarding the arbitrability of international online consumer disputes. Therefore, it will be argued in this chapter that existing legal rules of international private law might be inadequate when it comes to governing legal issues that result from international online consumer disputes. Thus, this chapter identifies and analyses arbitration from the perspective of international online consumer disputes as an alternative disputes solution to court. It highlights important legal factors why international arbitration should be considered over litigation and what are the advantages and disadvantages of arbitration involving consumer disputes in comparison with other types of ADR. In addition, it is a useful opportunity to highlight some questionable characteristics of arbitration as a legal system that applies in international disputes and the extent to which it is adaptable.

## ***2. Traditional court resolution of international online consumer disputes***

The Internet has influenced the content of and the way to access information, allowing parties located in different parts of the world to make contracts with each other at the click of a mouse. This has had a particularly significant effect on businesses and

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such a disputes under a limited ground, even if there is an arbitration clause or agreement in consumer contract. Those limits imposed by the arbitration law and consumer law. However, the case in the USA is entirely the opposite of the England and Wales. The USA have federal policy favouring arbitration in consumer disputes, thus, it does not set forth any special restrictions on consumer arbitration, its encourage the parties to arbitrate online consumer disputes. The USA courts, in many cases, have compelled consumers to go to arbitration, wherever there is an arbitration agreement or clause in the contract based on the protection of contractual autonomy. This issue will be discussed in depth in chapter 3

consumers by offering online consumers a vast choice of products and businesses an enormous potential customer base.<sup>4</sup> Furthermore, the Internet as a borderless communication medium creates an environment where activities can take place amongst strangers and this has also caused many legal problems. The potential for disputes that go beyond the geographical and legal boundaries of each jurisdiction are augmented. Such as disputes on delivery of tangible goods and services which must still be physically delivered using traditional channels such as postal services;<sup>5</sup> disputes on delivery of intangible goods and services such as computer software, entertainment content or information services; to disputes on online payment processes.<sup>6</sup>

This state of affairs means that international online consumers who are seeking justice and redress through the courts face a number of obstacles. For example, international online consumers will be facing the complexity of court procedures which are very lengthy and time-consuming.<sup>7</sup> Besides those, the cost of legal consultation and/or representation in court is also expensive.<sup>8</sup> More importantly, international online consumers between England and Wales and the USA require a bilateral or multilateral enforcement treaty in order to overcome the difficulty of undertaking enforcement proceedings of court judgments in a foreign country.<sup>9</sup> However, it might be argued that some of the above issues are similar in international arbitration. Nevertheless, it can be argued also that arbitration still has the upper hand and can be an ADR method to litigation thanks to the New York Convention 1958.<sup>10</sup> Although it is subject to narrow exceptions such as incapacity of parties, non-arbitrability of disputes if they are not considered as commercial under the national law of the Contracting State,<sup>11</sup> it ensures

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<sup>4</sup> Lucy Kung, Robert G. Picard, and Ruth Towse, *The Internet and the Mass Media* (Sage Publications Ltd. 2008) 39

<sup>5</sup> A European Initiative in Electronic Commerce, COM (97) 0157 final at Chapter 1 (7).

<sup>6</sup> *ibid*; See also, Organisation for Economic Co-operation and Development (OECD) "Empowering e-consumers, strengthening consumer in the internet economy" 8-12 December 2009, para 20

<sup>7</sup> Communication from the Commission on "the out-of-court settlement of consumer disputes" and Commission recommendation on the principles applicable to the bodies responsible for out of court settlement of consumer disputes, Brussels, 30.03.1998, COM (1998) 198 final, 5

<sup>8</sup> Thomas Schultz, 'Internet Disputes, Fairness in Arbitration and Transnationalism: A Reply to Julia Hörnle' (2011) 19 *International Journal of Law and Information Technology* 153

<sup>9</sup> United Nations Commission on International Trade Law, Possible Future Work on Online Dispute Resolution in Cross-Border Electronic Commerce Transactions, Forty-third session, 21 June-9 July 2010, New York, (A/CN.9/706), para.30

<sup>10</sup> Adopted on 10 June 1958, entered into force on 7 June 1959; On 2/04/2015, 154 States had ratified the New York Convention, See the Convention status at: [http://www.uncitral.org/uncitral/en/uncitral\\_texts/arbitration/NYConvention\\_status.html](http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/NYConvention_status.html), (Accessed 3/05/2014).

<sup>11</sup> The New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards 1985, Article I and V (1) (2)

enforceability for foreign and non-domestic arbitral awards. In contrast, there is no international treaty that provides enforcement rules and proceedings for foreign and non-domestic judgments to ensure that international businesses and consumers will comply with it or any outcomes reached by other means such as mediation.

It is relevant to mention that courts may also find it difficult to handle international online consumer disputes for several reasons. Some of these have been highlighted by the United Nations Commission on International Trade Law and include the high volume of consumer claims;<sup>12</sup> the contest between questions regarding jurisdictional rules and applicable law in international online contracts and consumer protection; and the enforcement of foreign judgments.<sup>13</sup> This is mainly because jurisdictional rules ‘pose real and substantial barriers’<sup>14</sup> to providing consumer protection in international online disputes.<sup>15</sup> In addition, there is a lack of an effective means to enforce the existing law due to the absence of an international treaty providing enforcement of international decisions. In such cases, every jurisdiction wants to be able to ensure the protection of their citizens, whether a consumer or a local business.<sup>16</sup> The following analysis will show the problem of conflicts of interest and rights and rules regarding the applicable law and jurisdiction rules between parties that cannot be ignored. From an international online consumer perspective, their rights and functions are being protected by litigating any disputes in the home country under home law. The rights and interests of the consumer, however, intersect with the fact that business has the same rights and functions in his home country, which is not to be subject to foreign jurisdictions.

Conflict of laws rules that determine applicable law and jurisdiction have a close connection as problematic issues to the core of this thesis.<sup>17</sup> Therefore, it is useful to examine those issues that are unpredictable and problematic as well as very closely

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<sup>12</sup> Louis Del Duca, Zbynek Loebl, and Colin Rule, ‘Facilitating Expansion of Cross-Border E- Commerce - Developing a Global Online Dispute Resolution System ( Lessons Derived from Existing ODR Systems – Work of the United Nations Commission on International Trade Law )’ (2012) 1 Penn State Journal of Law & International Affairs

<sup>13</sup> United Nations Commission on International Trade Law, Possible future work on online dispute resolution in cross-border electronic commerce transactions, Forty-third session, 21 June-9 July 2010, New York, (A/CN.9/706), para.30.

<sup>14</sup> Hörnle, *Cross-border Internet Dispute Resolution* (n 2) 246.

<sup>15</sup> This will be explained in depth in the following subsection.

<sup>16</sup> Faye Fangfei Wang, ‘Obstacles and Solutions to Internet Jurisdiction A Comparative Analysis of the EU and US laws ’ (2008) 3 Journal of International Commercial Law and Technology, 233–241

<sup>17</sup> See Chapter 5, in this chapter the author argues the theory of arbitrability as conflict of law issue and as jurisdictions issue.

related to the topic of this chapter.

## **2.1 Complexity, unpredictability and disadvantageous implications**

In general, conflict of laws, which are also known as private international law, comes into operation whenever the court is faced with a case involving one or more foreign elements.<sup>18</sup> The foreign element can be an event that has occurred in a foreign country, when the subject matter of the dispute has a foreign aspect or if disputants are from different countries.<sup>19</sup> For example, an English consumer agrees to buy computer software from a retailer in New York City through the Internet.<sup>20</sup> In the event of disputes, the conflict of laws rules determine which countries' laws and jurisdiction are applied. Under the common law system, personal jurisdiction rules apply in England and New York City. The rules of personal jurisdiction allow the court to hear the dispute based on the connection of their territory such as personal (nationality) and subject matter jurisdiction and/or the location of disputants.<sup>21</sup> On this basis, the court will examine whether the contract has a sufficient connection to the jurisdiction in order to hear the dispute.<sup>22</sup> However, in regard to online contracts, more than one jurisdiction is often involved.<sup>23</sup> There are two obstacles that stem from the pluralism of connecting factors that can arise in determining the jurisdiction in such international online consumer cases. The first, will be explained in depth in chapter 4, is related to the neutrality of international online consumer contract disputes which require the court to consider the legal capacity of the consumer based on what type of contact or relationship the parties have had. This is required because jurisdiction rules, for example, in England and Wales distinguish between business contracts and consumer contracts whilst in the USA there is no such distinction. In the author's view, the way in which the law distinguishes between business

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<sup>18</sup> Abia J Mayss, *Principles of conflict of laws (Principles of law series)* (3rd edn, Cavendish Publishing Limited 1996) 109

<sup>19</sup> *ibid.*

<sup>20</sup> See for example OmniGraffle website for developing applications exclusively for Mac laptops <https://www.omnigroup.com/omnigraffle>

<sup>21</sup> Dan Jerker B Svantesson, *Private International Law and the Internet* (2nd edn, Kluwer Law International). 17

<sup>22</sup> *ibid.*

<sup>23</sup> Brian Fitzgerald and Samsung Xiaoxiang Shi, 'Civil jurisdiction, intellectual property and the internet' in Brian Fitzgerald and others (eds), *Copyright Law, Digital Content And The Internet In The Asia-Pacific* (Sydney University Press 2008) 381

contracts and consumer contracts might be the most problematic issue in international online consumer disputes.<sup>24</sup>

The second, in terms of the difficulty and unpredictability regarding the pluralism of connecting factors, is the determination of the applicable law. The lack of uniform conflict of laws rules at the international level makes it difficult to determine what substantive law will be held to govern such types of disputes.<sup>25</sup> While private law differs widely from country to country,<sup>26</sup> the different elements connected with the dispute do not always lead to the same conflict of laws rules. In addition, the different conflicts of laws rules do not always lead to the same applicable substantive law.<sup>27</sup> Consequently, '[f]or a consumer this may only provide illusory protection (as conflict of laws and the current state of international enforcement are extremely complicated) by different levels of consumer protection' even at the regional level of the EU or the US.<sup>28</sup> The European Parliament also gave a similar opinion in November 2007 about the protection afforded to consumers by conflict of laws:

[T]he protection afforded to consumers by conflict-of-laws provisions is largely illusory in view of the small value of most consumer claims and the cost and time consumed by bringing court proceedings. It is therefore considered that, particularly as regards electronic commerce, the conflicts rule should be backed up by easier and more widespread availability of appropriate online alternative dispute resolution (ADR) systems.<sup>29</sup>

Thus, it can be said that international online consumer claims through the court may not be the most successful way to protect consumer interests.<sup>30</sup> Even though, in business generally, in order to obtain legal certainty to ensure their interests, they include in their

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<sup>24</sup> This issues has an impact on the party autonomy which determine the right and the obligations for consumer as a weaker parties; will be explained in depth in chapter 4, See Chapter 4

<sup>25</sup> James J. Healy, 'Consumer Protection Choice Of Law : European Lessons For The United' (2008) 19 *Duke J. Comp. & Int'l L.* 585

<sup>26</sup> Friedrich K Juenger, 'The Lex Mercatoria and Private International Law' (2000) 60 *Louisiana Law Review* 1134

<sup>27</sup> Peter Nygh, *Autonomy in International Contracts* (1st edn, Clarendon Press, Oxford 1999) 84

<sup>28</sup> Alternative Dispute Resolution Guidelines, Agreement reached between Consumers International and the Global Business Dialogue on Electronic Commerce (November 2003), available at < [http://www.gbd-e.org/pubs/ADR\\_Guideline.pdf](http://www.gbd-e.org/pubs/ADR_Guideline.pdf) > (Accessed 3/05/2014).

<sup>29</sup> See European Parliament, Final Compromise Amendments 66, Recital 10 a (new), 14 Nov. 2007 available

at<[http://www.europarl.europa.eu/meetdocs/2004\\_2009/documents/dv/juri\\_oj\(2007\)1119\\_romei\\_am\\_/JU\\_RI\\_OJ\(2007\)1119\\_RomeI\\_AM\\_en.pdf](http://www.europarl.europa.eu/meetdocs/2004_2009/documents/dv/juri_oj(2007)1119_romei_am_/JU_RI_OJ(2007)1119_RomeI_AM_en.pdf) > (Accessed 3/05/2014).

<sup>30</sup> Organization of American States Committee On Juridical and Political Affairs, United States Response to Proposals For A Convention and Model Law on Jurisdiction and Applicable Law, (OEA/Ser. GCP/CAJP-2837/10) 21 April 2010; See also Paula Serra Freire, 'Regulation of International Consumer Contracts in the Americas' (2010) 11 *Bus. L. Int'l* 65

online contract some standard terms such as a choice of law and jurisdiction or arbitration clauses. However, the validity and the enforceability of such contractual clauses is not the same in every country. Again, this situation is due to differences between business contracts and consumer contracts which are still debatable in jurisdictions, such as the USA, and where it is an important element to provide protection for a weaker party in an adhesion contract in his jurisdiction, such as in England and Wales. As result, this issue becomes more complex when online consumer contracts have terms that determine their choice of law and their court jurisdiction when there is no international convention to resolve all conflict of laws regarding that matter. This is especially the case where both parties from different jurisdictions have the same interests and rights in applying their own substantive law and jurisdiction rules in business and consumer transactions. These issues will be taken up in the upcoming sections.

## **2.2 Limitation of national consumer court ‘exclusive’ jurisdiction**

In the legal sense, court jurisdiction means the geographic area, which provides legal authority to the court to hear and judge a particular case. International ‘exclusive’<sup>31</sup> jurisdiction issues occur, in common law, when the subject matter of the dispute has a foreign aspect or disputants are from different countries. A court could exercise its jurisdiction over a defendant regarding a contract with those who are resident/domiciled within its territory. Under the common law, domicile or habitual residence is the basic connecting factor in conflict of laws rules, however, in international online contracts, the scenario is much more problematic.<sup>32</sup> Due to the Internet, the legal relationships between parties link together the legal systems of more than one country. Consequently, it will be necessary to determine which country’s court has legal authority over the ‘jurisdiction’ to hear and determine such disputes. As far as court jurisdiction is concerned, it will also be necessary to determine the extent to which its judgment may be enforced

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<sup>31</sup> The concepts “exclusive” refers to the ability of individuals (i.e. business or consumer) to bring the disputes before local courts and, the ability of local courts to exercise jurisdiction over foreign defendants.

<sup>32</sup> Wang, ‘Obstacles and Solutions to Internet Jurisdiction A Comparative Analysis of the EU and US laws’ (n 16); Morten Foss and Lee A Bygrave, ‘International Consumer Purchases through the Internet : Jurisdictional Issues pursuant to European Law’ (2000) 8 International Journal of Law and Information Technology 99

internationally.<sup>33</sup>

Currently, there is no international convention that deals with the jurisdiction of international disputes between online businesses and online consumers.<sup>34</sup> This means that the conflict of laws rules regarding the court jurisdiction issue might lead online businesses to face the possibility of being subject to foreign legal jurisdictions in which their websites can be accessed.<sup>35</sup> This goes against the functions and rights of any online business, as it should be able to litigate its disputes in the state where it is domiciled. On the other hand, consumers might not have adequate protection for their international online contracts. This is also against the rights and functions of international online consumers, whereas international online consumers should have protection, regarding the court jurisdiction, as a judicial protection, to litigate their international online disputes in their domicile. This state of affairs could not be applied everywhere even if there was an unfair jurisdiction clause (the choice of forum clause) which often provides that all disputes arising out of the online contract must be heard in the courts of a particular jurisdiction. This issue will be considered fully in the following subsections in connection to international online consumers.

### **2.2.1 Jurisdictional limits**

In general, judicial protection is an essential element at the international level as well as in many national legal systems<sup>36</sup> in so far as it allows individuals to enforce their rights and obtain legal redress. This right refers to a broad concept which generally encompasses various core elements, including access to justice, the right to an effective remedy and the principles of fair trial and due process of law.<sup>37</sup> Internationally, however, in protecting such a fundamental right for individuals, the judicial protection, in its broad concept, would require extra ‘effective’ judicial access from and to the domestic judicial

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<sup>33</sup> See Section 2.4 of this chapter, regarding the enforceability. However, it should be made clear at this point that such a thought is not the main argument of this thesis even though it might be an argument in a future piece of work, which might be beyond the scope of this thesis.

<sup>34</sup> At the international level, the Hague Convention does not deal with B2C contracts; Faye Fangfei Wang, *Internet jurisdiction and choice of law: legal practices in the EU, US and China* (Cambridge University Press 2010) 19

<sup>35</sup> *ibid.*

<sup>36</sup> Linda Maria Ravo, ‘The role of the Principle of Effective Judicial Protection in the EU and its Impact on National Jurisdictions’ [2012] *The University of Trieste* 101–125

<sup>37</sup> *ibid.*

system.<sup>38</sup> This is in order to establish a procedure for the individual to seek protection for their guaranteed rights and remedies, especially in sensitive areas of law, such as online consumer disputes where there is a particular need for protection internationally.

In England and Wales, as a part of the European Union (EU), the Brussels I Regulation on Jurisdiction of courts and the recognition and enforcement of judgments in Civil and Commercial Matters<sup>39</sup> and the Hague Convention on Choice of Court Agreement 2005 (Hague Convention 2005)<sup>40</sup> lay down rules governing the jurisdiction of courts which have the legal authority to hear an international dispute within their territory. However, in international online consumer disputes the Hague Convention 2005 does not apply.<sup>41</sup> This is unlike the Brussels I Regulation which does not provide any significant exception regarding the court jurisdiction issue for international online consumer disputes but leaves it unresolved internationally.<sup>42</sup> The end result identical: neither of them applies upon international online consumer disputes. As a consequence, for cases falling outside the scope of the Hague Convention 2005, such as international online consumer cases involving parties from England and Wales and the USA, the jurisdiction of courts is determined, by the traditional common law rules between England and Wales and the USA based on the conflict of laws rules in the domestic law of the court where the matter is brought.<sup>43</sup>

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<sup>38</sup> A notable example can be seen under the Free Movement Directive, Article 31 providing for every person “access to judicial and, where appropriate, administrative redress procedures in the host Member State to appeal against or seek review of any decision taken against them on the grounds of public policy, public security or public health”. See Directive 2004/38/EC of the European Parliament and of the Council of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States.

<sup>39</sup> Council Regulation (EC) No 1215/2012, on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, 12 December 2012 came into force on 10 January 2015.

<sup>40</sup> The Hague Convention of 30 June 2005 on Choice of Court Agreements is aimed at ensuring the effectiveness of choice of court agreements (also known as "forum selection clauses") between parties to international commercial transactions. Available at:

[http://www.hcch.net/index\\_en.php?act=text.display&tid=134](http://www.hcch.net/index_en.php?act=text.display&tid=134) (Accessed 3/05/2014)

<sup>41</sup> The Hague Convention 2005, Article 2 (a) states “*This Convention shall not apply to exclusive choice of court agreements to which a natural person acting primarily for personal, family or household purposes (a consumer) is a party*”.

<sup>42</sup> The European Union in 2009 signed the the Huge Convention on Choice of Court Agreement 2005 on behalf of all its member states except Denmark as (following Council decision No 2009/397/EC of 26 February 2009), it applies, if at least one of the parties were domiciled in one of EU Countries, while the other is domiciled in other States party of the Convention. It should be noted that United States of America is a States party of the Convention since 19 January 2007.

<sup>43</sup> Jonathan Hill, *Cross-Border Consumer Contracts* (Oxford University Press 2008) 34; Mayss, *Principles of conflict of laws(Principles of law series)* (n 18)13



Conversely, the Brussels I Regulation stipulates that cross-border consumer disputes enjoy a significant exception regarding the court jurisdiction.<sup>44</sup> Paragraphs 1 and 2 of Article 16 give the consumer the freedom and discretion to bring any action related to the dispute either in the courts of his domicile or in the courts of the business's domicile. Within the scope of the thesis, it also gives the court in England and Wales a special or exclusive jurisdiction on international consumer matters. Nevertheless, such privilege does not apply to contracts involving parties from the USA as both parties need to be domiciled in an EU Member State.<sup>45</sup> Although, this could be a good solution. The EU has made considerable steps towards harmonizing its laws to protect their online consumers but in international scenarios, where one of the parties (i.e. defendant) is not domiciled in one of the EU countries nor has a branch, agency or other establishment in one of the Member States, the issue of court jurisdiction has not yet been resolved. In other words, the Brussels I Regulation left the door open for such a situation to be solved by the national laws of the EU countries which means that it has to be determined by the domestic law of the court where the matter is brought.

In this way, in order for an international online consumer to establish the jurisdiction of England and Wales to hear an international online consumer dispute where the defendant is in a foreign country, such as the USA, it is necessary to consider first when the online consumer is domiciled in England and Wales.

In accordance with the domestic law, a consumer as natural person is domiciled in England and Wales if he is resident or, the nature and circumstances of his residence indicate that he has a substantial connection with that jurisdiction.<sup>46</sup> In contrast, a business as a legal person is domiciled where its central management and control of the business is exercised.<sup>47</sup>

As a result, an online consumer must establish that she/he has a substantial connection with the court jurisdiction in England and Wales or in a particular part of it. The Civil Procedure Rules 1998 (CPR)<sup>48</sup> asserts that the court jurisdiction is determined on the basis

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<sup>44</sup> The Brussels I Regulation, Article 18 “1. A consumer may bring proceedings against the other party to a contract either in the courts of the Member State in which that party is domiciled or, regardless of the domicile of the other party, in the courts for the place where the consumer is domiciled.

2. Proceedings may be brought against a consumer by the other party to the contract only in the courts of the Member State in which the consumer is domiciled.”

<sup>45</sup> This is determined in accordance with Articles 62 and 63 of the Brussels regulation No 1215/2012

<sup>46</sup> The Civil Jurisdiction and Judgments Order 2001, No. 3929, Schedule 1, para 9

<sup>47</sup> The Civil Jurisdiction and Judgments Order 2001, Schedule 1, para 10

<sup>48</sup> The Civil Procedure Rules (CPR) 1998, No. 3132

of service.<sup>49</sup> In regard to the service, part 6 of CPR sets out different ways in which the service may occur,<sup>50</sup> namely, where the matter involves a contract.<sup>51</sup> One of these is an electronic communications tool.<sup>52</sup> Paragraph 6 of part 6 of the CPR contains rules in regard to service out of the jurisdiction. In accordance with these rules, the jurisdiction of the court would be established for international online consumers in England and Wales if one of these connections applied when contracting with foreign sellers through electronic communications tools (i.e. the Internet):

1. The contract either has to have been made within the jurisdiction of England and Wales;
2. Or made by or through an agent trading or residing within this jurisdiction;
3. Or the contract is governed by English law;
4. Or contains a term to the effect that the court shall have jurisdiction to determine any claim in respect of the contract.<sup>53</sup>

Here, there are three substantial connections or ways to determine the court's special or exclusive jurisdiction which an international online consumer domiciled in England and Wales should establish. Each of these connections, however, does not guarantee online consumers significant exception regarding the court jurisdiction.<sup>54</sup> An online consumer will not always be able to prove that his online contract was concluded within England and Wales as a jurisdiction with an international (foreign) seller. In other words, the consumer has to provide evidence that his online contract was not concluded from Scotland for example. In such a way, it can be argued that the jurisdiction of the court where the consumer is domiciled, England and Wales, may not always have special or exclusive jurisdiction to hear and decide international online consumer disputes. In addition, the second substantial connection, in accordance with Article 15 (2) of Brussels I Regulation, states that online websites as electronic communications tools will not constitute a branch or agency.<sup>55</sup> Thus, if the business does not run an agent domiciled in England and Wales, an accessible website by a consumer cannot be considered a contract

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<sup>49</sup> The Civil Procedure Rules (CPR) 1998, Part 6

<sup>50</sup> The Civil Procedure Rules (CPR) 1998, Part 6, para 20

<sup>51</sup> Practice Direction supplements Section IV of CPR Part 6, para 6

<sup>52</sup> The Civil Procedure Rules (CPR) 1998, Part 6 (3)

<sup>53</sup> Practice Direction supplements Section IV of CPR Part 6, para 6

<sup>54</sup> Loran E. Gillies, *Electronic Commerce and International Private Law* (Ashgate 2008) 114

<sup>55</sup> Brussels I Regulation, Article 15 (2) "Where a consumer enters into a contract with a party who is not domiciled in the Member State but has a branch, agency or other establishment in one of the Member States, that party shall, in disputes arising out of the operations of the branch, agency or establishment, be deemed to be domiciled in that State."

through an agent in England and Wales. The third way to determine the court's exclusive jurisdiction is unlikely to be established as a foreign business would not conclude in their international online contract (click-wrap agreement) a jurisdiction clause in favour of the courts of England and Wales.

Unsurprisingly, in light of the previous argument, the courts of England and Wales seem to interpret these rules cautiously.<sup>56</sup> An important example can be seen in the *Rayner* case.<sup>57</sup> The Court of Appeal dealt with the critical question of determining the jurisdiction through cross-border online websites. In this case, the Court of Appeal raised the important question of which party initiated the contract, ie who invited whom to do business. In other words, was the online business targeting persons (online consumers) within England and Wales jurisdiction (.co.uk as a domain name) to do business or was the online consumer seeking out the seller to do business with? The method of determining this was done through the concept of a 'specific invitation'.<sup>58</sup> The court examined the website and found that there was no suggestion of the website being 'interactive' so the website itself could not be considered 'advertising' or a 'specific invitation'.<sup>59</sup> The Court remarked that the consumer was the one who had made the effort to find a foreign website business even though the website was accessible to the consumer from his home. As a result, it was determined that the courts in England had no jurisdiction to hear the dispute.<sup>60</sup>

The same conclusion was reached in the *Crate & Barrel* case<sup>61</sup> where the defendant was a foreign online business, which had not actively targeted worldwide trade. It was arguable that the use of their website was in relation to the goods available in their Dublin store only and had not been used in relation to any of the relevant goods in the course of any trade with the UK.<sup>62</sup> They denied that by placing the advertisement or operating a website in Dublin they intended to do business in the UK, and they stated that they had never traded there or had any consumers buying goods or services in the UK. The judge held that the website was exclusively designed for the Ireland market by using the domain

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<sup>56</sup> Pablo Cortes, *Online Dispute Resolution for Consumer in the European Union*, (Routledge 2011).29

<sup>57</sup> *Andrew Rayner v. Richard Davies* [2002] EWCA Civ 1880 [2003] 1 All ER (Comm) 394

<sup>58</sup> *ibid*, para 17, 26

<sup>59</sup> *ibid*, para 16

<sup>60</sup> *ibid*, [2002] EWCA Civ 1880, para 34

<sup>61</sup> *Euromarket Designs Inc. v Peters and Crate & Barrel Ltd*, [2001] F.S.R. 20

<sup>62</sup> *ibid*

‘.ie’ despite the fact that the site was accessible to UK online consumers.<sup>63</sup> The judge stated that ‘the mere fact that websites can be accessed anywhere in the world does not mean [...] that the law should regard them as being used everywhere in the world’.<sup>64</sup> From the author’s point of view, this is a major handicap in international online consumer disputes as the existing framework only addresses domestic scenarios. In other words, international online consumers who are domiciled in England and Wales have the right to litigate international disputes only when the online business has directed its activities towards them. In the opposite situation, where an online consumer seeks to make a deal with an international online foreign trader, the existing framework is not adequate to provide consumers with a significant exception regarding the court jurisdiction as a protection. In the EU, there are considerable steps in place to protect consumers regionally but the same right of protection cannot be extended to international online consumer disputes outside the EU.<sup>65</sup> Due to the existing state of affairs, ‘[a] balance should be found between ensuring access to justice on the one hand and international courtesy on the other hand, which would allow a proceeding to be brought when there would otherwise be no access to justice’.<sup>66</sup>

Another interesting issue is the standards of the terms and conditions in international online consumer contracts. This, of course, includes terms such as jurisdiction clauses. As far as online consumer contracts are concluded within the EU, in particular, England and Wales, the jurisdiction clause might be regarded as an unfair term ‘clause’ if it has not been negotiated in a fair manner in the online consumer contract according to the Unfair Terms in Consumer Contracts Regulations 1999.<sup>67</sup> International online consumers from England and Wales, however, cannot rely on that protection outside the EU countries. This state of affairs exists because of two reasons. First, the jurisdiction clause under the principle of the Unfair Terms Regulation is not binding and is not necessarily viewed in the same way by another state outside the EU, such as the USA. As a result of

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<sup>63</sup> *ibid*

<sup>64</sup> *ibid*, [2001] F.S.R. 20, para 12

<sup>65</sup> The same argument has been addressed on the Review of Council Regulation (EC) No 44/2001, the main question in the review was to what extent the scope of special jurisdiction rules are required to extend the application of the Regulation to cases, with the current connection factors of the internet, involve third defendants domiciled in a non-Member State. See the Green Paper of the Commission of the European Communities COM (2009) 175 final, On Jurisdiction and the Recognition Enforcement of Judgments in Civil and Commercial Matters’, Brussels 21/04/2009, available at : <<http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2009:0175:FIN:EN:PDF>> (accessed 23/04/2014).

<sup>66</sup> *ibid*, COM (2009) 175 final, 3

<sup>67</sup> The Unfair Terms in Consumer Contracts Regulations 1999, No. 2083, Article 5(1)

this, international online consumers might have no choice but to sue the business in their own jurisdiction. Second, in order to avoid a jurisdiction clause as an unfair term in England and Wales, the business must have directed its activities towards the consumer's country of domicile. Otherwise, the mandatory protection rules of a consumer in his domicile, which may invalidate any unfair clause in a consumer contract, would not apply to the online business.

The situation outlined in the previous analysis is unfair to international online consumers if they conclude an international online contract with a non-resident, foreign online business. However, from a different point of view it can be argued that the business as defendant should not be in fear of being hauled before a foreign consumer's court just because an online consumer from another country knocks on its door.<sup>68</sup> Otherwise, it would be difficult for a business to defend itself in many other jurisdictions. From an international online consumer perspective, however, this also hinders the ability of consumers to establish court jurisdiction in their own country as a claimant.<sup>69</sup> This is because the business had not directed its activity to the consumer's jurisdiction. This means there is no protection from foreign websites that are accessible from his/her own country through the Internet when the online business has no branches or agencies in the EU Member States. Likewise, the trader had not directed his activity to the consumer's domicile.

In conclusion, an international online consumer, whether claimant or defendant in cases where a non-EU Member States business is involved, cannot persuade his court to stay the proceedings in his domicile. This is especially, if there is a jurisdiction clause in the international online consumer contract which stipulates that the courts of the business country have the jurisdiction – 'the legal authority' – in the event of disputes, to hear and judge such disputes. Thus, international online consumers are at a major disadvantage. This will be the argument of the following subsection.

### **2.2.2 Jurisdiction clause: a major handicap to the consumer**

Generally, U.S supreme courts respect contractual clauses in online consumer contracts, including jurisdiction clauses (the choice of forum clause).<sup>70</sup> However, there is no specific

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<sup>68</sup> Zheng Tang, *Electronic Consumer Contracts in The Conflict of Laws* (Hart Publishing 2009)104

<sup>69</sup> Gillies, *Electronic Commerce and International Private Law* (n 54) 116

<sup>70</sup> Epstein MA and Politano FL, *Drafting License Agreements* (4th edn, Wolters Kluwer 2015), 64

law that addresses conflict concerning court jurisdiction over the Internet; courts have been forced to apply traditional analyses of personal jurisdiction to such cases.<sup>71</sup> The concept of ‘personal jurisdiction’ means that a state may not apply its own law to a case unless a person was physically present in the jurisdictional forum.<sup>72</sup> Thus, in order to determine the scope of state jurisdiction where there is no jurisdiction clause, the US courts have adopted the ‘minimum contacts’ test. This was required in the *International Shoe*<sup>73</sup> case to evaluate whether the defendant purposefully directed his activities at or purposefully availed himself of the forum state.<sup>74</sup> The court in *International Shoe* held that courts are permitted to exercise jurisdiction over any defendant as long as he has minimum contact with the forum, ‘such that the maintenance of the suit does not offend traditional notions of fair play and substantial justice’.<sup>75</sup>

However, since commercial activities through the Internet do not require a physical presence, the traditional conception of personal jurisdiction has also been changed and new tests have been developed such as the ‘effects’ test<sup>76</sup> and the ‘sliding scale’ test. The majority of federal courts use the ‘sliding scale’ test to determine personal jurisdiction in Internet cases<sup>77</sup> as set out in *Zippo Manufacturing Co.*<sup>78</sup> In this case, websites were separated into three types:

(1) Active websites. If a website does business over the Internet, eg eBay, where the claimant or the defendant is able to enter into contracts with residents of a foreign jurisdiction by offering goods for sale or enabling a person visiting the website to order merchandise, services or files through it.

(2) Passive websites. Those websites that do not conduct business and are often used to provide information to users but do not allow their users to interact with the host of the

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<sup>71</sup> Tricia Leigh Gray, ‘Minimum Contacts in Cyberspace : The Classic Jurisdiction Analysis in a New Setting’ (2002) 1 Journal of High Technology Law 85

<sup>72</sup> Erin F Norris, ‘Why The Internet Isn’t Special: Restoring Predictability To Personal Jurisdiction’ (2011) 53 Ariz. L. Rev. 1013

<sup>73</sup> *International Shoe Co. v. Washington*, 326 U.S. 310, 66 S. Ct. 154, 90 L. Ed. 95 (1945)

<sup>74</sup> *ibid*, (n 72)

<sup>75</sup> *ibid*, 326 US 310 (1945), p. 317

<sup>76</sup> The “effects” test is based on the case of *Calder v. Jones*, The Court in this case, permits to exercise jurisdiction over defendants when the defendants harm the forum of the residents intentionally, *Calder v. Jones*, 465 U.S. 783 (1984); And see , *Keeton v. Hustler Magazine, Inc.*, 465 U.S. 770 (1984).

<sup>77</sup> Eric C Hawkins, ‘General Jurisdiction and Internet Contacts : What Role , if any , Should the Zippo Sliding Scale Test Play in the Analysis ?’ (2006) 74 Fordham L. Rev 2371

<sup>78</sup> *Zippo Mfg. Co. v. Zippo Dot Com, Inc*, 952 F. Supp. 1119 (W.D. Pa. 1997).

website (e.g. blogs).

(3) Mixed (interactive) websites. Those websites that are a combination of the previous two which allow users to exchange information between themselves and enable a person visiting the website to order goods, services or files through it (e.g. Facebook).

In the event of disputes, the court will analyze ‘purposeful availment’ in determining personal jurisdiction. This focuses on the defendant's intentionality as to whether the defendant purposefully and voluntarily directed his activities toward the consumer forum<sup>79</sup> as well as ensuring that the defendant will not be hauled before a foreign court based upon random contracts through the Internet. Thus, websites that conduct business (active websites) offer ‘purposeful availment’ which are grounds for the exercise of specific jurisdiction because the requisite ‘purposeful availment’ has occurred.<sup>80</sup> Websites that simply present information (passive websites) do not offer grounds for specific jurisdiction because most likely there is no ‘purposeful availment’ from these websites and the defendant did not purposefully direct his information to any particular jurisdiction even though the information was accessible to users in their jurisdiction.<sup>81</sup> The ‘purposeful availment’ of mixed (interactive) websites is measured by the level of interactivity and its commercial nature to determine the grounds for the exercise of specific jurisdiction.<sup>82</sup>

Some scholars<sup>83</sup> argue that this test is not useful and can be unpredictable because many websites are increasingly showing a high level of interaction which means they are falling into the mixed websites category. In addition, when the interactivity of the parties is low, this approach would lead to different judicial interpretations as it is difficult for a court to recognize their jurisdiction. Due to this, other scholars argue that US courts need to develop a new test to determine personal jurisdiction.<sup>84</sup> Some US courts have already

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<sup>79</sup> *United States v. Swiss American Bank, Ltd.*, 274 F.3d 610, 623-24 (1st Cir. 2001)

<sup>80</sup> *Thompson v. Handa-Lopez, Inc.*, 998 F. Supp. 738 (W.D. Tex. 1998)

<sup>81</sup> *Resnick v. Manfredy*, 1999 U.S. Dist. LEXIS 5877 (E.D. Pa. Apr. 26, 1999)

<sup>82</sup> *Zippo Mfg. Co. v. Zippo Dot Com, Inc.*, 952 F. Supp. 1119, at 1124

<sup>83</sup> Bunmi Awoyemi, ‘Zippo is Dying, Should It Be Dead?: The Exercise of Personal Jurisdiction by U.S. Federal Courts Over Non-Domiciliary Defendants in Trademark Infringement Lawsuits Arising Out of Cyberspace’ (2005) 9 Intellectual Property L. Rev; See also Hawkins, ‘General Jurisdiction and Internet Contacts: What Role, if any, Should the Zippo Sliding Scale Test Play in the Analysis?’ (n 77); Foss and Bygrave, ‘International Consumer Purchases through the Internet: Jurisdictional Issues pursuant to European Law’ (n 32)

<sup>84</sup> C.Douglas Floyd & Shima Baradaran- Robison, ‘Toward a Unified Test of Personal Jurisdiction in an Era of Widely Diffused Wrongs: The Relevance of Purpose and Effects.’ (2006) 81 Ind. LJ 601; See also, Illar, D. J. ‘Unraveling International Jurisdictional Issues on the World Wide Web’, (2010) U. Det. Mercy

done so and have modified the ‘sliding scale’ test to require additional evidence that the defendant intentionally targeted his activities in that state.<sup>85</sup> This requirement is similar to the test that is used in England and Wales to determine jurisdiction. Nevertheless, it also faces the same issue in regard to consumers as it is difficult for the consumer to prove it. Moreover, when a consumer seeks out a foreign website then he has to sue the business in his own jurisdiction.

The complexities of predicting court jurisdiction mean that the threat remains of a business being sued before a court in a different state or jurisdiction. Thus, from an online business perspective, in order to provide legal certainty for themselves they include the choice of forum clause within their online contract to avoid being subject to many jurisdictions with different consumer protection laws. In fact, this situation is not just confined to the USA; it applies to any business anywhere. However, because there is no special law to address jurisdiction issues on the Internet, the vast majority of US courts uphold forum selection clauses<sup>86</sup> ‘unless they are unreasonable, unconscionable or contrary to the public policy of the forum’.<sup>87</sup>

The leading case is *Carnival Cruise Lines*.<sup>88</sup> In this case, the consumer purchased two tickets from Carnival, a Florida-based cruise line. On the back of the tickets, there was a choice of forum clause in small print stating that any dispute arising out of the contract must be resolved in the courts of Florida. When the dispute occurred, the Supreme Court enforced the choice of forum clause outside the consumer's home court even though it was likely that the consumer had never read the clause and the clause itself was not the subject of any negotiation between the parties. The Court held that the clause was reasonable, and if the clause was not the subject of bargaining between parties that does not mean it is never enforceable. In addition, the consumers benefited from reduced fares which reflected the savings that the cruise line made by limiting the forum. Otherwise, transacting with consumers from different jurisdictions made the business subject to litigation in many forums. This case has been used by more recent cases to extend a policy

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L. Rev., 88; See also, Johnson, K. D. “Measuring Minimum Contacts Over the Internet: How Courts Analyze Internet Communications to Acquire Personal Jurisdiction Over the Out-of-State Person”, (2007) 46 U. Louisville L. Rev., 313.

<sup>85</sup> *Toys "R" Us, Inc. v. Step Two, S.A.*, 318 F.3d 446, 454-55 (3d Cir. 2003).

<sup>86</sup> M Rustad and MV Onufrio, ‘Reconceptualizing Consumer Terms of Use for a Globalized Knowledge Economy’ (2012) 14 U. Pa. J. Bus. L. 1085

<sup>87</sup> Jeffrey M. Jensen, ‘VI . Personal Jurisdiction in Federal Courts over International E-Commerce Cases’ (2007) 40 Loy. L.A. L. Rev 1507

<sup>88</sup> *Carnival Cruise Lines, Inc. v. Shute*, 499 U.S. 585 (1991)



favouring the ability of parties to choose the forum in which their online disputes are to be settled.<sup>89</sup> The New Jersey Supreme Court applied this in *Microsoft Network, LLC*.<sup>90</sup> It was applicable where the consumer failed to prove any of the following three circumstances: (1) the clause is a result of fraud or ‘overweening’ bargaining power; (2) enforcement would violate the strong public policy of New Jersey; or (3) enforcement would seriously inconvenience trial. It was also applicable where the website (a) prompted potential subscribers to read the terms of use in advance; (b) contained adequate clarity and the meaning is plain; and (c) permitted consumers to click on ‘I Agree’ to show mutual assent.<sup>91</sup> Thus, this clause is a substantial agreement to which the parties are bound.<sup>92</sup> The same occurred in *Network Solutions, Inc*<sup>93</sup> where the court held that the forum selection clause was valid where subscribers to online software were required to review license terms in a scrollable window and to click ‘I Agree’ or ‘I Don't Agree’. However, many international online shopping websites have a registration system that users must ‘subscribe’ to and their terms and conditions are found at the beginning of the registration process. Online consumers may never read them or do so only once without paying much attention to the terms and conditions for using the website. The general tendency of USA courts has been in favour of applying the rule of ‘reasonable person’.<sup>94</sup> This holds that validating or invalidating the online terms and conditions of particular websites is based on the degree that those clauses were visible and noticeable by a reasonable person, under ordinary circumstances. Accordingly, it is clear that consumers in the US have had much less protection than their counterparts in the EU in terms of the validity and enforceability of choice of court agreements, namely in internet disputes.

Overall, the US supreme courts are more likely to provide jurisdiction to the business’s forum which may result in consumers being deprived of the protection afforded to them by the laws of their countries of domicile<sup>95</sup> even when a consumer buys goods or services as a result of a direct marketing by the business in the consumer’s domicile unless there

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<sup>89</sup> Ronald A. Brand, ‘Party Autonomy and Access to Justice In The UNCITRAL Online Dispute Resolution Project’ (2013) 10 Loy. U. Chi. Int’l L. Rev. 11

<sup>90</sup> *Caspi v. Microsoft Network, L.L.C.* 323 N.J. Super. 118, 732 A.2d 528 (N.J. Super. Ct. App. Div. 1999)

<sup>91</sup> *ibid*

<sup>92</sup> *ibid*

<sup>93</sup> *Doe v. Network Solutions, LLC*, No. 07-5115, 2008 WL 191419 (N.D. Cal. January 22, 2008)

<sup>94</sup> See Juliet M Moringiello and William L Reynolds, ‘Electronic Contracting Cases 2009-2010’ (2010) 66 Business Lawyer 1

<sup>95</sup> Zheng Sophia Tang, ‘Private International Law in “Consumer Contracts: A European Perspective”’ (2010) 6 Journal of Private International Law 225, 249.

is a jurisdiction clause stating otherwise. In such cases where there is a jurisdiction clause, there is a major drawback for international online consumers as the US supreme courts will uphold this clause unless it is unreasonable, unconscionable or contrary to its public policy. In such cases, it is highly likely that the seller will submit the contract, in the event of disputes, to the law and jurisdiction that is the most preferable to him.

### **2.3 The dilemma over applicable law**

In general, different levels of freedom have an influence upon the choice of law in international online commercial contracts.<sup>96</sup> This might be seen as one of the most problematic issues in the field of conflict of laws.<sup>97</sup> Similar to the jurisdiction matters, the dilemma in relation to the applicable law, as different states have different laws in their territory, could create a patchwork of laws that confuse both international online businesses and consumers.<sup>98</sup> The dilemma can be seen from two different aspects: where there is a choice of law clause in a consumer contract in which the validity of such a choice, fairness and its enforceability need to be determined, and where there is an absence of online choice of law clause, within which the conflict of laws rules and the connecting factors vary from one jurisdiction to another, which is used in order for the court to find the proper law applicable to the international disputes.

Regarding the online choice of law clause, however, efforts in the EU have been to limit the party autonomy in choice of law clauses in consumer contracts and to harmonize the special rules ‘connecting factors’ which are used to determine the applicable law, as those could create a legal dysfunction to protect consumer’s rights and function.<sup>99</sup> By the same token, Article 6 of the Rome I Regulation provides that parties in consumer contracts may have a valid choice of law clause. In other words, the parties may choose the applicable law even if one of them is a consumer.<sup>100</sup> Nevertheless, such a clause cannot result in depriving the consumer from the protection afforded to him by the law of the country of

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<sup>96</sup> Tang, *Electronic Consumer Contracts in The Conflict of Laws* (n 68 ) 231

<sup>97</sup> Peter North and James Fawcett, *Cheshire and North’s private international law* (14th edn, Oxford University Press 2008) 41

<sup>98</sup> Lee A Bygrave and Dan Svantesson, ‘Jurisdictional Issues and Consumer Protection in Cyberspace : The View from “ Down Under ”’, 2001

<sup>99</sup> It should be noted here that the Rome I Regulation, within its scope, lay down rules to all Member State, in order to harmonize the applicable law in international consumer contract, to determine the applicable law according to the law of most closely connected factor to the contract.

<sup>100</sup> R Giesela, ‘Consumer Protection in Choice of Law’ (2011) 44 CORNELL INT’L L.J. 569–602

his habitual residence.<sup>101</sup> Thus, the choice of law clause is a valid clause when it states that the consumer's law is the applicable law. Therefore, the same question arises again, is such a protection really adequate?

Similar to the court jurisdiction issue, the 'directing activities' approach is the only way the Rome I Regulation can be applied to the international online environment.<sup>102</sup> In other words, when an international online business, based outside the EU as in the USA, intends to direct its commercial activities towards the consumer's country by whatever means,<sup>103</sup> and the contract is concluded as a result of such activities. A choice of law clause may deprive the consumer of the protection afforded to them within an EU Member State jurisdiction, such as England and Wales. The Rome I Regulation protects international online consumers from such activities as it covers those online websites, which are merely accessible in the consumer's home country. However, in such scenarios there should be evidence that the trader has targeted such a country.<sup>104</sup> This could be difficult to prove. Other than that, Rome I Regulation does not provide a clear provision regarding the applicable law in case of conflict between the law of a Member State and the law of a non-Member State.

In this regard, the author agrees with the argument that the choice of law for international online consumer contracts should be given more attention than any other contract terms and conditions.<sup>105</sup> However, the conditions for the application of consumer law in international online consumer disputes are based on the notion of pursuing activities in the consumer's home country or directing those activities to that country.<sup>106</sup> Whereas

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<sup>101</sup> The Rome I Regulation, Article 6 (2) states : "... such a choice may not, however, have the result of depriving the consumer of the protection afforded to him..."

<sup>102</sup> In the EU, the 'directing activities' approach has been applied in both the Brussels and Rome I Regulations as a criterion for jurisdiction and applicable law issues, See the Brussels I Article 15 Regulation, the Rome I Regulation, Article 6 (1)

<sup>103</sup> The Rome I Regulation, Article 6 (1) "(a) pursues his commercial or professional activities in the country where the consumer has his habitual residence, or (b) by any means, directs such activities to that country or to several countries including that country";

<sup>104</sup> Paul Cachia, 'Consumer Contracts in European Private International Law: The Sphere of Operation of the Consumer Contract Rules in the Brussels I and Rome I Regulations' (2009) 34 European Law Review 476; See also Joined cases C-585/08 and C-144/09 *Peter Pammer v Reederi Schlüter & Co KG and Hotel Alpenhof GesmbH v Oliver Heller* [2010] ECR I-12527; Case C-218/12 *Lokman Emrek v Vlado Sabranovic* [2013] Bus LR 104, "the existence of such a causal link constitutes evidence of the connection between the contract and such activity." para 33

<sup>105</sup> Mo Zhang, 'Contractual Choice of Law in Contracts of Adhesion and Party Autonomy' (2008) 41 Akron L. Rev. 123

<[http://heinonlinebackup.com/hol-cgi-bin/get\\_pdf.cgi?handle=hein.journals/aklr41&section=6](http://heinonlinebackup.com/hol-cgi-bin/get_pdf.cgi?handle=hein.journals/aklr41&section=6)> (accessed 8 February 2014).

<sup>106</sup> Michael Wilderspin, 'The Rome I Regulation: Communitarisation and modernisation of the Rome

international regulations are required to ensure protection for online consumers internationally, it is one of the areas of law where there is a lack of international regulations as there is no specific agreement governing the choice of law clause in such types of international online contracts.<sup>107</sup> Thus, it can be said such a state of affairs is similar to the one that governs the jurisdiction of the court as such jurisdiction is established over international online disputes and the court can apply its own laws to determine the validity of such a clause, its fairness and its enforceability.

Thus, to some extent it can be argued that in the event of international online consumer disputes between England and Wales and the USA (EU Member State and non-Member State), the situation for international online consumers might be better even if the proper law for international online consumer contracts will be determined similar to the absence of choice of law situation. In this scenario, the court should find the appropriate law to apply to the online consumer contract based on a list of connecting factors, such as the habitual residence/domicile/nationality of the parties, in which the law of the most closely connected factor to the contract will be applied. However, the flip side of the coin might be that there is no guarantee that the English law will be the applicable law.

In contrast, the USA law intends to treat consumer contracts like any other commercial contract with a strong contractual autonomy tradition, without significant exception rules of consumer contracts.<sup>108</sup> Thus, a choice of law clause could be regarded as a valid and enforceable clause even if the other contracting party is a consumer. In addition, in the USA, there are a large number of state laws that might be applicable to different connecting factors when the rules and factors themselves differ among states.<sup>109</sup> Most USA states follow the choice of law for a contract provided by the US Second Restatement of Conflict of Laws.<sup>110</sup> Section 187 of Second Restatement stipulates that:

[T]he law of the state chosen by the parties to govern their contractual rights and duties will be applied, *unless* (a) the chosen state has no substantial relationship to the parties or the transaction and there is no other reasonable basis for the

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Convention' (2008) 9 ERA Forum 259–274

<sup>107</sup> Wang, *Internet jurisdiction and choice of law: legal practices in the EU, US and China* (n 34) 98

<sup>108</sup> Restatement (Second) of Conflict of Laws, Chapter 8, Section 186, states that "[i]ssues in contract are determined by the law chosen by the parties"; See also Uniform Commercial Code .2001, Section 1-103,

<sup>109</sup> Philip Adam Davis, 'The Defamation of Choice-of-Law in Cyberspace : Countering the View that the Restatement ( Second ) of Conflict of Laws is Inadequate to Navigate the Borderless Reaches of the Intangible Frontier The Defamation of Choice-of-Law in Cyberspace : Countering' (2002) 54 Federal Communications Law Journal 340

<sup>110</sup> Svantesson, *Private International Law and the Internet* (n 21), 154

parties' choice, or (b) application of the law of the chosen state would be contrary to a fundamental policy of a state which has a materially greater interest than the chosen state in the determination of the particular issue.<sup>111</sup>

In other words, section 187 requires the court to examine the relationship between the chosen law, parties and transaction and then the public policy of different states that might have a greater interest than the chosen state. In doing so, according to section 188, the governing law of the contract will be 'the law of the state/country that has the most significant relationship to the transaction and the parties'. Consequently, the court will consider (a) the place of contracting; (b) the place of negotiation of the contract; (c) the place of performance; (d) the location of the subject matter of the contract; and (e) the domicile, residence, nationality, place of incorporation and place of business of the parties.<sup>112</sup> However, this approach has been criticized as it is hard for a court to conduct such analysis in cross-border cases and it is very complicated to be suitable for international online contracts.<sup>113</sup>

However, in case of the absence of the choice of law clause, the law of the consumer's habitual residence might be the applicable law under the US Conflict of Laws Second Restatement even though there is no express provision providing for this result.<sup>114</sup> This is because according to Restatement sections 189 to 197, contracts are generally subject to the law of the party who receives the goods and services.<sup>115</sup> Since this is always the consumer, there is no need for a special provision, in the US, to deal with international online consumer contracts.<sup>116</sup>

Overall, it can be said that the choice of law from an international law perspective may lead international online consumers to one of two options. The first is that an online consumer in his home country may litigate an international online business but according to the law of the business. Thus, the applicable law is a foreign law for consumers. The

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<sup>111</sup> Restatement (Second) of Conflict of Laws, Chapter 8, Section 187

<sup>112</sup> Restatement (Second) of Conflict of Laws, Chapter 8, Section 188

<sup>113</sup> Wang, *Internet jurisdiction and choice of law: legal practices in the EU, US and China* (n 34),131; Davis, 'The Defamation of Choice-of-Law in Cyberspace : Countering the View that the Restatement ( Second ) of Conflict of Laws is Inadequate to Navigate the Borderless Reaches of the Intangible Frontier The Defamation of Choice-of-Law in Cyberspace : Countering' (n 109); William J. Woodward, 'Legal Uncertainty and Aberrant Contracts : The Choice of Law Clause' (2014) 89 Chi.-Kent. L. Rev 197; Erin Ann O'Hara, 'Choice of Law for Internet Transactions: The Uneasy Case for Online Consumer Protection' (2005) 153 University of Pennsylvania Law Review 1883

<sup>114</sup> Restatement (Second) of Conflict of Laws, Chapter 8, Section 188

<sup>115</sup> See Giesela, 'Consumer Protection in Choice of Law' (n 100)

<sup>116</sup> *ibid.*

second is that an international online consumer may sue an online business in his home country but according to the law of the consumer's home country. It can be argued that they were not drafted with economic theory in mind as the right to litigate a foreign business in a consumer's home country would be the most significant factor in ensuring consumer protection internationally. As such, the rule that stipulates that the law of the consumer country should always apply may need to be reconsidered internationally to provide better protection for international online consumers. Conflict of laws rules, in certain situations, require a legal harmonization between the US and England and Wales in order to find the most appropriate (protective) law in international online consumer disputes.

#### **2.4 The absence of a uniform enforceable structure**

The ability of the winning party to enforce a court decision in a foreign jurisdiction is one of the elements in the operation of justice for parties who hope to reach a final and binding decision. It is an additional reason why parties try to resolve their disputes in court. However, at the international level, the importance of the enforcement power of a court judgment is contingent. In other words, the issue here is that the enforcement power is strictly territorial.<sup>117</sup> This means that no one individual or state can engage in any act to enforce its law on the territory of another state without the latter's permission.<sup>118</sup> States are eager to protect their citizens from judgments considered incompatible with the fundamental standards of domestic law and justice. The international treaties and conventions between states regulate and provide permission for the exercise of adjudicatory authority and the enforcement of foreign judgments. In addition, the procedural law has different requirements to enforce foreign judicial decisions in each state, which depend on where the foreign judgment was rendered.<sup>119</sup> In cases that fall within the scope of the thesis, ie international online consumer disputes, the problem of enforcement becomes even more complicated as there is no international treaty between England and Wales and the USA to satisfy the needs of court enforcement mechanisms for international online consumer disputes.

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<sup>117</sup> Uta Kohi, *Jurisdiction and the Internet: Regulatory Competence over Online Activity* (Cambridge University Press 2007) 200

<sup>118</sup> *ibid.*

<sup>119</sup> See Wolfgang Wurmnest, 'Recognition and Enforcement of U.S. Money Judgments in Germany' (2005) 23 *Berkeley J. Int'l Law*

In that regard, the most important attempt in private international law was the Hague Convention. Although it was adopted in June 2005, the actual drafting of the document began at the Hague Conference in 1992.<sup>120</sup> However, no treaty was ever concluded between the two jurisdictions concerning consumers.

The objective in the Preliminary Draft Convention on Jurisdiction and Foreign Judgments in Civil and Commercial Matters<sup>121</sup> was to provide enforceable legal structures for the choice of court agreements in the same way that the New York Convention of 1958 had done for arbitration agreements.<sup>122</sup> In this draft, Article 7 was the most controversial provision. The article lays down special rules of jurisdiction for consumer contracts.<sup>123</sup> In order to achieve its purpose, the scope of Article 7 was defined by reference to the term ‘consumer’. In fact, there are two standard options for the definition of consumer: one is to define the consumer as a person acting outside his trade or profession, and the other is a natural person acting primarily for personal, family or household purposes. The Draft Convention used the first option, defining it as a person who has concluded a contract ‘for a purpose which is outside its trade or profession’. This definition is the same as the one adopted in the Brussels Convention (Regulations) but contrasts with the concept in the USA.<sup>124</sup> In order to provide protection for a consumer who initiates court proceedings or has an action brought against him, this Article has two alternatives that allow consumers to initiate an action in their habitual residence when contracts had been concluded or directed to the consumers’ state:

- 1) If Article 7 is used as a default rule when the parties have not entered a contractual clause selecting a forum.
- 2) If there is a jurisdiction clause or agreement, Article 7 applies only if the agreement

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<sup>120</sup> The US attempted to address this problem by negotiating a treaty with the UK. The US expected that, if this treaty could be negotiated successfully with the UK, it might provide a prototype for similar agreements with other European countries; See Samuel P Baumgartner, *The Proposed Hague Convention on Jurisdiction and Foreign Judgments : trans-Atlantic lawmaking for transnational litigation* (Tübingen : Mohr Siebeck 2003)

<sup>121</sup> Preliminary Draft Convention on Jurisdiction and Foreign Judgments in Civil and Commercial Matters (Hague Convention) October 1999 and its revision June 2001

<sup>122</sup> Preliminary Draft Convention on Exclusive Choice of Court Agreements, Explanatory Report, December 2004, Doc. No 25, Available at [http://www.hcch.net/upload/wop/jdgm\\_pd26e.pdf](http://www.hcch.net/upload/wop/jdgm_pd26e.pdf) (Accessed 1/06/2014)

<sup>123</sup> Preliminary Draft Convention on Jurisdiction and Foreign Judgments in Civil and Commercial Matters, adopted by The Special Commission, August 2000, Doc. No 11, Available at <http://www.hcch.net/upload/wop/jdgmPd11.pdf> (Accessed 1/06/2014)

<sup>124</sup> Those two issues will be discussed in depth in chapter 3 and 4

was entered into after the dispute has arisen.<sup>125</sup>

In the light of this distinction, EU countries, including the UK, support option (2), which is reflected in Article 17 of the Brussels I Regulation, and the US supports option (1).<sup>126</sup> This creates conflict of laws as any judgment resulting from choice of court agreements will be recognized and enforced only if it has legal effect in the state of origin.<sup>127</sup> If it does not have legal effect as the jurisdiction clause is null and void or in alternative, considered to be an unfair clause in the state of origin, such as within EU countries when the clause was entered into contract before the dispute has arisen where it should be entered into the consumer contract after the dispute has arisen, then it will not be recognized and enforced. Thus, the jurisdiction clause would not constitute a valid determination of the parties' rights and obligations as it has different weight in the US and the EU. Likewise, the judgment would not be recognized and enforceable under the Hague Convention.

In order to harmonize at least some of these issues and to create greater predictability and reliability in this international commercial field, the scope of The Hague Convention 2005 has been limited and the choice of court clauses apply to B2B contracts only.<sup>128</sup> In other words, the Hague Convention excludes its applicability to consumer contracts, which leaves consumers without any enforcement power of court decision. Until this issue is resolved, it appears highly unlikely that there will be formal harmonization for jurisdiction and enforcement of judgments.<sup>129</sup> Consequently, international online consumers have been left without any enforceable remedies internationally.

In such a situation, a true ADR for international online consumer disputes is necessary. A number of issues need to be determined, namely the legal system that applies in the international arena and the extent that it is adaptable and enforceable in order to achieve an international balance (rights and obligations) for international online consumers with protection similar to the one at a domestic level. The following sections of this chapter argue that arbitration is not only a necessary dispute resolution mechanism but also

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<sup>125</sup> This Article has been removed from the Hague Convention 2005

<sup>126</sup> William E. O'Brian, 'The Hague Convention on Jurisdiction and Judgments: The Way Forward' (2003) 66 *The Modern Law Review* 491

<sup>127</sup> Preliminary Draft Convention on Exclusive Choice of Court Agreements, explanatory report, March 2004, Doc. No 11, para 120, Available at < [http://www.hcch.net/upload/wop/jdgm\\_pd25e.pdf](http://www.hcch.net/upload/wop/jdgm_pd25e.pdf)>(Accessed 1/06/2014)

<sup>128</sup> The Hague Convention 2005, Article 2

<sup>129</sup> Peter Swire, 'Elephants And Mice Revisited: Law And Choice Of Law On The Internet' (2005) 153 *University of Pennsylvania Law Review* 1975



important as an alternative to litigation.

### ***3. Is Arbitration a viable alternative for international online consumer disputes?***

In considering arbitration as a ‘viable’ alternative, it might be better to examine it from the perspective of the weaker party. There are two main elements, which should be considered of particular importance to consumers involved in international online disputes. The first is the legal element; the gap between state and private justice in dealing with international online consumer disputes. In other words, the gap between an international arbitrator and a state judge in dealing with international online consumer disputes. This is, from the author’s point of view, necessary in order to determine arbitration as an international, flexible, ‘autonomous procedure’ that functions outside the court system according to laws and legal rules as a ‘judicial procedure’ subject to court review of ‘judicial control’ over its arbitral awards, and as an ADR approach for international online consumer disputes. It should be noted here that arbitration under this element should function according to national and international law and legal rules as ‘autonomous procedure’<sup>130</sup> and as ‘judicial procedure’.<sup>131</sup>

The second is the factual element, i.e. the characterisation of arbitration in dealing with the subject matter of international online consumer disputes and dealing with the contracting parties themselves who opt for arbitration as a viable means of redress.

Hence, it is important to compare arbitration on the point that the choice of arbitration mechanism, as a form of private justice, will potentially have a significant impact on the outcome of such a dispute internationally and by the preferential approach (related to potential advantages and disadvantages) from an international online consumer perspective. This is in order to determine the level of substitutability of ADR for international online consumer disputes.

Therefore, the focus of this chapter will be on arbitration as having the highest potential benefit over litigation and mediation internationally. It is recognized that international

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<sup>130</sup> Parties may influence arbitration rules by adopting specific provisions in their agreement; see Andrew Tweeddale and Keren Tweeddale, *Arbitration of Commercial Disputes International and English Law and Practice* (Oxford University Press 2007).

<sup>131</sup> Those two issues will be discussed in depth in chapter 3 and 4 under the legal capacity of consumer and the contractual identity of the parties.

commercial transactions are normally more complex and more expensive than their national counterparts. Therefore, the key difference is the outcome.<sup>132</sup> In conciliation and mediation procedures, the parties can, to some extent,<sup>133</sup> be required to attempt them but no decision, award or judgment can be imposed nor can a party be forced to accept a settled outcome.<sup>134</sup> In contrast, arbitration is the only type of ADR, which has an effective enforcement structure and principles designed for international commercial disputes due to the existence of the New York Convention.<sup>135</sup> The most important aspect of the New York Convention 1958, within the scope of this thesis, is the scope of its application to international online consumer disputes within both England and Wales and the USA as contracting states.<sup>136</sup>

### 3.1 Arbitration in comparison with litigation

In order to compare arbitration with litigation, the theme of arbitration should be clear. However, there is no uniform definition for it<sup>137</sup> as there are many different types of arbitration, which are subject to different legal rules.<sup>138</sup> Nonetheless, there are essential elements, which reflect the ‘autonomous procedure’, ‘judicial procedure’ and ‘judicial control’ of its awards.<sup>139</sup> Those elements are as follows: a dispute; an agreement and/or clause that refers to arbitration; a third party to examine the agreement; a final and binding award by the third party; and a final decision of the arbitrator that is binding with

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<sup>132</sup> As Holtzmann has noted, “[e]nforcement of foreign arbitral awards is not merely a legal exercise; it is a commercial necessity, otherwise if businessmen are not reasonably sure of enforcement of foreign arbitral awards, there will be little or no arbitration”; HM Holtzmann, *International Arbitration : 60 years of ICC arbitration : a look at the future* (ICC Publishing S.A. 1984) 361.

<sup>133</sup> See the author’s argument in the previous section, regarding the court issue on this matter, mainly subsection 2.4.

<sup>134</sup> As we will see in the following subsection 3.2 regarding the Mediation as international out of court settlement.

<sup>135</sup> The New York Convention 1958 is one of the key instruments in international arbitration with 148 parties (Contracting States), and applies to the recognition and enforcement of foreign arbitral awards and the referral by a court to arbitration. It obliges Parties/ Contracting States to ensure recognition and enforcement of foreign arbitral awards in the same way as domestic awards. For example Art (3) of New York convention: ‘...there shall not be imposed substantially more onerous conditions or higher fees or charges on the recognition or enforcement of arbitral awards to which this Convention applies than are imposed on the recognition or enforcement of domestic arbitral awards’.

<sup>136</sup> The Convention was prepared and opened for signature on 10 June 1958 by the United Nations Conference on International Commercial Arbitration with 24 Signatories and 148 Parties as last status at : 17/04/2013, both of United Kingdom of Great Britain and United States of America, available at <[http://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg\\_no=XXII-1&chapter=22&lang=en](http://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XXII-1&chapter=22&lang=en)> (Accessed 10/06/2014).

<sup>137</sup> Tweeddale, *Arbitration of Commercial Disputes International and English Law and Practice* (n 132) 33.

<sup>138</sup> *ibid.*

<sup>139</sup> *ibid.*

reference to a court of law ‘enforceability’. Thus, for the purposes of this thesis, arbitration can be defined as a ‘method of dispute resolution involving one or more neutral third parties who are usually agreed to by the disputing parties whose decision is final and binding’.<sup>140</sup>

There are four fundamental characteristics that differentiate arbitration from litigation. Those differences may have a significant impact on the outcome and on choosing arbitration as a form of private justice over state justice. Some of the differences are beyond the scope of this thesis but they are important as a means of building up legal background for the following chapters. They are: third party, potential cost, transparency vs confidentiality and the right of appeal vs the finality of the award.

### **3.1.1 Arbitrator as a third party**

The fact that parties can choose the arbitrator whereas a judge is typically assigned. This can mean that someone who is an expert in the subject matter of the dispute can arbitrate on it. An expert arbitrator may require less hearing time and his decision may also be better informed and more predictable than a generalist judge.<sup>141</sup> On one hand, a state judge may have no relevant experience and background in the matter. However, where consumers waive their right in litigation or where there is an abuse against a consumer, the court would be more advantageous for them <sup>142</sup> as ‘judges are well-trained to recognize abusive forum shopping’.<sup>143</sup> Moreover, the judge derives its authority from state while the arbitrator derives their authority from the parties.<sup>144</sup> Arbitrator also have a financial relationship with parties, more likely with business which appear to affect the outcome. Furthermore, judge’s decisions are judicially reviewable for substantiates and procedure aspect, while the arbitrator’s award is reviewable on procedure aspect only.<sup>145</sup> On the other hand, arbitrator and judge share a similarities, both have review on their decisions. Arbitrator like judge do not like to have their award being annulled set aside or denied enforcement.

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<sup>140</sup> Black’s Law Dictionary

<sup>141</sup> See chapter 6 (the arbitrator as problem resolver for consumer disputes)

<sup>142</sup> Thomas J. Lilly, ‘Participation in Litigation as a Waiver of the Contractual Right to Arbitrate : Toward a Unified Theory’ (2013) 92 Neb. L. Rev. 86

<sup>143</sup> *Marie vs Allied Home Mortgage Corp* , 402 F.3d (1st Cir. 2005) .at 13

<sup>144</sup> See Susan D Franck, ‘The Role of International Arbitrators’ (2006) 93 ILSA Journal of International & Comparative Law 515

<sup>145</sup> *ibid.*

Overall, within the scope of this study on England and Wales and the USA, the ability of the disputes to be arbitrable subjectively and objectively imposes legal requirements upon the arbitrators and also upon the courts dealing with arbitration.<sup>146</sup>

### **3.1.2 The potential cost**

In general international commercial disputes, the ‘[c]osts in an adjudication can be very significant’.<sup>147</sup> Thus, the reduction of legal costs can be considered as a potential advantage in submitting to arbitration rather than a court in international disputes. However, in regard to international online consumer disputes, there is doubt over the arbitration cost as a benefit that reduces legal costs of consumer disputes as the vast majority of consumer disputes involve relatively low-priced goods, services or credit.<sup>148</sup> The problem for international online consumers is how to reduce the time and money, ensure access to justice and participation in a legal redress mechanism. Litigation in online consumer disputes, especially in the international context, can be very time-consuming and makes up a very high proportion of the total transaction costs.<sup>149</sup> Arbitration might proceed more quickly because of the ability of the parties to control the procedure.<sup>150</sup> Therefore, in theory, arbitration costs should not exceed a nominal fee of litigation.<sup>151</sup>

On the other hand, it can be argued that the potential costs of arbitration and the characteristics of the consumer as the weaker party are not well-suited as it is simply not economical to have arbitration for disputes for the small amounts normally at issue in online consumer disputes. The uncertainty about costs of arbitration may restrict the right of ‘judicial protection’<sup>152</sup> as it may deny access to any forum of justice, whether private or state justice.<sup>153</sup> That is to say, the right of ‘judicial protection’ requires an accessible

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<sup>146</sup> This situation will be the center gravity of the following chapter

<sup>147</sup> *Picardi (t/a Picardi Architects) v Cuniberti and another* [2002] EWHC 2923, paras 131,133

<sup>148</sup> David Cohen and Peter Finkle, ‘Consumer Redress Through Alternative Dispute Resolution and Small Claims Court : Theory and Practice’ (1993) 13 Windsor Y.B. Access to Just 81

<sup>149</sup> In case, *Euromarkets Designs Inc. v. Peters and Crate*, the English judge mentioned that the parties had already incurred more than £100,000 in costs up until the preliminary hearing on jurisdiction. This case has been analyzed in section 2.21.

<sup>150</sup> Kyriaki Noussia, *Confidentiality in International Commercial Arbitration* (Springer Berlin Heidelberg 2010) 20

<sup>151</sup> Directive 2013/11/EU (Directive on consumer ADR) on alternative dispute resolution for consumer disputes and amending Regulation (EC) No 2006/2004 and Directive 2009/22/EC, para 41

<sup>152</sup> Susan Lott, Marie Hélène, and Jannick Desforges, ‘Mandatory Arbitration and Consumer Contracts’ [2004] Canadian Cataloguing and Publication Data

<sup>153</sup> Jonnette Watson Hamilton, ‘Pre-Dispute Consumer Arbitration Clauses : Denying Access to Justice?’ (2006) 51 McGill L.J. 693,

forum of justice<sup>154</sup> yet the cost of arbitration can be more than the cost of the transaction itself. Budnitz<sup>155</sup> states that the cost of arbitration is often prohibitively high, either because the consumer simply cannot afford to pay the necessary fees and other expenses or because the cost of arbitration would be far greater than any possible benefit from bringing the claim to arbitration. Thus, '[a]rbitration threatens the integrity of the nation's dispute resolution system, therefore, such a situation demands correction by Congress'.<sup>156</sup> Budnitz concludes that the high cost of mandatory arbitration usually leaves consumers with no legal remedy. At the same time, it is difficult for consumers to prove in court that the high costs preclude them from arbitrating their claims.<sup>157</sup>

However, it can be said that the above argument is often economically irrational as most consumer disputes, by their nature, are characterized by a disproportion between the economic value at stake and the cost of its 'judicial protection' settlement.<sup>158</sup> Certainly, from the perspective of an individual online consumer involved in an international dispute, the economic impact of a longer period depends on the value of time that a consumer puts into seeking redress from the filing of the action/case to resolution, whether in private justice or state justice<sup>159</sup> – in other words, international arbitration settlement versus national court settlement for international online consumer disputes. Keeping economic theory in mind, consumers must pay to have their claims resolved whether in arbitration or court.

Hence, the question here is the extent to which the cost of arbitration is significantly greater than the costs of filing an international claim in court. Answering such a question should be done by comparing the time of recovery and the average change over time in consumer prices of goods and services.<sup>160</sup> For example, if there is a successful claim for

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<sup>154</sup> *Brower v. Gateway 2000, Inc.*, 676 N.Y.S.2d 569, 573 (App. Div. 1998) (noting that excessive costs serve "to deter consumers from invoking arbitration"); *Mendez v. Palm Harbor Homes, Inc.*, 45 P.3d 594, 605 (Wash. Ct. App. 2002) (holding that prohibitive costs may "render the arbitral forum inaccessible").

<sup>155</sup> See Mark E. Budnitz, 'The High Cost of Mandatory Consumer Arbitration' (2004) 67 *Law and Contemporary Problems* 133 (Winter 2004)

<sup>156</sup> *ibid.*

<sup>157</sup> *ibid.*

<sup>158</sup> See the Commission Recommendation (98/257/EC) on the principles applicable to the bodies responsible for out-of-court settlement of consumer disputes 30 March 1998

<sup>159</sup> Cohen and Peter Finkle, 'Consumer Redress Through Alternative Dispute Resolution and Small Claims Court: Theory and Practice' (n 148)

<sup>160</sup> Inflation as measured by the consumer price index reflects the annual percentage change in the cost to the average consumer of acquiring a basket of goods and services that may be fixed or changed at specified intervals, such as yearly, See The World Bank Group, Available at: <<http://data.worldbank.org/indicator/FP.CPI.TOTL.ZG>> (Accessed 1/08/2014)

£10,000 and a delay of twelve months until resolution, this yields a loss in the real value of the recovery depending on the inflation of consumer prices. In the other words, with an annual inflation of 2.6% such as in England and Wales in 2013<sup>161</sup> then the present value of the recovery received twelve months later on a claim of £10,000 is reduced to £9,740.

In 2013 the American Arbitration Association (AAA),<sup>162</sup> in response to the popularity of using arbitration in consumer contracts, changed its fee structure for consumer disputes; both parties in a consumer contract (dispute) pay filing fees for arbitration.<sup>163</sup> The AAA divides fees between the consumer and the business. According to the AAA schedule fees a consumer has to pay a non-refundable \$200 for filing unless the parties' agreement provides that the consumer pays less, whilst a refundable \$1,500 is payable in full by the business.<sup>164</sup> This fee is due from the business once the consumer has met the filing requirements. In addition, all other expenses are borne by the business, including the arbitrator expenses, travel, the costs related to witnesses produced, and any other AAA expenses.<sup>165</sup> The AAA has also addressed the issue of when a consumer wishes to select a small claims court instead of arbitration by providing such an option for the consumer to do so.<sup>166</sup>

Therefore, it can be argued here that under the rules of AAA, arbitration may be a more attractive option for consumers with regard to the small value claims than the small claims court in both countries. On the one hand, the maximum amount for what a consumer can sue in the small claims court varies from state to state even within the same country. For example, the small claims court in England and Wales deals with claims of up to £10,000, having increased the amount from £5,000 on 1 April 2013. In Northern Ireland and Scotland, the limit remains at £3,000. The small claims court in the US varies from state

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<sup>161</sup> In accordance to the BBC Websites, Available at: < <http://www.bbc.co.uk/news/10612209>> (Accessed 1/08/2014)

<sup>162</sup> The American Arbitration Association (AAA), is a not-for-profit organization for providing services to individuals and organizations. The AAA provides administrative services in the US, as well as abroad through its International Centre for Dispute Resolution (ICDR).

<sup>163</sup> The American Arbitration Association (AAA), 'Supplementary Procedures for Consumer-Related Disputes' [2013] Rules effective September 15, 2005.; Fees effective March 1, 2013. Available at : <[http://www.adr.org/cs/idcplg?IdcService=GET\\_FILE&dDocName=ADRSTAGE2009997&RevisionSelectionMethod=LatestReleased](http://www.adr.org/cs/idcplg?IdcService=GET_FILE&dDocName=ADRSTAGE2009997&RevisionSelectionMethod=LatestReleased)> accessed 20/10/2013

<sup>164</sup> *ibid*, C-8, p.12

<sup>165</sup> *ibid*, p.14

<sup>166</sup> *ibid*, (Consumers are not prohibited from seeking relief in a small claims court for disputes, even in consumer arbitration cases filed by the business), p.4

to state, for example in Arizona it is \$2,500, Ohio \$3,000, Florida \$5,000, New York \$5,000, Pennsylvania \$12,000 and Georgia \$15,000.<sup>167</sup> These limits give some guidance as to the relevant values in litigation. On the other hand, the arbitration organization rules require businesses to pay most of the costs for claims. For example, if a claim is for \$4,000 an arbitration claim would cost a consumer just \$200<sup>168</sup> in accordance with AAA schedule fees. While, in the small claims court in the UK, a claim of £4,000 would cost a consumer £365.<sup>169</sup> In addition, the court costs are only payable by the claimant and added to the amount of the claim, which will therefore be paid by the losing party, whether consumer or business. In contrast, when an arbitration award is subject to ‘judicial review’, parties may struggle at all court levels to enforce an award, which increases the costs and delays for them.

### **3.1.3 Transparency vs confidentiality**

The third difference between private and state justice is related to the ‘judicial procedures’ of arbitration. The traditional notion of arbitration proceedings as a private dispute resolution process is of a secret environment where disputants can overcome their fears of disclosure, thus aiding the free flow of information. However, this secret environment also means that the award or documents or any communications made in arbitration will not be published.

In general, this is called confidentiality, which is one of the advantages of arbitration.<sup>170</sup> This is because confidentiality transcends privacy as it involves also the element of secrecy.<sup>171</sup> This is one of the reasons why parties frequently choose (private) arbitration over (public) litigation.<sup>172</sup> Without this sense of security, arbitration would lose some of its attractiveness as a private dispute resolution process. Conversely, transparency in adjudication is an important advantage and more desirable for the consumer, especially

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<sup>167</sup> The Small Claims Court in England and Wales’s deals with claims of up to £10,000, after increasing the amount from £5,000 on 1 April 2013, In Northern Ireland and Scotland, the limits remain at £3,000. The Small Claims Court in USA is varies from state to state, for example in Arizona \$2,500, Ohio \$3,000, Florida \$5,000, New York \$5,000, Pennsylvania \$12,000, Georgia \$15,000; see Ralph Warner, *Everybody’s Guide to Small Claims Court* (14th edn, NOLO 2012)

<sup>168</sup> The conversion has been done by the author in March 2013, at <<http://www.xe.com>>

<sup>169</sup> HM Courts Form EX50 provides details of all small claims court costs, from 1 July 2013, available at: <<http://hmctsformfinder.justice.gov.uk/courtfinder/forms/ex050-eng.pdf>> (accessed 10/01/2014)

<sup>170</sup> Blackaby, Redfern, and Hunter, *International Arbitration* (n 2) 136

<sup>171</sup> Noussia, *Confidentiality in International Commercial Arbitration* (n 150) 26

<sup>172</sup> Redfern and Hunter, *law and practice of international commercial arbitration* (Sweet & Maxwell 2004) 32

when they are subject to a power imbalance. In addition, the availability and accessibility of information about arbitral awards or other aspects of arbitration would help to provide the opportunity for parties, in particular consumers, to evaluate the procedure and the activities of the bodies responsible for resolving their disputes.<sup>173</sup> Although the absence of transparency may adversely affect the rights of the parties and cause misgivings for arbitration as to out-of-court procedures for resolving consumer disputes,<sup>174</sup> it might be argued that there is no benefit to transparency in arbitral awards by the fact that different arbitrators will reach different conclusions. Furthermore, since arbitral awards are only binding on the parties to the arbitration, they cannot be used as precedents in future disputes. Thus, confidentiality agreements, as mentioned above, ensure that arbitral awards are not available for use in future disputes. Nevertheless, transparency is still considered a safeguard for consumers by exposing potential structural or systemic bias and allowing criticism of possible deficiencies in a process.<sup>175</sup> With regard to the award, transparency helps to check the quality and impartiality of dispute resolution.<sup>176</sup> Transparency also helps to raise the party's (i.e. consumer) expectations of arbitration by drawing on other individuals' experiences.

To this extent, arbitration and court proceedings differ. It is true that arbitration proceedings are private whilst courts have a public process. However, it is not correct to assume that arbitration proceedings are automatically or completely confidential.<sup>177</sup> Arbitration is private to the extent that arbitrators do not publish reasoned opinions that provide information to the public regarding arbitrated cases.<sup>178</sup> However, the arbitral award can be published if there are no obligations to keep the documents, evidence and the contents of the award confidential. Such an obligation can arise from the parties' agreement or institutional arbitration rules or the applicable law.<sup>179</sup> In other words, confidentiality is a duty of the parties. Parties who are concerned to ensure confidentiality

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<sup>173</sup> Directive 2013/11/EU (Directive on consumer ADR) on alternative dispute resolution for consumer disputes and amending Regulation (EC) No 2006/2004 and Directive 2009/22/EC, para 39

<sup>174</sup> See Commission Recommendation 98/257/EC on the principles applicable to the bodies responsible for out-of-court settlement of consumer disputes, OJ L 115, 17.4.1998

<sup>175</sup> Hörnle, *Cross-border Internet Dispute Resolution* (n 2) 208

<sup>176</sup> *ibid.*

<sup>177</sup> Amy Schmitz, 'Untangling the Privacy Paradox in Arbitration' (2006) 54 U. Kan. L. Rev 1222

<sup>178</sup> Noussia, *Confidentiality in International Commercial Arbitration* (n 150) 25

<sup>179</sup> See for example, International Centre For Dispute Resolution – ICDR, International Dispute Resolution Procedures for Mediation and Arbitration Rules 2009, Article 20(4), 27(4) and 34; See also: The London Court of International Arbitration – LCIA, Arbitration Rules 1998, Articles 19,20,27 and 30.



can do so by including an express confidentiality clause in their arbitration agreement.<sup>180</sup> Otherwise, neither the arbitration laws in England and Wales nor in the USA guarantee such secrecy of arbitration information or include any express provisions imposing a duty to keep the arbitral award confidential.<sup>181</sup> More importantly, the New York Convention 1958 does not have any provision imposing a duty of confidentiality. This is because the New York Convention 1958 aims to facilitate the enforcement of the arbitral award.

However, the courts in England and Wales have a different perspective with regard to confidentiality in arbitration. The England and Wales courts have consistently held that there is an implied duty to maintain confidentiality in arbitration.<sup>182</sup> The starting point in considering the position of courts in England and Wales was in *Dolling-Baker v Merrett*.<sup>183</sup> In that case, the Court of Appeal held that parties to arbitration were under an implied obligation not to use or disclose, without the consent of the other party or with the leave of court, all such documents. It further held that this implied obligation arose from the private nature of arbitration.<sup>184</sup> However, the court did not provide details on the extent to which there is an implied obligation of confidentiality or if there are any exceptions to it.<sup>185</sup>

In another case, the Court of Appeal in *Ali Shipping Corp v Shipyard Trogir*<sup>186</sup> also held that there was an implied term of confidentiality in arbitration. In this case, however, there was an application for an injunction restraining the defendant from disclosing certain arbitral documents from an earlier arbitration, specifically the award, the opening submissions and the transcripts of evidence. The defendant wished to use these documents in subsequent arbitration proceedings, which raised related defenses against companies that were related to the claimant in the earlier arbitration. This was in consideration of the fact that the disputant companies were owned by the same parent company which all shared the same lawyer and the same people had negotiated the subject of the dispute. More importantly, disclosure of the award and the documents from

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<sup>180</sup> Blackaby, Redfern, and Hunter, *International Arbitration* (n 2) 136

<sup>181</sup> Noussia, *Confidentiality in International Commercial Arbitration* (n 150); Schmitz, 'Untangling the Privacy Paradox in Arbitration' (n 177)

<sup>182</sup> See for example: *Hassneh Insurance Co of Israel & Ors v Stuart J Mew* [1993] 2 Lloyd's Rep 243; *Insurance Co v Lloyd's Syndicate* [1995] 1 Lloyd's Rep 272; *London and Leeds Estates Ltd v Paribas Ltd* (No 2) [1995] 2 EG 134, [1995] 1 EGLR 102

<sup>183</sup> *Dolling-Baker v Merrett*, [1990] 1 W.L.R. 1205.

<sup>184</sup> 1 W.L.R. 1205.

<sup>185</sup> Hörnle, *Cross-border Internet Dispute Resolution* (n 2) 154

<sup>186</sup> *Ali Shipping Corp v. Shipyard Trogir* [1998] 1 Lloyd's Rep. 643

the arbitration would not be ordered for a stranger but for the same family business. Despite those facts, the court held that the term of confidentiality was implied not on the basis of business efficacy but as a general rule to fit in each and every arbitration case. However, the Court did recognize several potential exceptions to the duty of confidentiality: '(1) the consent of the parties, (2) a court order, (3) the "reasonable necessity" to protect or enforce a party's legal rights, and (4) "the interests of justice"'.<sup>187</sup> Nevertheless, those potential exceptions did not make any distinction between the disclosure of the arbitral documents and the award. However, Lord Hobhouse in *Associated Electric v European Reinsurance Company*<sup>188</sup> criticized the approach in *Ali Shipping Corp* by citing reservations about the desirability or merit of adopting this approach in regard to implied duty of confidentiality in arbitration. This is because such an approach:

... [r]uns the risk of failing to distinguish between different types of confidentiality which attach to different types of document [...] and elides privacy and confidentiality. Commercial arbitrations are essentially private proceedings and unlike litigation in public courts do not place anything in the public domain. But when it comes to the award, the same logic cannot be applied. Generalizations and the formulation of detailed implied terms are not appropriate.<sup>189</sup>

It is interesting to note that these statements have led some authors to conclude that the concept of confidentiality advanced in *Ali Shipping Corp* is now open to doubt.<sup>190</sup> Consequently, a balance between confidentiality and transparency has been established under the law of England and Wales.<sup>191</sup> Thus, the publication of arbitral awards is required here, precisely for the public (consumer) interest.

In contrast, courts in the USA will not easily accept the non-disclosure of information used in arbitral processes or awards.<sup>192</sup> Even where international arbitration or institutional rules or agreements require that arbitrations remain confidential, courts will not enforce the confidentiality provisions.<sup>193</sup> As far as consumers are concerned, the Circuit Court in *Ting v AT&T*<sup>194</sup> clearly acknowledged that confidentiality provisions

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<sup>187</sup> [1998] 1 Lloyd's Rep. 643, at 969

<sup>188</sup> *Associated Electric & Gas Insurance Services Limited v European Reinsurance Company of Zurich* [2003] UKPC 11, The Times, January 30, 2003

<sup>189</sup> *ibid*, [2003] UKPC 11

<sup>190</sup> Hörnle, Cross-border Internet Dispute Resolution (n 2)159

<sup>191</sup> *ibid*.

<sup>192</sup> *Princeton Ins. Co. v Vergano*, 883 A. 2d 44, 61–67 (Del. Ch. 2005)

<sup>193</sup> *United States v Panhandle Eastern Corp*, 118 FRD 346 (DDeI 1988)

<sup>194</sup> *Ting v AT&T*, 319 F3d 1126 (9th Circuit 2003)

usually favour companies over individuals, especially when companies continually arbitrate the same claims:

ATT has placed itself in a far superior legal posture by ensuring that none of its potential opponents have access to precedent while, at the same time, ATT accumulates a wealth of knowledge on how to negotiate the terms of its own unilaterally crafted contract. Further, the unavailability of arbitral decisions may prevent potential plaintiffs from obtaining the information needed to build a case of intentional misconduct or unlawful discrimination against ATT. For these reasons, we hold that the district court did not err in finding the secrecy provision unconscionable.<sup>195</sup>

Hence, the transparency of arbitral awards would provide protection for consumers in the event of disputes, mainly in those cases where there is an imbalance of power between parties as well as in cases where one party uses arbitration repeatedly while the other uses arbitration once. In those cases, the transparency protects the weaker parties (ie consumers) by obtaining the information needed to build the case and ensuring an equal treatment between them. Therefore, the mechanism for publishing an arbitration award is important for arbitration to succeed in consumer disputes. Otherwise, a consumer will never gain confidence in arbitration as an alternative (private) dispute resolution. It should be noted that the Californian Code of Civil Procedure took a forward step in this regard by requiring the publication of statistics about consumer awards, including the name of the business party, type of dispute, the amount of the claim and the amount of the award made.<sup>196</sup>

### ***3.1.4 The right of appeal vs finality of awards***

The fourth difference is related to ‘judicial procedure’ in appealing the arbitral award. The finality of the arbitration award, unlike state justice before a trial court, is not subject to appellate review (judicial review), such as for mistakes of law that are unsupported by the evidence. In other words, an appellate court cannot overturn an arbitration award. As a result, the parties will be bound by the arbitrator’s decision. At the basic level, this difference can be considered a mixed blessing;<sup>197</sup> it may be either a benefit or a drawback of arbitration, depending on the parties’ interests.<sup>198</sup> On the one hand, some parties opt for

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<sup>195</sup> *ibid.*

<sup>196</sup> Californian Code of Civil Procedure, section.1281.96

<sup>197</sup> Di Jiang-Schuerger, ‘Perfect Arbitration = Arbitration + Litigation?’ (1999) 4 Harv. Negot. L. Rev. 231; Kristen M Blankley, ‘Be More Specific ! Can Writing A Detailed Arbitration Agreement Expand Judicial Review Under The Federal Arbitration Act ?’ (2012) 2 Seton Hall Circuit Review 391

<sup>198</sup> *ibid.*, Jiang-Schuerger.

arbitration rather than litigation to get the benefit of a fast and final decision or to remove the threat of lawsuits by avoiding further costs and significant delay. For those, the finality of arbitration is a clear advantage.<sup>199</sup> On the other hand, the weaker party lacks the safeguard of judicial review; the right to appeal is a ‘judicial protection’,<sup>200</sup> which might provide accuracy of the resolution,<sup>201</sup> especially in situations where the consumers have concerns about arbitrator bias or applying the wrong law regarding the protection rules.<sup>202</sup> Whatever the reason, the fact remains that such a technique to avoid judicial review of the arbitral award is damaging to the weaker party (i.e., the consumer). On the contrary, when an arbitration award is subject to ‘judicial review’, parties may struggle in all level courts to enforce an award, which will increase the costs and delays for them. However, the right of appeal is necessary to guarantee the application of mandatory public norms.<sup>203</sup>

However, it is necessary to note that there is a ‘judicial control’. The Arbitration Act 1996 in England and Wales allows parties to contract out the right to appeal for mistakes of law<sup>204</sup> but that does not include procedural defects.<sup>205</sup> Nevertheless, there is a time limit of twenty-eight days for bringing any appeals.<sup>206</sup> Furthermore, those grounds for a party to challenge the award are available where the seat of arbitration is in England, Wales or Northern Ireland, or where the applicable law is the law of England and Wales. Otherwise, the parties cannot appeal to a court in England and Wales. Where the case is in England and Wales, the Arbitration Act 1996 provides three main grounds for the challenge of an award, namely, lack of substantive jurisdiction,<sup>207</sup> serious irregularity<sup>208</sup> and error of law.<sup>209</sup> Therefore, a party has a right to challenge an award for lack of substantive jurisdiction such as there is no valid arbitration agreement or conflicting

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<sup>199</sup> Paul Bennett Marrow, ‘A Practical Approach To Affording Review Of Commercial Arbitration Awards: Using An Appellate Arbitrator’ in *AAA Handbook on Commercial Arbitration*, vol. 32 (JurisNet, LLC 2010) 486

<sup>200</sup> Rule Colin, *Online dispute resolution for business: B2B, ecommerce, consumer, employment, insurance, and other commercial conflicts* (Jossey-Bass, 2002) 112

<sup>201</sup> Robert Mnookin, ‘Alternative Dispute Resolution’ [1998] Harvard Law School John M. Olin Center for Law, Economics and Business Discussion Paper Series. 232

<sup>202</sup> See Chapter 6

<sup>203</sup> Hörnle, *Cross-border Internet Dispute Resolution* (n 2) 161

<sup>204</sup> The Arbitration Act 1996, Section 69(1)

<sup>205</sup> Deniz Celik, ‘Judicial review under the UK and US Arbitration Acts : Is arbitration a better substitute for litigation ?’ (2013) 1 IALS Student Law Review 13

<sup>206</sup> The Arbitration Act 1996, Section 70 (3)

<sup>207</sup> The Arbitration Act 1996, Section 67

<sup>208</sup> The Arbitration Act 1996, Section 68

<sup>209</sup> The Arbitration Act 1996, Section 69

issues outside the arbitration agreement.<sup>210</sup> This right of appeal also applies to the other eight forms of irregularity or misconduct listed in section 68, such as the tribunal exceeding its powers<sup>211</sup> or failure by the tribunal to conduct the arbitration according to the procedure agreed by the parties.<sup>212</sup> However, section 68 of Arbitration Act 1996 also limits the power of a court to review an arbitral award unless it is satisfied that the arbitrators were obviously wrong on a question of law before allowing an appeal, taking into account the perspective of the parties' rights and the importance of the point of law for the public interest.<sup>213</sup> In this regard, when the issue has general public importance, the House of Lords in *Nema* case held that 'leave should not be given, unless the judge considered that a strong prima facie case had been made out that the arbitrator had been wrong in his construction'.<sup>214</sup> Nevertheless, there is no answer to the question of how strong the case should be. This is left to the factual circumstances of each case.<sup>215</sup>

In the same way as the Arbitration Act 1996, the American FAA<sup>216</sup> allows parties to challenge an arbitral award in certain situations, whether judicial review on the merits or on the procedure. As to the procedure, the parties have the right of appeal in circumstances such as fraud or corruption, arbitrator misconduct or where the arbitrators exceeded their power. As to the merits, the grounds for judicial review were set out in the *Hall Street* case<sup>217</sup> where there was a manifest disregard for the law.<sup>218</sup> However, in both ways, the right of appeal is still a matter of contract as parties can insert additional grounds into their arbitration agreements to enable the national courts to extend the right to review the award.<sup>219</sup>

On the international level, the New York Convention governs the arbitration, and both the US and the UK are party to it. Under the New York Convention, the enforcing court

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<sup>210</sup> The Arbitration Act 1996, Section 68(2)(a)

<sup>211</sup> The Arbitration Act 1996, Section 68(2)(b)

<sup>212</sup> The Arbitration Act 1996, Section 68(2)(c)

<sup>213</sup> Hörnle, *Cross-border Internet Dispute Resolution* (n 2) 163; Guy Pendell and David Bridge, 'Arbitration in England and Wales' in Torsten Lörcher and others (eds), *CMS Guide to Arbitration, Volume I* (4th edn, CMS Legal Services 2012) 321; See also: *Mr. Justice Tuckey in Egmatra AG v. Marco Trading Corporation* [1999] 1 Lloyd's Rep 862 (Comm), 864; *Lesotho Highlands v. Impreglio SpA* [2005] UKHL 43 (HL)

<sup>214</sup> *Pioneer Shipping Ltd v BTP Tioxide Ltd (The Nema)* [1982] AC 724

<sup>215</sup> Celik, 'Judicial review under the UK and US Arbitration Acts : Is arbitration a better substitute for litigation ?' (n 205)

<sup>216</sup> The United States Arbitration Act 1925, Ch. 213, 43 Stat. 883 (codified at 9 U.S.C. §§ 1– 16 (2006))

<sup>217</sup> *Hall Street Associates v. Mattel Inc.*, 128 S.C.t 1396 (2008)

<sup>218</sup> *ibid.*, 128 S.C.t 1396 (2008)

<sup>219</sup> See Blankley, 'Be More Specific ! Can Writing A Detailed Arbitration Agreement Expand Judicial Review Under The Federal Arbitration Act ?' (n 197)

still has the power to refuse to recognize and enforce an arbitral award based on local public policy or non-arbitrability considerations.<sup>220</sup> However, the New York Convention does not provide the enforcing courts with the power to review the international arbitral award from substantive points of law. For example, in the case of *Hilmarton Ltd*,<sup>221</sup> the English courts enforced an award even though the contract underlying the claim was illegal in the place where the contract was to be performed.<sup>222</sup> This means that the national courts have wider grounds to annul a domestic award than an international award under the New York Convention. However, neither of the above requirements to appeal an arbitral award is problematic for international online consumers.

### **3.2 Arbitration in comparison with mediation**

ADR refers to a wide range of practices and techniques whose aims are to resolve legal disputes outside the courts of law. ADR normally encompasses negotiation, mediation without a formal legal adjudication process and arbitration with a formal legal adjudication process. All of these alternatives differ from the dispute mechanism of litigation. Common benefits of these alternatives over litigation are the reduction in the costs of international disputes. This is because ADR is faster than ordinary litigation proceedings. However, the key difference is that negotiation and mediation are more amicable ways of resolving disputes than arbitration,<sup>223</sup> with the latter leading to better outcomes in international commercial disputes.<sup>224</sup> Keeping the preferential approach in mind, it is important, therefore, to compare arbitration from the point of view of a formal and non-formal legal adjudication process where international online consumers are involved in disputes.

Mediation is typically a process whereby a natural third party facilitates negotiations between the parties in order to assist them to reach an agreement to their disputes.<sup>225</sup> The mediator can encourage them to think outside their disputes which can suit both of them and achieve a win-win outcome. For example, in a case where parties have or may have other commercial relationships in the future, they may agree to settle their disputes with

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<sup>220</sup> New York Convention 1958, Article V

<sup>221</sup> *OTV SA v. Hilmarton Ltd* [1999] 2 Lloyd's Rep 222 (Comm)

<sup>222</sup> *ibid*, [1999] 2 Lloyd's Rep 222 (Comm)

<sup>223</sup> Simon Greenberg, Christopher Kee, and J.Romesh Weeramantry, *International Commercial Arbitration* (Cambridge University Press 2011) 19

<sup>224</sup> See, Mnookin, 'Alternative Dispute Resolution' (n 201); Healy, 'Consumer Protection Choice Of Law : European Lessons For The United' (n 25)

<sup>225</sup> Tweeddale, *Arbitration of Commercial Disputes International and English Law and Practice* (n 132) 6

that in mind. The mediator can attempt to reach a solution for the parties but this cannot be imposed upon them as they are under no legal obligation to comply. The determination of the mediator of the dispute is not final and not binding and has no power to influence any further stage of dispute resolution.<sup>226</sup>

However, it is difficult to decide whether the nature of the non-binding outcome of mediation is a strength or a weakness. Some believe that mediation is the way forward to protect consumer rights instead of an arbitration mechanism because it is more flexible, time efficient, voluntary and user-friendly.<sup>227</sup> These advantages could be very effective especially if a solution is urgently required by the disputants. Furthermore, mediation increases the possibility of access to justice because it avoids conflict of laws and is cheaper, quicker and less stressful than arbitration. In addition, if the mediation fails, there is no binding award; the parties still have the right to go to court.<sup>228</sup> However, the above argument could be valid to the extent that disputants accept to negotiate with each other. In this respect, the mediation play an important role as a filter for the disputes issues. Otherwise, when one of the disputants is acting in bad faith, the outcome reached by a mediation mechanism will simply be rejected or refused to be complied with by the parties. This is sometimes done to waste time and money and demoralize the parties who are less able to afford litigation, especially in international disputes where the court may not accessible.<sup>229</sup> Like arbitration, mediation is often promoted as a ‘private’ or ‘confidential’ process, raising some moral and perhaps ethical obligations. Therefore, some suggest that the good faith requirement is necessary to obtain effective mediation to prevent parties from abusing its process.<sup>230</sup> However, the concept of good faith lacks clarity, and the phrase does not suggest any guidelines. As such, the court needs to determine in detail what each party did or said. Therefore, others argue that such a situation may decrease the public values of the law by preventing the applicable law of

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<sup>226</sup> Steven P. Finizio and, Duncan Speller, *A Practical Guide to International Commercial Arbitration: Assessment, Planning and Strategy* (Sweet & Maxwell/Thomson Reuters, 2010) 16

<sup>227</sup> Pablo Cortes, *Online Dispute Resolution for consumer in the EU*, (n 58) 173

<sup>228</sup> *ibid.*

<sup>229</sup> John Lande, *Using Dispute System Design Methods to Promote Good-Faith Participation in Court-Connected Mediation Programs*, (2002) 50 *Ucla Law Rev.* 69

<sup>230</sup> See Kimberlee K. Kovach, *Good Faith in Mediation—Requested, Recommended, or Required? A New Ethic*, (1997) 38 *S. TEX. L. REV.* 575; Carol L Izumi and Homer C La Rue, ‘Prohibiting Good Faith Reports under the Uniform Mediation Act: Keeping the Adjudication Camel out of the Mediation Tent’ (2003) 2003 *J. Disp. Resol.*

the disputes and enforcing the societal values instead of the legal rules.<sup>231</sup> It should be noted that a mediation clause is enforceable as a contract term<sup>232</sup> even though when a mediator reaches a settlement, there are no legal duties to comply with it.<sup>233</sup> This is because mediation is a voluntary settlement.<sup>234</sup>

Therefore, it does not really matter what a mediator thinks is right or wrong. What really matters is the parties themselves because they are the ones who will agree how the dispute is going to be solved between them.<sup>235</sup> As such, mediation is only effective to the extent that parties find it effective.<sup>236</sup>

### **3.3 The international enforcement power of arbitration**

It has been noted in this chapter that there is not yet an international treaty between England and Wales and the US to satisfy the needs of enforcement court mechanisms for international consumer disputes.<sup>237</sup> Whereas the international enforcement of arbitration is its main key ‘advantage’ as a form of ‘private justice’ over domestic litigation as ‘state justice’, it is also the main key difference of arbitration to mediation as a form of ADR which uses ‘out of court settlement’. As a result, the enforcement of awards is the point that separates arbitration from other methods of international dispute resolution. Otherwise, arbitration would be pointless or have no value internationally.<sup>238</sup> In other words, the effective role of arbitration as an international ADR will not be maintained unless the arbitral award is enforceable.

The effectiveness of international arbitration is due to the strong influence of the New York Convention 1958, which makes the enforcement of arbitration awards between the contracting states a relatively simple matter by providing a legal framework for the enforcement of foreign awards. The New York Convention 1958 provides that an award made in the territory of a state which is a party to the New York Convention shall be recognized as binding on the parties to the arbitration. This may explain why most

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<sup>231</sup> Thomas Schultz, ‘The Three Pursuits of Dispute Settlement’ (2010) 1 Czech (& Central European) Yearbook of Arbitration 227

<sup>232</sup> *Cable & Wireless plc v IBM United Kingdom Ltd* [2002] EWHC 2059.

<sup>233</sup> Greenberg, Kee, and Weeramantry, *International Commercial Arbitration* (n 223) 19

<sup>234</sup> J.G. Merrills, *International Dispute Settlement* (5th ed. Cambridge University Press 2011) 40

<sup>235</sup> Colin, *Online dispute resolution for business: B2B, ecommerce, consumer, employment, insurance, and other commercial conflicts* (n 200) 41

<sup>236</sup> Merrills, *International Dispute Settlement* (n 234) 40

<sup>237</sup> See Section 2.4

<sup>238</sup> Indira Carr, *International Trade Law* (Cavendish Publishing Limited London 1996) 214.



international commercial transactions require disputes to be resolved by arbitration.<sup>239</sup> However, this thesis focuses on another commercial function of arbitration in international online consumer transactions regarding the 'private access to justice'. International online consumer transactions are not in the same category as B2B international online transactions. International online consumer transactions often involve an exchange of small amounts of money between consumers and suppliers of goods and services. As such, is the enforcement of arbitration an important matter for a weaker party such as an international online consumer? It should be noted that this is an interesting research topic in itself, but is beyond the scope of the current study.<sup>240</sup> However, one can imagine that enforcement of arbitration could be useful for international online consumer disputes.<sup>241</sup> This has encouraged countries such as Germany, Portugal, the Czech Republic, Russia and the US to improve and/or extend their arbitration rules to include consumer disputes.<sup>242</sup> Other countries have also considered doing so such as China,<sup>243</sup> However they are yet to do so.

Conversely, England and Wales was one of the first to enact statutory protection for consumers from arbitration. In 1996, the UK Parliament repealed the Consumer Arbitration Agreements Act 1988 and introduced the Arbitration Act 1996, which excepted arbitration from consumer disputes unless the agreement to arbitrate was entered into after the dispute arose and/or the amount of the potential claim was above £5,000.<sup>244</sup> Subsequently, it can be said that the arbitration award would be enforceable for/against a consumer under certain circumstances.<sup>245</sup> Those limitations to arbitration in consumer disputes (at least from the author's point of view) are because of the awareness of the importance of hosting arbitration as an 'autonomous procedure' and a 'judicial

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<sup>239</sup> BL Benson 'To Arbitrate or to Litigate: That is the Question' [1999] *European Journal of Law and Economics* 91, 93.

<sup>240</sup> It may need a separate study to be entirely covered.

<sup>241</sup> Amy J. Schmitz, 'Drive-Thru' Arbitration in the Digital Age: Empowering Consumers Through Binding ODR, 62 *BAYLOR L. REV.* 178 (2010); Catherine A. Rogers, *The Arrival of the Have-Nots in International Arbitration*, 8 *NEV. L.J.* 341 (2007); A Vahrenwald 'Out-of-Court Dispute Settlement Systems for E-commerce' Report on legal issues [2000] available at: <http://www.vahrenwald.com/doc/part4.pdf> (accessed 10/05/2014)

<sup>242</sup> Alexander J. Belohlávek, *B2C Arbitration: Consumer Protection in Arbitration* (Juris Publishing 2012)

<sup>243</sup> South China Morning Post, Buyers' council weighs arbitration, available at: <http://www.scmp.com/news/hong-kong/article/1249942/hong-kongs-consumer-council-considers-dispute-resolution-system> (Accessed 12/07/2014)

<sup>244</sup> The sum of £5000 is determined by a statutory instrument which is The Unfair Arbitration Agreements (Specified Amount) Order 1999, SI 1999/2167

<sup>245</sup> These limitations in regards to England and Wales consumer approach will be discussed in further detail in chapter 4

procedure’. Consequently, any uncertainty that may occur from formal validity under ‘autonomous procedure’ and/or ‘judicial procedure’ would reflect on the capability of settlement of consumer disputes by arbitration under the law of that country as a violation of public policy.<sup>246</sup> Therefore, many questions and doubts have arisen regarding the suitability of existing legal norms that govern this new generation of international online consumer disputes.

However, as far as this chapter is concerned, the relevant question is whether the New York Convention 1958 can provide enforcement of international online consumer disputes. In other words, the applicability of the New York Convention 1958 on an electronic award related to international online consumer disputes. This will be carried out in the following subsections.

### **3.3.1 *Electronic arbitration awards***

The concept of an electronic award is new in comparison with arbitration and the New York Convention 1958. Its roots come from using the Internet as a platform for out of court mechanisms (i.e. arbitration and mediation) to provide a connection between parties, arbitrators and any other concerned individual when they are located far from one another.<sup>247</sup> As a result, the arbitrator renders the award through the Internet. Some legal requirements may be in conflict with this electronic format, mainly regarding the enforcement of the online arbitral award under the New York Convention 1958. In order to enforce an arbitral award, Article 1 of the New York Convention 1958 requires it to be made ‘in the territory of a State other than the State where the recognition and enforcement of such awards are sought’. This means that the arbitration award has to have a substantial link with the jurisdiction in which it is made.<sup>248</sup> This leaves it to be determined where the online award was concluded. The importance of this relates to Article 3, which states that ‘Each Contracting State shall recognize arbitral awards as

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<sup>246</sup> These issue will be discuss will be thoroughly discussed and analyzed throughout the following chapter of this thesis. However, it is important to mention here that according to Article V of the New York Convention 1958, mainly para. 2 that state: “Recognition and enforcement of an arbitral award may also be refused if the competent authority in the country where recognition and enforcement is sought finds that: (a) the subject matter of the difference is not capable of settlement by arbitration under the law of that country; or (b) the recognition or enforcement of the award would be contrary to the public policy of that country”.

<sup>247</sup> United Nations Commission on International Trade Law, A/CN.9/706, para. 34

<sup>248</sup> H Yu and M Nasir, ‘Can Online Arbitration Exist Within the Traditional Arbitration Framework’ (2003) 20 Journal of International Arbitration 455–473; Jana Herboczková, ‘Certain Aspects of Online Arbitration’ [no date] Masarykovy university, Czech Republic.

binding and enforce them in accordance with the rules of procedure of the territory where the award is relied upon'. Thus, there is a need to determine whether it was made in a contracting state or not in order to enforce it according to Article 1 of the New York Convention 1985. Thus, the point here is not only where the arbitral award was made but whether or not the state is a contracting state in the New York Convention 1958.

As the scope of this thesis is limited to the legal systems of England and Wales and the USA, and both are contracting parties to the New York Convention 1958, it is important to determine the arbitration seat, i.e. the 'juridical seat',<sup>249</sup> because the seat where the award was made is considered a connecting factor between the arbitration as 'private justice' and the court jurisdiction of the chosen state (territorial) as 'judicial control'. In other words, the court of the place of arbitration is the 'juridical seat' in which the arbitration was held to have primary jurisdiction to review an award and determine its validity,<sup>250</sup> whilst the other courts have secondary jurisdiction and may only determine whether or not to enforce the foreign award in their jurisdiction.<sup>251</sup> The court has primary jurisdiction over 'judicial control' but does not require the geographical or physical presence of the arbitration tribunal.<sup>252</sup> Thus, the approach to that matter is resolved if the parties have chosen the seat of arbitration in the arbitration agreement or clause or if the arbitrator has chosen a contracting state as the place of arbitration. Overall, there is nothing to prevent the parties from conducting online arbitration in that situation.<sup>253</sup> However, the lack of uniformity in domestic arbitration law between primary and secondary court jurisdiction may damage the effectiveness of arbitration even with the strong influence of the New York Convention 1958 over the contracting parties.<sup>254</sup> This division of arbitration laws affects arbitral tribunal awards. Such a situation can be seen in cases where the parties and the arbitrator fail to specify the place of arbitration.<sup>255</sup>

As far as the enforcement of foreign awards in England and Wales is concerned, section 3 of the Arbitration Act 1996 provides that in the absence of such determination of the arbitration seat by the parties and arbitrator then the seat must be inferred from 'all the

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<sup>249</sup> Arbitration Act 1996, Section 3 "the seat of the arbitration" means the juridical seat of the arbitration"

<sup>250</sup> *Gulf Petro Trading Co. v. Nigerian National Petroleum Corp.*, 512 F.3d 742, 746-47 (5th Cir. 2008).

<sup>251</sup> *ibid.*

<sup>252</sup> Jean-François Poudret, Sébastien Besson, *Comparative Law of International Arbitration*, (2007 Sweet and Maxwell), 101

<sup>253</sup> *ibid.*, 100

<sup>254</sup> This issue can be found between federal and state court in the USA; See Chapter 3, Section 4.2

<sup>255</sup> This issue will be discussed in depth in Chapter 5.

relevant circumstances'.<sup>256</sup> There has been a clear response by courts in England and Wales to this. In *Naviera Amazonica Peruana SA v Compania Internacional de Seguros del Peru*,<sup>257</sup> *Union of India v McDonnell Douglas Corpn*,<sup>258</sup> and in *ABB Lummus Global Ltd v Keppel Fels Ltd*<sup>259</sup> the seat of arbitration was not known. Nevertheless, the court pointed out that parties have chosen the law of a certain state as the procedural law of arbitration so the chosen state would be appointed as the seat of the arbitration. Section 4 of the Arbitration Act 1996 gives the parties the ability to agree that no national law will govern arbitration. Section 2 refers to section 66, which is applied to arbitration conducted abroad where no seat has been designated or determined, left the enforcement of the award to the court, may be enforced in the same manner as a judgment. It seems that an online award would be enforceable even if there were no seat in accordance with section 66.

However, the situation is different in the US when the parties fail to provide in their contract a seat of arbitration. Some courts have treated the situation as a disagreement between the parties like any other dispute parties and so have referred the seat of arbitration dispute to the arbitrator,<sup>260</sup> whilst other courts have treated it as a 'refusal' or 'failure' to arbitrate under section 4 of the FAA and so have ordered that arbitration take place where the 'hearings and proceedings' must take place in the district of the court ordering the parties to arbitrate. Goldstein argues that the parties might decide that the arbitral tribunal should not have this power to determine the seat. On the other hand, the phrase 'hearings and proceedings' in section 4 was included to ensure that the district court could not compel attendance at the arbitration by persons residing in another state. Therefore, another solution has to be found.<sup>261</sup>

It seems from the above discussion that the online arbitration award is enforceable in England and Wales as the courts do not require an award to be made in the territory of a state. In contrast, in the US this situation differs from one court to another and from one case to another. This state of affairs affects arbitral tribunal awards for which there is no

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<sup>256</sup> Arbitration Act 1996, Section 3.

<sup>257</sup> [1988] 1 Lloyd's Rep 116

<sup>258</sup> [1993] 2 Lloyd's Rep 48

<sup>259</sup> [1999] 2 Lloyd's Rep 24

<sup>260</sup> *National Network of Accountants Investment Advisors, Inc. v. Gray*, 693 F. Supp.2d 200 (E.D.N.Y. 2010); *Matter of U.S. Lines, Inc. and Liverpool & London Steamship Protections & Indem.*, 833 F.Supp. 350 (S.D.N.Y. 1993).

<sup>261</sup> Marc Glodstein, "Choosing the Unchosen Seat of Arbitration: Coping With FAA Dysfunctionality", available at < <http://arbblog.lexmarc.us/2011/12/>> (accessed 08/06/2014).

universally accepted standard.

### **3.3.2 *Applicability of the New York Convention to online consumer disputes***

The New York Convention 1958 mandates contracting states to recognize and enforce the awards of international arbitration. However, its applicability is not without limitations. Article II (1) states:

Each Contracting State shall recognize an agreement in writing, under which the parties undertake to submit to arbitration all or any differences which have arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not, concerning a subject matter capable of settlement by arbitration.<sup>262</sup>

There are three essential elements to this article for the applicability of the New York Convention 1958: first, there must be an agreement in writing; second, there must be a defined legal relationship; third, there must be a subject matter capable of settlement by arbitration. In regards to international online transactions, the first two elements may raise the issue of applicability of the New York Convention 1958 to online activities. This subject has raised a lot of issues and a lot of discussion, including on its interpretation, implementation and invalidation, to such an extent that the third element, ‘a subject matter capable of settlement by arbitration’ has been put into considerable doubt. This is especially so when the contracting parties have different legal systems and ideas on the matter. A number of cases related to this will be considered in subsequent chapters.

#### **(a) *An online agreement in writing***

In the context of international arbitration, a written agreement is an important requirement, the reason for imposing such a requirement is self-evident;<sup>263</sup> it clearly expresses the parties’ wills and intention to submit to arbitration.<sup>264</sup> Otherwise, there is no right to arbitrate and no right to enforce it.<sup>265</sup> As such, it is an important provision which has been incorporated into the Arbitration Act 1996,<sup>266</sup> and the FAA.<sup>267</sup> Therefore, the general rule in the national laws of both countries is that for an arbitration agreement

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<sup>262</sup> The New York Convention 1958, Article 2 (1)

<sup>263</sup> Blackaby, Redfern, and Hunter, *International Arbitration* (n 2) 89

<sup>264</sup> Jean-François Poudret, Sébastien Besson, *Comparative Law of International Arbitration*, (n 252) 124

<sup>265</sup> Tweeddale, *Arbitration of Commercial Disputes International and English Law and Practice* (n 132) 99

<sup>266</sup> The Arbitration Act 1996, section (5)

<sup>267</sup> The Federal Arbitration Act 1925, section (2)

to be valid, it has to be in writing and signed. An arbitration agreement imposes exclusive jurisdiction as to whether the party will have access to an arbitral tribunal or a court – state or private justice – for the purposes of resolving the merits of their legal dispute. It is, therefore, essential to ensure that an agreement to exclude jurisdiction of national courts is clearly established.<sup>268</sup>

Within the scope of this thesis, a written agreement is also important where online consumers are involved. On this, a concern must be raised as to whether online arbitration clauses or agreements satisfy the ‘in writing’ requirement under the New York Convention 1958.

This is echoed in Article 2(2) of the New York Convention 1958 where it states that the meaning of the term an agreement in writing ‘shall include an arbitral clause in a contract or an arbitration agreement, signed by the parties or contained in an exchange of letters or telegrams’.<sup>269</sup> In other words, the New York Convention 1958 does not state any specific electronic means in regard to the conclusion of an arbitration agreement but it does then cover electronic commerce by stating that ‘the circumstances described therein are not exhaustive’.<sup>270</sup>

Nevertheless, an online contract could not exist without electronic means; it is also necessary to provide evidence of a party’s intention to be bound by such an online contract. Therefore, both international and national laws have modernized the concepts of writing and signatures to address the development in e-commerce. On the international level, the UNCITRAL Model Law on International Commercial Arbitration (Model Law on Arbitration), Article 7(2) provides that: ‘The arbitration agreement shall be in writing. An agreement is in writing if it is contained in a document signed by the parties or in an exchange of letters, telex, telegrams or other means of telecommunication which provides a record of the agreement.’ Moreover, the United Nations Convention on the Use of Electronic Communications in International Contracts 2005 (CUECIC) sets out specific rules which state that online contracts need to meet the same requirements as the

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<sup>268</sup> Blackaby, Redfern, and Hunter, *International Arbitration* (n 2) 90

<sup>269</sup> The New York Convention 1958, article 2(2)

<sup>270</sup> Recommendation regarding the interpretation of article II, paragraph 2, and article VII, paragraph 1, of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, done in New York, 10 June 1958, adopted by the United Nations Commission on International Trade Law on 7 July 2006 at its thirty-ninth session. See also, Draft declaration regarding the interpretation of article II, paragraph (2), and article VII, paragraph (1), of the New York Convention. Both available at : <http://www.newyorkconvention.org/uncitral/recommendations> (accessed 18/03/2013).

traditional paper-based system of international contracts and those equivalent to international contracts and electronic contracts in function, such as writing, signing and recording. In addition, Article 6(1) of the UNCITRAL Model Law on E-Commerce (Model Law on E-Commerce) gives a new definition of 'in writing' by using the concept of 'data messages'. In this respect, Article 11 provides that 'where a data message is used in the formation of a contract, that contract shall not be denied validity or enforceability on the sole ground that a data message was used for that purpose'. Similar developments can be seen at the EU level. For example, Article 16(1) of the Electronic Commerce Directive<sup>271</sup> provides that EU Member States shall ensure that an electronic signature is not denied the legal effectiveness of electronic signatures used in such systems and their admissibility as evidence in legal proceedings should be recognised.

As far as England and Wales is concerned, electronic signatures can be found in the Electronic Communications Act 2000 and in the definition of 'writing' provided in section 178 of the Copyright, Designs and Patents Act 1988.<sup>272</sup> The Arbitration Act 1996 provides that an arbitration agreement is in writing if the agreement is made by 'exchange of communications in writing' and the agreement is in writing if it is recorded by one of the parties.<sup>273</sup> In the US, the Uniform Commercial Code provides that a contract for the sale of goods for the amount of \$500 or more is not enforceable unless there is some writing sufficient for that contract to indicate it has been made between the parties and signed by each.<sup>274</sup> The Uniform Electronic Transactions Act 1999 (UETA)<sup>275</sup> allows the signature to be accomplished through electronic means in order to create a valid contract with no specific requirements of technology to be used.<sup>276</sup> Last but not least, it should be noted that no court has yet held that a contract which is formed by electronic means has failed to satisfy the writing requirement in both jurisdictions.<sup>277</sup>

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<sup>271</sup> Directive 2000/31/EC of the European Parliament, ('Directive on electronic commerce') Official Journal L 178

<sup>272</sup> The Copyright, Designs and Patents Act 1988, c.48

<sup>273</sup> The Arbitration Act 1996, Article 5(b)

<sup>274</sup> The Uniform Commercial Code, 2-201(1)

<sup>275</sup> The Uniform Electronic Transactions Act 1999, adopted by 47 American States

<sup>276</sup> Faye Fangfei Wang, *Law of Electronic Commerce* (Routledge 2010)79

<sup>277</sup> England and Wales courts held that a rubber stamp and a faxed copy of a signature fulfilled the signature requirement; see for example: *Goodman v. J. Eban Ltd* [1954] 1 Q.B. 550, 557; See also Yu and Nasir, 'Can Online Arbitration Exist Within the Traditional Arbitration Framework' (n 248); For more see Gerald Spindler and Fritjof Börner, *E-Commerce Law in Europe and the USA* (Springer Berlin Heidelberg 2002)

Accordingly, it can be said that an online arbitration agreement for consumer contracts satisfies the formal requirement under the New York Convention 1958 as long as it can be recorded and printed out in a recognisable form, including offer and acceptance conducted by both parties. This is, as has been mentioned above, a way of proving the existence of such a contract. As the existence of online contracts do not raise any issues, the issue recently raised is the problem of when the online contract provides limited bargaining power to the other party (i.e. consumer) by giving them an option on a ‘take-it-or-leave-it’ basis to agree to arbitration. This issue will be discussed in-depth in chapter 4.

***(b) Consumer disputes as commercial legal relationship***

The question here is whether consumers are considered within the concept of a defined legal relationship in the context of the New York Convention 1958. The answer to this question originates in the New York Convention itself. Article I of the Convention provides that it applies to disputes arising out of a legal relationship between persons ‘whether physical or legal’<sup>278</sup> whereas those disputes are considered commercial disputes under the national law of the state.<sup>279</sup> In other words, a contracting state is allowed to apply the Convention to enforce a non-commercial arbitral award. However, some contracting states, such as the US, formulated a reservation on Article I to limit their obligation;<sup>280</sup> they will apply the Convention only upon disputes arising out of a legal relationship which are considered as commercial under the national law.<sup>281</sup> Thus, the question is whether online consumer disputes are considered as commercial disputes.

To this extent, it can be argued that the New York Convention 1958 allows this to be applied to any person whether natural or legal if their legal relationship is considered as commercial. On this, Di Pietro maintains that the rationale behind this commercial reservation is to act as ‘a thread’ to connect arbitrability of disputes with contracting states that distinguish between commercial and non-commercial so that they benefit from

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<sup>278</sup> The New York convention 1958, Article I (1)

<sup>279</sup> The New York convention 1958, Article I (3) “State... may also declare that it will apply the Convention only to differences arising out of legal relationships, whether contractual or not, which are considered as commercial under the national law of the State making such declaration”.

<sup>280</sup> To date the commercial reservation is adopted by 44 Contracting States of the Convention.

<sup>281</sup> Countries such as United States of America, Poland, Malaysia and Argentina; See the Status of New York Convention available at [http://www.uncitral.org/uncitral/en/uncitral\\_texts/arbitration/NYConvention\\_status.html](http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/NYConvention_status.html) (accessed 23/10/2013)



the Convention.<sup>282</sup> He claims that the evidence for this is the fact that the Convention did not attempt to define the word commercial but leaves that definition to the law of each contracting state.<sup>283</sup> Therefore, such a reservation may result in different definitions, taking into account the different international character of online transactions.<sup>284</sup> In this respect, it is the national legislation which determines whether specific classes of disputes are considered commercial or not and the extent to which those commercial disputes are arbitrable. However, with regard to the question of whether consumer disputes are commercial or not, so whether they are barred from international arbitration or not, is not clearly answered by the national laws of the target countries. Moreover, the Arbitration Act 1996<sup>285</sup> is silent on the issue of arbitrability in general although the same Act states that consumer disputes are arbitrable if the value of the claim is more than £5000. In contrast, the FAA, in section 2, provides that any maritime transaction or contract involving commerce is capable of being settled by arbitration.<sup>286</sup> Even though the scope of commercial contracts is uncertain,<sup>287</sup> the meaning of the word commerce in section 2 of the FAA has been interpreted expansively to include consumer transactions.<sup>288</sup>

As a result, it can be said that consumer disputes are arbitrable in general by the national laws in the target jurisdictions. Thus, it can be said that international online consumer arbitration falls within the scope of the New York Convention 1958 as long as consumer disputes are considered as commercial disputes.

#### **4. Conclusion**

This chapter has aimed to highlight some selected issues that are problematic in international online consumer dispute resolution. In the same way as any other international disputes, online consumer disputes have special legal norms and rules for

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<sup>282</sup> Di Pietro, 'General Remarks on Arbitrability under the New York Convention' in Eds Loukas A Mistelis and Stavros L Brekoulakis (ed), *Arbitrability: International and Comparative Perspectives* (Kluwer Law International 2009), 88

<sup>283</sup> *ibid.*

<sup>284</sup> This issue will be discussed in depth in chapter 3 and 4

<sup>285</sup> Arbitration Act 1996, c. 23; This Act extends to England, Wales and Northern Ireland only.

<sup>286</sup> The Federal Arbitration Act 1925, in section (2) "A written provision in any maritime transaction or a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction, or the refusal to perform the whole or any part thereof, or an agreement in writing to submit to arbitration an existing controversy arising out of such a contract, transaction"

<sup>287</sup> Jon O. Shimabukuro, "The Federal Arbitration Act: Background and Recent Developments" Report for Congress, 2002

<sup>288</sup> See *Allied Bruce Terminix Companies v. Dobson*, 513 US 265 (1995)

the three main stages: jurisdiction, applicable law and enforcement. Based on those classifications, it is possible to define the most important challenges and problems. Hence, it can be said that the special characteristics of online consumers as weaker parties requires a significant exception to the rules regarding the above classification. In the event of international online consumer disputes, such types of online transactions have connections of equal importance with several legal orders. Due to the role of the Internet in such types of transactions, the localization of international online consumer contracts within a particular national system may be arbitrary. Besides, it is a complex process to achieve.

This chapter has demonstrated that different elements lead to different conflict of laws rules, which means different jurisdictions and applicable laws, and therefore different outcomes. The distinction between consumer and business contract, the lack of uniform international application regarding the conflict of laws rules and the absence of an enforcement legal structure internationally might have become adequate reasons for providing extra-judicial protection for international online consumers. This is especially the case where both parties from different jurisdictions have the same interests and rights in applying their own jurisdictions and substantive law rules in international business and consumer transactions. However, there is no international convention to overcome or resolve those issues. The legal consequences of such a situation are not only about the validity of online consumer contracts, including their terms and conditions, and about having different weight internationally; international online consumer disputes have been left internationally without any protection to ensure them a binding decision or enforceable court remedies apart from the New York Convention.

Having analysed these issues, this thesis will not now discuss the notion of ‘effectiveness’ of judicial process regarding international online consumer disputes by courts. The purpose of this chapter is to find reasonable alternative solutions for international online consumer disputes among the existing rules of private international law, namely as these relate to England and Wales and the US. Therefore, this chapter focuses on the functionality of arbitration as a judicial procedure in comparison with traditional court ‘state justice’ procedure from an international online consumer point of view. The main question posed in that regard is the extent to which arbitration would be better as an alternative judicial procedure for ‘private justice’ from an international online consumer

perspective.

Arbitration can be seen as an important and effective mechanism because it inhabits a middle place between two complex systems of national laws and international treaties. Internationally, arbitration rules are more flexible; they are based on the will of the parties that are involved in international disputes; they function according to law from outside the court system; but they give certain courts room for 'judicial control' by applying the law of the country in which the arbitration has its place. More importantly, the outcome is enforceable as long as it is not contrary to the public policy of the enforcement country.

Accordingly, arbitration is a true alternative dispute resolution mechanism for international disputes. However, it is difficult to claim that international online consumer disputes are better resolved by arbitration rather than litigation or vice versa, in particular for those disputes where there is a strong power imbalance between the parties. Nevertheless, it is the only alternative process to litigation that can provide a remedy for international online consumer disputes. Thus, when dealing with international online consumers, the main question of how to improve the legal position of international online consumers as weaker parties from leading to an unfair and predictable outcome internationally is a fundamental one.

Hence, the analysis of the application of national arbitration rules as autonomous procedure and judicial procedure regarding the arbitrability of international online consumer disputes will be the aim of this thesis in its upcoming chapters.

## Chapter 3: The Arbitrability of International Online Consumer Disputes: A Complicated Balance

### 1. Introduction

In the previous chapter, the characteristics of arbitration as a judicial procedure, in comparison with traditional ‘state justice’ procedure, were discussed and analysed in the context of ‘functionality’ from a consumer point of view. However, the judicial protection may differ from one country to another.

In a general legal sense, any consumer dispute should be capable of settlement by arbitration including international online disputes. Arbitrability as a term refers to the capability of certain disputes and parties to be solved by arbitration. However, it has also been increasingly used broadly to refer to every requirement that must be met in order for arbitration to effectively move forward.<sup>1</sup> In the era of globalisation, arbitrability aims to recognise foreign legal relations between parties<sup>2</sup> as arbitration is a private proceeding that has a public consequence.<sup>3</sup> However, the New York Convention is limited to disputes that are capable of being settled by arbitration within national law.<sup>4</sup> On this point, Redfern and Hunter state that:

The significance of arbitrability should not be exaggerated. It is important to be aware that it may be an issue, but in broad terms most commercial disputes are arbitrable under the law of most countries.<sup>5</sup>

Arguably, certain issues may still be emerging in certain types of disputes, such as international online consumer disputes, which at the level of national law differ from each other significantly. The arbitrability of online consumer disputes has been, in general within England and Wales, strongly undesirable because of concerns about the state being

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<sup>1</sup> George A Bermann, ‘The “ Gateway ” Problem in International Commercial Arbitration’ (2012) 37 *The Yale Journal of International Law*; Available at: <<http://www.yjil.org/print/volume-37-issue-1/the-gateway-problem-in-international-commercial-arbitration>> (accessed 12/09/2013)

<sup>2</sup> Haris Pamboukis, ‘On Arbitrability, the Arbitrator as a Problem Solver’ in Loukas A Mistelis and Stavros L Brekoulakis (eds.), *Arbitrability: International and Comparative Perspective* (Kluwer Law International 2009), 122

<sup>3</sup> Nigel Blackaby, Alan Redfern, and Martin Hunter, *International Arbitration* (5<sup>th</sup> edn. Oxford University Press 2009), 123

<sup>4</sup> The New York Convention 1958, Arts II (1) and V (2)(a); see also the UNCITRAL Model Law on International Commercial Arbitration (1985) with amendments as adopted in (2006), Arts 34(2)(b)(i) and 36(1)(b)(i).

<sup>5</sup> Redfern and Hunter, *law and practice of international commercial arbitration* (Sweet & Maxwell 2004), 154

over-protective of its public policy (i.e. consumer interests) and a distrust towards arbitration especially in adhesion contracts cases in which consumers have no bargaining power but are forced to enter into arbitration.<sup>6</sup> However, in the USA, arbitration is seen as faster and less expensive than litigation.<sup>7</sup> Arbitration is perceived to be in the interests of the parties and society.<sup>8</sup> Furthermore, the inequality in bargaining power merely by itself is not a sufficient reason to restrict arbitration as a form of alternative dispute resolution for consumer disputes.

Indeed, the above approaches are different in their practical applications in the way that they have different legal norms, rules and requirements regarding the contractual autonomy rules and the protection of the weaker party in domestic online consumer disputes. Whilst there is no doubt that consumers deserve a certain degree of specific protection, which is mainly based on the characteristic of the consumer as the weakest party in the contract who suffers from a lack of information and must accept non-negotiated terms. It is difficult not to argue that both parties have voluntarily and equitably chosen arbitration and opted out of litigation.<sup>9</sup> Conversely, it is also hard to principally claim that the resolution of consumer disputes in court would be more suitable than arbitration. In addition, there is no empirical evidence to show that consumers do worse in arbitration than in court.<sup>10</sup> Overall, it can be said that for such types of international disputes (i.e. online consumer) arbitration is the only form of alternative dispute resolution that provides the contract with enforcement power and gives due regard to basic legal obligations internationally.

The question that may arise as pertinent to the arbitrability of international online consumer disputes is the extent to which the limitation upon the arbitrability of consumer disputes can be balance as an accepted standard, namely between contractual autonomy

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<sup>6</sup> This is in general the tendency of the Europe Union countries, which is based on EU special legal protection for consumer such as Council Directive 93/13/EEC on Unfair Terms in Consumer Contracts [1993] OJ L 95/29

<sup>7</sup> This is the tendency of the United States of America (USA)

<sup>8</sup> Thomas Carbonneau, *Cases and Materials on the Law and Practice of Arbitration* (2nd editio. Juris Publishing 2000) 19

<sup>9</sup> This issue will also be discussed in the following Chapter, see Chapter 4

<sup>10</sup> Sarah R Cole and Kristen M Blankley, 'Empirical Research on Consumer Arbitration : What the Data Reveals' (2008) 113 Penn St. L. Rev.,1051; Sarah R Cole and Theodore H. Frank, 'The Current State of Consumer Arbitration' (2008) 15 Disp. Resol. Mag. 30; LACORS (Local Authorities Coordinators of Regulatory Services) believe the law relating consumer transactions should offer the same protections for B2B as B2C, and operating under the same principles, See BIS Summary of Responses Consumer Law Review : Call for Evidence, Summary of Responses, Department for Business Innovation & Skills, July 2009, para 33

and the protection of the weaker party. To answer such a question, an analysis of the application of law on the arbitrability of consumer disputes and a discussion as to when such disputes would be arbitrable internationally is required. In order to carry out a convincing analysis on this part of the research, it will be helpful to make a distinction between two different legal policies regarding arbitration as a form of private justice for consumers. As such, the theme of this chapter will be related to domestic law, namely the domestic law of England and Wales and the USA, as they have two contrasting legal policies for dealing with arbitration as private justice for consumers. This chapter will identify the different approaches to determine arbitrability and the reasons behind them. The following chapters will then address them.

In order to do this, it is necessary to define the concept of arbitrability from the outset. It is also essential to address the different interpretations and definitions of the concept of arbitrability in legal theory and the legal framework within the statutory rules of the New York Convention, English law and American federal law. It is not an easy task to build a comprehensive concept of arbitrability to fit both law jurisdictions but defining arbitrability is important in order to at least give some guidance to facilitate the analysis of what arbitrability forms are relevant to international online consumer disputes and the different criteria that are adopted in determining the arbitrability of such disputes. It is also necessary to make a distinction between the different forms – subjective and objective arbitrability, the different perspectives of national law and the different grounds of the legal requirement of consumer to justify non-arbitrability, whether as a weaker party under the control of unfair contract terms in the UK or within the doctrine of unconscionability in adhesion contracts in the USA, regardless of contractual origin.

## ***2. The notion of arbitrability***

### **2.1 Positive and negative aspects of the notion of arbitrability**

As it was demonstrated in the previous chapter, international commercial arbitration is an important and effective mechanism because it is held in place by a complex system of national laws and international treaties. However, an international arbitration agreement and an international arbitration award are only effective when they provide a settlement for disputes that are recognized and enforceable by the national legal system.<sup>11</sup> The

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<sup>11</sup> Blackaby, Redfern, and Hunter, *International Arbitration* (n 3) 123

national laws and conventions allow certain types of disputes to be adjudicated by an arbitral tribunal and prohibit others. This is based on the fundamental elements related to economic, legal and social standards of a state or region.<sup>12</sup> Those standards may vary from one country to another and ‘depend on the judgment of the respective community at a particular time’<sup>13</sup> in according to which they pertain to protect (i.e. consumers).<sup>14</sup> The determinations of those standards are usually made by reference to the domestic law of the country.<sup>15</sup> In this way, arbitrability is concerned with whether a dispute is amenable to settlement by arbitration. However, countries have their own traditions and interests that differ from one another in identifying which matter should be protected and whether it should be resolved by the courts of law rather than private arbitration. Thus, arbitrability can be seen as the open or restricted procedures of arbitration used to adjudicate a legal process internationally.

In the international context, the understanding of the arbitrability concept stems from the New York Convention 1958<sup>16</sup> even though under the New York Convention 1958 the issue of arbitrability is covered indirectly; under Article I (3), the Convention applies to disputes between persons ‘whether physical or legal’<sup>17</sup> whereas those disputes are considered as commercial disputes under the national law of the state.<sup>18</sup> In the same fashion, Article II (1) and Article V(2) provides that each contracting state shall recognize and enforce an arbitration agreement or an award between parties whereas the subject matter is capable of settlement by arbitration under the national law of the state<sup>19</sup> unless

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<sup>12</sup> Ilias Bantekas, ‘The Foundations of Arbitrability in International Commercial Arbitration’ (2008) 27 Aust. YBIL 193; Richard C Reuben, “First Options, Consent to Arbitration, and the Demise of Separability: Restoring Access to Justice for Contracts with Arbitration Provisions” (2003) 56 SMUL Rev.819.; Zheng Sophia Tang, ‘Private International Law in “Consumer Contracts: A European Perspective”’ (2010) 6 Journal of Private International Law 225

<sup>13</sup> Douglas Jones, ‘Arbitration and Party Autonomy: How free is the Choice to Arbitrate?’ in Geoffrey M.Beresford Hartwell (ed), *The Commercial Way to Justice* (Kluwer Law International 1997) at 121-149.

<sup>14</sup> Stavros L. Brekoulakis, ‘Law Applicable to Arbitrability: Revisiting the Revisited LEXFORI’ in Eds Loukas A Mistelis and Stavros L Brekoulakis (ed), *Arbitrability: International and Comparative Perspective* (Kluwer Law International 2009) 99

<sup>15</sup> Bantekas, ‘The Foundations of Arbitrability in International Commercial Arbitration’ (n 12)

<sup>16</sup> Besides that the important of the New York Convention 1958 on the Recognition and Enforcement of Foreign Arbitral Awards as the one of the most successful international convention cross the world by 149 Parties, Both of the United Kingdom and the United States of America are contracting State. (Entry into force: UK 23/12/1975, USA 29/12/1970)

<sup>17</sup> The New York convention 1958, Article I (1)

<sup>18</sup> The New York convention 1958, Article I (3) “State... may also declare that it will apply the Convention only to differences arising out of legal relationships, whether contractual or not, which are considered as commercial under the national law of the State making such declaration”.

<sup>19</sup> The New York convention 1958, Article II (1) “Each Contracting State shall recognize an agreement in writing, under which the parties undertake to submit to arbitration all or any differences which have

it is found that the said agreement is null and void, inoperative or incapable of being performed or would be contrary to public policy under the national law of the enforcement country.<sup>20</sup> However, the New York Convention did not attempt to provide what is meant by the word ‘commercial’. The arbitrability ‘subject matter’ of disputes is ‘a thread’<sup>21</sup> to connect contracting states that distinguish between the word ‘commercial’ within their national laws.<sup>22</sup> In this respect, it is the national legislation that determines whether specific classes of commercial disputes are arbitrable or not, including consumer disputes. It is important to note that such different determinations may result in different conclusions, given the different international characteristics of online commercial transactions.

Consumer disputes as a subject matter are arbitrable in general within domestic laws.<sup>23</sup> Therefore, it has been argued in such a situation by Hanotiau that arbitrability is only a condition to confirm the validity of an arbitration agreement;<sup>24</sup> subsequently, it is confirmed that the arbitration tribunal has the jurisdiction over a particular dispute.<sup>25</sup> Nonetheless, it can also be argued that arbitrability is one of the issues of international arbitration where contractual and jurisdictional natures collide.<sup>26</sup> As Carbonneau and Janson argue, arbitrability ‘determines the point at which the exercise of contractual freedom ends and the public mission of adjudication begins’.<sup>27</sup> Therefore, it may be better

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arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not, concerning a subject matter capable of settlement by arbitration”.

<sup>20</sup> The New York Convention 1958, Article II (3) “[a]t the request of one of the parties, refer the parties to arbitration, unless it finds that the said agreement is null and void, inoperative or incapable of being performed”. Article V(2) “[a]n arbitral award may also be refused (A) The subject matter of the difference is not capable of settlement by arbitration (B) the award would be contrary to the public policy”

<sup>21</sup> Di Pietro, ‘General Remarks on Arbitrability under the New York Convention’ in Loukas A Mistelis and Stavros L Brekoulakis (ed), *Arbitrability: International and Comparative Perspectives* (Kluwer Law International 2009), 88

<sup>22</sup> See Chapter 2, Section 3.3.2 (b)

<sup>23</sup> The English Arbitration Act 1996 is silent on the issue of arbitrability in general, as well as the arbitrability of consumer disputes, the same the USA Federal Arbitration Act 1925 has not answered exclusively whether consumer disputes are barred from arbitration or not; See Chapter 2, Section 3.3.2 (b)

<sup>24</sup> In this respect Hanotiau states that:

“Arbitrability is indeed a condition of validity of the arbitration agreement and consequently, of the arbitrator jurisdiction.”, Bernard Hanotiau, ‘What Law Governs the Issue of Arbitrability?’ (1996) 12 *Arbitration International*, 391

<sup>25</sup> *ibid.*

<sup>26</sup> LA Mistelis and SL Brekoulakis, *Arbitrability: international & comparative perspectives* (Loukas A Mistelis and Stavros L Brekoulakis (ed), Kluwer Law International. 2009) 3

<sup>27</sup> Sited by: Stefan Kroll, Loukas A. Mistelis, and Pilar Perales Viscasillas, *International Arbitration and International Commercial Law: Synergy, Convergence and Evolution - Liber Amicorum Eric Bergsten* (Vikki Rogers (ed), Kluwer Law International 2011)



not to limit arbitrability solely to the validity of the arbitration agreement.<sup>28</sup> The reason for supporting this opinion is because arbitrability has different functions, which may affect arbitration procedures and the outcome at any stage as far as the jurisdiction aspect. In other words, arbitrability fulfils both a negative and positive function upon arbitration processes.

The negative function can be expressed in two different ways. First, it affects the legal relationship between the parties. Whilst party autonomy espouses the right to opt out of national court jurisdiction,<sup>29</sup> arbitrability may hold that the contract and/or the dispute between parties falls within the exclusive jurisdiction of the national courts<sup>30</sup> wherever the matter is considered to be important to the operation of justice (fundamental human and civil rights,<sup>31</sup> criminal<sup>32</sup> and some commercial activities<sup>33</sup>). At the same time, arbitrability may hold that the arbitration agreement is null and void as the subject matter is not capable of settlement by arbitration because of an illegal act or enterprise.<sup>34</sup> Second, arbitrability ensures the application of the mandatory rules by arbitrators to determine their authority and the issue between parties.<sup>35</sup>

On the other hand, the positive function of arbitrability can be expressed by the admissibility of the arbitration agreement by concerning the relevance rules of other legal

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<sup>28</sup> Robert B. Kovaks, 'A Transnational Approach to the Arbitrability of Insolvency Proceedings in International Arbitration' [2012] The International Insolvency Institute, Available at: <<http://www.iiiglobal.org/component/jdownloads/viewdownload/391/5979.html>> (accessed 12/09/2013)

<sup>29</sup> Mistelis and Brekoulakis, *Arbitrability: international & comparative perspectives* (n 26)

<sup>30</sup> Edward Morgan, 'Contract Theory and the Sources of Rights: An Approach to the Arbitrability Question' (1986) 60 S. Cal. L. Rev. 1059

<sup>31</sup> In this regard, The International Covenant on Economic, Social and Cultural Rights, Article (11) provides certain rights with guaranteed protection to access to effective judicial and at the international level as national level: For example: The right to water (arts. 11 and 12 of the International Covenant on Economic, Social and Cultural Rights), General Comment No. 15 (2002) Twenty-ninth session, Geneva, 11-29 November 2002

<sup>32</sup> Julian D.M Lew and Oliver Marsden, 'Arbitrability' in Julian D.M Lew and Harris Bor (eds), *Arbitration in England, with chapters On Scotland and Ireland* (Kluwer Law International 2013),405

<sup>33</sup> For example: In case, *Zimmerman v. Continental Airlines, Inc.*, the court held that bankruptcy proceeding were not capable to settlement by arbitration because it's important of the smooth function of the national commercial activities. *Zimmerman v. Continental Airlines* 712 F.2d 55 (3rd Cir.1983), cert. denied, [1984] 464 U.S. 1038, 104 S.Ct. 699, 79 L.Ed.2d 165 ; On this point see: Joanna Rauh, 'Hard Core Matters: Bankruptcy judge discretion to waive pre-petition arbitration agreements in core proceedings'; Available at: <<http://www.socialaw.com/slbook/judgeyoung07/07rauhfinalpaper.pdf>> (accessed 12/09/2013)

<sup>34</sup> Andrew Tweeddale and Keren Tweeddale, *Arbitration of Commercial Disputes International and English Law and Practice* (Oxford University Press 2007) 112

<sup>35</sup> Julian D.M Lew, 'Competition law: limits to Arbitrators' Authority' in Loukas A Mistelis and Stavros L Brekoulakis (ed), *Arbitrability: International and Comparative Perspective* (Kluwer Law International 2009) 243

orders internationally.<sup>36</sup> It also imposes fundamental standards on legal relationships between parties<sup>37</sup> and confers jurisdictional power to an arbitral tribunal.<sup>38</sup>

Thus, the different function of arbitrability affects arbitration as an autonomous and judicial legal process. As far as consumer protection rules are concerned, a number of factors<sup>39</sup> might play a crucial role in either enabling or restricting procedures of arbitration as a form of private justice for online consumers, especially internationally. The author would argue that this role has not yet been sufficiently addressed. Therefore, it is crucial when examining the question of arbitrability, and whether it is an open or restricted procedure, to examine whether the concept of arbitrability should be cleared. Otherwise, the different meanings of arbitrability can create confusion and a complicated balance regarding the outcomes. This will be carried out in the following subsection.

## **2.2 Multiple definitions of arbitrability**

Although there is no internationally-accepted definition of arbitrability<sup>40</sup> and neither do the national laws nor the special protective regulations explicitly address the issues of arbitrability for various types of commercial disputes, including consumer disputes, there have been numerous attempts in the academic literature at defining arbitrability. A brief overview of some of these academic opinions will follow.

Brekoulakis emphasizes that the issue of arbitrability stands at the crossroads of the contractual and jurisdictional natures of arbitration.<sup>41</sup> As such, arbitrability is a specific

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<sup>36</sup> In *Fulham Football Club (1987) Ltd v. David Richards*, The England and Wales Court of Appeal (Civil Division) has pointed out that “Not surprisingly, the source of such restrictions cannot be found in the AA 1996 or what might be termed the law of arbitration itself [...] the scope of even the most widely drafted arbitration agreement will have to yield to restrictions derived from other areas of the law. Sections 9(4) and 81 of the AA 1996 confirm this. But the source of those restrictions is to be found elsewhere”, *Fulham Football Club (1987) Ltd v Richards & Anor [2011] EWCA Civ 855*.

<sup>37</sup> The phrase “defined legal relationship” has been used with the capability of the disputes to be arbitrable by Art. II of New York Convention in regard to recognize the arbitration agreement: “*Each Contracting State shall recognize an agreement in writing under which the parties undertake to submit to arbitration all or any differences which have arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not, concerning a subject matter capable of settlement by arbitration.*”; See also the UNCITRAL Arbitration Model Law, Art. 7.

<sup>38</sup> Pamboukis, ‘On Arbitrability,: the Arbitrator as a Problem Solver’ (n 2).

<sup>39</sup> Factors such as the place of arbitration, the place of disputes, the subject matter of the disputes and the location of the parties.

<sup>40</sup> Tweeddale, *Arbitration of Commercial Disputes International and English Law and Practice* (n 34) 425

<sup>41</sup> Stavros Brekoulakis, ‘On Arbitrability: Persisting misconceptions and new areas of concern’ in Loukas A Mistelis and Stavros L Brekoulakis (ed), *Arbitrability: International & Comparative Perspectives*, (Kluwer Law International, 2009) 39

condition to determine whether a tribunal has jurisdiction over a particular dispute or not. Brekoulakis states that:

[A]rbitrability is a specific condition pertaining to the jurisdictional aspect of arbitration agreement and, therefore, it goes beyond the discussion on validity. Thus, arbitrability is a condition precedent for the tribunal to assume jurisdiction over a particular dispute (a jurisdictional requirement), rather than a condition of validity of an arbitration agreement (contractual requirement).<sup>42</sup>

Hence, arbitrability is more likely to be an issue concerning a tribunal's jurisdiction over a particular dispute rather than an issue that considers only the validity of the arbitration agreement which the tribunal should have the right to decide in the first place. He adds that when a particular subject matter in a claim is considered to be non-arbitrable then that would prevent the tribunal from assuming jurisdiction over only that particular matter but this does not mean that the clause or agreement is null and void from the outset.<sup>43</sup> This is because the same tribunal might have jurisdiction to determine another claim falling under the same agreement.<sup>44</sup>

This definition may seem specific to the notion of arbitrability but it goes beyond the way that consumer contracts are concluded and performed. It should be noted here that the issue is procedural rather than substantive. Therefore, it can be argued that if a consumer contract involves an arbitration clause which provides that any dispute arising out of this contract will be referred to arbitration, it would be held as null or void from the outset even if it would be arbitrable as a subject matter. For example, within England and Wales, consumer disputes under a certain amount (i.e. £5,000) are not arbitrable. In such situations, an arbitration clause would be automatically considered an unfair clause.<sup>45</sup> In other words, it would be held as null or void from the outset. Therefore, in such a case the tribunal would probably not decline the exclusive jurisdiction of a court over the dispute if it were applying a different applicable law.

Youssef states that the concept of arbitrability refers to the question of where the parties can settle their disputes, either through state or private justice, in relation to the facts in their dispute. Thus, arbitrability is also determined when the parties have a right to go to

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<sup>42</sup> *ibid.*

<sup>43</sup> *ibid.*

<sup>44</sup> *ibid.*

<sup>45</sup> Office of Fair Trading, *Unfair contract terms guidance (Guidance for the Unfair Terms in Consumer Contracts Regulations 1999)* [2008], para.17.2; See also *The English Unfair Arbitration Agreements (Specified Amount) Order 1999*, SI 1999/2167

arbitration to resolve their dispute.<sup>46</sup> In relation to this, Youssef states that ‘[a]rbitrability is also the fundamental expression of freedom to arbitrate’.<sup>47</sup> However, it can be argued here that this fundamental expression of the ‘party autonomy’ of consumers may differ from one country to another and from one online dispute to another. Moreover, it must be remembered that arbitration might be a private proceeding but it also has a public consequence that concerns matters of public interest.<sup>48</sup> This justifies the limitation upon arbitration in certain types of disputes such as consumer disputes.<sup>49</sup> The questions that arise are: to what extent are online consumers free? How free is the choice to arbitrate?

Shore clarifies when the parties have a fundamental right to go to arbitration by pointing out gateway questions for determining the arbitrability at the international level. Those gateway questions include: (1) existence of a valid arbitration agreement, (2) the scope of the agreement covers the dispute, and (3) the dispute is not contrary to public policy. Thus, ‘arbitrability refers to whether the specific claims raised are of [a] subject matter capable of settlement by arbitration, and are not subject to the exclusive jurisdiction of courts’.<sup>50</sup> It can be argued that the subject matter of consumer disputes is capable of settlement by arbitration. However, there is still the question of who should be the initial decision-maker of those gateway questions at the international level if one of the parties raises them, and whether they are under the exclusive jurisdiction of courts or whether the tribunal has authority to determine them in consumer disputes.

Carbonneau, simplifies the concept of arbitrability by describing it as ‘the essential dividing line between public and private justice’.<sup>51</sup> This statement is important because it implies that, even though states allow parties to enter into arbitration agreements to settle their disputes, states also impose restrictions and limitations upon the party autonomy on what matters can and cannot be resolved by arbitration.<sup>52</sup> States will always

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<sup>46</sup> Karim Youssef, ‘The Death of Inarbitrability’ in Loukas A Mistelis and Stavros L Brekoulakis (ed), *Arbitrability: International and Comparative Perspectives* (Kluwer Law International, 2009) 49

<sup>47</sup> *ibid.*

<sup>48</sup> Blackaby, Redfern, and Hunter, *International Arbitration* (n 3) 123

<sup>49</sup> Also disputes such as: competition disputes, intellectual property disputes, family matter and the employer and employee disputes.

<sup>50</sup> Laurence Shore, ‘The United States’ Perspective on ‘Arbitrability’ in Loukas A Mistelis and Stavros L Brekoulakis (ed), *Arbitrability: International & Comparative Perspectives*, (Kluwer Law International, 2009) 70

<sup>51</sup> Tomas E. Carbonneau, ‘Liberal Rules of Arbitrability and the Autonomy of Labor Arbitration in United States’ in Loukas A Mistelis and Stavros L Brekoulakis (ed), *Arbitrability: international & comparative perspectives* (Kluwer Law International 2009) 143

<sup>52</sup> The English Arbitration Act 1996, section 1(b) states “The parties should be free to agree how their disputes are resolved, subject only to such safeguards as are necessary in public interest”.

have a tendency to ensure that there is a safeguard for the weakest party who has less bargaining power (i.e. consumer) in their own jurisdiction against arbitration.<sup>53</sup> Most of the restrictions and limitations upon party autonomy are influenced by the deep distrust of arbitration within some countries.<sup>54</sup> It can be said that this distrust is often related to the public interest, i.e. consumer interest, particularly where the capability of the arbitrator to apply consumer protection rules might be questionable.<sup>55</sup>

However, from a court perspective within the jurisdictions of England and Wales and the USA there are the two main opinions about arbitrability that are widely dissimilar between courts. In England and Wales, the courts often define arbitrability to mean whether specific classes of disputes are barred from arbitration. This is based on the subject matter of the dispute itself with reference to public policy or public interest as the basis for the bar and to reserve certain types of disputes to the exclusive domain of courts.<sup>56</sup> On the other side of the Atlantic, the USA courts also associate arbitrability with the question of what type of dispute can be submitted to arbitration based on the subject matter of disputes with reference to public policy or public interest. In addition, USA courts also consider whether an arbitral tribunal has authority to decide that a given dispute should be submitted to arbitration or not in order to determine whether the tribunal has jurisdiction over it.<sup>57</sup> These different perspectives about the meaning of arbitrability can create confusion and a tension between courts and arbitrators as to who should be the decision-maker on issues such as the validity of the arbitration agreement.<sup>58</sup> Thus, in order to define the arbitrability of international consumer disputes, the definition has to deal with the above questions of the different functions (effects) of arbitrability, considering the peculiarity of international online consumer disputes regardless of contractual origin of the arbitrator, whether in England and Wales or the USA.

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<sup>53</sup> Council Directive 93/13/EEC on unfair terms in consumer contracts [1993] OJ L95/29, the Annex Term (q).

<sup>54</sup> M. Sornarajah, *The Settlement of Foreign Investment Disputes*, (Kluwer Law International 2000) 110

<sup>55</sup> This aspect will be discussed in Chapter 5

<sup>56</sup> Julia Hörnle, 'Legal Controls on the Use of Arbitration Clause in B2C e-Commerce Contracts' [2008] Masaryk University Journal of Law and Technology 23

<sup>57</sup> Shore, 'The United States' Perspective on 'Arbitrability'' (n 50) 70

<sup>58</sup> Laurence Shore, 'Defining 'Arbitrability' The United States Vs. the rest of the world.' [2009] New York Law Journal, Available at: <<http://www.gibsondunn.com/publications/documents/shore-definingarbitrability.pdf>> (accessed 05/08/ 2013).

### **2.3 The peculiarity of international online consumer disputes**

In the previous subsection, it was shown how arbitrability as a term is used in a specific way by private international law writers to refer to national court competence to claim jurisdiction over disputes involving arbitration. It is clear that it is not an easy task to build a comprehensive concept of arbitrability that fits both law jurisdictions as these have different legal policies regarding the same matter. This could unnecessarily restrict a state's ability to meet certain public policy concerns that were likely to evolve over time in such types of disputes.<sup>59</sup> Thus, one can readily appreciate how the term arbitrability is understood so broadly. For that reason, it is not illogical to employ the term as shorthand for any and all threshold issues since any commercial dispute can be arbitrable fairly only if all threshold issues that are raised are resolved in favour of arbitration going forward. Only then can it be said that the disputes truly are 'able to be arbitrable'.<sup>60</sup> Accordingly, the term non-arbitrability can refer to the 'inability of arbitration to provide for an effective resolution of a specific dispute'.<sup>61</sup> This is due to the distinctive nature of international online consumer disputes as procedural justice rather than the subject matter of dispute. Hence, the term arbitrability can be used in the same narrow sense. Given that this thesis is concerned with the arbitrability of international online consumer disputes, all threshold issues in that matter should be considered. It might be better not confine arbitrability to a single approach but rather it should be a flexible approach in order to take all the crucial factors into consideration. The special characteristics of international online consumer disputes leads to the conclusion that applying one single factor might not always result in successful and effective outcomes. The question that needs to be determined by arbitrability is how appropriate arbitration rules are for settling international online consumer disputes. In the author's view, it would be more fruitful to refer the arbitrability to procedural justice as this would ensure successful and effective outcomes for online consumers in international arbitration. The idea of the outcomes was also used as a key difference between private and state justice for international online consumer disputes in the previous chapter.<sup>62</sup> The idea of the outcomes also forces us to

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<sup>59</sup> United Nations, General Assembly, Report of the United Nations Commission on International Trade Law, Sixty-first session, Supplement No. 17 (A/61/17), para. 185

<sup>60</sup> Bermann, 'The "Gateway" Problem in International Commercial Arbitration' (n 1)

<sup>61</sup> Franco Ferrari and Stefan Kroll, *Conflict of Laws in International Arbitration* (sellier european law publishers 2011) 131

<sup>62</sup> See Chapter 2, Section 2.3

question whether arbitration is able to successfully dispose of the international online consumer disputes regardless of the contractual origin of the arbitrator and the parties. From the author's point of view, arbitrability should be read as the ability of arbitration (arbitrator) to provide an effective resolution for international online consumer disputes with special consideration for the capability of the consumer as a weaker party involved in an international dispute over an online adhesion contract.

Using arbitrability in this concept for international online consumer disputes is mainly to reconcile it with the different national laws within the scope of this thesis, which in that regard establish the domain of arbitration over the matters that may or may not be arbitrable. Therefore, it is necessary to have regard to the state law concerned and these are likely to include the law governing both parties involved and the arbitrator as third party.<sup>63</sup> Furthermore, in both of the selected jurisdictions consumer disputes are arbitrable in general and can be resolved by arbitration. Hence, it can be assumed here that the limitations upon consumer party autonomy and his state or function serve to provide a safeguard for the consumer as the weakest party in arbitration, whether in England and Wales or the US. In simple words, those 'limitations' may provide different layers of protection to safeguard consumers but all share the common purpose to hold the balance sufficiently against the business as strong parties. From this point of view, it is easy to say that the notion of any limitations against arbitration relies upon the ability of consumers to arbitrate their disputes and should be interpreted in such a way. Thus, the author believes that the following holds true: if the arbitrators consider the capability of the consumer as a weaker party, they might be able to provide an effective resolution for international online consumer disputes.

Based on what has been said above, one may argue that the ability of arbitration to provide an effective resolution does not always mean a fair dispute resolution (equal treatment, rationality and effectiveness)<sup>64</sup> whilst the fairness in dispute resolution includes effective resolution.<sup>65</sup> However, it can also be said that according to the new Directive on alternative dispute resolution for consumer disputes,<sup>66</sup> the requirement for

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<sup>63</sup> Blackaby, Redfern, and Hunter, *International Arbitration* (n 3) 124

<sup>64</sup> Julia Hörnle, *Cross-border Internet Dispute Resolution* (Cambridge University Press 2009) 8

<sup>65</sup> David S Schwartz, "Mandatory Arbitration and Fairness" (2009) 84 *Notre Dame Law Review* 1247; Hörnle, *Cross-border Internet Dispute Resolution* (n 64) 171,186

<sup>66</sup> Directive 2013/11/EU on alternative dispute resolution for consumer disputes (Directive on Consumer ADR) [2013] OJ L 165/63, Article 8

an effective resolution includes availability, accessibility and usability, whether online or offline, for both parties, irrespective of where they are in order to give full effect to the will of the parties.<sup>67</sup> It also means that the parties need not be but may be (legally) represented.<sup>68</sup> In addition, effective resolution also includes time and cost in which should be available at a minimal fee for consumers and within a short period of time.<sup>69</sup> Furthermore, the United Nations Guideline on Consumer Protection 1985 calls for the availability of effective consumer redress ‘[t]o obtain redress through formal or informal procedures that are expeditious, fair, inexpensive and accessible. Such procedures should take particular account of the needs of low-income consumers.’<sup>70</sup> However, fairness means that a consumer should be informed about the arguments, evidence, documents and facts that are put forward by the other party, and should have the possibility within a reasonable period of time to express their point of view.<sup>71</sup> Thus, it can be assumed that an effective resolution does include fairness access, process and outcome.

On the other hand, any adjudicative methods of dispute resolution, whether litigation or arbitration, is required to ensure the procedural fairness between the parties in their proceedings. This procedural fairness requires that the parties are treated equally and given an opportunity to be heard and deal with the case of their opponent. In the case of online consumers, this procedural fairness may not be enough if they are not considered in their treatment as the weakest party in the international online contract. Thus, it is reasonable to say that the arbitrator should consider their specific situation (i.e. their weakness in international dealings) as a significant exception to provide a safe ground for them to hold the balance sufficiently against the business. Hence, the arbitrator should be a part of the solution to ensure the balance is maintained between international consumers and online businesses in the event of a dispute.

The idea of procedural justice is controversial, with a variety of views about what makes a private procedure fair for the consumer.<sup>72</sup> Of course, additional due process

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<sup>67</sup> Directive 2013/11/EU, Article 8 (a)

<sup>68</sup> Directive 2013/11/EU, Article 8 (b)

<sup>69</sup> Directive 2013/11/EU, Article 8 (c),(e)

<sup>70</sup> The United Nation Guideline on Consumer protection 1985, A/RES/39/248 (16 April 1985), para.3(e) and 28. Available at: <http://www.un.org/documents/ga/res/39/a39r248.htm> (Accessed 12/09/2013).

<sup>71</sup> Directive 2013/11/EU, Article 9

<sup>72</sup> This is also dependent upon whether consumer is in need for protection from arbitration because of the nature “notion” of consumer or because the position of the consumer in the online contract or because the contract itself is type of adhesion contracts. However, those questions have different answers and different



requirements are a considerable solution to ensure justice for the weaker party and ensure a higher level of fairness resolution for Internet disputes, namely consumer disputes.<sup>73</sup> The need to protect the consumer as the weakest party in the contract is important. However, it can also be argued that intensifying the level of consumer protection is not always favourable to consumers, at least internationally, because it can increase the price of products and decrease the number of services for others.<sup>74</sup> A higher level of consumer protection would provide for an easy way for them to escape contractual obligations and terms (ie arbitration) without imposing any general duty upon a consumer to act in good faith or any legal responsibility for their legal acts. However, the main issue to be overcome by arbitration is the recognition and enforcement of foreign decisions under the New York Convention as well as to avoid any disrespect to the basic legal obligations internationally.<sup>75</sup> In this context, Schultz states that ‘the best is the enemy of the good and justice would remain elusive regardless of how much fairness one would hope to infer from extended hearings and the hence increased levels of due process’.<sup>76</sup> Moreover, according to Schultz, it is ‘imperfect as it is ... to ask an arbitrator in a small case (i.e. online consumer disputes) to be even more cautious about due process than in large arbitration cases’.<sup>77</sup>

Nonetheless, international online consumers should not be deprived of the protection afforded to them by the mandatory rules in their habitual residence. Indeed, at the present time, consumer protection rules to govern international online consumer disputes create conflict of laws, as it has been shown in the chapter 2.<sup>78</sup> The legislatures take a variety of approaches, and these lack uniformity for identifying consumer activities on the internet. Moreover, the grounds for the exercise of specific jurisdiction of national court of consumer is limited internationally. This is in addition to the issue of what should be

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approaches in both the England and Wales and the USA; this situation will be discussed in-depth in Chapter 4.

<sup>73</sup> Hörnle, *Cross-border Internet Dispute Resolution* (n 64); See also Julia Hörnle, Online Dispute Resolution in Business-to-Consumer E-commerce Transactions, *JILT* (2),2002, available at: [http://www2.warwick.ac.uk/fac/soc/law/elj/jilt/2002\\_2/hornle/](http://www2.warwick.ac.uk/fac/soc/law/elj/jilt/2002_2/hornle/) ( Accessed 12/09/2013)

<sup>74</sup> Vanessa Mak, ‘Two Levels, One Standard? The Multi-Level Regulation of Consumer Protection in Europe (April 7, 2010)’ in James Devenney and Mel Kenny (eds), *European Consumer Protection Theory and Practice* (Cambridge University Press 2012) 40

<sup>75</sup> Alexander J. Bělohávek, ‘Autonomy in B2C Arbitration: Is the European Model of Consumer Protection Really Adequate?’ in Alena Bányaiová and others (eds), *Czech (& Central European) Yearbook of Arbitration*, 2012

<sup>76</sup> Thomas Schultz, ‘Internet Disputes, Fairness in Arbitration and Transnationalism: A Reply to Julia Hörnle’ (2011) 19 *International Journal of Law and Information Technology* 153

<sup>77</sup> *ibid*, 158

<sup>78</sup> Chapter 2, section 2.2

considered a consumer contract and a consumer dispute.<sup>79</sup> In some jurisdictions, there are distinctions between business contracts and consumer contracts<sup>80</sup> and in other jurisdictions, this distinction is debatable.<sup>81</sup> The laws in both jurisdictions do not declare that consumer disputes are legally incapable of being submitted to arbitration. However, courts may declare specific limitations where those disputes are contrary to public policy or public interest even when the legislatures are silent about their arbitrability.<sup>82</sup>

Therefore, the special characteristics of online consumers and the prerequisites of consumer protection will be analysed within two categories of arbitrability: subjective arbitrability (*ratione personae*) and objective arbitrability (*ratione materiae*).<sup>83</sup> The first category is a restriction upon parties, whether certain individuals or entities, where one of them is not capable of referring the dispute to arbitration on account of their status or function.<sup>84</sup> The second category is a restriction or limitation based on the subject matter of the dispute which is not capable of being settled by arbitration.<sup>85</sup> Both categories raise a question about status or function for international online consumers.

### ***3. Subjective arbitrability of the international online consumer***

In general, subjective arbitrability refers to the freedom of the parties and their power to agree to arbitration as a form of private justice.<sup>86</sup> In traditional practice, this freedom relies upon the personal legal capacity of parties (an individual or corporate entity) to agree to enter into a contract which includes an arbitration clause and/or with a view to concluding an arbitration agreement.<sup>87</sup> The personal legal capacity of the parties defines

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<sup>79</sup> Shelley McGill, 'Consumer Arbitration Clause Enforcement: A Balanced Legislative Response' (2010) 47 *American Business Law Journal* 361, available at: <<http://doi.wiley.com/10.1111/j.1744-1714.2010.01099.x>> (Accessed 12/09/2014).; Chinthaka Liyanage, 'Online arbitration compared to offline arbitration and the reception of online consumer arbitration' (2010) 22 *Sri Lanka JIL* 173

<sup>80</sup> This is the approach under the English law (England and Wales), which is also the EU's approach namely, in the Brussels Regulation

<sup>81</sup> Such a situation is found at the USA, R Giesela, 'Consumer Protection in Choice of Law' (2011) 44 *CORNELL INT'L L.J.* 569–602

<sup>82</sup> Brekoulakis, 'On Arbitrability: Persisting misconceptions and new areas of concern' (n 41)21

<sup>83</sup> Lew and Marsden, 'Arbitrability' (n 32),400; Yves Forties L, 'Arbitrability of Disputes' in Gerald Aksen and others (eds), *Global Reflection on International Law ,Commerce and Dispute Resolution* (International Chamber of commerce (ICC) 2005), 270.

<sup>84</sup> Emmanuel Gaillard and John Savage, *Fouchard, Gaillard, Goldman on International Commercial Arbitration* (Kluwer Law International 1999), 313; Lew and Marsden, 'Arbitrability' (n 32)

<sup>85</sup> Lew and Marsden, 'Arbitrability' (n 32)

<sup>86</sup> Youssef, 'The Death of Inarbitrability' (n 46) 49

<sup>87</sup> *ibid.*

the scope of the parties' power of referral to arbitration.<sup>88</sup> It also reflects the personal legal protection and the rights of any party that enters into a transaction,<sup>89</sup> such as a minor. Thus, the legal capacity can be related to the quality of the parties in dispute.<sup>90</sup> Therefore, it can be said that the subjective arbitrability answers the question of who can or cannot submit to arbitration on account of their status or function. With regard to the special characteristics of consumers, the issue of consumers' legal capacity to participate in arbitration and their willingness to forego legal remedies can be a point of dispute in arbitration.

Consumers are normally protected from waivers of their rights "legal or judicial right". It is undeniable that a consumer is likely to have no bargaining position and to be unaware of the arbitration clause in the contract or its significance within the contract that may involve a waiver of the right to go to court even before their dispute arises. Consequently, the validity of an arbitral clause in a consumer contract is questionable.<sup>91</sup>

In the following two subsections, the issue of legal capacity will be discussed to evaluate the subjective arbitrability of the consumer and its protection to enter into arbitration and, whether is it certain enough to provide effective resolution in the international online environment.

### **3.1 The legal capacity of the consumer**

When analysing the legal capacity of the consumer in order to enter into the arbitration process, the first thing that comes to mind is the scope of protection and the approach of recognizing the legal capacity of the consumer to determine who can or cannot enter into legally binding arbitration contracts internationally.

In regards to international arbitration, it is important to realize that the issue of capacity

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<sup>88</sup> Klaus Peter Berger, 'Re-Examining the Arbitration Agreement, Applicable Law Consensus or Confusion?' in Albert Jan van den Berg (ed), *International Arbitration 2006: Back to Basics?* (Kluwer Law International 2007) 304; Simon Greenberg, Christopher Kee, and J.Romesh Weeramantry, *International Commercial Arbitration* (Cambridge University Press 2011) 182

<sup>89</sup> Triin Kivisild Paul Varul, Anu Avi, 'Restrictions on Active Legal Capacity' [2004] *Juridica International Law Review*, 99, Available at: <[http://www.juridicainternational.eu/public/pdf/ji\\_2004\\_1\\_99.pdf](http://www.juridicainternational.eu/public/pdf/ji_2004_1_99.pdf)> (accessed 20/09/2013)

<sup>90</sup> Bernard Hanotiau, 'The law applicable to the issue of arbitrability' (1998) 7 *International Business Law Journal* 755

<sup>91</sup> In case *Sheffer v. Samsung Telecommunications America LLC et al*, the consumer argue that arbitration clause in smartphone contract is 'far from conspicuous' According to his response, he was not even aware of the arbitration clause, which he says is "hidden" on page 245 of the 263-page user manual. No. 13-3466, response in opposition filed (C.D. Cal. Aug. 19, 2013).

may mean that the award is set aside at the enforcement stage due to lack of capacity.<sup>92</sup> Arguably, it is possible to say that an underage minor has a lack of consumer capacity. Article V(1) of the New York Convention permits refusal of recognition and enforcement of an arbitral award where one of the parties was ‘under some incapacity’.<sup>93</sup> Likewise, the Arbitration Model Law under Article 34(2)(a)(i) reaches the same conclusion.<sup>94</sup> Accordingly, legal capacity has significant consequences for arbitration awards.

In the context of consumer disputes, legal capacity could be very problematic internationally,<sup>95</sup> especially when it comes to the practice in the online environment. In the first place, the arbitration contract, whether an agreement or clause, usually contains within it a waiver of the right to go to court. The waiver of such a right requires consent which should be given on a voluntary and fully-informed basis, without undue influence or language mistake.<sup>96</sup> However, there is a classic difference of context, as we will see in the following section, regarding the legal capacity, in order to impose fundamental standards on the legal relationship between parties that might lead to an unfair outcome. England and Wales, for instance, imposes a special legal protection on consumers under the Arbitration Act 1996 in order to provide a level of equality for consumers and businesses in arbitration disputes. The Arbitration Act 1996, as we will see in the following section, provides a restrictive value upon consumer contracts in arbitration and extends the application of the Regulation on the Unfair Terms in Consumer Contracts 1999 (UTCCR).<sup>97</sup> Thus, arbitration may be regarded as unfair for international online consumers if circumstances do not permit it. Therefore, the degree of such protection is based on how to recognize a person (natural or legal) as a consumer, and how the subjective arbitrability of a consumer can be determined in which a consumer can or cannot opt for arbitration prior to the dispute arising. In contrast, the USA does not impose any special requirement for consumer capacity; consumers are like any other

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<sup>92</sup> Karl-heinz Böckstiegel, ‘Public Policy as a Limit to Arbitration and its Enforcement’ [2008] IBA Journal of Dispute resolution, Special Issue 2008, The New York Convention – 50 Years, Presented at the 11th IBA International Arbitration Day and United Nations New York Convention Day “The New York Convention: 50 Years” in New York on 1 February 200 123

<sup>93</sup> Tweeddale, *Arbitration of Commercial Disputes International and English Law and Practice* (n 34), 127

<sup>94</sup> The UNCITRAL Arbitration Model Law 1985, Article 34(2)(a)(i) “a party to the arbitration agreement referred to in article (7) was under some incapacity;”.

<sup>95</sup> Bělohávek, ‘Autonomy in B2C Arbitration: Is the European Model of Consumer Protection Really Adequate?’ (n 75); Khalil Mechantaf, ‘Balancing protection and autonomy in consumer arbitrations : an international perspective’ (2012) 78 *Arbitration* 232–246

<sup>96</sup> This aspect will be addressed in the following Chapter.

<sup>97</sup> Arbitration Act 1996, Section 89; The Unfair Terms in Consumer Contracts Regulation (Consumer Protection)[1999] No. 2083

party protected in accordance to the general principles of contract law. Thus, an arbitration agreement is no different from any other contract.<sup>98</sup> As such, the argument here is not only that there is no consistent approach but also that the scope of protection is different. Thus, analysis of the status quo of the law governing international online consumer disputes must consider whether a consumer is in need of protection from arbitration because of the nature of the consumer or because of the position of the consumer in the contract. It should be emphasised here that this thesis argues how effectively these rules can be applied due to the special characteristics and features of international online consumers.

### **3.2 Consumer capacity as special protection**

The right to access state justice has particular significance for consumers, namely international online consumers. However, it raises some fundamental questions when it comes to the subjective arbitrability of international online consumer disputes. In the previous chapter, it was shown that EU private international law provides its consumers with a significant exception regarding the court's exclusive jurisdiction by invalidating any clause that assigns the jurisdiction to any court of law other than the courts in the consumer's country of habitual residence.<sup>99</sup> Generally, by the same token, arbitration is considered to be a tool to deprive a consumer of their right to access state justice. Therefore, consumers are well protected from arbitration unless they expressly agree to waive such a right.<sup>100</sup> This protection, according to the European Convention on Human Rights<sup>101</sup> Article 6, states that the waiver of such a right has no other exceptions as it confirms the right of parties to a fair trial.<sup>102</sup>

The consideration of an arbitration clause in a consumer contract between EU Member States has great potential to be an unfair term. This is due to the EC Directive on Unfair Terms in Consumer Contracts (UTCCD).<sup>103</sup> The reason behind such special protection is

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<sup>98</sup> Greenberg, Kee, and Weeramantry, *International Commercial Arbitration* (n 88) 169

<sup>99</sup> See Chapter 2, Section 2.2.1

<sup>100</sup> Under the Commission Recommendation there is another stipulation which is "only after the disputes has materialised" however the Recommendation has no binding force, the Commission Recommendation on the principles applicable to the bodies responsible for out-of-court settlement of consumer disputes, 30 March 1998, (98/257/EC).

<sup>101</sup> The European Convention on Human Rights (ECHR) (formally the Convention for the Protection of Human Rights and Fundamental Freedoms), the convention entered into force on 3 September 1953.

<sup>102</sup> European Convention on Human Rights, Article 6 (Right to a fair trial)

<sup>103</sup> EC Directive 1993/13/EEC on Unfair Terms In Consumer Contracts [1993] OJ L 95/29

to ensure that consumers waived their right to state justice in a voluntary way and were fully informed of the consequences that arise from arbitration as form of private justice.<sup>104</sup> As a result of such protection, consumers within EU Member States cannot refer their future disputes to arbitration. Redfern and Hunter describe an arbitration clause before disputes arise as ‘a blank cheque, which may be cashed for an unknown amount at a future and as yet unknown date’.<sup>105</sup> They go on to say that: ‘It is hardly surprising that States adopt a more cautious attitude towards allowing future rights to be given away than they do towards the relinquishment of existing rights’.<sup>106</sup> To put it in another way, any person (natural or legal) has the freedom to resort to arbitration to settle their dispute before and after the dispute has arisen. Moreover, anyone considered to be a consumer must have the freedom to go to court unless they expressly agree after the dispute to go to arbitration on a voluntary and fully-informed basis. This is related to the special state and function of the consumer in the contract as the weaker party.

Consequently, the notion of ‘consumer’ is a key concept to provide special protection under subjective arbitrability regarding the arbitration clause internationally as it imposes fundamental standards of rights on a legal relationship between parties. However, there is no clear definition of a consumer internationally<sup>107</sup> because the different legal regimes draw a dividing line between commercial contracts and consumer contracts in different places depending on the legislation involved.<sup>108</sup> Therefore, some definitions of consumer refer to a natural person acting outside a business<sup>109</sup> whilst other

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<sup>104</sup> *Paul Stretfor v Football Association LTD*, [2007] EWCA Civ 238, “where parties have voluntarily or (as some of the cases put it) freely entered into an arbitration agreement they are to be treated as waiving their rights under article 6” para. 45

<sup>105</sup> Alan Redfern and Martin Hunter, *Law and practice of international commercial arbitration: student edition* (3rd edn, Sweet & Maxwell 2003)1-37

<sup>106</sup> The Court of Appeal in the case of *Peter Smith v. Kvaerner*, observed: “...the party waiving should be aware of all the material facts, of the consequences of the choice open to him, and given a fair opportunity to reach an un-pressured decision” [2006] EWCA Civ 242, para. 29

<sup>107</sup> Jonathan Hill, *Cross-Border Consumer Contracts* (Oxford University Press 2008) 3

<sup>108</sup> The Directive 2011/83/EU on Consumer Rights combines the Directive 2005/29/EC, 85/577/EEC and Directive 97/7/EC, in order to standardise the meaning of consumer as : any natural person who, in contracts covered by this Directive, is acting for purposes which are outside his trade, business, craft or profession; On the other hand, Directive 90/314 on package travel, package holidays and package tours contain a very different definition of consumer as: means the person who takes or agrees to take the package (‘the principal contractor’), or any person on whose behalf the principal contractor agrees to purchase the package (‘the other beneficiaries’) or any person to whom the principal contractor or any of the other beneficiaries transfers the package (‘the transferee’).

<sup>109</sup> Such as United Kingdom (England and Wales and Northern Ireland) as cited under the Unfair Terms in Consumer Contracts Regulations 1999(Consumer Protection), Article 3(1)

definitions include the legal person as a consumer,<sup>110</sup> or refer only to the kind of act from the principal purpose of use.<sup>111</sup>

Unsurprisingly, the jurisprudence of the Court of Justice of the European Union (hereafter CJEU) took a firm stand on the possibility of regarding any party or entity as a consumer. In the joined cases of *Idealservice* the Court held that the term ‘consumer’ related only to natural persons and legal persons were excluded. As defined in Article 2(b) of the UTCCD, the term ‘consumer’ must be applied solely to natural persons.<sup>112</sup> Under Article 2(b) of the Directive, a consumer as a natural person is one ‘who is acting for purposes which are outside his trade, business or profession’.<sup>113</sup> In *Patrice Di Pinto* the CJEU used a narrow definition with regard to consumer. The court decided that a legal person does not have any protection as a consumer even when they are in the position of a weaker party.<sup>114</sup> This means that the consumer must be a natural person<sup>115</sup> whereas the business or supplier may be a natural or legal person.

In that regard, the definition of consumer is narrow, in which limit the scope of protection. Such a limitation has been described as ‘an irrational limitation’ to consumer contracts.<sup>116</sup> This is because the rationale for protecting consumers should be to rectify the inequality of bargaining power between economically imbalanced parties, and such an imbalance is much wider between large and small enterprises than between small traders and consumers.<sup>117</sup> In consequence, the concept of consumer should be broader than as defined in EU law as the narrow definition excludes small enterprises, family businesses and non-commercial organizations that may face similar problems from being in the weaker

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<sup>110</sup> Such as United Kingdom (England and Wales and Northern Ireland) as cited under the Arbitration Act 1996, S.90; The same definition also in Belgium, Slovakia, Denmark, Greece, and Austria and Spain, See Hans-W. Micklitz, Jules Stuyck, and Evelyn Terryn, *Cases, Materials and Text on Consumer Law: Ius Commune Casebooks for a Common Law of Europe* (Hart Publishing 2010) 29; Research Group on the Existing EC Private Law, *Contract II— General Provisions, Delivery of Goods, Package Travel and Payment Services*, Principles of the Existing EC Contract Law (Sellier, European Law Publishers 2009) 59

<sup>111</sup> Such as Denmark, Finland and Sweden, See: Margus Kingisepp and Age Värvi, ‘The Notion of Consumer in EU Consumer Acquis and the Consumer Rights Directive — a Significant Change of Paradigm?’ [2011] *Juridica International* XVIII 44–53.

<sup>112</sup> Joined Cases C-541/99 and C-542/99 *Cape Snc v Idealservice Srl and Idealservice MN RE Sas v. OMAI Sri*, ECR [2001] I-09049

<sup>113</sup> The Unfair Terms in Consumer Contracts Directive, Article 2(b); Consumer has also the same definition of consumer under Directive 2011/83/EU on consumer rights [2011] OJ L 304/64, Article 2(2)

<sup>114</sup> Case C-361/89, *Patrice Di Pinto v. France* [1991] I-01189, para.19 and 23

<sup>115</sup> *ibid*, joined Cases C-541/99 and C-542/99; See also Case C-110/14, *Horățiu Ovidiu Costea v. SC Volksbank România SA*, [2015] ECLI:EU:C:2015:271

<sup>116</sup> As Weatherill described it, Geraint G. Howells and Stephen Weatherill, *Consumer protection law* (Ashgate Publishing, Ltd. 2005) 117; however, such a limitation will be analysed in depth in the following Chapter from the party autonomy perspective.

<sup>117</sup> *ibid*.

position when they deal as consumer.<sup>118</sup>

The issue of the narrow definition of consumer finds its echo in the jurisprudence of the CJEU in relation to determining the ‘capacity’ of the consumer. The CJEU adopted the purpose of the contract of a natural person who is acting outside the scope of an economic activity in determining the nature of the consumer ‘capacity’, that is, by objective and not subjective reasons. In other words, the CJEU did not accept the subjective notion of consumer<sup>119</sup> which ignores the protection of the really weak party in the contract.<sup>120</sup> The CJEU stated that:

... in order to determine whether a person has the capacity of a consumer, a concept which must be strictly construed, reference must be made to the position of the person concerned in a particular contract, having regard to the nature and aim of that contract, and not to the subjective situation of the person concerned.<sup>121</sup>

Accordingly, if an imbalance has arisen between parties then specific protective rules would not be applied to protect the weaker party based on the subjective situation but rather the specific protective rules would apply to protect only the natural person who is in the position of the consumer party in the contract. Consequently, the nature and aim of the contract was limited to the application of the specific protective rules ‘[t]o apply only to contracts concluded outside and independently of any trade or professional activity or purpose, whether present or future’.<sup>122</sup> Arguably, it is possible to say here that the definition of consumer as a natural person is a restrictive term. The problem still remains as different factors will also be considered at the international level which include determining the party’s nationality and domicile or place of residence because the consumer is subject to different levels of protection in the various Member States.<sup>123</sup> On the other hand, there is no guarantee that consumers in all Member States will have the same level of protection. Such a determination of the capacity of consumers would require the court and/or the tribunal to establish all the consequences arising under

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<sup>118</sup> This will be discussed in depth in the following chapter, see chapter 4

<sup>119</sup> Pablo Cortes, *Online Dispute Resolution for consumer in the European Union*, vol. 19 (Routledge 2011) 10

<sup>120</sup> Ewoud Hondius, ‘The Notion of Consumer: European Union versus Member States’ (2007) 28 *Sydney Law Review* 89

<sup>121</sup> Case C-269/95, *Francesco Benincasa v. DentalkitSrl*, [1997] ECR, I-3767, para 12

<sup>122</sup> Case C-269/95, [1997], para. 18

<sup>123</sup> Berger, ‘Re-Examining the Arbitration Agreement, Applicable Law Consensus or Confusion?’ (n 88), 331; See also, European Commission, Impact Assessment Report [2008]- accompanying the proposal for a directive on consumer rights, SEC(2008) 2544



national law in order to ensure that such a person is considered a consumer, and as a way to determine the validity of the arbitration clause. It is even more complex to use this objective approach to determine the consumer's capacity (as a weaker party) in international online transactions. Besides, a distinction between physical goods and digitized goods, physical services and digitized services, and physical performance and digitized performance to determine the purpose of the contract may also be required.<sup>124</sup> For example, if a natural person enters into an online contract, it must be determined how the purpose of the contract, whether for personal use or professional activity, would be recognizable to the other contractual partner (the owner of the website). With this in mind, the contract may still give rise to a question about whether a party who may have 'double capacity' (eg buying something for personal consumption as well as for professional use) should receive the same level of protection as a consumer.<sup>125</sup> Protection of the party as a consumer will normally apply whenever the professional interest is not higher than the personal one.<sup>126</sup> However, it is still argued that this kind of protection seems to be based on judicial scrutiny in relation to recognizing whether the natural person should be considered as a consumer in the first place by distinguishing them from those acting in a professional capacity.<sup>127</sup> For that purpose, the nature and purpose of the contract and any other objective circumstances in which the contract was concluded should be taken into consideration by the national court.<sup>128</sup> Subsequently, the national court has to determine on a case-by-case basis not only whether the consumer understood the arbitration clause but also whether they agreed to it voluntarily and in a fully informed way.

To sum up, the validity of an arbitration clause is dependent on an objective approach to determine the consumer's capacity. The objective approach recognizes that the legal capacity of the consumer is limited to a natural person only acting outside a business activity. Consequently, such an objective approach is not certain enough; if the natural person was considered as a professional then they would not enjoy any protection as a consumer even though they are also in the position of the weaker party. This can lead to

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<sup>124</sup> Faye Fangfei Wang, *Law of Electronic Commerce* (Routledge 2010), 131

<sup>125</sup> This issue will be analyzed in depth in the following chapter; See Chapter 4

<sup>126</sup> Christophe Girot, *User Protection in IT Contracts: A Comparative Study of the Protection of the User Against Defective Performance in Information Technology* (Kluwer Law International 2001)78

<sup>127</sup> *ibid.*; Pablo Cortes, *Online Dispute Resolution for consumer in the European Union* (n 119) 12; DG Health and Consumer Protection, Preparatory Work for the Impact Assessment on the Review of the Consumer Acquis/ Analytical Report on the Green Paper on the Review of the Consumer Acquis, submitted by the Consumer Policy Evaluation Consortium, 2007, 53

<sup>128</sup> Case C-464/01, *Johann Gruber v. Bay Wa AG* [2005] ECR I-00439, para 47

unfair and unpredictable outcomes as it can exclude large categories of online consumers when the time comes to determine the conditions to confirm the arbitration agreement/clause under the subjective arbitrability of international online consumers.

### **3.3 The value of disputes as extra protection**

It is difficult to determine consumer capacity in the context of subjective arbitrability without analysing the value of consumer disputes in England and Wales. In order to do this, it must be borne in mind that the purpose of the contract and not the subjective situation of the international online consumer is the main way to determine consumer protection. The approach under jurisprudence of the CJEU in relation to determining the capacity of a consumer under the UTCCD represents an objective approach. However, in cases where the purpose of the contract is not clear, it can be said that there is a gap in the law that is open to abuse.

In the event of international disputes, in England and Wales the Unfair Terms Directive is not a binding instrument when dealing with non-European countries; the national court of law is. The Arbitration Act, mainly sections 89, 90 and 91, governs the arbitration clauses/agreement in consumer contracts. More importantly, section 89 extends the application of the UTCCR<sup>129</sup> to consumer arbitration agreements.<sup>130</sup> It should be noted here that the provisions of the UTCCR have largely been ‘copy-pasted’ from the provisions of the UTCCD.<sup>131</sup> In fact, the UTCCR and UTCCD both impose the same fundamental standards (rights and protections) in consumer contracts regarding the relationship between the consumer and business.<sup>132</sup> Therefore, it is possible to say that the key features of the UTCCR are the same as the UTCCD: the objective approach in establishing or indicating who or what the consumer contract is; and the application of the fairness test to non-individually negotiated terms in consumer contracts.<sup>133</sup>

Section 90 stipulates that the UTCCR rules apply where the consumer is a legal person, not only where the consumer is a natural person.<sup>134</sup> Accordingly, the legal person is

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<sup>129</sup> The Unfair Terms in Consumer Contracts Regulations (Consumer Protection)1999, No. 2083

<sup>130</sup> Arbitration Act 1996, Section 89(1) “The following sections extend the application of the Unfair Terms in Consumer Contracts Regulations 1994” The Unfair Terms in Consumer Contracts Regulations 1994 are revoked by The Unfair Terms in Consumer Contracts Regulation (Consumer Protection)[1999] No. 2083

<sup>131</sup> Council Directive 93/13/EEC on unfair terms in consumer contracts[1993] OJ L 95/29

<sup>132</sup> The Unfair Terms in Consumer Contracts Regulations 1999, section 3(1)

<sup>133</sup> The Unfair Terms in Consumer Contracts Regulations 1999, section 5(1)

<sup>134</sup> Arbitration Act 1996, Section 90 “The Regulations apply where the consumer is a legal person as they apply where the consumer is a natural person.”

protected under Section 90 of the Arbitration Act, and may rely on the UTCCR to avoid the unfair arbitration clause in their contracts. However, the problem here is that the definition of consumer in the UTCCR is a restrictive term, similar to the one under UTCCD, as this applies only where the consumer is ‘a natural person’<sup>135</sup> and is limited to contracts concluded ‘for purposes which are outside his trade, business or profession’.<sup>136</sup> In such a case, the argument here is that the different wording does not provide a clear answer to the legal capacity of a consumer as a legal person, and this issue may raise further questions as to when the consumer is a legal person according to Section 90 of the Arbitration Act.

In order to answer the above questions, this situation has to be extended to B2B relationships as well. The relevant piece of legislation is the Unfair Contract Terms Act 1977 (UCTA)<sup>137</sup> which applies to B2C and B2B contracts. In there, legal persons (i.e. businesses) can be classed as consumers if they are purchasing goods which are ordinarily supplied to a consumer.

Thus, the legal capacity of a consumer, as a special protection, can extend to the latter when it is ‘dealing as a consumer’<sup>138</sup> or acting for purposes outside of its economic activity.<sup>139</sup> For example, in *R & B Customs Brokers Ltd v United Dominions Trust Ltd*,<sup>140</sup> the plaintiff R & B Customs Brokers was a two-man company. They bought a second hand car from United Dominions Trust for the personal and business use of the company’s directors. The car turned out to suffer from a serious leak, which could not be repaired. The Court of Appeal held that the car was not fit for purpose but then had to decide whether the buyer was ‘dealing as a consumer’. The Court of Appeal held that no

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<sup>135</sup> Immaculada Barral-Viñals, ‘E-Consumers and Effective Protection: the Online Dispute Resolution System’ in James Devenney and Mel Kenny (eds), *European Consumer Protection Theory and Practice* (Cambridge University Press 2012) 82; See also Cases C-541/99 and C-542/99[2001]

<sup>136</sup> The Unfair Terms in Consumer Contracts Regulations 1999, Article 3(1); the same definition under Directive 93/13/EEC on unfair terms in consumer contracts, Article 2(b) :“consumer” means any natural person who, in contracts covered by these Regulations, is acting for purposes which are outside his trade, business or profession.

<sup>137</sup> Unfair Contract Terms Act 1977 c.50 (For England, Wales and Northern Ireland)

<sup>138</sup> Unfair Contract Terms Act 1977, Section 12(1) “Dealing as a consumer” (1)A party to a contract “deals as consumer” in relation to another party if : (a)he neither makes the contract in the course of a business nor holds himself out as doing so; and (b)the other party does make the contract in the course of a business; and (c) in the case of a contract governed by the law of sale of goods or hire-purchase, or by section 7 of this Act, the goods passing under or in pursuance of the contract are of a type ordinarily supplied for private use or consumption.

<sup>139</sup> Unfair Contract Terms Act 1977, Section 5(2)(a) “goods are to be regarded as “in consumer use” when a person is using them, or has them in his possession for use, otherwise than exclusively for the purposes of a business”.

<sup>140</sup> *R&B Customs Brokers Ltd v United Dominions Trust Ltd* [1988] 1 WLR 321

sufficient degree of regularity had been shown by the defendant as to establish that the activity was an integral part of the plaintiff's business, and the evidence that the car was the second or third vehicle acquired in the context of this case was not enough. Therefore, the company was 'dealing as a consumer'.

Furthermore, in *Stevenson v Rogers*, the Court of Appeal had given a firm ruling to the effect that any sale by a business is 'in the course of a business'.<sup>141</sup> The Court of Appeal held that the UCTA intended to widen the protection afforded to consumers to include a business purchase based on several factors, including the capacity in which the seller dealt and the nature of the goods involved.<sup>142</sup>

Therefore, it can be said here that if a solicitor was selling off his car or laptop which he no longer needed for his work, he would be selling them 'in the course of a business' even though he was acting for purposes outside of that economic activity.<sup>143</sup> In contrast, if the solicitor was buying the same product (the car or the laptop) by using a company address then the solicitor would be 'dealing as a consumer' according to *R & B Customs Brokers*.<sup>144</sup> However, under Article 3(1) of UTCCR such a person does not enjoy consumer protection from arbitration even when he was 'dealing as a consumer'. Article 3(1) ascribes the term consumer solely to natural persons.

It should be noted that such an interpretation is in the jurisprudence of the CJEU in relation to determining the capacity of a consumer. The CJEU closed the door to the possibility of seeing any legal persons or party as a consumer even when they are acting for purposes not related or conducive to their normal trade or business under UTCCD and EU private international law.<sup>145</sup> Thus, it is still unclear how section 90 of the Arbitration Act would be applied to a legal person when the case law maintains that a legal person is considered as a consumer and so is granted consumer protection only within the meaning of UTCCR.<sup>146</sup> Besides, the protection under UCTA is mainly connected with satisfactory quality or fitness for a particular purpose (private use or

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<sup>141</sup> *Stevenson v Rogers* [1999] 1 All ER 613, See also, L. S. Sealy, When Is a Sale Made "in the Course of a Business"? (1999) 58 The Cambridge Law Journal 276

<sup>142</sup> *ibid*, *Stevenson v Rogers* [1999]

<sup>143</sup> Hans Schulte-Nölke, Christian Twigg-Flesner, and Martin Ebers, *EC Consumer Law Compendium: The Consumer Acquis and its transposition in the Member States* (Sellier European Law publishers 2008) 459

<sup>144</sup> *R&B Customs Brokers Ltd v United Dominions Trust Ltd* [1988] 1 WLR 321

<sup>145</sup> Joined Cases C-541/99 and C-542/99 the court held that "consumer" must be interpreted solely to natural persons, *Cape Snc v Idealservice Srl and Idealservice MN RE Sas v OMAI Sri*, ECR [2001] I-09049

<sup>146</sup> *ibid*. Schulte-Nölke, *EC Consumer Law Compendium*, (n 143) 461

consumption) and does not include protection from arbitration.

Thus, there is an overlap in the definition of consumer in the two pieces of legislation and the protection offered is phrased in different ways. The law in England and Wales has gone even further in protecting consumers from arbitration than the UTCCD. The Guidelines of Unfair Contract Terms in Consumer Contracts Regulations, published by the UK's Office of Fair Trading (OFT)<sup>147</sup> confirms that under section 91 of the Arbitration Act, arbitration clauses in consumer contracts are always and automatically unfair, regardless of circumstances under the UTCCR, if they are to be applied to disputes with a value of no more than £5,000.<sup>148</sup> In addition, the same document states that arbitration clauses may also be unfair even when the disputes involve a value of more than £5000 under the specific circumstances of the UTCCR, for instance, when they are non-negotiated or not fully covered by legal provisions.<sup>149</sup>

It seems that the legislators in England and Wales do not consider arbitration as an adequate means for resolving consumer disputes as the Arbitration Act provides a high threshold value for determining the subjective arbitrability in consumer disputes. Courts in England and Wales focus only on the capacity of the consumer as a natural person when the purchase of luxury goods is above £5,000<sup>150</sup> whereas any claim below the amount of £5,000 in consumer disputes is automatically unfair for and unenforceable against consumers on the basis that a consumer must have access to 'state justice', in this case the small claims court.<sup>151</sup>

From a different angle, the distinction above regarding the value of the disputes can be seen as a degree level between 'sophisticated and unsophisticated parties' in order to determine whether the parties intended to form a contract and what they meant by the terms they used to justify the arbitration clause in consumer contracts. The contract should be above £5,000. However, that does not mean that the arbitration clause cannot be regarded as an unfair clause.<sup>152</sup> From such an angle, it can be said that the court can

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<sup>147</sup> The British Office of Fair Trading is the UK's consumer and competition authority which a non-ministerial government department established by statute in 1973 to make markets work well open, fair and vigorous competition with each other for the consumer's custom.

<sup>148</sup> Office of Fair Trading, Unfair contract terms guidance (Guidance for the Unfair Terms in Consumer Contracts Regulations 1999) [2008], para.17.2

<sup>149</sup> Guidance for the Unfair Terms in Consumer Contracts Regulations 1999, para.17.3

<sup>150</sup> David Collins, 'Compulsory Arbitration Clauses in Domestic and International Consumer Contracts' (2008) 19 King's Law Journal, 335

<sup>151</sup> The small claims court in England and Wales deals with claims of up to £10,000

<sup>152</sup> See Case *Mylcrist Builders Ltd v Buck*, [2008] EWHC 2172 (TCC)

justify the enforcement of an arbitration clause or foreign arbitration award against a business or a ‘sophisticated’ consumer whereas a consumer with a contract for less than £5,000 is considered a weaker party even when they are sophisticated.

It can be argued here that the control exercised upon the arbitrability of consumer disputes, by the value of the contract, does not take into account the need for arbitration internationally which may fulfil a useful function as a dispute resolution mechanism for international online transactions of less than £5,000. This is where the litigation for international claims may be unenforceable and too expensive, even for a sophisticated party. On the other hand, the subjective arbitrability of consumer disputes reflects a consideration of the public policy, and this imposes certain requirements upon the arbitrator and the court. Those requirements, under the Arbitration Act and the UTCCR can be abused by ‘sophisticated’ online consumers when disputes arise but does not protect the ‘real’ weaker party, namely, international online consumers. The interplay between arbitration rules in England and Wales and the EU consumer protection create a highly restrictive approach regarding arbitration clause when used in pre-disputes in international online consumer disputes. However, the protected consumer from arbitration is identified by an objective approach. Indeed, here, any strengths or weaknesses in the objective approach are reflected upon the protection for the weaker party in pre-disputes. The overlap between the European concept of consumer applied in England and Wales under the UTCCR as a natural person, the concept of consumer under the UCTA as a legal person ‘dealing as a consumer, and the EAA which protects both types of consumer – a natural person and a legal person – become significantly more restrictive when it comes to permitting the arbitrability of international online consumer disputes of less than £5,000. This issue will be addressed in-depth in the following chapter.<sup>153</sup>

It is important to keep in mind here that this kind of protection is based on judicial scrutiny that determines the legal capacity of a consumer as a special protection. The legal capacity of a consumer is limited to a natural person only if he/she is acting outside a business activity but there is no guarantee that the same natural person will be protected internationally due to the double capacity issue.

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<sup>153</sup> See Chapter 4

### **3.4 The potential for arbitration costs to act as a barrier to subjective arbitrability of the online consumer**

The Arbitration Act restricts the arbitrability of consumer disputes based on the value of the contract if it is below £5000, and a contract over £5000 is tested by a court as required by the UTCCR to determine whether the arbitration clause is fair to consumers. In contrast, the US Supreme Court encourages consumers to arbitrate their disputes as all sides benefit from arbitration: businesses, consumers and society as a whole.<sup>154</sup> Unsurprisingly, many businesses are using arbitration for consumer disputes within the USA due to benefits such as speed, informality, low-stress environments and the efficiency of reducing legal costs.<sup>155</sup>

Logically, there is no argument about the benefits of arbitration from the business point of view. However, there is a doubt about the arbitration cost as a benefit that reduces legal costs of consumer disputes. Nevertheless, the answer may depend on what type of arbitration and what type of the institution is being used. This issue has been considered in the previous chapter in comparison with litigation.<sup>156</sup> However, the important aspect of the cost of arbitration is to determine the subjective arbitrability where the high cost of arbitration raises difficulties for online consumers and precludes them from arbitrating their claims internationally. This is when the fees for the arbitration may tie consumers into more expensive processes than courts.<sup>157</sup> In this case, the consumer will have no access to justice in cases he could not afford the fees of the exclusive arbitration. Therefore, the question here is, would it be sufficient justification for a court to strike out an exclusive arbitration clause for the mere incapacity of a consumer to pay for their arbitration claim?

The courts in England and Wales would strike out an exclusive arbitration clause, as explained earlier, by making a determination in relation to consumer capacity and the value of the dispute rather than the cost of the arbitration process. This is because the arbitration clause is banned before disputes arise. In contrast, on several occasions the USA courts have struck down the arbitration clause as unconscionable or otherwise

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<sup>154</sup> Joshua T Mandelbaum, 'Stuck in a Bind: Can the Arbitration Fairness Act Solve the Problems of Mandatory Binding Arbitration in the Consumer Context?' (2009) 94 Iowa Law Review 1075–1105

<sup>155</sup> *ibid.*

<sup>156</sup> See Chapter 2, Section 3.1.2

<sup>157</sup> Christopher R. Drahozal and Raymond J. Friel, 'Consumer Arbitration in the European Union and the United States' (2003) 28 N.C.J. Int'l L. & Com. Reg. 356

unenforceable because it might force the consumer to incur the high cost of arbitration,<sup>158</sup> thus preventing consumers from seeking their rights under federal law. In other words, after the disputes arise.

In the event of disputes, the author believes that the cost of arbitration should be considered under the subjective arbitrability of the international online consumer. The Supreme Court in the US also supported this view in the case of *Tony Brower et al v Gateway 2000, Inc.*<sup>159</sup> In this case, the consumer purchased computers and software products from the defendant Gateway 2000 through a direct-sales system (telephone order). Inside the product, Gateway 2000 included an arbitration clause within its standard terms and conditions as follows: ‘The arbitration shall be conducted in accordance with the Rules of Conciliation and Arbitration of the International Chamber of Commerce.’<sup>160</sup> The agreement provided by Gateway 2000 required the consumer to pay in advance a \$4,000 fee, more than the cost of most Gateway products, in addition to a \$2000 registration fee that was non-refundable even if the consumer obtained an arbitration award. The consumers’ counsel estimated that the damages would not exceed \$1,000. The court held that the dispute was arbitrable but the clause substantively unconscionable and thus unenforceable because the arbitration cost of the arbitrator was intended to deter consumers from using the arbitration process due to the high financial cost.<sup>161</sup>

It would seem that consumers can avoid arbitration by showing that the high costs of arbitration are substantively unconscionable as it may exceed the purpose from resort to arbitration. This is especially so if the costs that are borne by the consumers are prohibitive costs which prevent them from accessing arbitration or preclude them from vindicating their federal statutory rights.<sup>162</sup> The US Supreme Court ruled on this point

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<sup>158</sup> *Brower v. Gateway 2000, Inc.*, 676 N.Y.S.2d 569, 573 (App. Div. 1998) (the court noting that excessive cost factor serve to deter consumers from invoking arbitration); See also *Green Tree v. Randolph*, 531 U.S. 79 (2001) (the court held the agreement unenforceable because the agreement was silent with respect to payment of arbitration expense which it posed a risk that Randolph’s ability to vindicate her statutory rights would be undone by “steep” arbitration costs); See also *Mendez v. Palm Harbor Homes*, 45 P.3d 594 (Wash. Ct. App. 2002) (the administrative costs of American Arbitration Association (“AAA”) prohibitively high for the consumer).

<sup>159</sup> *Brower v. Gateway 2000, Inc.*, 676 N.Y.S.2d 569, 573 (App. Div. 1998)

<sup>160</sup> *ibid*

<sup>161</sup> *ibid*

<sup>162</sup> Amy Schmitz, ‘American Exceptionalism in Consumer Arbitration’ (2013) 10 *Loy. U. Chi. Int’l L. Rev.* 82; Richard M. Alderman, ‘Pre-Dispute Mandatory Arbitration in Consumer Contracts: A Call for Reform’ (2002) 5 *Journal of Texas Consumer* 58



in *Green Tree v Randolph*.<sup>163</sup> In this case, Randolph argued that her agreement to arbitrate said nothing about arbitration costs and that she was unable to vindicate her statutory rights in arbitration. She contended that because the agreement was silent in regard to arbitration fees that ‘create[d] a “risk” that she will be required to bear prohibitive arbitration costs if she pursues her claims in an arbitral forum’.<sup>164</sup> The court held that the agreement to arbitrate was unenforceable because the ‘likelihood’ of large arbitration costs could preclude the litigant ‘from effectively vindicating her federal statutory rights’.<sup>165</sup> Even though Randolph had provided information regarding high AAA arbitration fees and costs, it was not clear that she would bear these costs or she could not pay the fees.<sup>166</sup>

As a result, the Supreme Court in the *Green Tree* case provided some direction to create a fair balance between the individual’s ability to pay and the actual costs of arbitration.<sup>167</sup> However, it did not clarify how high the ‘likelihood’ of costs must be to invalidate an arbitration agreement under subjective arbitrability. Therefore, these challenges to prove the inability to pay do not always succeed;<sup>168</sup> the court will apply the case-by-case test to determine the inability to pay the arbitration fees and costs,<sup>169</sup> and whether the cost is so substantial as to deter the consumer from vindicating their statutory rights.<sup>170</sup> However, the Supreme Court has never addressed the issue of the inability to pay the arbitration fees and costs where the arbitration agreement requires consumers to arbitrate outside of their home jurisdictions.<sup>171</sup> This issue is of great importance, from the author’s perspective, as it should be considered a violation of consumer protection policy not only because of the difference in legislative rights but also because a consumer will have no

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<sup>163</sup> *Green Tree Financial Corp.-Ala v. Randolph*, 531 U.S. 79, 92 (2000)

<sup>164</sup> 531 U.S. 79, 92 (2000)

<sup>165</sup> 531 U.S. 79, 92 (2000), para 81

<sup>166</sup> 531 U.S. 79, 92 (2000)

<sup>167</sup> Jennifer L. Peresie, ‘Reducing the presumption of arbitrability’ (2004) 22 *Yale Law & Policy Review* 453

<sup>168</sup> Mark Berger, ‘Arbitration and Arbitrability: Toward an Expectation Model’ (2004) 56 *Baylor L. Rev.* 753; Schmitz, ‘American Exceptionalism in Consumer Arbitration’ (n 162); Peresie, ‘Reducing the presumption of arbitrability’ (n 167)

<sup>169</sup> Richard A. Gerano, Mark B. and Bales, ‘Determining the Proper Standard for Invalidating Arbitration Agreements Based on High Prohibitive Costs: A Discussion on the Varying Applications of the Case-By-Case Rule’ (2012) 14 *Transactions: The Tennessee Journal of Business Law* 57.

<sup>170</sup> See *Bradford v. Rockwell Semiconductor Sys., Inc.*, 238 F.3d 549, 557 (4th Cir. 2001) at 557 the court determined the ability of party to pay the arbitration cost based on the cost impact on the individual party’s situation; See also *Morrison v. Circuit City Stores, Inc.*, 317 F.3d 646, 660 (6th Cir. 2003) at 669 where the court determined the ability of party to pay the arbitration cost based on the cost impact to a similarly situated “group of plaintiffs”.

<sup>171</sup> Schmitz, ‘American Exceptionalism in Consumer Arbitration’ (n 162) 86

other access to justice.<sup>172</sup>

#### ***4. Different approaches to determine the objective arbitrability of the consumer***

Objective arbitrability, unlike subjective arbitrability, aims to impose restrictions and/or limitations upon the subject matter of the disputes that are not capable of being settled by arbitration.<sup>173</sup> It refers the court and the arbitrator to the question of what type of disputes can be submitted to arbitration. Thus, it can be considered as a legal test of disputes wherever the law prevents a particular kind of dispute from being resolved by arbitration but instead the exclusive domain of the court.<sup>174</sup> In this context, objective arbitrability tests the existence of the arbitration agreement and whether it covers a certain type of dispute that is non-arbitrable.<sup>175</sup> On the other hand, it works as a restriction upon parties' autonomy to resolve a particular dispute by arbitration, regardless of the consent between parties.<sup>176</sup> This restriction upon the party autonomy may be justified to the extent that the subject matter of such disputes touches a national or international public policy.<sup>177</sup> The reason for this is because the enforcement of arbitral awards has external public effects more than just between the parties as these may be entangled with public interest or involve public law.<sup>178</sup> As result, the courts often treat the arbitrability as 'public policy' issue where national legal systems restrict generally the parties' right and the arbitrability of their disputes that revolve around the idea of public interest.<sup>179</sup>

With regard to international arbitration, it is important to note that the issue of the subject matter is considered under the New York Convention 1958. Any substantial conflict between the foreign law and the public policy of the enforcement country could lead to a refusal to enforce the award under the subject matter for being non-arbitrable.<sup>180</sup>

In regards to international online consumer disputes, the subject matter of consumer

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<sup>172</sup> This issue will be discussed in depth at chapter 5.

<sup>173</sup> Lew and Marsden, 'Arbitrability' (n 32)

<sup>174</sup> Hörnle, 'Legal Controls on the Use of Arbitration Clause in B2C e-Commerce Contracts' (n 56)

<sup>175</sup> Jonnette Watson Hamilton, 'Pre-Dispute Consumer Arbitration Clauses : Denying Access to Justice ?' (2006) 51 McGill L.J. 693

<sup>176</sup> Greenberg, Kee, and Weeramantry, *International Commercial Arbitration* (n 88), 166

<sup>177</sup> Christoph Liebscher, 'Insolvency and Arbitrability' in Loukas A Mistelis and Stavros Brekoulakis (eds), *Arbitrability: International and Comparative Perspectives* (Kluwer Law International 2009), 165

<sup>178</sup> Youssef, 'The Death of Inarbitrability' (n 46) 50

<sup>179</sup> Shore, 'Defining 'Arbitrability' The United States Vs. the rest of the world.' (n 58)

<sup>180</sup> The New York Convention 1958, Article V

disputes can be submitted to arbitration in principle within both England and Wales and the USA,<sup>181</sup> within the scope of the New York Convention 1958.<sup>182</sup> However, the objective arbitrability of consumer disputes is subject to different, specific conditions. Those conditions relate to the enforcement of the pre-disputes consumer arbitration clause, which turns to the arbitrability issue at different stages in the arbitration procedure.<sup>183</sup> However, there is no international standardized approach to determine arbitrability of consumer disputes and different strategies and policies that reflect on international online consumer disputes.<sup>184</sup> Whereas the underlying approach in England and Wales appears to be in favour of absolute consumer protection, even the essence of its subject is still arbitrable. The intensification of the absolute consumer protection against arbitration is based on the Arbitration Act, which refers to special legal protection for consumers. This special legal protection can be justified under procedural justice that consumers cannot benefit from arbitration without special legal protection against the imbalance in the bargaining power of businesses and consumers.<sup>185</sup> Therefore, it can be said that such an approach is based on the nature and position of the consumer as the weaker party. This is because arbitration is seen as ‘a restriction of consumer’s rights to impose an arbitration scheme as a final remedy’.<sup>186</sup> However, the US approach is different. The protection afforded to the consumer is based on the general law principles of contract with a high degree of respect to the contractual autonomy of all contractual partners, including the consumer. The reasonable grounds for this approach can be justified as well. The FAA considers consumer contracts like any other commercial contract. Furthermore, inequality in bargaining power, merely by itself, is not a sufficient reason to hold the arbitration clause null and void in consumer contracts or to provide the consumer with special legal protection.<sup>187</sup> Therefore, it can be said that arbitration in such

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<sup>181</sup> Hörnle, *Cross-border Internet Dispute Resolution* (n 64), 174

<sup>182</sup> See Chapter 2, subsection 3.3.2

<sup>183</sup> Ronald G. Aronovsky, ‘The Supreme Court and the Future of Arbitration: Towards a Preemptive Federal Arbitration Procedural Paradigm?’ (2012) 42 Sw. L. Rev. 131

<sup>184</sup> Tom Stipanowich, Nancy Welsh, Lisa Blomgren, and Larry Mills, ‘Roundtable on Consumer and Employment Dispute Resolution: Consumer Arbitration Roundtable Summary Report (April 17, 2012)’, 2012 Pepperdine University Legal Studies Research Paper No. 2012/22 Malibu, California

<sup>185</sup> Carbonneau, *Cases and Materials on the Law and Practice of Arbitration* (n 8)19

<sup>186</sup> The Unfair Terms in Consumer Contracts Regulation (Consumer Protection)[1999] No. 2083, Schedule 2 paragraph 1(q) “excluding or hindering the consumer’s right to take legal action or exercise any other legal remedy, particularly by requiring the consumer to take disputes exclusively to arbitration not covered by legal provisions, unduly restricting the evidence available to him or imposing on him a burden of proof which, according to the applicable law, should lie with another party to the contract”.

<sup>187</sup> Reference was made to case *Brower v. Gateway 2000, Inc* , (The court held that the consumer claim did not amount to hold that the arbitration clause is unenforceable because it involved no choice or

an approach is perceived to be in the parties' and society's interest.<sup>188</sup>

Consequently, the different jurisdictions have dealt with such problematic areas with different approaches. The way to understand how the arbitrability of international online consumer can be applied relies on analysing the application of consumer protection rules of each jurisdiction in the study at the national law or inter-state, and regional law levels to examine to what extent each approach is adequate to be applied to international online consumer disputes.

#### **4.1 Overriding arbitration in favour of absolute consumer protection**

As has been mentioned above, the jurisdiction of England and Wales favours absolute protection of consumer. However, the Arbitration Act 1996 is silent on the issue of arbitrability in general. It does not introduce any specific provisions regarding arbitrability in terms of what disputes may or may not be arbitrable. Rubino states that the Arbitration Act has not provided any dividing line between disputes that can be submitted to arbitration and those that cannot, but rather proceeds on a case-by-case basis.<sup>189</sup> On the other hand, the Arbitration Act clarifies that both contractual and non-contractual disputes can be submitted to arbitration<sup>190</sup> and the parties are free to agree to arbitrate their disputes subject only to such safeguards that are necessary in the public interest.<sup>191</sup> In other words, it can be said that disputes arising between parties including international online consumer disputes are generally arbitrable unless they are subject to the public interest. In that regard, consumer disputes are subject to the public interest. The Arbitration Act provides special legal protection for the consumer as a contract partner; such a protection applies whatever the law applicable to the arbitration agreement.<sup>192</sup> The protection rule for consumers under the UTCCR which relates to the arbitration clause is intended to protect consumers as opposed to traders.<sup>193</sup> The rationale for the intervention in favour of consumers revolves around the idea of a lack of information on the part of the consumer

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negotiation and lead to inequality bargaining power between the consumer and the computer company), 676 N.Y.S.2d 569, 575 (1st Dept. 1998).

<sup>188</sup> Carbonneau, Cases and Materials on the Law and Practice of Arbitration, (n 8) 19

<sup>189</sup> Rubino-Sammartano, Mauro, *International Arbitration Law and Practice* (2<sup>nd</sup> edn, Kluwer Law International 2001). 174

<sup>190</sup> The English Arbitration Act 1996, section 6(1)

<sup>191</sup> The English Arbitration Act 1996, section 1(b)

<sup>192</sup> The English Arbitration Act 1996, section 89(3)

<sup>193</sup> David Oughton and John Lowry, *Consumer Law* (2nd edn, Oxford University Press 2000), 15

which puts the consumer in a position of unequal bargaining power. This can be justified by the difficulty that consumers face getting the necessary information.<sup>194</sup> Indeed, this situation appears in pre-disputes arbitration clauses in consumer contracts. In this context, the public interest, arbitration clause is considered, in accordance with Article 5 of the UTCCR, to be one of the ‘non-exhaustive lists of the terms, which may be regarded as unfair’.<sup>195</sup> In this way, the arbitration clause may prevent consumers from enjoying statutory rights of ‘judicial protection’ and ‘access to justice’. Those rights should be guaranteed.

However, it can be argued here that dealing with arbitration as a ‘grey’ clause in international online consumer contracts would leave more room for a different interpretation.<sup>196</sup> This would mean that arbitration clauses could sometimes be prohibited and sometimes legally permitted.<sup>197</sup>

#### **4.1.1 The duty of national courts to determine arbitrability**

In adhesion contracts, mostly online consumer contracts, arbitration clauses are seen as ‘trap’ clauses which restrict consumers’ right to access to justice. Thus, it is likely to be contrary to the requirement of good faith and causes a significant imbalance in the parties’ rights and obligations under the contract.<sup>198</sup> Article 5 of the UTCCR protects consumers from such a ‘trap’ clause and provides protection for consumers against the unfair terms, including the arbitration clause. This is the same protection under Article 3 of the UTCCD which applies to European Member States. In this regard, it is important to state that, within the EU Member States, the jurisprudence of the CJEU emphasizes the protection of the consumer as the weaker party in the contract by requiring the national court to determine the fairness of the arbitration clause. This duty is required even if the consumer

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<sup>194</sup> *ibid.*; see also Joined Cases C-240/98 to C-244/98 *OcéanoGrupoEditorial vs SalvatEditores* [2000] ECR I-4941, para.25; See also Case C-168/05 *Mostaza Claro v Centro MóvilMilenium SL* [2006] E.C.R. I-1042, para. 25

<sup>195</sup> The Regulations on Unfair Terms in Consumer Contracts 1999, Article 5(5) refers to Schedule 2 to this Regulations, which contains “an indicative and non-exhaustive list of the terms which may be regarded as unfair”, Schedule 2 (q) stipulate arbitration clause as one of the clause that may be regarded as unfair.

<sup>196</sup> Hans-w Micklitz, ‘Reforming European Unfair Terms Legislation in Consumer Contracts Marisaria Maugeri’ (2010) 6 *European Review of Contract Law* 1–31

<sup>197</sup> As Article 5(5) of The Regulations on Unfair Terms in Consumer Contracts 1999, mentions that arbitration clause ‘may be regarded as unfair’

<sup>198</sup> The Unfair Terms in Consumer Contracts Regulation 1999, Article 5(1); The Unfair Terms in Consumer Contracts Directive 93/13/EEC, Article 3(1) provides “A contractual term which has not been individually negotiated shall be regarded as unfair if, contrary to the requirement of good faith, it causes a significant imbalance in the parties’ rights and obligations arising under the contract, to the detriment of the consumer.”

has not raised such an issue. The court has to ensure that the consumer waiver of his right was done on a voluntary and fully informed basis. The CJEU in *Mostaza*<sup>199</sup> decided that:

[T]he power of the national court has been regarded as necessary for ensuring that the consumer enjoys effective protection ... that the Directive must be interpreted as meaning that a national court must determine whether the arbitration agreement is void and annul that award where that agreement contains an unfair term, even though the consumer has not pleaded that invalidity in the course of the arbitration proceedings.<sup>200</sup>

As a consequence, it can be said that the existence of arbitration in a consumer contract whether a clause, agreement or an award, is always subject to the possibility of being voided and annulled in the event of a consumer dispute.<sup>201</sup> Indeed, this is a high level of protection based only on the characteristics of the consumer as a weaker party that suffers from unfair terms due to the lack of information and/or having to accept non-negotiated terms.<sup>202</sup> However, neither the UTCCD nor UTCCR have made any distinction regarding the Internet as a special jurisdiction for international consumer disputes with countries outside the EU Member States. From a conflict of laws perspective, the matter becomes more complex internationally.<sup>203</sup> Therefore, the questions here are: What is the standard approach for a national court to determine that the arbitration clause, agreement or award is voided and annulled? Does the arbitration as an unfair term apply the same for all online consumers in both domestic and international transactions? To the extent that the answer is no, would this not undermine party autonomy and the effectiveness of arbitration awards at the international level? This will be illustrated in the following two sections.

#### **4.1.2 For national online consumer disputes**

As it has been stated above, the UTCCR refers to the arbitration clause as a 'grey' clause, in which potentially unfair terms in consumer contracts would lead to different interpretation. As a result, the national court, in the event of disputes, is required to determine the fairness of an arbitration clause. The test is conducted in order to provide

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<sup>199</sup> Case C-168/05, *Mostaza Claro v Centro Móvil Milenium SL* [2006] E.C.R. I-10421, para.39

<sup>200</sup> Case C-168/05 [2006] E.C.R. I-10421, [emphasis added]

<sup>201</sup> Case C-168/05, [2006] E.C.R. I-10421

<sup>202</sup> Howells and Weatherill, *Consumer protection law* (n 116) 262; Hew R. Dundas, 'Recent Developments in English Arbitration Law : Arbitrations Involving Consumers , Whether to Hold a Hearing , Enforcement of Foreign Awards and a Postscript' (2009) 75 *Arbitration* 115

<sup>203</sup> Factors such as the place of concluding the contract and the place of arbitration are considered as challenging issue in determining the applicable law to provide consumer protection; this will be argued in depth in Chapter 5.

a higher level of protection from such a ‘trap’ clause. This can be seen clearly in paragraph 1(q) of Schedule 2 of the UTCCR where an arbitration clause is considered an unfair term when it excludes or hinders ‘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’.<sup>204</sup>

In other words, the arbitration clause is a ‘trap’ clause as it excludes the right to access ‘state justice’. However, the phrase ‘arbitration not covered by legal provisions’ is not entirely clear and can lead to multiple interpretations. Hornle reaches the conclusion that such a phrase could refer to the applicable law of the arbitration or could refer to the arbitrator who does not base his/her decision on strict law.<sup>205</sup> It could also refer to every arbitration requirement in order for arbitration to go forward effectively. In the event of disputes, such a legal aspect may turn into an arbitrability issue in different fora and at different stages of the arbitration proceedings, whether pre or post award stage. Thus, the legal provisions are extremely important in order to re-examine the issue of the existence and validity and to provide a dividing line between arbitration and court ‘private and state justice’ in favour of consumers. For example, an arbitration clause in favour of consumers should include in its legal provisions legal information regarding the third party (single arbitrator or more), the cost of arbitration and the right to appeal as well as the place of arbitration and the applicable law. In England and Wales, in *Mylcryst Builders Limited v Mrs. G Buck*,<sup>206</sup> Mr. Justice Ramsey spoke in favour of this notion when he commented that the phrase ‘arbitration not covered by legal provisions’ applies where there is a statutory arbitration requirement. It does not apply to arbitration generally.<sup>207</sup> In this case, the statutory arbitration requirement was in a box at the end of the letter for completion by Mrs Buck. The box referred to the terms and conditions on the first page of the contract which included a provision concerning an arbitration clause. Justice Ramsey invalidated the arbitration clause under the UTCCR and held that the arbitration clause was unenforceable because it should be more than just a box in the contract that listed all the terms. Otherwise, the tribunal would lack the substantive jurisdiction to make that award. On this basis, Justice Ramsey stated that:

[T]he impact of the arbitration clause would not be apparent to a layperson ...

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<sup>204</sup> The Unfair Terms in Consumer Contracts Regulations 1999, Schedule 2, paragraph 1(q)

<sup>205</sup> Hörnle, ‘Legal Controls on the Use of Arbitration Clause in B2C e-Commerce Contracts’ (n 56)

<sup>206</sup> *Mylcryst Builders Ltd v Buck*, [2008] EWHC 2172 (TCC),

<sup>207</sup> *ibid*, para.54

The requirement of fair and open dealing means that for consumer transactions the arbitration clause and its effect need to be more fully, clearly and prominently set out than it was in this case.<sup>208</sup>

It can be understood that an arbitration clause must be clear to the consumer as a layperson in order to enforce an arbitration award against him. Thus, in the event of disputes, the purpose in protecting consumers is based on the characteristics of the consumer as a layperson who suffers from a lack of information and must accept non-negotiated terms.<sup>209</sup> Although this may be true regarding online consumers (natural persons), he/she may not have the ability to acquire the necessary information to be at the same level as the supplier. Hence, where the contract terms lack information and/or are non-negotiated, those terms need to be considered as ‘unfair terms’ internationally.

On one hand, the above situation can be applied to all online contract in the context of adhesion contracts whether the layperson consider as consumer or not. On the other hand, it can be argued that an arbitration clause is fair and there is no imbalance between the parties. In other words, the consumer is not always in an unequal bargaining position. If the terms were transparent and made prominent by the seller in plain, intelligible language without doubt of the meaning, if they were legible and readily available<sup>210</sup> to a level that the consumer was aware of them and able to take them voluntarily into account in their decision to buy a product without lack of legal information then they would have a choice to object to their inclusion.<sup>211</sup> It could be argued that the law should seek to protect only consumers who are not ‘reasonably well informed, reasonably observant and circumspect’<sup>212</sup> based on the idea of protecting the weaker party. This different treatment is justified by evidence of the imbalance between the parties.<sup>213</sup>

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<sup>208</sup> *ibid*, para.56

<sup>209</sup> Howells and Weatherill, *Consumer protection law* (n 116) 262; Dundas, ‘Recent Developments in English Arbitration Law : Arbitrations Involving Consumers , Whether to Hold a Hearing , Enforcement of Foreign Awards and a Postscript’ (n 202)

<sup>210</sup> In the explanatory note of article 6 of The Unfair Terms in Consumer Contracts Regulations 1999; “[T]he assessment of unfairness will take into account all the circumstances attending the conclusion of the contract. However, the assessment is not to relate to the definition of the main subject matter of the contract... as long as the terms concerned are in plain, intelligible language”; See also article 7 (1) of the same Regulation “A seller or supplier shall ensure that any written term of a contract is expressed in plain, intelligible language”.

<sup>211</sup> See Department for Business Enterprise and Regulatory Reform (BERR), ‘Summary of Responses Consumer Law Review : Call for Evidence Summary of Responses Contents’ [July 2009], para. 129

<sup>212</sup> Case C-210/96, *Gut Springenheide GmbH and Rudolf Tusky v Oberkreisdirektor des Kreises Steinfurt - Amt für Lebensmittelüberwachung*, [1998] ECR I-4657.

<sup>213</sup> Barral-Viñals, ‘E-Consumers and Effective Protection: the Online Dispute Resolution System’ (n 135) 87



Under those circumstances, in accordance with the UTCCR, the fairness of the arbitration clause in England and Wales often involves two requirements against which the consumer contract should be tested: first, whether there is an absence of good faith about ‘fair and open dealing’<sup>214</sup> as a business should not take advantage of the unfamiliarity of consumers with the subject matter;<sup>215</sup> second, whether it causes a significant imbalance – this was described in *Director General of Fair Trading v First National Bank* as ‘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’.<sup>216</sup> It is equally important to mention that Lord Millet in the same case held that it can be more than just one single test of good faith to determine a significant imbalance, it may also be necessary to assess from a practical standpoint by asking if the terms were drawn to the consumer’s attention and whether the consumer would have been surprised by the arbitration clause or would have accepted it.<sup>217</sup> In other words, if a variety of terms and information have been given to the consumer before they accept the contract in fair and open dealing then at that time there is no significant imbalance between the parties.

In English contract law, there is no legal principle of good faith.<sup>218</sup> The concept of good faith, although literally copied from the UTCCD, is nevertheless misleading about a number of definitions including ‘consumer’ and ‘unfair’. Hence, this will give rise to considerable uncertainty<sup>219</sup> due to a lack of clarity.<sup>220</sup>

Nevertheless, the Arbitration Act restricts the arbitration clause in consumer contract as unfair clause where the contract value is below a certain amount (£5,000)<sup>221</sup> even though

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<sup>214</sup> Schedule 2 of the Unfair Terms in Consumer Contracts Regulations 1999 (UTCCR) provides: "In making an assessment of good faith, regard shall be had in particular to: (a) the strength of the bargaining positions of the parties; (b) whether the consumer had an inducement to agree to the term; (c) whether the goods or services were sold or supplied to the special order of the consumer, and (d) the extent to which the seller or supplier has dealt fairly and equitably with the consumer."; See also Andrew Burrows, *A Casebook on Contract*, - Second Edition (Hart Publishing 2007), 298

<sup>215</sup> *ibid*

<sup>216</sup> *Director General of Fair trading v First National Bank*, [2001] UKHL 52; see also: *UK Housing Alliance (North West) Ltd v Francis* [2010] EWCA Civ 117.

<sup>217</sup> *ibid*, [2001] UKHL 52

<sup>218</sup> Chitty, Joseph. *Chitty on Contracts*, 31st edition volume 1, section 1-39

<sup>219</sup> Ewan Mckendrick, *Contract Law* (10th edn, Palgrave Macmillan 2013) 306

<sup>220</sup> This issue will be addressed in depth in the following Chapter 4; however, it is equally important to mention here that, the Law Commission and the Scottish Law Commission have recently suggested that the UTCCR should not be copy out but should be rewritten in a clear way using concepts and language that more likely to be understood by readers whether consumer or suppliers, See The Law Commission and the Scottish Law Commission, *Unfair Terms in Consumer Contract Unfair: a new approach?* (2012), para 9.51; See also: *Terms in contract* (2005) Law Com No.292; Scot Law Com No.199, para 3.116

<sup>221</sup> Unfair Arbitration Agreements (Specified Amount) Order 1999 (SI 1999/2167)

they expressly agree to arbitrate in full awareness. From the author's perspective, such limitation is in favour of consumer protection by holding the objective arbitrability of consumer disputes where the value of disputes is below £5,000 has to be within the exclusive jurisdiction of national courts of consumers, ie those of England and Wales.

#### **4.1.3 For international online consumer disputes**

This subsection can begin by continuing where the previous subsection ended. The UTCCR is not very clear and this may lead to different interpretations. The Arbitration Act considers that any arbitration clause in a consumer contract under £5,000 is an unfair clause. The application of the protection rules of unfair arbitration (clause and/or agreement) is still questionable in international online consumer disputes. The high threshold value for determining the subject matter of arbitrability in consumer disputes can be a point of dispute as a procedure and substantial issue. The value of disputes as extra protection for determining the legal validity of the arbitration clause is not available in any other country.<sup>222</sup> Thus, the application of this rule may conflict with the standard of consumer protection policy internationally. Therefore, it can be assumed that the UTCCR does not necessarily apply to arbitration in international online consumer contracts.<sup>223</sup>

However, in cases where an international online consumer manages to establish the jurisdiction of the courts in England and Wales, the considerations that should be taken into account when addressing the objective arbitrability are no different from national online consumer disputes. Nevertheless, an important distinction from a conflict of laws perspective has to be made clear here in regard to international online consumer disputes between EU Member States and non-EU Member States.

For EU Member States, arguably, such a protection could be better achieved. The Rome I Regulation applies to those who are parties to the Rome Convention. Article 5(2) of the Convention provides that the mandatory consumer protection law of the consumer's country of residence applies if the contract was preceded by advertising or a specific invitation in the consumer's country of residence and the consumer took the steps to

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<sup>222</sup> Bělohávek, 'Autonomy in B2C Arbitration: Is the European Model of Consumer Protection Really Adequate?' (n 75)

<sup>223</sup> Khalil Mechantaf, 'Balancing protection and autonomy in consumer arbitrations: an international perspective' (n 75)

conclude the contract.<sup>224</sup> Thus, the contract has to be a consequence of a proposal or advertisement specially directed to the consumer and the conclusion of the contract in the country of the consumer. However, Articles 6(1)(a),(b) of the Rome I Regulation applies the mandatory consumer protection law of the consumer's country of residence if the supplier directs its activities to the consumer's country of residence by any means.<sup>225</sup> In other words, the protection under the Rome Convention apply if the business target the consumer as an individual, while the Rome I Regulation provide the protection if the business target the country where the consumer habitually resides.<sup>226</sup>

In such case, a choice of law in a consumer contract should not deprive the consumer of the protection afforded to him by the law of the country in which he has his habitual residence.<sup>227</sup> However, such a choice of law in international online consumer contracts is often represented by the business under the choice of law clause and mainly refers to his country. This means that the express choice of law under the principle of party autonomy, which the arbitrators will uphold, might completely deprive an online consumer from the protection awarded to him under the law of his country of domicile. It should be noted, however, that the rule of party autonomy is not without its limits. This is to prevent it from being abused in cases such as online consumer disputes that are repugnant to public policy. Therefore, the Rome I Regulation (The Rome Convention), which forbids parties from choosing the law (choice of law clause), can result in depriving the consumer from the protection afforded to him by the law of the country of his habitual residence.<sup>228</sup> However, in this context, the consumer protection rules refer to a consumer's place of residence<sup>229</sup> whereas a consumer may have more than one residence at the same time.

For non-EU Member States such as the USA, the New York Convention 1958 governs the arbitration agreements of international consumer disputes. The New York Convention

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<sup>224</sup> The Rome Convention 1980 Article 5(2), "if in that country the conclusion of the contract was preceded by a specific invitation addressed to him or by advertising, and he had taken in that country all the steps necessary on his part for the conclusion of the contract"

<sup>225</sup> The Rome I Regulation, Article, 6(1) "(a)pursues his commercial or professional activities in the country where the consumer has his habitual residence, or (b)by any means, directs such activities to that country or to several countries including that country"

<sup>226</sup> Lorna E Gillies, 'Choice-Of-Law Rules For Electronic Consumer Contracts: Replacement Of The Rome Convention By The Rome I Regulation' (2007) 3 J. Priv. Int'l L 89

<sup>227</sup> Giuliano, Mario and Lagarde, Paul, Report on the Convention on the law applicable to contractual obligations, (1980) Official Journal C 282, 31 October 1980.

<sup>228</sup> The Rome I Regulation ,Article 6 (2) states : "... such a choice may not, however, have the result of depriving the consumer of the protection afforded to him..."

<sup>229</sup> The Rome I Regulation, Article 6 (1) states: "[a] contract concluded by consumer .... a shall be governed by the law of the country where the consumer has his habitual residence"

contains uniform substantive rules. Article II(1) states that: ‘Each Contracting State shall recognize an agreement in writing under which the parties undertake to submit to arbitration’. Article II(2) specifies that the term ‘agreement in writing’ means an arbitral clause in a contract and/or an arbitration agreement.<sup>230</sup> This suggests that any arbitration agreement that fulfils those rules of the New York Convention must be enforced by the court of a contracting state.<sup>231</sup> However, national courts in England and Wales will make such determinations pursuant to its own rules, including by considering the UTCCR. It can be argued that an international consumer dispute involving an arbitration agreement that meets the form requirements of the New York Convention is not affected by the application of the UTCCR where the consumer did not raise such an objection.<sup>232</sup>

Nevertheless, within the EU, the CJEU tilted the balance in favour of absolute consumer protection by increasing obligations of Member State courts to assess, on its own motion, whether an arbitration clause is fair or unfair.<sup>233</sup> In addition, the CJEU rendered its decision in *Eco Swiss* that a national court must annul arbitral awards that fail to ‘observe national rules of public policy’.<sup>234</sup> The CJEU supported this conclusion in *Maria Cristina* where it held that:

[A]rticle 6 of the directive must be regarded as a provision of equal standing to national rules which rank, within the domestic legal system, as rules of public policy... the national court is required, in accordance with domestic rules of procedure, to assess of its own motion whether an arbitration clause is in conflict with domestic rules of public policy,... in the light of Article 6 of that directive, where it has available to it the legal and factual elements necessary for that task.<sup>235</sup>

It can be said that the UTCCR falls within the meaning of public policy. Thus, any agreements or decisions involving unfair contractual terms are prohibited by the Arbitration Act pursuant to the rules of the UTCCR as these are non-arbitrable as a matter

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<sup>230</sup> The New York Convention 1958, Article II (2) “The term “agreement in writing” shall include an arbitral clause in a contract or an arbitration agreement, signed by the parties or contained in an exchange of letters or telegrams”.

<sup>231</sup> *ibid*, Report on the Convention (n 227)

<sup>232</sup> Mechantaf, ‘Balancing protection and autonomy in consumer arbitrations : an international perspective’ (n 75) See also Hossein Abedian, ‘Judicial Review of Arbitral Awards in International Arbitration – A Case for an Efficient System of Judicial Review’ (2011) 28 *Journal of International Arbitration* 553–590

<sup>233</sup> M Piers, ‘Consumer arbitration in the EU: a forced marriage with incompatible expectations’ (2011) 2 *Journal of International Dispute Settlement* 209–230; See also Hans-W. Micklitz, N. Reich, and P. Rott, *Understanding EU Consumer Law* (Intersentia 2009), 46; See also: Case C-168/05 *Elisa María Mostaza Claro v. Centro Móvil Milenium SL* [2006], ECR, I-10421, para. 38

<sup>234</sup> Case C-126/97, *Eco Swiss China Time Ltd v Benetton International NV* [1999] E.C.R. I-3055, para.37 and 41.

<sup>235</sup> Case C- 40/08, *Asturcom Telecomunicaciones SL v. Maria Cristina Rodríguez Nogueira* [2009], E.C.R. I-09579, para. 52 and 53

of public policy and Community law. Consequently, the international arbitration agreement or award against a consumer that involves an unfair contractual term is not enforceable within England and Wales. This is because it also falls within the meaning of Article V(2)(b) of the New York Convention ‘where the recognition or enforcement of the award would be contrary to the public policy of the country where such recognition and enforcement are sought’.

#### **4.2 Overriding consumer protection in favour of federal arbitration**

The FAA<sup>236</sup> is also silent in regard to arbitrability. However, within the US, arbitration is recognized as being as effective as court proceedings in adjudicating commercial disputes.<sup>237</sup> Furthermore, arbitration works in the interests of parties and society as an alternative to state court proceedings when it is an accessible and affordable forum.<sup>238</sup> Therefore, the legislators and judges consider arbitration to be capable of dealing with consumer disputes even if there is a difference in bargaining power.<sup>239</sup> The US Supreme Court in the case of *Moses H Cone Memorial Hospital v Mercury Construction* declared this as a national policy favouring arbitration. In this case, Justice Brennan confirmed that:

[Q]uestions of arbitrability must be addressed with a healthy regard for the federal policy favouring arbitration ... any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration whether the problem at hand is the construction of the contract language itself or an allegation of waiver, delay, or a like defense to arbitrability.<sup>240</sup>

Under the FAA,<sup>241</sup> there are only two limitations on the arbitrability of disputes to enforce arbitration provisions between parties: the agreement has to be for a commercial transaction and must be in writing. Section 2 states that:

A written provision in any maritime transaction or a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction, or the refusal to perform the whole or

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<sup>236</sup> United States Arbitration Act of 1925, ch. 213, 43 Stat. 883 (1925) (codified at 9 U.S.C. §§ 1– 16 (2006))

<sup>237</sup> Carbonneau, *Cases and Materials on the Law and Practice of Arbitration* (n 8) 19

<sup>238</sup> Hörnle, ‘Legal Controls on the Use of Arbitration Clause in B2C e-Commerce Contracts’ (n 56)

<sup>239</sup> Donna M Bates, ‘A Consumer ’ s Dream or Pandora ’ s Box : Is Arbitration a Viable Option for Cross-Border Consumer Disputes ?’ (2003) 27 *The Fordham International Law Journal*, p. 823. See eg, *Brower v. Gateway 2000, Inc.*, 676 N.Y.S.2d 569, 575 (1st Dept. 1998); See also: *Gilmer v. Interstate/Johnson Lane Corp.* “[m]ere inequality in bargaining power, however, is not a sufficient reason to hold that arbitration agreements are never enforceable in the employment context.” 90-18, 500 U.S. 20 (1991), para. 33

<sup>240</sup> See *Moses H. Cone Memorial Hospital v Mercury Construction*, 460 US 1 (1983)

<sup>241</sup> United States Arbitration Act 1925, ch. 213, 43 Stat. 883 (1925) (codified at 9 U.S.C. §§ 1– 16 (2006))

any part thereof, or an agreement in writing to submit to arbitration an existing controversy arising out of such a contract, transaction, or refusal, shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.<sup>242</sup>

Under the FAA, the enforceability of commercial arbitration needs an agreement in writing.<sup>243</sup> This gave arbitration nearly an ultimate enforcement power. Hence, an arbitration agreement and/or clause which includes B2C transactions is considered a valid clause and likely to be enforceable as it is governed under the ordinary contract law rules because the meaning of the word ‘commerce’ within the FAA includes consumer transactions.<sup>244</sup> Furthermore, the FAA was not only created for international use; it applies to any contract ‘involving commerce’<sup>245</sup> whether they are ‘among several States or with foreign nations’.<sup>246</sup> In *Allied Bruce Terminix Companies v Dobson* the Supreme Court extended the FAA and arbitration clauses in consumer adhesion contracts by interpreting the phrase ‘involving commerce’ as broader, covering more than ‘only persons or activities ... to include (the generation of goods and services for interstate markets and their transport and distribution to the consumer)’<sup>247, 248</sup>

Breyer justifies the extension of the arbitration scope (clause) to B2C adhesion contracts by relying on the economic benefits of arbitration, which is a helpful tool for avoiding expense and delay in the complicated process of litigation as arbitration is usually cheaper and faster than litigation.<sup>249</sup> He also asserted that ‘[w]e agree that Congress, when enacting this law [FAA], had the needs of consumers, as well as others, in mind’.<sup>250</sup> On this, McGill argues that consumer protection has been ignored in favour of arbitration,<sup>251</sup> and there is a misinterpretation of commercial arbitration policy when it ignores

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<sup>242</sup> Federal Arbitration Act 1925, Section 2

<sup>243</sup> Case *Southland Corp v Keating* “We discern only two limitations on the enforceability of arbitration provisions governed by the Federal Arbitration Act: they must be part of a written maritime contract or a contract —evidencing a transaction involving commerce and such clauses may be revoked upon —grounds as exist at law or in equity for the revocation of any contract. We see nothing in the Act indicating that the broad principle of enforceability is subject to any additional limitations.” Case *Southland Corp v Keating*, 465 US 1, 11 (1984)

<sup>244</sup> F. Paul Bland, Jr., Michael J. Quirk, Kate Gordon, and Jonathan Sheldon, *Consumer Arbitration Agreements: Enforceability and Other Topics*, (4th edn, NCLC, Boston, 2004), 11.

<sup>245</sup> Federal Arbitration Act 1925, Section 2

<sup>246</sup> Federal Arbitration Act 1925, Section 1

<sup>247</sup> *United States v. American Building Maintenance Industries*, 422 U. S. 271, 276 (1975) (quoting *Gulf Oil Corp. v. Copp Paving Co.*, 419 U. S. 186, 195 (1974)); *FTC v. Bunte Brothers, Inc.*, 312 U. S. 349, 351 (1941).

<sup>248</sup> *Allied Bruce Terminix Companies v. Dobson*, 513 US 265 (1995)

<sup>249</sup> 513 US 265 (1995)

<sup>250</sup> 513 US 265 (1995)

<sup>251</sup> McGill, ‘Consumer Arbitration Clause Enforcement: A Balanced Legislative Response’ (n 79)

consumer protection principles and the realities of the consumer environment in the age of global trade and e-commerce.<sup>252</sup> Nonetheless, in rejecting this argument, the Washington Supreme Court described the policy underlying the FAA as follows: ‘Congress simply require us to put arbitration clause on the same footing as other contracts, not to make them the special favorites of the law’.<sup>253</sup> Therefore, the FAA favours arbitration, not exculpation; arbitration can be a perfectly appropriate place for individuals to vindicate federal statutory rights.<sup>254</sup> In addition, the doctrine of unconscionability is a contract law defense against any unfair contractual term.<sup>255</sup> It originated in US common law of contract as applied to sale of goods contracts.<sup>256</sup> Such an approach is not based on the nature of the consumer but on whether the position of a consumer is as the weaker party in the contract or not. Therefore, consumers are protected against a lack of assent,<sup>257</sup> lack of consideration<sup>258</sup> and fraud.<sup>259</sup>

#### **4.2.1 Federal policy favouring arbitration vs. consumer protection of state law**

There is a very different perspective between states in regard to the arbitrability of consumer disputes but as the US Supreme Court declared in *Southland Corp v Keating* that the FAA should take preference over the special law of individual states.<sup>260</sup> Arbitration clause in a consumer contract is enforceable under the FAA.<sup>261</sup> On the other hand, the courts of some states argue that under the unconscionability doctrine, an arbitration clause in a consumer contract should be unenforceable and void in consumer contracts whereas arbitration is heavily weighted in favour of those who have superior bargaining power and deprive consumers of their statutory rights. The California Court states that in ‘[S]ection 2 of the Federal Arbitration Act ... it is well-established that unconscionability is a generally applicable contract defense, which may render an arbitration provision unenforceable’.<sup>262</sup> Therefore, it declared under the California

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<sup>252</sup> *ibid.*

<sup>253</sup> *Scott, et al v. Cingular Wireless xx*, 160 WASH.2D 843 (2007), para.23

<sup>254</sup> 160 WASH.2D 843 (2007), para 25

<sup>255</sup> Christopher R Drahozal and John M Rounds, ‘Private Regulation of Consumer Arbitration’ [2011] *Tenn. L. Rev.* 79 (2011): 289

<sup>256</sup> Under the Second Restatement of Contracts; Section 2-302 of the Uniform Commercial Code

<sup>257</sup> *Badie v. Bank of America*, 79 Cal. Rptr. 2d 273, 289 (Cal. App. 1998)

<sup>258</sup> *Gibson v. Neighborhood Health Clinics, Inc.*, 121 F.3d 1126, 1131 (1997)

<sup>259</sup> *Engalla v. Permanente Medical Group, Inc.*, 938 P.2d 903, 908 (Cal. 1997)

<sup>260</sup> *Southland Corp v Keating*, 465 US 1, 11 (1984)

<sup>261</sup> 160 WASH.2D 843 (2007), “There is a clear split of authority”, para. 8

<sup>262</sup> 160 WASH.2D 843 (2007)

Consumer Legal Remedies Act that, where an arbitration clause deprives consumers of any statutory or common law right, said clause is contrary to the public policy and shall be unenforceable and void.<sup>263</sup>

The California courts use a three-part test set out in *Discover Bank v Superior Court of Los Angeles*<sup>264</sup> to determine unconscionability, but only when the arbitration clause or arbitration agreement deprives consumers of their statutory rights: (1) whether the consumer contract is one of adhesion; (2) whether the contract involves disputes of ‘predictably [...] small amounts of damages’; and (3) whether the alleged intent of the contract is to permit the company to cheat large numbers of consumers out of individually small sums of money.<sup>265</sup> Therefore, under California law, an arbitration clause in a consumer contract is unenforceable due to unconscionability. However, also under California law, *Discover Bank* is itself one of the best examples that clarifies the varied perspective of the unconscionability doctrine in regard to consumer disputes. This case concerns the validity of a provision in an arbitration agreement between Discover Bank and a credit card holder. The arbitration agreement between them had a Delaware choice-of-law provision. The credit card holder was a California resident. He agreed to individually arbitrate any disputes and waive the right to bring a class arbitration.<sup>266</sup> The trial court ruled that the class arbitration waiver was unconscionable. The Court of Appeal reversed the trial court decision because it violated the FAA and held that class arbitration waiver may be unconscionable under California law but the FAA pre-empts the state law rule and, moreover, the arbitration agreement contained a choice-of-law clause providing for the application of Delaware and federal law. The Supreme Court of California in turn reversed the decision of the Court of Appeal in regard to the unconscionability issue because it violated the public policy of the state under the California Consumer Legal Remedies Act, but remanded to the Court of Appeal to decide the choice-of-law issue as

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<sup>263</sup> The California Consumers Legal Remedies Act, Cal. Civ.Code §§ 1750-1784.

<sup>264</sup> *Discover Bank v. Superior Court of Los Angeles* 36 Cal.4th 148, 30 Cal.Rptr.3d 76, 113 P.3d 1100 (Cal.2005).

<sup>265</sup> *Shroyer v. New Cingular Wireless Servs., Inc.*, 498 F.3d 979,983 (9<sup>th</sup> Circuit 2007)

<sup>266</sup> Class arbitration is an alternative to a class action lawsuit in which a group of plaintiffs settles its differences with a defendant in the form of arbitration. In other word, there are for any claims where there are multiple parties or Claimants to the same cause of action. However, class arbitration is less common than class action lawsuits, but, both of these class actions most often go to court, where a judge or jury determines that the class of people is appropriate to join together and a judge decides what, if anything, the company has to pay. In UK has also (Group litigation orders) since 2000, it is provided for the case management of claims which give rise to common or related issues of fact or law between multiple parties or Claimants. See, Gabrielle Nater-Bass, ‘Class Action Arbitration: A New Challenge?’ (2009) 27 ASA Bulletin 671



to whether California or Delaware should apply. The Court of Appeal, in doing so, applied Delaware law and held that the arbitration clause was not unconscionable but in fact enforceable under Delaware law.<sup>267</sup>

In 2011 the US Supreme Court in *AT&T Mobility LLC v Concepcion*<sup>268</sup> had a substantial impact when it upheld the ability of business companies to use arbitration clauses in consumer contracts, which effectively eliminated the ability of many consumers to litigate.<sup>269</sup> In this case, Vincent and Liza Concepcion were charged \$30 for sales tax on a free phone contract even though AT&T Mobility had advertised it as a free phone contract. Therefore, AT&T Mobility had engaged in false advertising and fraud by charging sales tax on a free phone. AT&T moved to compel arbitration under the pre-dispute arbitration clause in its contract with the Concepcions, requiring consumers to arbitrate their claims individually. They challenged that arbitration under California law was unenforceable and unlawful. Both the district court and the Ninth Circuit found arbitration to be unenforceable, relying on the California Supreme Court's decision in *Discover Bank* test, in particular, 'cheat[ing] large numbers of consumers out of individually small sums of money'.<sup>270</sup> However, the US Supreme Court ruled that the FAA policy favouring arbitration pre-empted California's *Discover Bank* test which made the arbitration clause unenforceable in many consumer contracts.<sup>271</sup> According to Justice Scalia who delivered the opinion of the Court: 'States cannot require a procedure that is inconsistent with the FAA even if it is desirable for unrelated reasons.'<sup>272</sup>

The consequences of this case made the arbitration clause enforceable in many consumer contracts as well as ruling that FAA's liberal policy favouring arbitration pre-empted the public policy of the states. In other words, under the FAA California must enforce arbitration agreements even when the California Consumer Legal Remedies Act deems that any waiver by an arbitration clause or agreements in a consumer contract are contrary to public policy and thus unenforceable.

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<sup>267</sup> *Discover Bank v. Superior Court*, 36 Cal.Rptr.3d 456 (2005)

<sup>268</sup> *AT&T Mobility LLC v. Concepcion*, 584 F. 3d 849, reversed and remanded(2011)

<sup>269</sup> Alan S. Kaplinsky, Mark J. Levin, and Martin C. Bryce, 'Arbitration Developments : Post- Concepcion -The Debate Continues' (2013) 68 *The Business Lawyer* 649

<sup>270</sup> *Discover Bank v. Superior Court*, 113 P.3d 1100, 1110 (Cal. 2005), para. 14

<sup>271</sup> Aronovsky, 'The Supreme Court and the Future of Arbitration: Towards a Preemptive Federal Arbitration Procedural Paradigm?' (n 183)

<sup>272</sup> *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. at 1753

It can be understood that arbitration in a consumer contract would not be restricted based on the public policy of the state. This was also what the Supreme Court of Washington stated ‘[I]t is not free to disregard the federal law because a different outcome is preferred, instead the courts should focus on the importance of arbitration and the liberal federal policy favouring arbitration’.<sup>273</sup> Therefore, the conflict between federal policy and state public policy seems to have come to an end, post-*Concepcion*.<sup>274</sup> Under current US law, consumer arbitration will replace litigation<sup>275</sup> except if Congress empowers the Arbitration Fairness Act of 2013.<sup>276</sup>

However, it can be argued that forcing a consumer into arbitration also creates another question related to the imbalance between the parties due to the repeat player and repeat provider (arbitrator) issue,<sup>277</sup> which is an advantage to business as they are more likely to be repeat players in arbitration over consumers. In other words, when a business concludes thousands of disputes with the arbitration provider, it will be favoured by the arbitrator because of the possibility of business more disputes.<sup>278</sup> Such an issue is also likely to appear whether the arbitration agreement is a pre or a post dispute agreement.<sup>279</sup>

#### **4.2.2 What is left for state courts**

Whilst consumer disputes are arbitrable and enforceable under the current federal law of the USA, courts may still decide questions related to subject matter arbitrability of the existence of the arbitration agreement and whether it covers a certain type of dispute.<sup>280</sup> The US Supreme Court gave a broader meaning of arbitrability in *Green Financial Corp v Bazzle*.<sup>281</sup> The court held that an arbitrator is the one who must decide the arbitrability

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<sup>273</sup> *Scott, et al v. Cingular Wireless xx*, 160 WASH.2D 843 (2007), para.50

<sup>274</sup> Kaplinsky, Levin, and Martin C. Bryce, ‘Arbitration Developments : Post- Concepcion -The Debate Continues’ (n 269)

<sup>275</sup> Richard M. Alderman, ‘The Future of Consumer Law in the United States - Hello Arbitration, Bye Bye Court, So long Consumer Protection’ in Christian Twigg-Flesner Deborah Parry, Annette Nordhausen, Geraint Howells (ed), *The Year Book of Consumer Law* (Ashgate Publishing Limited 2009), 277

<sup>276</sup> Arbitration Fairness Act of 2013 S. 878; this bill was introduced on May 12, 2011, in a previous session of Congress, but was not enacted and Reintroduce at May 07, 2013 to amend title 9 of the United States Code with respect to arbitration, which declares that no pre-dispute arbitration agreement shall be valid or enforceable if it requires arbitration of an employment, consumer, antitrust, or civil rights dispute. The current status available at: <<https://www.govtrack.us/congress/bills/113/s878>>

<sup>277</sup> This issue will also be discussed in Chapter 6

<sup>278</sup> Jeff Guarrera, ‘Mandatory Arbitration: Inherently Unconscionable , but Immune from Unconscionability’ (2012) 40 Western State University Law Review 89

<sup>279</sup> Mandelbaum, ‘Stuck in a Bind: Can the Arbitration Fairness Act Solve the Problems of Mandatory Binding Arbitration in the Consumer Context ?’ (n 154)

<sup>280</sup> Shore, ‘The United States’ Prespective on ‘Arbitrability’ (n 50), 79

<sup>281</sup> *Green Financial Corp v. Bazzle* 539 U.S. 444 (2003)

issue because agreeing to an arbitration clause or agreement means that parties have agreed that an arbitrator, not a judge, would answer the relevant question of the disputes.<sup>282</sup> Therefore, if there is doubt about that matter, such as whether there is a valid arbitration agreement at all or whether a binding arbitration clause applies to a certain type of dispute, it should be resolved in favour of arbitration.<sup>283</sup> The Supreme Court in *Cardegna v Buckeye Check Cashing* referred the issue of the validity of a whole contract to the arbitrator as the one who should decide whether the contract was valid and whether the arbitration agreement was void or not, unless the issue was about fraud in the arbitration clause itself. The Supreme Court in *Rent-A-Center, Inc v Jackson*<sup>284</sup> stated that any challenge to the validity of the arbitration agreement itself should go directly to the tribunal for determination.<sup>285</sup> Otherwise, referring this to a court would prevent arbitrators from performing what is surely among their core functions in contract cases, namely determining whether a contract is or is not enforceable.<sup>286</sup> However, in the context of a consumer contract, the arbitration clause itself is imposed in the consumer contract so it is difficult to see how a weaker party without bargaining power could agree that the arbitrator would decide arbitrability issues when he/she signed the contract in the first place? In particular, the issue of consumer arbitration can rise due to the repeat player (business) and repeat provider (arbitrator) issue. The Supreme Court has indisputably strengthened the enforcement of consumer arbitration but has overridden the protection of the consumer.<sup>287</sup>

## **5. Conclusion**

In this chapter, it has been shown that the notion of arbitrability in general has two different functions, and these were classified within the chapter under positive and negative aspects. The consumer protections were analysed within the above aspects under two main categories of arbitrability: subjective arbitrability (*ratione personae*) and objective arbitrability (*ratione materiae*).

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<sup>282</sup> *ibid*, para. 452

<sup>283</sup> *ibid*.

<sup>284</sup> *Rent-A-Center, W., Inc. v. Jackson*, 130 S. Ct. 2772, 2779 (2010)

<sup>285</sup> *ibid*, at 2779

<sup>286</sup> *ibid*.

<sup>287</sup> Aronovsky, 'The Supreme Court and the Future of Arbitration: Towards a Preemptive Federal Arbitration Procedural Paradigm?' (n 183); See also, Alan S Kaplinsky and Mark J Levin, 'Consumer Financial Services Arbitration: What Does the Future Hold After Concepcion? Consumer Financial Services Arbitration: What Does the Future Hold After Concepcion?' (2013) 8

As a result, subjective arbitrability of consumer provide protection to consumer (ie online consumer) form pre-disputes arbitration clause as unfair clause only. However, the legal protection of the consumer, which espouses the right of 'judicial protection', is imposed upon a narrow consumer definition as a weaker party who suffer from lack of information. Nevertheless, in international online consumer disputes, the rules and the legal norms regarding the legal capacity of consumer, to confirm the protection where contractual and jurisdictional right regarding online consumer disputes collide, are not certain enough.

In contrast, regarding objective arbitrability, different jurisdictions have dealt with such problematic areas with different approaches. The two different legal approaches have been analyzed which govern the consumer protection laws and their applicability to the international practice of online consumer contracts. It is clear that, to some extent, the inter-states and regional application of private international law have proven themselves to be adequate to be applied to online contracting cases but not to online consumer contracting. The international application of these rules over online consumer disputes has remained uncertain.

## **Chapter 4: Party Autonomy of the Online Consumer: How Free is the Choice to Arbitrate?**

### ***1. Introduction***

By conducting business over the Internet, users can enter into international contracts that extend into many different jurisdictions. These online contracts are often adhesion contracts which are drafted to meet the requirements of the businesses that create them, and are presented by one party i.e. businesses in advance. The issue with these contracts is that they offer limited bargaining power to the other party (ie the consumer) as they only give them the option to contract on a ‘take-it-or-leave-it’ basis. Consumers agree to those contracts and terms millions of times each day by clicking that they agree to the terms or impliedly agreeing by using the website. The problem here is that those terms, such as an arbitration clause, are likely under specific conditions to be valid and enforceable by a court even though they are often hidden at the bottom of web pages under a simple link (user agreement/conditions of use & sale) or in the small print.<sup>1</sup> Moreover, those contract terms may be contrary to the basic principle of contract law, such as autonomy of the parties. The autonomy of parties in the sense of ‘freedom of the contract’ is easily affected, especially when the contract includes terms such as an arbitration clause to which the trader must draw the attention of the consumer about the effect of those terms upon their rights. This is because the autonomy can consist of mutuality, equality and freedom in the terms of the contract. In such a case, online consumer contracts do not provide any of these principles by letting business decide which terms are drafted without also letting the consumer negotiate over any of the terms they are not satisfied with.<sup>2</sup> However, on the other hand, where there is an equality of bargaining in online consumer contract, party autonomy can lead to an unfair result and

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<sup>1</sup> See for example: the Conditions of Use of Amazon.com “Any dispute or claim relating in any way to your use of any Amazon Service, or to any products or services sold or distributed by Amazon or through Amazon.com will be resolved by binding arbitration, rather than in court”, available at: <[http://www.amazon.com/gp/help/customer/display.html/ref=footer\\_cou?ie=UTF8&nodeId=508088](http://www.amazon.com/gp/help/customer/display.html/ref=footer_cou?ie=UTF8&nodeId=508088)> (accessed 19/3/2013);

See also: eBay user agreement contains an agreement to arbitrate “...require you to submit claims you have against us to binding and final arbitration...” see Legal Disputes, Section B (“Agreement to Arbitrate”), available at: <<http://pages.ebay.com/help/policies/user-agreement.html>> (accessed 19/3/2013).

<sup>2</sup> Mo Zhang, “Contractual Choice of Law in Contracts of Adhesion and Party Autonomy” (2008) 41 Akron L.Rev.123, Available at <[http://heinonlinebackup.com/holcgibin/get\\_pdf.cgi?handle=hein.journals/aklr41&section=6](http://heinonlinebackup.com/holcgibin/get_pdf.cgi?handle=hein.journals/aklr41&section=6)> (accessed 08/02 2014).

deprive the consumer of their rights as a consumer if they have difficulty understanding the complexity of the contract terms.<sup>3</sup> These complexities of party autonomy become considerable when their differences overlap in the definition of consumer.<sup>4</sup>

The dilemma about the notion of consumer is becoming more problematic as the regulation of consumer protection depends mainly on objective factors such as the purpose of the contract. This reflects upon the way that the party autonomy (freedom of the contract) is determined and the protection afforded to the parties in the event of a dispute. Moreover, the effect of party autonomy has been widely restricted in consumer contracts, which brings more uncertainty and difficulties in protecting the real weaker party, especially through the Internet where business can also deal as a consumer.

The main question that emerges as relevant is who qualifies as an online consumer. The clear manifestation of online contract that legal and natural persons are more likely to suffer from being in a position of the weaker party. Asymmetry in the allocation of information and/or in access to the information needed, together with personal and economic inequality, creates a gap between parties that puts the consumer in a position of inequality of bargaining power.<sup>5</sup> This gap rarely allows the consumer to challenge the standard terms of contracts, in particular the terms in online contracts. In such cases, the notion of online consumer has to be adopted in its true spirit as a weaker party. This seems to be the central issue in consumer contracts.

This chapter focuses on consumer protection of the weaker party in arbitration arising from online consumer contracts. In doing so, it is necessary to consider the ‘consumer’ that we wish to protect and what this definition means in practice for businesses. It is also important to consider the rationale of consumer protection and the consumer aspect of party autonomy. Whilst accepting the consumer as a weaker party, analysis will be carried out on the protection of the weaker party and the effort to protect consumers in different legal traditions and rules in the USA and England and Wales, as well as arguing that

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<sup>3</sup> Zheng Tang, *Electronic Consumer Contracts in The Conflict of Laws* (Hart Publishing 2009) 18

<sup>4</sup> Christopher R. Drahozal and Raymond J. Friel, ‘Consumer Arbitration in the European Union and the United States’ (2003) 28 N.C.J. Int’l L. & Com. Reg. 356; Jonathan Hill, *Cross-Border Consumer Contracts* (Oxford University Press 2008), 2; James Devenney and Mel Kenny, *European Consumer Protection, Theory and Practice* (Cambridge University Press 2012) 124

<sup>5</sup> Case C-89/91 *Shearson v TVB*, the Court of Justice of the European Union (CJEU) has stated that: “[T]he special system established ... is inspired by the concern to protect the consumer as the party deemed to be economically weaker and less experienced in legal matters than the other party to the contract”. [1993] ECR I-139, para 18

unfairness and unconscionability rules do not place a business under an obligation to give the consumer specific notice about the existence of an arbitration clause. This will address the question of how free is the choice of consumers to arbitrate.

## **2. The consumer within online contracts**

### **2.1 Introduction**

In a general sense, the definition of consumer is ‘a person who buys things or uses services’.<sup>6</sup> This definition includes any user of goods or services supplied by another person. However, there is no uniform legal definition of consumer at an international level or at the regional level of the EU.<sup>7</sup> Moreover, different legislation draws a dividing line between commercial and consumer contracts in a different way, based on what type of consumer they aim to protect.<sup>8</sup> As demonstrated in Chapter 3, some definitions of consumer refer to a natural person<sup>9</sup> or an individual acting outside a business<sup>10</sup> whilst other definitions include a legal person<sup>11</sup> or refer only to the kind of act from the principal purpose of use.<sup>12</sup> Despite being phrased in different ways, the present author agrees with

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<sup>6</sup> Oxford dictionary

<sup>7</sup> Drahozal and Friel, ‘Consumer Arbitration in the European Union and the United States’ (n 4); Hill, *Cross-Border Consumer Contracts* (n 4) 2; Immaculada Barral-Viñals, ‘E-Consumers and Effective Protection: the Online Dispute Resolution System’ in James Devenney and Mel Kenny (eds), *European Consumer Protection Theory and Practice* (Cambridge University Press 2012)124

<sup>8</sup> For example: The Directive 2011/83/EU on Consumer Rights combines the Directive 2005/29/EC, 85/577/EEC and Directive 97/7/EC, in order to standardise the meaning of consumer as : any natural person who, in contracts covered by this Directive, is acting for purposes which are outside his trade, business, craft or profession; On the other hand, Directive 90/314 on package travel, package holidays and package tours contain a very different definition of consumer as: means the person who takes or agrees to take the package (‘the principal contractor’), or any person on whose behalf the principal contractor agrees to purchase the package (‘the other beneficiaries’) or any person to whom the principal contractor or any of the other beneficiaries transfers the package (‘the transferee’).

<sup>9</sup> Such as England and Wales under the Unfair Terms in Consumer Contracts Regulations 1999 (Consumer Protection), Article 3(1)

<sup>10</sup> Such as England and Wales under the Consumer Right Act 2015, c.15, Section 2 (3) “Consumer” means an individual acting for purposes that are wholly or mainly outside that individual’s trade, business, craft or profession.

<sup>11</sup> Such as United kingdom (England and Wales and Northern Ireland) as cited under the Arbitration Act 1996, S.90; the same definition also in Belgium Slovakia, Denmark, Greece, and Austria and Spain, see Hans-W. Micklitz, Jules Stuyck, and Evelyn Terryn, *Cases, Materials and Text on Consumer Law: Ius Commune Casebooks for a Common Law of Europe* (Hart Publishing 2010) 29; Research Group on the Existing EC Private Law, *Contract II— General Provisions, Delivery of Goods, Package Travel and Payment Services*, Principles of the Existing EC Contract Law (Sellier. European Law Publishers 2009) 59

<sup>12</sup> Such as U.S.A under Uniform Commercial Code-Secured Transactions defines "Consumer transaction" means a transaction in which (i) an individual incurs an obligation primarily for personal, family, or household purposes, U.C.C. § 9-102(26) (2002); See also: Denmark, Finland and Sweden, See: Margus Kingisepp and Age Värvi, ‘The Notion of Consumer in EU Consumer Acquis and the Consumer Rights Directive — a Significant Change of Paradigm?’ [2011] *Juridica International* XVIII 44–53.

Stuyck statement that:

[A] central issue in consumer law literature is the notion of the consumer, although for many subjects of consumer law it doesn't matter whether a broad or a restrictive concept is chosen [...] the definition of consumer however does matter when rules govern contractual relations in order to protect the weaker "consuming" party against the supposedly more powerful (professional) "supplying" party.<sup>13</sup>

This is true as the main purpose of the rules of consumers is to protect a party, which may be regarded as a weaker party in the transaction involved.<sup>14</sup> Therefore, it has been suggested that the concept of consumer should include any person whether legal or natural person, who may be regarded as a weaker party in a contractual relationship.<sup>15</sup> This is because the idea that one party in a contract is the weaker party means that the other party is in a superior bargaining position. Such an imbalance between contract parties limits to a large extent the freedom of the contract for the benefit of stronger party (business) while the other party (consumer) whether a legal or natural person is in a weaker bargaining position in the contract.<sup>16</sup> Thus, it possible to imagine that the consumer can be defined by subjective characteristics which includes all weaker parties (natural and legal persons) who suffer from an economic inequality and/or from being in a position of the weaker party in the contract in one way or another, such as facing difficulty accessing information about the unfair terms. The subjective approach does not limit the notion of consumer to be defined by the natural person only under specific circumstances but instead it leaves it up to the courts to decide if someone should be considered a consumer under the circumstances of inequality and/or being in the position of the weaker party. However, the law does not adopt the subjective approach. Instead, the law limits the scope of consumers by objective factors with respect to the characteristics of the party and the subject matter of the contract in order to provide protection. It can be logically understood that laws aim to protect groups of people instead of providing protection to individuals on a case-by-case basis. However, the objective approach may not be very useful in the online environment.

The following section analyses the concept of the consumer within the rules that govern

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<sup>13</sup> Jules Stuyck, 'European consumer law after the treaty of amsterdam: consumer policy in or beyond the internal market?' (2000) 37 *Common Market Law Review* 367

<sup>14</sup> *Consumer Policy Strategy 2002-2006*, Com (2002) 208, 22

<sup>15</sup> Barral-Viñals, 'E-Consumers and Effective Protection: the Online Dispute Resolution System' (n 7) 83

<sup>16</sup> *ibid.* 87



contractual relations in order to protect the weaker party especially in online contracts.

## **2.2 The concept of online consumer**

Generally speaking, any person will clearly be a ‘consumer’ where an individual makes purchases. Businesses, however, as natural and legal persons are not considered consumers even they ‘deal as a consumer’<sup>17</sup> in order to protect them from arbitration clause in online contract. Therefore, the definition of ‘consumer’ needs to be carefully applied in order to protect the weaker party. However, this issue is not restricted to different laws from different countries; it can also be found in the legislation belonging to one national legal system. This is because the definition of consumer depends not only on the jurisdiction but also on the legislation involved. For example, in England and Wales the definition given for consumer under the Fair Trading Act 1973 (section 137(2)) is different from that provided by the UCTA, and the UTCCR.<sup>18</sup>

There is no uniform agreed definition of consumer even within EU.<sup>19</sup> However, the majority of definitions of consumer include some common elements. These elements define the scope of applicability of the protecting laws by the characteristics of parties, even if there are some differences in the purpose of the act or the contract. It can be said that a consumer is commonly (1) an individual (natural person) in the contract; and (2) acts outside his trade or profession or acts for personal, family or household purposes.

Therefore, the application of the specific protective rules is limited to specific groups of people and excludes others who might be in the position of consumer as a weaker party. This is because the special protection provided to the consumer is established based

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<sup>17</sup> The concept “dealing as a consumer” found in England and Wales under the Unfair Contract Terms Act 1977, Section.12 (1) It states ‘(1) A party to a contract ‘deals as consumer’ in relation to another party if - (a) he neither makes the contract in the course of a business nor holds himself out as doing so; and (b) the other party does make the contract in the course of a business; and (c) in the case of a contract governed by the law of sale of goods or hire-purchase, or by section 7 of this Act, the goods passing under or in pursuance of the contract are of a type ordinarily supplied for private use or consumption.

<sup>18</sup> Under the Fair Trading Act 1973 section 137(2) Consumer means: “any person who is either (a) a person to whom goods are or are sought to be supplied (whether by way of sale or otherwise) in the course of a business carried on by the person supplying or seeking to supply them, or (b) a person for whom services are or are sought to be supplied in the course of a business carried on by the person supplying or seeking to supply them, and who does not receive or seek to receive the goods or services in the course of a business carried on by him”; Under The Unfair Terms in Consumer Contracts Regulations 1999, Consumer means “any natural person who, in contracts covered by these Regulations, is acting for purposes which are outside his trade, business or profession”; The different definitions of consumer also in Consumer Insurance (Disclosure and Representations) Act 2012, s.1; Consumers, Estate Agents and Redress Act 2007, s. 3; The Consumer Contracts Regulations (Information, Cancellation and Additional Charges) 2013, s 4

<sup>19</sup> Reinhard Schu, ‘The Applicable Law to Consumer Contracts Made Over the Internet: Consumer Protection Through Private International Law?’ (1997) 5 Int J Law Info Tech 192

mainly on objective factors to determine who qualifies as a consumer. These objective factors focus on two main aspects: the characteristics of parties in a particular contract and the purpose (the nature and aim) of that contract. Both aspects bring more uncertainty and difficulties when determine the arbitrability of such disputes and have an impact upon the protection afforded to them in the event of a dispute. The following analysis clearly supports those who say that providing special protection to a consumer in a contract as a weaker party should be extended to cover all types of consumers.

### **2.2.1 The characteristics of online consumer**

However, B2C transactions involve the sale of goods and/or services from one person, whether individuals or legal entities, to a natural person who is acting outside the scope of his economic activity.<sup>20</sup> This particular type raises the issue of the consumer as the weaker party because there is an economic inequality between the consumer and the business party. In the case of C2C, it is impossible to define both parties as consumer even though only one party can be the buyer.<sup>21</sup> Both of them cannot be considered as the weaker party against the other. Thus, the specific protection provision may not be applicable. C2C transactions have the same characteristics as B2B ones. A B2B transaction is a sale of goods and/or services from a legal person (company) to another where one of them sometimes deals as a consumer and it is possible to imagine economic inequality between them.<sup>22</sup>

However, according to the UTCCR, in England and Wales a ‘consumer’ means any natural person who is acting for purposes which are outside his trade, business or profession.<sup>23</sup> It is important to remember that England and Wales implement the same definition of consumer under the UTCCR as the one under the UTCCD in order to give effect to the European Directive.<sup>24</sup> In contrast, a ‘consumer’ under the Consumer Right Act 2015 means an individual acting for purposes that are wholly or mainly outside that individual’s trade, business, craft or profession.<sup>25</sup> In the USA, the UCC defines a

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<sup>20</sup> Faye Fangfei Wang, *Law of Electronic Commerce* (Routledge 2010) 14; See also Hans Schulte-Nölke, Christian Twigg-Flesner, and Martin Ebers, *EC Consumer Law Compendium: The Consumer Acquis and its transposition in the Member States* (Sellier European Law publishers 2008)

<sup>21</sup> Wang, *Law of Electronic Commerce* (n 20) 17

<sup>22</sup> Geraint G. Howells and Stephen Weatherill, *Consumer protection law* (Ashgate Publishing, Ltd. 2005) 117

<sup>23</sup> The Unfair Terms in Consumer Contracts Regulations 1999, Article 3(1)

<sup>24</sup> Council Directive 93/13/EEC on unfair terms in consumer contracts [1993] OJ L 095, Article 2(b)

<sup>25</sup> The consumer right Act 2015, Chapter 15, Section 2(3)

consumer as an individual who incurs an obligation primarily for personal, family or household purposes.<sup>26</sup> The different use of the terms individual and natural person can indicate some slight variations; this can be seen in the legislation in England and Wales. In England and Wales, they are slightly more generous by using the word individual in the definition of consumer which is less restrictive than the term natural person. The word individual has been used widely to refer to a consumer in section 189(1) of the Consumer Credit Act 1974 (amended 2006)<sup>27</sup> with the result that a partnership consisting of two or three persons and other unincorporated bodies of persons can be protected by the Act.<sup>28</sup> In the USA, in contrast, the word individual is used to refer to a single person as distinguished from a group or class.<sup>29</sup>

However, on both sides of the Atlantic a consumer is the one party in the contract who must be an individual or natural person but cannot be a legal person.<sup>30</sup> This firm stand takes away the possibility of any other party or entity qualifying as a consumer. The issue of the narrow definition of consumer found its echo in the jurisprudence of the CJEU. In joined cases *Idealservice* the court held that the term consumer related only to natural persons and legal persons were excluded. As defined in Article 2(b) on unfair terms in consumer contracts, the word consumer must be ascribed solely to natural persons.<sup>31</sup> Moreover, in *Patrice Di Pinto* the CJEU confirmed the narrow definition with regard to consumers; the court interpreted that a legal person did not have any protection as a consumer even when they were in the position of weaker party.<sup>32</sup> This means that the consumer must be a natural person only.<sup>33</sup> Applying this notion of consumer to arbitration it means that a small group of individual who can be protected from arbitration. This is not based on the lack of information nor the inequality of economic situation of the party in the contract but on the certain defining characteristics of a person concerned. In that regard Weatherill describes this as ‘an irrational limitation’ to consumer contracts.<sup>34</sup> This

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<sup>26</sup> Uniform Commercial Code 2001, Article 1-201(11)

<sup>27</sup> See David Oughton and John Lowry, *Consumer Law* (2nd edn, Oxford University Press 2000), chapter 1

<sup>28</sup> Consumer Credit Act 2006, Chapter 14, Agreements regulated under the Consumer Credit Act 1974, Section 1

<sup>29</sup> Black's Law Dictionary

<sup>30</sup> Ewoud Hondius, ‘The Notion of Consumer: European Union versus Member States’ (2007) 28 *Sydney Law Review* 89

<sup>31</sup> Joined Cases C-541/99 and C-542/99 *Cape Snc v Idealservice Srl and Idealservice MN RE Sas v OMAI Sri*, ECR [2001] I-09049

<sup>32</sup> Case C-361/89, *Patrice Di Pinto v. France* [1991] I-01189, para.19 and 23

<sup>33</sup> *ibid*, joined Cases C-541/99 and C-542/99 C

<sup>34</sup> Howells and Weatherill, *Consumer protection law* (n 22) 117

is because the rationale for protecting the consumer should be to rectify the inequality of bargaining power between economically imbalanced parties, and such an imbalance is much wider between large and small enterprises than between small traders and consumers.<sup>35</sup> To this extent, the author argue that the USA approach make more sense as it does not provides such distinguish between business and consumer when it comes to incorporating arbitration clauses in consumer contracts, but assessed in accordance with the general principles of law of contract.

In consequence, if there is need to protect consumer from arbitration clause, the concept of consumer should be broader because the narrow definition with regard to the consumer excludes small enterprises or family businesses who may face similar problems from being in a weak position as a consumer in the online contract.<sup>36</sup>

### ***2.2.2 Legal person dealing as a consumer***

The limitation of the definition of consumer to a natural person for the purpose of personal use should have an exception when a legal person deals as a consumer. Such an exception can be found in England and Wales under the term ‘dealing as a consumer’. The UCTA defines another aspect of the consumer by using the term ‘dealing as a consumer’ for a legal person. As Section 12 states, a party to a contract ‘deals as consumer’ in relation to another party if:

- (a) he neither makes the contract in the course of a business nor holds himself out as doing so; and
- (b) the other party does make the contract in the course of a business; and
- (c) in the case of a contract governed by the law of sale of goods or hire-purchase, or by section 7 of this Act, the goods passing under or in pursuance of the contract are of a type ordinarily supplied for private use or consumption.<sup>37</sup>

This section concludes that if the first party is an individual then paragraph (c) of that subsection must be ignored.<sup>38</sup> Subject to this, the business cannot be regarded as dealing as a consumer under any circumstances ‘if he is an individual and the goods are second hand goods sold at public auction’. Moreover, ‘it is for those claiming that a party does

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<sup>35</sup> *ibid.*

<sup>36</sup> *ibid.*

<sup>37</sup> The Unfair Contract Terms Act 1977, Section 12

<sup>38</sup> The Unfair Contract Terms Act 1977, Section 12 (1A)

not deal as consumer to show that he does not'.<sup>39</sup> Howells and Weatherill describe this as a valuable protection for the consumer as any grey area in regard to determining what is 'in the course of a business' should be evaluated in favour of the consumer.<sup>40</sup> The value of this rule is not just that it provides protection to the consumer as a legal person and individual but that it provides protection for the so-called 'dual-purpose contracts', i.e. when the buyer has bought the goods for a mixed purpose, such as a small enterprise or family business, which is in part within and in part outside his trade or profession such as buying a car or laptop. For example, if an individual buys a commercial tractor for his garden, that individual will be 'dealing as a consumer'. However, this also means that in a C2C (and a B2B) contract where one party is contracting for personal or private use and the other party acts for private use and/or for mixed purpose, they are likely to miss out on consumer protection and on the notion of 'dealing as a consumer'.<sup>41</sup> Therefore, the question here is whether it is necessary for the business to have been aware of the purpose of the contract as a consumer contract. In other words, should the consumer make clear to the business that the purpose of the contract is for private or personal use? This is clearly answered in *R & B Customs Brokers Co Ltd v United Dominions Trust Ltd*.<sup>42</sup> In this case, the Court of Appeal held that:

where an activity merely incidental to the carrying on of a business a degree of regularity had to be established before it could be said that the activity was an integral part of the business and so carried on in the course of that business; that since the company had not held itself out as making the contract for the purchase of the car in the course of business, and since, on the facts, the necessary degree of regularity had not been shown, the company was dealing as a consumer within the meaning of section 12(1) of the Unfair Contract Terms Act 1977.<sup>43</sup>

In the light of the decision in this case, the legal person can be protected as a consumer under the UCTA. However, in regard to the UTCCR, the legal person is outside the definition of consumer. The legal person under the UTCCR can only be a 'seller or supplier'. As such, if the rules of UTCCR are applied upon a case such as *R & B Customs Brokers* then the 'consumer' would not be protected against the unfair terms because it is a legal person even if it was dealing as a consumer. As the rules of UTCCR consider the legal person dealing as a consumer on an equal footing with the business, the notion of

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<sup>39</sup> The Unfair Contract Terms Act 1977, Section 12 (3)

<sup>40</sup> Howells and Weatherill, Consumer protection law (n 22) 287

<sup>41</sup> *ibid.* 288

<sup>42</sup> *R & B Customs Brokers Co Ltd v United Dominions Trust Ltd* (Saunders Abbott (1980) Ltd, third party) - [1988] 1 All ER 847

<sup>43</sup> [1988] 1 All ER 847

consumer under UTCCR appears more limited than UCTA.<sup>44</sup> In addition, UTCCR controls and provides protection to a consumer only as a natural person against the terms that have not been individually negotiated as unfair terms which includes arbitration.<sup>45</sup> In regard to arbitration, Section 90 of the Arbitration Act 1996 extends the application of the UTCCR to the legal person as it applies where the consumer is a natural person. This means that it includes a company and partnership.<sup>46</sup> In such a case, if the contract included an arbitration clause, and so was considered by the court as a consumer because he was dealing as a consumer, then he would be protected under Section 90 of the Arbitration Act even though the UTCCR applies only to a natural person.

However, it falls on the business to prove that the legal person was not dealing as a consumer and to prove that the terms were individually negotiated. In addition, the Arbitration Act and consumer rules are silent with regard to the perspective from which the contract should be evaluated, whether it is due to the fact that natural persons are involved or due to the nature of the underlying transaction irrespective of the person involved.

The author's opinion is that the contract should be evaluated according to the nature of the underlying transaction, irrespective of the person involved, in order to improve and widen the interpretation of 'consumer' to avoid any abuse of law. This is because there is a large number of legal entities which have all the traits that justify protection by consumer law such as the family business. This is will be explained in the following subsections.

### ***2.2.3 The purpose of the consumer contract or transaction***

There are, in principle, two ways to describe the purpose of an act (the nature and aim of the contract) to determine the consumer contract. The purpose of the party could be a negative one as in England and Wales, which requires a consumer to act outside his trade or profession, or it could be a positive one as in the USA where a consumer acts for personal, family or household purposes. This raises the question as to whether a different description would lead to a different result. In fact, this depends on how the term 'outside'

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<sup>44</sup> Howells and Weatherill, *Consumer protection law* (n 22), 288

<sup>45</sup> The Unfair Terms in Consumer Contracts Regulations 1999, Article (5)

<sup>46</sup> Geoffrey Woodroffe and Robert Lowes, *Consumer Law and Practice* (7th edn, Sweet & Maxwell 2007)203

his trade or profession is interpreted. An answer can be found in the case of *Benincasa v Dentalkit Srl*.<sup>47</sup> In this case, the CJEU addressed the meaning of the term ‘outside his trade or profession’. It held that the consumer should conclude the contract outside and independently of any trade or professional activity or purpose, whether present or future.<sup>48</sup> This was in spite of Mr Benincasa arguing that he should be protected as a consumer because when he concluded that contract he was not carrying on any business. Clearly, the consumer in the field of protection is determined based on the status of consumer under a particular contract with regard to the scope and the purpose of that contract, which should be outside any trade or profession, whether at the time of contracting or in the future.<sup>49</sup> Thus, if a natural person who is a member of a non-profit organization, such as a charity, concludes a sale contract in his name where the goods are to be used by the organization, such a party in England and Wales receives protection because they are a consumer outside any trade or profession. On the other hand, this contract is not a consumer contract in the USA as it is not for personal, family or household purposes. Therefore, the negative definition of consumer which has been chosen by England and Wales provides protection to any natural person who concludes a contract for goods or services as long as the purpose is outside his trade or profession. Otherwise, the natural person is not able to rely on the special rules of protection as a consumer. However, it is argued that this kind of protection seems to be based on judicial scrutiny in relation to recognizing whether the natural person should be considered as a consumer in the first place by distinguishing them from those acting in a business activity.<sup>50</sup> For that purpose, the nature and purpose of the contract and any other circumstances to which a natural person can objectively be regarded, in which the contract was concluded, should be taken into consideration by the national court.<sup>51</sup> However, this problem in using the objective approach can be seen clearly where there is

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<sup>47</sup> Case C- 269/95 *Francesco Benincasa v Dentalkit Srl* [1997] ECR I-03767, paras 17 and 18

<sup>48</sup> *ibid*

<sup>49</sup> Tang, *Electronic Consumer Contracts in The Conflict of Laws* (n 3) 22

<sup>50</sup> Christophe Girot, *User Protection in IT Contracts: A Comparative Study of the Protection of the User Against Defective Performance in Information Technology* (Kluwer Law International 2001); Pablo Cortes, *Online Dispute Resolution for consumer in the European Union*, vol. 19 (Routledge 2011) 12; DG Health and Consumer Protection, Preparatory Work for the Impact Assessment on the Review of the Consumer Acquis/ Analytical Report on the Green Paper on the Review of the Consumer Acquis, submitted by the Consumer Policy Evaluation Consortium, 2007, 53

<sup>51</sup> See Case C-92/11 *RWE Vertrieb v. Verbraucherzentrale Nordrhein-Westfalen* [2013] ECR, para 25; See also Case C-488/11 *Katarina de Man Garabito v. Jahani BV* [2013] EU:C:2013:341, para 31-33

a mixed purpose transaction, such as in the case of *Gruber*.<sup>52</sup> Mr Gruber, a farmer, had given the other contract party the impression that he was acting for business purposes. This impression was formed when he asked for the goods to be delivered to a business address instead of his personal address. Therefore, the court had to decide whether the contract was intended to meet the needs of the trade or profession of the person concerned or whether the business use was merely negligible. In this case, the CJEU held that where an individual orders items without giving further information about the items, which could in fact be used for his business, or uses business stationery to do so, or has goods delivered to his business address, and the other party to the contract could not reasonably have been aware of the private purpose of the items, then in such a case the consumer act should be considered as a waiver of the special protection provided to him.<sup>53</sup> In other words, if there were an arbitration clause the consumer in the above case would not be protected from arbitration. As such, it seems that the CJEU decision is very restrictive. The court deemed the act of the consumer from a standpoint that is contrary to the principle of good faith and so removed protection from him. In fact, the wrong impression by the consumer could be considered as an act of carelessness due to the fact that the consumer was less experienced in legal matters than the other party to the contract. Therefore, some authors consider the approach of the CJEU in the case of *Gruber* to have brought no clarification in regard to the mixed purpose of a consumer contract.<sup>54</sup> Instead, this approach appears to undermine the purpose of mandatory consumer protection rules.<sup>55</sup>

Consequently, the consideration of a natural person as a consumer within the field of substantive consumer protection is related to the element of the consumer concept that can be shown.<sup>56</sup> If the natural person is not able to show the private purpose of the contract than he/she is considered as a non-consumer. He/she will not then enjoy any protection as a consumer even though he/she is in the position of the weaker party.

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<sup>52</sup> Case C-464/01, *Johann Gruber v. Bay Wa AG* [2005] ECR I-00439

<sup>53</sup> *ibid*, para 47- 55

<sup>54</sup> Christian von Bar, Eric Clive, and Hans Schulte-Nölke, *Principles, Definitions and Model Rules of European Private Law Draft Common Frame of Reference (DCFR)* (München: Sellier 2009) 149; See also Schulte-Nölke, Twigg-Flesner, and Ebers, *EC Consumer Law Compendium: The Consumer Acquis and its transposition in the Member States* (n 20) 684

<sup>55</sup> *ibid*, Clive, and Schulte-Nölke, *Principles, Definitions and Model Rules of European Private Law Draft Common Frame of Reference (DCFR)* (n 54), 140

<sup>56</sup> Norbert Reich, 'Harmonisation of European contract law: with special emphasis on consumer law' (2011) 1 *China-EU Law Journal* 55



Therefore, the court should not only be concerned with the nature and aim of the contract when providing protection but rather should be concerned with the position of the private person in the contract within the transaction.<sup>57</sup> This would improve and widen the interpretation of ‘consumer’ from the current one given by the CJEU by having regard to the subjective situation of the person concerned, thus avoiding any abuse of protecting laws in cases where the impression of the contract purpose is not obvious.

### **2.3 Who is the weaker party in an online contract?**

The problem here is that online information is often presented without making any distinction between online users. In addition, the way of concluding an online contract is no different. This raises a question here as is it possible that the information requirement would change the notion of consumer as a weaker party in the online contract from the natural person only to include also the legal person as an online weaker party when they are dealing as a consumer.

In England and Wales, there are two main regulations which aim to protect consumers when buying online: the Electronic Commerce (EC Directive) Regulations 2002 (ECR 2002) and the Consumer Protection (Distance Selling) Regulations 2000 (DSR 2000) which can be applied to provide protection to consumers when they deal with businesses without meeting face-to-face at any stage until after the contract has been concluded. These regulations work side by side with the protection of unfair terms under UTCCR to protect consumers in respect of contracts concluded on the Internet. All these aim not just to prevent the abuse of superior bargaining power on the Internet but also to preclude unfair practices such as missing information and misleading advertising information, whether about the seller or about goods and services. Here, the definitions of consumer under ECR 2002 and DSR 2000 are similar to the one under UTCCR. However, the definition of consumer under the EU Consumer Rights Directive (CRD 2011)<sup>58</sup> and the Consumer Right Act 2015 essentially converges with UTCCR. It is nevertheless more accurate even though it is more restricted in regard to the legal person. A consumer under

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<sup>57</sup> Deborah Parry, Annette Nordhausen, Geraint Howells, and Christian Twigg-Flesner, *The Yearbook of Consumer Law 2009* (Ashgate Publishing Limited 2008), 19

<sup>58</sup> The EU Consumer Rights Directive 2011/83/EU, the Directive is amending Council Directive 93/13/EEC and Directive 1999/44/EC of the European Parliament and of the Council and repealing Council Directive 85/577/EEC and Directive 97/7/EC of the European Parliament and of the Council, the transposition of the Directive into national laws is due by 13 December 2013. Member States must then apply the national laws implementing the Directive from 13 June 2014.

the CRD 2011 and the Consumer Right Act 2015 is ‘an individual acting for purposes which are wholly or mainly outside that individual’s trade, business, craft or profession’.<sup>59</sup> In particular, the definition in CRD 2011 and the Consumer Right Act 2015 addresses the issues related to dual-purpose contracts by confirming that the purpose of the consumer act must be wholly or mainly outside his business or trade. Furthermore, they add that ‘craft’ should be excluded from consumer economic activity.

The significance of those regulations is in providing the balance and equality between parties by focusing on two main aspects: lack of information and control of unfair terms. Both aspects consider and deal with the consumer as the weaker party. The major objective behind this is to create equality of power in relation to the informational gap between the trader and the consumer. This can also be found in Article 2:104 in the Principles of European Contract Law where it states that ‘the seller must show that he has taken reasonable steps to give a sufficient notice about the existence of special terms to bring them to the consumer's attention before or when the contract was concluded’.<sup>60</sup> Therefore, the argument here can be made in connection to the ‘information requirement’.

There is no doubt that the information requirement is a key concept whose aim is to protect the weaker party, which is most likely the consumer, but it can also be applied to the internet to any person whether consumer or non-consumer in the legal sense. In other words, the notion of consumer in the field of e-commerce (online consumer), having regard to the information requirement, is not restricted to natural persons only but can be extended to any individual and any legal person who can deal as a consumer as well. This opinion is based on Article 9 of ECR 2002 and Article 7 of DSR 2000.<sup>61</sup> The information requirement of the online contract in Article 9 of ECR 2002 determines the information that should be provided where contracts are concluded by electronic means whereas Article 7 of DSR 2000 is related to information required prior to the conclusion of the contract. However, these articles were not drafted to protect only consumers but also

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<sup>59</sup> The Consumer Right Act 2015, Section 2(3); the EU Consumer Rights Directive 2011/83/EU, Article 2 (1)

<sup>60</sup> The Principles of European Contract Law 2002, Article 2:104 (ex art. 5.103 A): (1) Contract terms which have not been individually negotiated may be invoked against a party who did not know of them only if the party invoking them took reasonable steps to bring them to the other party's attention before or when the contract was concluded. (2) Terms are not brought appropriately to a party's attention by a mere reference to them in a contract document, even if that party signs the document; The Principles of European Contract Law 2002 (Parts I, II, and III) (Parts I and II revised 1998, Part III 2002)

<sup>61</sup> M.Lehmann, ‘Electronic Commerce and Consumer Protection in Europe’ (no date) 17 Santa Clara Computer & High Tech. L. J. 101

describe how an online contract should be concluded by providing clear information about the business, the goods or services and the sale before deciding to buy. In other words, these articles are directly related to protecting any online user “weaker party” who is suffering from a lack of information when an online contract is offered by providing the basic information that must be included within an online contract. The justification for this opinion is that a contracting party on the Internet cannot be in a position of equal bargaining power if he has difficulties in obtaining information.<sup>62</sup> The weaker party here can be any contractor, whether a consumer or legal person, when dealing as a consumer. Barral adopted this opinion and stated that: ‘[I]n e-commerce prior information requirement is a tool for consumer protection that has been extended to any contractor in the internet who needs legal guidance by means of prior information requirement’.<sup>63</sup> She explained that the need for special protection for the consumer is based on the idea of protection of the weaker party. In this regard, the weaker party on the internet is any party that can be considered a ‘non-expert’ because of the lack of the necessary information that is used to impose some conditions.<sup>64</sup> Therefore, whoever can be considered as a non-expert when the contract process is made electronically can also be considered a weaker party.<sup>65</sup> This protection should be extended to protect legal persons such as non-commercial organization, small enterprises, family businesses or farmers engaged in ‘craft’ who are dealing as consumer and a non-expert in the overall context of the online contract, which should also be considered as a weaker party.

In addition, the information requirements rules do not address the main issue of the content of the unfair terms or the imbalance in bargaining power between trader and consumer. Those terms remain to be fixed by private negotiation under UTCCR and depend on the type of consumer in order to process the unfair terms and to act rationally in response to it. Although the protection against the unfair terms is provided by law to consumers in the narrow sense, even if any contractor in the internet, whether considered a consumer or non-consumer in the legal sense, is still not able to influence the substance of the unfair term or any other online terms. Those online terms and the necessary information are provided on a ‘take-it-or-leave-it’ basis. From this standpoint, the information requirement can be assumed here to be more related to the competitive

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<sup>62</sup> Oughton and Lowry, *Consumer Law* (n 27) 16

<sup>63</sup> Barral, ‘E-Consumers And Effective Protection: The Online Disputes Resolution System’ (n 7) 85

<sup>64</sup> *ibid.* 86

<sup>65</sup> *ibid.* 87

market, with regard to health and safety issues, in which a trader tries to prove to the consumer that they indeed offer the better goods and services,<sup>66</sup> more than to provide a balance between contractors arbitration. On this, Weatherill confirms that ‘[i]ndeed, if a bargaining environment is fundamentally flawed by the imbalance between the parties, then to introduce disclosure requirements may even legitimate a pernicious practice’<sup>67</sup> This is in addition to the fact that the consumers are still unable to secure a fair deal from a powerful supplier even when they are supported by the mandatory information.<sup>68</sup>

Currently, the weaker party can only be a natural person within the narrow concept of consumer, which excludes all the other weaker parties that face the same issue in online contracts. If the concept of consumer in online contracts does not show any signs of being broadened, a distinction between physical goods and digitized goods, physical services and digitized services, and physical performance and digitized performance to determine the purpose of the contract may also be required.<sup>69</sup> The determination of the purposes of the contract would indicate whether or not the consumer could be considered as weaker party (ie small enterprise or family business or farmers), to determine whether they are covered by the consumer protection or not. However, the use of such an approach is more complex in international online contracts to protect the consumer as a weaker party.

Therefore, from the author perspective, the true meaning of the weaker party in online contract is unclear, due to the controversial definition of who is (or what constitutes ) a consumer. The concept of online consumer as weaker party should include both natural and legal person when they are buying from online websites for purposes which are outside of their trade or profession.

### ***3. The party autonomy of the online consumer***

#### **3.1 Introduction**

Party autonomy in the sense of ‘freedom of contract’ is one of the most important principles of contract law.<sup>70</sup> This can be explained by the fact that party autonomy is

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<sup>66</sup> Stephen Weatherill, *EU consumer law and policy* (Rev. ed. o. NetLibrary, Inc. 2005) 85

<sup>67</sup> *ibid.*

<sup>68</sup> *ibid.*

<sup>69</sup> Wang, *Law of Electronic Commerce* (n 20), 131

<sup>70</sup> See for example: Geraint G. Howells, Andre Janssen, and Reiner Schulze, *Information Rights and Obligations: A Challenge for Party Autonomy and Transactional Fairness* (Ashgate Publishing, Ltd. 2005); Stefan Grundmann, ‘Information , Party Autonomy And Economic Agents In European Contract

regarded as the formal expression of parties' will.<sup>71</sup> The parties exercise their freedom of contract by deciding who to contract with (partner freedom); on what terms (term freedom); and how to behave in the course of performance.<sup>72</sup> In a narrow sense, freedom of contract focuses on the term freedom of the contract.<sup>73</sup> The freedom of the term implies a license to involve the contract with any legal term that the parties may agree upon.<sup>74</sup> However, the parties do not have absolute freedom; their freedom is subject to some requirements such as good faith and fair dealing which is different from one jurisdiction to another.

However, it is important to mention here that good faith principles might not be available in the law of England and Wales.<sup>75</sup> This is not to say that contracting parties in England and Wales are free from standards of fairness as the concept of good faith is infiltrating it from EU legislation<sup>76</sup> – those principles are found under the Principles of European Contract Law.<sup>77</sup> In this regard, the England and Wales Court of Appeal has acknowledged that 'English law has, characteristically, committed itself to no such overriding principle but has developed piecemeal solutions in response to demonstrated problems of unfairness'.<sup>78</sup> Conversely, the USA incorporated similar principles (obligation of good faith) into the UCC.<sup>79</sup>

One of the important roles of good faith and fair dealing principles can be perceived in

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Law' (2002) 39 CML Rev. 269; Girlepteanu George, 'The Principle of Contractual Freedom' (2010) 1 AGORA Int'l J. Jurid. Sci. [cclxvi]; Zhang, 'Contractual Choice of Law in Contracts of Adhesion and Party Autonomy' (n 2)

<sup>71</sup> Grundmann, 'Information, Party Autonomy And Economic Agents In European Contract Law' (n70)

<sup>72</sup> Howells, Janssen, and Schulze, *Information Rights and Obligations: A Challenge for Party Autonomy and Transactional Fairness* (n70) 3

<sup>73</sup> Roger Brownsword, *Contract law: themes for the twenty-first century* (2nd edn, Oxford University Press 2006) 50

<sup>74</sup> *ibid.*

<sup>75</sup> *Chitty on Contracts*, 31st Ed., Vol 1 "in keeping with the principles of freedom of contract and the binding force of contract, in English contract law there is no legal principle of good faith of general application, although some authors have argued that there should be" 39

<sup>76</sup> *Yam Seng Pte Limited v International Trade Corporation Limited* [2013] EWHC 111 at 124; For example, the Unfair Terms in Consumer Contracts Regulations 1999, which give effect to a European directive, contain a requirement of good faith, as Article 5(1) "A contractual term which has not been individually negotiated shall be regarded as unfair if, contrary to the requirement of good faith,..."

<sup>77</sup> The Principles of European Contract Law 2002 (Parts I, II, and III) (Parts I and II revised 1998, Part III 2002), Article 1:102 "Parties are free to enter into a contract and to determine its contents, subject to the requirements of good faith and fair dealing, and the mandatory rules established by these Principles".

<sup>78</sup> *Interfoto Picture Library Ltd v Stiletto Visual Programmes Ltd* [1989] 1 QB 433 at 439

<sup>79</sup> Uniform Commercial Code 2001, UCC Article 1-304, "Every contract or duty within [the Uniform Commercial Code] imposes an obligation of good faith in its performance and enforcement"; Good faith mean under Article 1-201(20) "honesty in fact and the observance of reasonable commercial standards of fair dealing".

the event of disputes which arise after the contract is signed.<sup>80</sup> Such disputes generally arise when the application of the express contract would lead to unfair results or deprive some right that the other party sought to take advantage of in the express contract terms.<sup>81</sup> However, parties (ie consumer) are under an obligation to read the contract terms; they should be as well informed about every necessary term and subject in the contract as the other party.<sup>82</sup> In addition, the consumer has to understand what the other party is offering within those contractual terms in order to negotiate before they present their intention to enter into the contract. In such a way, it can be said that the contract has been signed by freely giving consent. This freedom of consent gives parties the right to enter into a contract by being able to contract as they wish but also gives the right to refuse to contract when not in their interests.<sup>83</sup> This was stipulated in one of the core international contract law conventions, the United Nation Convention on Contracts for the International Sales of Goods 1980 (CISG).<sup>84</sup> Article 19 of CISG states that:

A reply to an offer which purports to be an acceptance but contains additions, limitations or other modifications is a rejection of the offer and constitutes a counter-offer.<sup>85</sup>

Thus, the freedom as to the contractual parties must be mutual.<sup>86</sup> Consequently, signing the contract has the consequence of binding one party to the other based on the terms they have agreed on by freely giving consent. Therefore, they are fully informed and understand the consequences of the contract terms. Adams and Brownsword confirm that the law should respect genuine contractual choices without any intervention by judicial power, ie not what the judge thinks it would be reasonable for them to have made.<sup>87</sup>

In the context of arbitration, the argument of Adams and Brownsword might be true to the extent that parties are in the position of an equal bargaining power as their consent

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<sup>80</sup> William W Park, 'Arbitral jurisdiction in the United States: who decides what? Arbitral jurisdiction in the United States : who decides what ?' (2008) 33 Int. A.L.R.

<sup>81</sup> *ibid.*

<sup>82</sup> E. Allan Farnsworth, *Contracts*, (3rd edn, Aspen Law & Business, 1999) 297

<sup>83</sup> See George, 'The Principle of Contractual Freedom' (n 70)

<sup>84</sup> The United Nation Convention on Contracts for the International Sales of Goods 1980 (CISG) (or Vienna Convention) governs contracts for the international sales of goods between private businesses. However, it is excluding sales to consumers and sales of services, as well as sales of certain specified types of goods. Even so, it applies to contracts for sale of goods between parties whose places of business are in different Contracting States. There is 80 Parties; United Kingdom did not sign it, while entered into force at United States of America 1988.

<sup>85</sup> The International Sales of Goods Conventions 1980 (CISG), Article 19(1)

<sup>86</sup> Zhang, 'Contractual Choice of Law in Contracts of Adhesion and Party Autonomy' (n 2)

<sup>87</sup> John Adams and Roger Brownsword, *Key Issues in Contract* (Butterworths Law 1995) 256

and choice to arbitrate are genuine. However, this is not the case with a consumer. A consumer rarely reads the complex adhesion contract or understands the significance of the terms which include the arbitration clause.<sup>88</sup> Therefore, there is uncertainty about their genuine contractual choices. The protection against the unfair terms, such as arbitration, is provided to specific and small groups of people based on their objective circumstances. Those objective circumstances determine who should be considered a protected consumer by judicial power. Nonetheless, business is not under an obligation to notify the consumer about the existence of the special terms, such as an arbitration clause. This is because the issue of consent is governed by ordinary contract law rules to determine whether the parties have consented to the contract terms or not.

The nature of the e-commerce contract is another problematic issue. In regard to the terms of consent and choices, an online consumer, whether a legal or natural person, is treated equally based on the lack of bargaining power. Online contracts are modified to facilitate the use of standard terms to strip users of many of their rights. This is because of two related aspects of online consent and terms choices: (1) consumers are still not able to influence the substance of the term or any other online terms; (2) a consumer is usually not aware of all the terms in the contract due to the distracting way of presenting the terms within online contracts, such as in pre-checked boxes. Such an option do not certifying the consumer consent to the terms and condition. Once again, however, the protection is provided to specific and small groups of people.

In this context, a question may arise as to whether contract law should hold an online consumer responsible for their contract terms including an arbitration clause based on the consumer's lack of bargaining power or based on an adequate level of information that allows for informed consent to online contracts. The author believes it should be based on an adequate level of information. As will be seen in the following two subsections

### **3.2 The lack of choice in online contracts**

The types of e-commerce contracts which a consumer can be involved with when contracting online all have similar style terms. The style terms of those contracts, whether

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<sup>88</sup> Jean R. Sternlight, *Panacea or Corporate Tool?: Debunking the Supreme Courts Preference for Binding Arbitration*, (1996) 74 Wash. U.L.Q. 637, 676.

shrink-wrap, browse-wrap or click-wrap contracts, include many of the standard terms that do not give a consumer any opportunity to choose their terms and indicate their consent by clicking on an agreement section. Thus, the main issue is whether consent given in a contract could be deemed to be valid for all contract terms, including the arbitration clause. Such an issue is still open to debate. This is because a one-sided forum contract together with the lack of choice in regards to the arbitration clause can be evidence that there is an inequality of bargaining power, especially where there is a monopoly of power over legal information by the seller.<sup>89</sup> In such cases, the weaker party often only has a limited possibility of implementing any changes in the business terms and conditions, and they can be indirectly forced to choose between entering into a contract and becoming involved in an arbitration agreement or foregoing the contract.

The classical concept of arbitration is based on mutual consent, which is crucial to the legitimation of the arbitration process.<sup>90</sup> The intention of the parties to submit to arbitration should be freely agreed to that particular mode of dispute settlement.<sup>91</sup> Some commentators have stated that the freely consenting party is a legal fiction<sup>92</sup> as a consumer gives consent to a contract without understanding the contractual obligation or having a profound knowledge of the subject of arbitration. In such a way, entering into arbitration through an online contract may not always be consensual where the lack of genuine choice leads to non-mutual consent. Therefore, the question here is what requirements have come to replace the online consent of arbitration. The question cannot be answer without analysis inequality of bargaining power.

### **3.3 The inequality of bargaining power**

The expression ‘inequality of bargaining power’ was first used by the English Judge Lord Denning in *Lloyds Bank v Bundy*.<sup>93</sup> Lord Denning adopted the general principle of

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<sup>89</sup> Orna Rabinovich-Einy and Ethan Katsh, ‘Technology and the Future of Dispute Systems Design’ (2012) 17 Harv. Negot. L. Rev. 151; Scott Peppet, ‘Freedom of Contract in an Augmented Reality: The Case of Consumer Contracts’ (2012) 59 UCLA L. Rev. 676

<sup>90</sup> Gabrielle Kaufmann-kohler and Thomas Schultz, *Online Dispute Resolution: Challenges for Contemporary Justice ( International Arbitration Law Library Series Set )* (Kluwer Law International, The Hague 2004) 31,169

<sup>91</sup> Mayer, J., Seitz, T.: Recognizing and Understanding Consent Issues. In: Arbitration(2000) 79 MIBJ 505

<sup>92</sup> *ibid*

<sup>93</sup> See *Lloyd’s Bank Ltd. v Bundy* [1975] Q.B. 326, [1974] 3 All E.R. 757 (C.A.); See also Richard Stone, *Text, Cases and Materials on Contract Law* (2nd edn, Taylor and Francis 2012) 474



‘unconscionability’ from the USA.<sup>94</sup> According to Lord Denning, the ‘inequality of bargaining power’ between parties can be divided into five historical categories: duress of goods because of an urgent need of the goods; unconscionable transaction – a man is in need of special care and protection due to personal and social conditions; undue influence; undue pressure; and salvage agreements as unfair advantage taking.<sup>95</sup> The intention of Lord Denning was probably to refer not only to the classical vices of consent but also to provide special protection to the weaker party against the oppressive use of superior bargaining power in many considerations similar to those mentioned above, such as the consumer's ignorance, informational gap and lack of experience. This assumption would ensure that the courts have a general power of intervention wherever there is ‘inequality of bargaining power’. In the context of the consumer, that would imply that the notion of consumer extends to cover all types of consumers in the position of the weaker party. However, the approach of Lord Denning has not been followed by English courts. The English courts appear to have abandoned this attempt as too uncertain and unworkable.<sup>96</sup> When Parliament intervened to deal with this issue by enacting the UCTA.<sup>97</sup>

McKendrick states that a better approach would be to create a doctrine of inequality of bargaining power.<sup>98</sup> However, other scholars find that this would increase the risk of uncertainty because there is no general principle of inequality of bargaining power and it is difficult to obtain a uniform application of standards of fairness between different judges.<sup>99</sup> Thus, the notion of ‘inequality’ is in itself unclear.

Due to the increasing number of online contracts, the law in England and Wales has addressed the substantive unfairness in relation to clauses and particular types of contract (ie consumer contract).<sup>100</sup> In such cases, it is no surprise that the protection targets the consumer on the basis that he is the weaker party in the transaction. An example of this

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<sup>94</sup> A similar approach has been adopted in Australia and Canada; See Richard Stone, *The Modern Law of Contract* (10th edn, Routledge London 2013), 373

<sup>95</sup> *Lloyd's Bank Ltd. v. Bundy* [1975] Q.B. 326, [1974] 3 All E.R. 757 (C.A.)

<sup>96</sup> *National Westminster Bank plc v. Morgan* [1985] A.C. 686 at 708, [1985] 1 All E.R. 821 at 830 (H.L.); Ewan Mckendrick, *Contract Law* (10th edn, Palgrave Macmillan 2013) 305

<sup>97</sup> *National Westminster Bank plc v. Morgan* [1985] A.C. 686 at 708, [1985] 1 All E.R. 821

<sup>98</sup> *ibid.* Ewan Mckendrick, *Contract Law*, 307

<sup>99</sup> Stone, *The Modern Law of Contract* (n 94) 373

<sup>100</sup> *Williams vs. Walker-Thomas Furniture Co.* [1965] 350 F.2d 445, D.C. Circ.

is the restriction of the protection afforded to the consumer under the UTCCR. However, at the same time, this protection targets the natural consumer only.

The doctrine of unconscionability is a ground that exists for the revocation of a contract.<sup>101</sup> One of the best definitions of the term ‘unconscionability’ was given in the case *Williams v Walker-Thomas Furniture* where the court asserted that: ‘unconscionability has generally been recognised to include an absence of meaningful choice on the part of one of the parties, together with contract terms which are unreasonably favourable to the other party’.<sup>102</sup> Under this defence, the ‘inequality of bargaining power’ appears as an explicit element of unconscionability which allows courts to deny enforcement of any contract or clause power as being ‘unconscionable’ because of unequal bargaining at the time it was made.<sup>103</sup> Unconscionability is divided into procedural and substantive; procedural unconscionability requires an unfair bargaining process and substantive unconscionability pertains to overly harsh terms.<sup>104</sup> The courts require both procedural and substantive unconscionability to challenge any contract on such grounds.<sup>105</sup> In the context of arbitration in a consumer contract, only a clearly unfair arbitration clause will be recognised as unenforceable by the courts.<sup>106</sup> The one-sided nature of the contract such as an online consumer contract where a consumer has less bargaining power is not considered under unconscionability because the purpose of the unconscionability doctrine is to prevent ‘oppression and unfair surprise’, not to rectify bargaining power imbalances.<sup>107</sup>

Despite the structural differences, it is difficult to define which of them better responds to consumers’ needs. However, both play important roles in strengthening and encouraging bargaining processes and negotiations, and both would prevent injustice arising in the few cases in which it was needed.

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<sup>101</sup> Jeff Guarrera, ‘Mandatory Arbitration: Inherently Unconscionable , but Immune from Unconscionability’ (2012) 40 Western State University Law Review 89

<sup>102</sup> *Williams vs. Walker-Thomas Furniture Co.* 350 F.2d 445, (D.C. Circ 1965)

<sup>103</sup> Daniel D Barnhizer, ‘Inequality of Bargaining Power’ (2005) 76 U. Colo. L. Rev 139

<sup>104</sup> M Rustad and MV Onufrio, ‘Reconceptualizing Consumer Terms of Use for a Globalized Knowledge Economy’ (2012) 14 U. Pa. J. Bus. L. 1085

<sup>105</sup> *ibid.*

<sup>106</sup> See *Allied-Bruce Terminix Cos. v Dobson* 513 US (1995); See also *Comb and Toher v Paypal, Inc.* (US District Court, ND Cal, San José Div 30 August 2002).

<sup>107</sup> *ibid.* (n 104)

### **3.4 The lack of consent**

The issue of the lack of genuine choice in online consumer contracts mainly relates to the point that consumers are still not able to influence the substance of the term or any other online terms. However, the consent of online consumers is necessary in regard to enforcing the contract. The lack of choice and the inequality of bargaining power have an important effect upon the existence of genuine consent. The significance of such an issue is when there is an arbitration clause which forces consumers to waive their rights to litigate disputes. In addition, where there is an imbalance between parties, there is difficulty in claiming that the weaker party has truly consented to arbitrate.<sup>108</sup> The type of consent is also important, especially when the issue centres on a 'duty to read' which deems parties responsible for the result of their contract. It is true that the consumer is under an obligation to read the contract terms. Nonetheless, consumers rarely read and understand the form contracts that they sign which includes the arbitration clause.<sup>109</sup> It can be understood that the purpose of protecting consumers is based on the characteristics of the consumer as a non-expert who suffers from a lack of information and non-negotiated terms.<sup>110</sup> The question here is how the informed consent form of online consumers to arbitration exists.

#### **3.4.1 UK (England and Wales)**

Under the law of England and Wales, the UTCCR focuses on providing protection against the unfair terms which have not been individually negotiated which are believed to be unfair to consumer rights.<sup>111</sup> In addition, the Arbitration Act 1996 treats any consumer arbitration clause as unfair if the value of the claim is £5000 or less.<sup>112</sup> However, if the value of the claim is more than £5000, the contract terms must be brought to the attention of the consumer.<sup>113</sup> In such a way, with regard to online purchases, a crucial element of consumer consent is based on the knowledge of the consumer about the existence of the

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<sup>108</sup> David S. Schwartz, *Enforcing Small Print to Protect Big Business: Employee and Consumer Rights Claims in an Age of Compelled Arbitration*, (1997) *Wis. L. Rev.*33, 56-57.

<sup>109</sup> Jean R. Sternlight, *Panacea or Corporate Tool?: Debunking the Supreme Courts Preference for Binding Arbitration*, (1996) 74 *Wash. U.L.Q.* 637, 676

<sup>110</sup> Howells and Weatherill, *Consumer protection law* (n 22) 262; Hew R. Dundas, 'Recent Developments in English Arbitration Law : Arbitrations Involving Consumers , Whether to Hold a Hearing , Enforcement of Foreign Awards and a Postscript' (2009) 75 *Arbitration* 115

<sup>111</sup> Howells and Weatherill, *Consumer protection law* (n 22)118, 165

<sup>112</sup> The Arbitration Act 1996, section. 91; See also, *Unfair Arbitration Agreements (Specified Amount) Order 1999*, (SI 1999/2167)

<sup>113</sup> *Mylcrist Builders Ltd v Buck* [2008] EWHC 2172 TCC

specific term if it is above £5000. This limitation upon consumer consent is implemented to protect them from specific terms that deprive consumers of their rights, specifically if the terms are unusual in that type of contract such as arbitration.<sup>114</sup>

The law of England and Wales has three stages to evaluate the informed consent of consumers in arbitration. The first stage is by identifying who qualifies as a consumer; the second stage determines the value of the contract; and the third stage determines whether there was sufficient notice of the arbitration clause. The need for the three stages can be justified because an arbitration clause is unlike any other term in the contract. These have a high potential to be unfair which might affect other rights and obligations within the contract by depriving consumers of one of their fundamental rights which is to seek redress before the courts.<sup>115</sup>

However, in the author's opinion, the first and the second stages are by themselves a multifaceted problem. Although, the UTCCR protect consumers from one-sided contract terms with businesses, whether this contract is an online contract or a traditional contract, this protection is provided only to the natural person as a weaker party under two specific aspects: (1) when terms have been drafted in advance; and (2) when the consumer has not individually negotiated or the consumer has not been able to influence the substance of the terms.<sup>116</sup> Thus, if the consumer has no ability to influence the substance of the terms then the terms have not been individually negotiated.<sup>117</sup> Nevertheless, in both aspects, those terms could be suspected of being unfair because they are contrary to the requirement of good faith or because they cause a significant imbalance in the parties' rights and obligations.<sup>118</sup> As a consequence of this type of protection, the business has to show that a term was individually negotiated.<sup>119</sup> The main issue here seems to be related to the knowledge of the online consumer which ensures the free choice of the online consumer (natural person) to accept or refuse the arbitration. However, the fact that a consumer had knowledge to consider the terms of an agreement does not mean that the

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<sup>114</sup> *Interfoto Picture Library Ltd v. Stiletto Visual Programmes Ltd* [1989] Q.B. 433 (The Court of Appeal held that the term was not incorporated because there was not any given notice of the term)

<sup>115</sup> Florencia Marotta- Wurgler, 'Some Realities of Online Contracting' (2011) 19 *The University of Chicago Press* 11; Lucille M Ponte, 'Getting a Bad Rap? Unconscionability in Clickwrap Dispute Resolution Clauses and a Proposal for Improving the Quality of These Online Consumer 'Products'' (2011) 26 *Ohio St. J. on Disp. Resol.* 119

<sup>116</sup> The Unfair Terms in Consumer Contracts Regulations 1999, Article 5(2).

<sup>117</sup> Mckendrick, *Contract Law* (n 96) 311

<sup>118</sup> The Unfair Terms in Consumer Contracts Regulations 1999, Article 5(1).

<sup>119</sup> See *UK Housing Alliance (North West) Ltd v Francis* [2010] EWCA Civ 117

terms were individually negotiated.<sup>120</sup> Therefore, in order to maintain the level of consumer protection, the terms that are binding upon consumers have to be drafted in favour of consumers, and to draw consumer attention to this unusual term in plain, intelligible language,<sup>121</sup> to which the consumers have a proper understanding of how such terms may affect their rights and obligations.<sup>122</sup> Moreover, the supplier has to prove that is the case<sup>123</sup> otherwise those terms are unenforceable against the consumer.<sup>124</sup>

However, this imposes an absolute prohibition on a finding of individual negotiation if there has not been an ability to influence the substance of a term. This is if the value of the claim is more than £5000 and if not then the arbitration clause is unenforceable against the natural consumer regardless of the consumer giving their informed consent in advance. In addition, this prohibition is related to the natural consumer only. In terms of the nature of online contracting, all consumers share the same weak position, whether as a natural or a legal person. For example, all online consumers cannot influence or negotiate any of the terms that they do not satisfy.<sup>125</sup> More importantly, the online contract is presented to all types of consumers without any distinction between natural or legal consumer. Thus, the consequences of the arbitration clause, which deprive consumers of one of their fundamental rights to seek redress before the courts can also be applied whether the consumer is a natural person or a legal person. In other words, all types of online consumers share the lack of bargaining power and face the same consequences of such weakness because of the nature of online contracting; however, the consumer law provides protection for some consumers and excludes others.

On the issue of the consumer's duty to read, Ware argues that the arbitration clause is freely negotiated as long as the consumers are free to put the pen down without signing the whole contract even if it is included within an adhesion contract.<sup>126</sup> He explains that, if the consumer's consent to the arbitration clause is considered to be non-genuine just because the consumer does not pay any attention to it, this also applies to most, maybe to

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<sup>120</sup> *ibid.* Mckendrick, *Contract Law* (n 96)

<sup>121</sup> The Unfair Terms in Consumer Contracts Regulations 1999, Article 6

<sup>122</sup> *ibid.* Mckendrick, *Contract Law* (n 96)

<sup>123</sup> *UK Housing Alliance (North West) Ltd v Francis* [2010] EWCA Civ 117

<sup>124</sup> The Unfair Terms in Consumer Contracts Regulations 1999, Article 8(1).

<sup>125</sup> Zhang, 'Contractual Choice of Law in Contracts of Adhesion and Party Autonomy' (n 2)

<sup>126</sup> Stephen J. Ware, 'Consumer Arbitration as Exceptional Consumer Law (With a Contractualist Reply to Carrington & Haagen)' (1998) 29 *McGeorge L. Rev.* 195

all other types of clauses included in the adhesion contract which the consumer is unlikely to be attentive to as well; the arbitration clause is not unusual in this respect.<sup>127</sup>

This argument is logical to some extent as the online consumer contract is provided to consumers on a take-it-or-leave-it basis; ie, if the consumer (the online consumer) has the right to refuse the contract then there is no need to talk about imbalance between the parties. Needless to say, the consumer may sometimes not have such an option to refuse the contract when there is no other provider. However, although the consumer might be free, he is still not equal with the suppliers as the issue of consumer contracts is not about their ability to refuse the contract or not and this puts them in a position of unequal bargaining power. The concern here is that consumers have difficulty understanding the complex terms of the contract including the arbitration clause.<sup>128</sup> In addition, most consumers are not aware of the importance of the terms and conditions of the contract, especially if the terms are unusual terms. Their attention is typically focused on the price of the goods and how the service is going to be provided or delivered.<sup>129</sup> In England and Wales, this kind of control over certain types of terms can be found in sections 12 to 15 of the Sale of Goods Act 1979 which impose conditions regarding the title, description and quality of the products.

Therefore, in regard to an arbitration term, it must be on a level that ensures it is sufficiently brought to the attention of consumers before they get bound by it. For example, in order to give sufficient notice, Lord Denning stated in *Spurling v Bradshaw* that ‘some clauses need to 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’.<sup>130</sup> For that purpose, Article 7(1) of the same Regulation states that: ‘A seller or supplier shall ensure that any

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<sup>127</sup> *ibid.*

<sup>128</sup> Julia Hörnle, *Cross-border Internet Dispute Resolution* (Cambridge University Press 2009)75,86; Lorna Adams and Mark Samuel, ‘Consumer Rights and Business Practices’ [2013] IFF Research Ltd Prepared for BIS( London ); Jean R Sternlight, ‘Mandatory Binding Arbitration Clauses Prevent Consumers From Presenting Procedurally Difficult Claims’ (2012) 42 Southwestern University Law Review, 564–566; Sean Keefer, ‘The Path to Alternative Dispute Resolution’ (2010) 11 Resolved: J. Alternative Disp. Resol. 15–29.

<sup>129</sup> David S Schwartz, ‘Enforcing Small Print to Protect Big Business : Employee and Consumer Rights Claims in an Age of Compelled Arbitration’ (1997) 33 Wsconsin Law Review 36

<sup>130</sup> *J Spurling Ltd v Bradshaw* [1956] 1 W.L.R. 461 at 466; *Thornton v. Shoe Lane Parking Ltd.* Lord Denning M.R. (at page 169-170) said: “All I say is that it is so wide and so destructive of rights that the court should not hold any man bound by it unless it is drawn to his attention in the most explicit way.” [1971] 2 Q.B. 163; *Interfoto Picture Library Ltd v Stiletto Visual Programmes Ltd*, the court held that: “The term was not incorporated into the contract. Where a term is particularly onerous the person seeking to rely on the term must take greater measures to bring it to the attention of the other party.” [1989] QB 433

written term of a contract is expressed in plain, intelligible language.’<sup>131</sup> Moreover, the Commission Recommendation in Article VI states that ‘the decision taken by out-of-court body may be binding on the parties only if they were informed of its binding nature in advance and specifically accepted this’.<sup>132</sup> As such, the existence of the arbitration clause should be clear to consumers before they decide to accept the contract.<sup>133</sup>

The knowledge of consumers about the existence of the specific terms such as an arbitration clause and their informed consent upon it in advance is extremely important; otherwise the stronger party could oppress the weak party if it had not been well-advised.<sup>134</sup> It is important to ensure that the consumer is aware that they are agreeing to the other party’s terms and that the outcome of the terms are enforceable. Supporting evidence for this can be found in England and Wales in *Buck*.<sup>135</sup> In this landmark case, as explained in chapter 3, the court held that the arbitration clause and its effect need to be more fully, clearly and prominently set out than just by a box in the contract that listed all the terms.<sup>136</sup> In this context, the arbitration clause itself is not considered as a weakness for the consumer and as an advantage for the supplier; the issue is in the way it is represented to the consumer. Therefore, the court referred to the requirement of fair and open dealing because of the distracting way the arbitration clause was presented which was contrary to the requirement of good faith and caused a significant imbalance in the parties’ rights and obligations under the contract.<sup>137</sup> Good faith ‘fair and open dealing’ means that the supplier should not take advantage of the unfamiliarity of the consumer with the subject matter (ie arbitration).<sup>138</sup> The arbitration clause should be

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<sup>131</sup> In the explanatory note of article 6 of The Unfair Terms in Consumer Contracts Regulations 1999; “[T]he assessment of unfairness will take into account all the circumstances attending the conclusion of the contract. However, the assessment is not to relate to the definition of the main subject matter of the contract... as long as the terms concerned are in plain, intelligible language”.

<sup>132</sup> Commission Recommendation on the principles for out-of-court bodies involved in the consensual resolution of consumer disputes not covered by Recommendation 98/257/EC COM (2001) 1016, 4 April 2001

<sup>133</sup> Paul Haagen and Paul Carrington, ‘Contract and Jurisdiction’ [1996] Sup. Ct. Rev 331

<sup>134</sup> *ibid.*

<sup>135</sup> *Mylcris Builders Ltd v Buck*, [2008] EWHC 2172 TCC

<sup>136</sup> *ibid.*, para.56

<sup>137</sup> The Unfair Terms in Consumer Contracts Regulation 1999, Article 5(1); The Unfair Terms in Consumer Contracts Directive 93/13/EEC, Article 3(1) provides “A contractual term which has not been individually negotiated shall be regarded as unfair if, contrary to the requirement of good faith, it causes a significant imbalance in the parties’ rights and obligations arising under the contract, to the detriment of the consumer.”

<sup>138</sup> Andrew Burrows, *A Casebook on Contract* (2nd edn, Hart Publishing 2007) 298; See also Schedule 2 of the regulations provides: "In making an assessment of good faith, regard shall be had in particular to: (a) the strength of the bargaining positions of the parties; (b) whether the consumer had an inducement to agree to the term; (c) whether the goods or services were sold or supplied to the special order of the

completely clear to consumers with regard to its significance in the contract and the consequences of accepting an arbitration clause in the event of disputes. Otherwise, there will be a significant imbalance between the parties. This significant imbalance has been clearly described by the House of Lords in the case of *Director General of Fair Trading v First National Bank* where a significant imbalance may be found in unfair terms as ‘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’.<sup>139</sup> Lord Millet in the same case held that it can be more than just one single test of good faith to find a significant imbalance but it may be necessary to assess it from a practical standpoint by asking if the terms were drawn to the consumer attention’s and whether it is likely he would have been surprised by them or would have accepted them.<sup>140</sup> In other words, if a variety of terms and information has been given to a consumer before they accept the contract in fair and open dealing, at that time it is good faith dealing and there is no significant imbalance between the parties as they were fully aware about the arbitration clause and not surprised by it – so it can be deemed that parties have responsibility for the result of their contract.

Therefore, if there was an arbitration agreement executed in the form of a separate contract (a separate document signed by the parties), the situation of arbitration can be completely different with regard to *Buck* case. As in that respect, the terms would be seen as transparent and made in plain, intelligible language without doubt of the meaning, legible and readily available to a level which a consumer is aware of them and able to take them into account in their decision to buy a product without lack of information. So they would have a choice to object to its inclusion.<sup>141</sup> In such a way, it can be said that the business has taken reasonable steps to give sufficient notice about the existence of arbitration clauses, there is no imbalance in bargaining power between parties and those terms will be enforceable against the consumer as long as they are fully aware of them.<sup>142</sup> As such, it can be said that the parties in a consumer contract are equal when the terms were drawn specifically to the consumer’s attention<sup>143</sup> and there is no need to distinguish

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consumer, and (d) the extent to which the seller or supplier has dealt fairly and equitably with the consumer."

<sup>139</sup> *Director General of Fair trading v First National Bank*, [2001] UKHL 52 (25th October, 2001); See also *UK Housing Alliance (North West) Ltd v Francis* [2010] EWCA Civ 117.

<sup>140</sup> *ibid*, [2001] UKHL 52

<sup>141</sup> See Department for Business Enterprise and Regulatory Reform (BERR), ‘Summary of Responses Consumer Law Review : Call for Evidence Summary of Responses Contents’ [July 2009], para. 129

<sup>142</sup> *Mylcryst Builders Limited v Mrs G Buck* [2008] EWHC 2172

<sup>143</sup> *Smith v Hughes* [1871] LR 6 QB 597, Court of Appeal states “if, whatever a man’s real intention may be, he so conducts himself that a reasonable man would believe that he was assenting to the terms proposed



between who qualifies as a consumer in the legal sense.

These reasonable steps are indispensable not only for the consumer but for the business as well. A sufficient notice about the existence of arbitration clauses by the business would ensure the informed consent of the other party (consumer). This often prevents consumers from abusing the special protection afforded to them such as a consumer who refuses to take part in the arbitral proceedings in any manner and, in addition, fails to sue for annulment of the arbitral award.<sup>144</sup> Thus, consumers who are ‘reasonably well informed, reasonably observant and circumspect’<sup>145</sup> about their own decisions can be considered a free and equal party. Otherwise, the law should seek to protect consumers based on the idea of protecting the weaker party. This different treatment can be justified by evidence of imbalance between the parties.<sup>146</sup>

### **3.4.2 USA**

There is a different standard of online consent in the USA. This can be found in Article 208(3) of The Uniform Computer Information Transactions Act 1999 (UCITA) stating that:

[I]f a party adopts the terms of a record, the terms become part of the contract without regard to the party’s knowledge or understanding of individual terms in the record.<sup>147</sup>

The UCITA obliges the consumer to accept the consequences of acceptance of the contract terms even if the consumer does not read or understand the terms. Unsurprisingly, the UCITA follows the majority rule of USA courts in its broad validation of contracts terms;<sup>148</sup> as some describe it: ‘money now, terms later’.<sup>149</sup> This

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by the other party, and that other party upon that belief enters into the contract with him, the man thus conducting himself would be equally bound as if he had intended to agree to the other’s terms” [1871] LR 6 QB 597, p. 607; See *Interfoto Picture Library Ltd v Stiletto Visual Programmes Ltd* [1989] Q.B. 433; Hugh Beale, Jacobien Rutgers, Denis Tallon, Stefan Vogenauer, and Fauvarque-Cosson, *Cases, Materials and Text on Contract Law* (2nd edn, Hart Publishing, 2010) 761

<sup>144</sup> Alexander J. Belohlavek, ‘Arbitrability Limitation in Consumer (B2C) Disputes?: Consumers’ Protection as Legal and Economic Phenomenon’ (2012) 1 *Journal of Governance and Regulation* 156

<sup>145</sup> Case C-210/96, *Gut Springenheide GmbH and Rudolf Tusky v Oberkreisdirektor des Kreises Steinfurt - Amt für Lebensmittelüberwachung*, [1998] ECR I-4657.

<sup>146</sup> Barral-Viñals, ‘E-Consumers and Effective Protection: the Online Dispute Resolution System’ (n 7) 87

<sup>147</sup> The Uniform Computer Information Transactions Act (1999) has only been passed in two states, Virginia and Maryland.

<sup>148</sup> See Rustad and Onufrio, ‘Reconceptualizing Consumer Terms of Use for a Globalized Knowledge Economy’ (n 104)

<sup>149</sup> Christopher L Pitet, ‘The Problem with Money Now , Terms Later : ProCd , Inc . v . Zeidenberg and the Enforceability of Shrinkwrap Software Licenses’ (1997) 31 *Loy. L.A. L. Rev.* 325

description is generally because the USA courts tend to enforce the terms against consumers even if they were not aware of the terms at the time they signed it.<sup>150</sup> The policy of USA courts is dramatically different from those in England and Wales and the EU. This policy largely defers to the consumer freedom of contract and duty to read.<sup>151</sup> Although both the USA courts and England and Wales courts rely on the so-called ‘objective theory of consent’ to determine whether the parties have consented to the contract,<sup>152</sup> the objective consent is not concerned with the subjective state of mind of the parties but only whether they appear to have intended to agree to the other party’s terms.<sup>153</sup> However, the difference relates to the way that the informed consent of a consumer is considered as ‘bargaining’ over arbitration terms to show that the agreement exists. In England and Wales, as it has been mentioned above, businesses are required to give a sufficient notice which should draw the existence of arbitration terms to the attention of the consumer. Otherwise, such terms are invalid and unenforceable against the consumer. In contrast, the USA courts do not oblige businesses to provide a specific notice about the existence of the arbitration terms but do oblige consumers to read the contract and terms carefully. In such a way in the context of online contracts in the USA, the consent of consumers is implied as is that they are sufficiently informed and have read and understood the terms of the contract. Nevertheless, the USA courts occasionally strike out and refuse to enforce a term that the consumer did not read before entering into a contract if the business tried to prevent the consumer from knowing that such a term existed.<sup>154</sup> In other words, the lack of specific notice of the arbitration clause alone would

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<sup>150</sup> *ibid.*; See for example : *ProCD, Inc. v. Zeidenberg* 86 F.3d 1447 (7th Cir. 1996); *Lieschke v RealNetworks, Inc.* 2000 WL 198424 (N.D.Ill. Feb. 11, 2000)

<sup>151</sup> Rustad and Onufrio, ‘Reconceptualizing Consumer Terms of Use for a Globalized Knowledge Economy’ (n 104)

<sup>152</sup> Under England and Wales Law, the objective consent can be deduced from the case of *Smith v Hughes* that “...that a reasonable man would believe that he was assenting to the terms proposed by the other party, and that other party upon that belief enters into the contract with him, the man thus conducting himself would be equally bound as if he had intended to agree to the other party’s terms”. (1871) LR 6 QB 597; Under the UAS law, the objective consent can be found in Article 2(1) of the US Restatement Second of Contract (1981) as it states “A promise is a manifestation of intention to act or refrain from acting in a specified way, so made as to justify a promise in understanding that a commitment has been made”. The Comment (b) of the US Restatement Second of Contract on Article 2(1) provides that: “The phrase - manifestation of intention - adopts an external or objective standard for interpreting conduct; it means the external expression of intention as distinguished from undisclosed intention”.

<sup>153</sup> Mckendrick, *Contract Law* (n 96) 24

<sup>154</sup> The Uniform Commercial Code (2002), Article 2-302 (1) “if the court as a matter of law finds the contractor any clause of the contract to have been unconscionable at the time it was made the court may refuse to enforce the contract, or it may enforce the remainder of the contract without the unconscionable clause, or it may so limit the application of any unconscionable clause as to avoid any unconscionable result”; See Wurgler, ‘Some Realities of Online Contracting’ (n 115); See also *Discover Bank v. Superior Court*, the decision was meant to prevent business with superior bargaining power from cheating large

not render the arbitration clause unenforceable. In that case, businesses are only obliged to act within two very basic principles: good faith and fair dealing. In the USA, good faith means ‘honesty in fact in conduct contract or transaction’<sup>155</sup> but, more importantly, it means in the case of business: “honesty in fact and the observance of reasonable commercial standards of fair dealing’.<sup>156</sup> The last two principles do not require business to provide notice about the existence of the terms and potential outcome of the concluded contract.

With regard to arbitration consent, the requirements arise from the FAA in section 2. This provides that any written agreement arising out of a contract or a transaction involving commerce to be settled by arbitration ‘shall be valid, irrevocable, and enforceable’.<sup>157</sup> Moreover, section 4 permits a court to compel an unwilling party to enter into arbitration if it is satisfied that there is an enforceable agreement to arbitrate.<sup>158</sup> This situation is exemplified in *Hill v Gateway 2000 Inc.*<sup>159</sup> Hill ordered a computer over the telephone and paid for it with a credit card. The contract included an arbitration provision within a list of terms, which had been shipped in a box by the seller. The purchaser’s acceptance of the terms was shown by not returning the purchased item within thirty days. The trial court found that the arbitration clause was invalid. It concluded that the contract was formed when the payment was given over the phone so only the terms known to the buyer at the time of the contract formation were to be included in the agreement, and arbitration was not included. Therefore, it declined to enforce the arbitration clause. However, the appellate court held that the terms within the box, including the arbitration clause, were binding and emphasized the duty of the consumer to read the terms of contract. It also reasoned that the 30-day return clause constituted an ‘approve-or-return’ offer. Thus, if the buyer kept the computer for longer than 30 days then he was deemed to have accepted

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numbers of consumer out of small sums of money, 36 Cal. 4<sup>th</sup> 148. 30 Cal. Rptr. 3d 76 113p. 3d 1100 (2005)

<sup>155</sup> The Uniform Commercial Code (2001), Article 1-304 “Every contract or duty within the Uniform Commercial Code imposes an obligation of good faith in its performance and enforcement”; See also Brooke Overby, ‘An Institutional Analysis of Consumer’ (2001) 34 Vand. J. Transnatl. L 1219

<sup>156</sup> The Uniform Commercial Code (2001), Article 1-201

<sup>157</sup> The Federal Arbitration Act, Section 2

<sup>158</sup> The Federal Arbitration Act, Section 4 “The court shall hear the parties, and upon being satisfied that the making of the agreement for arbitration or the failure to comply therewith is not in issue, the court shall make an order directing the parties to proceed to arbitration in accordance with the terms of the agreement”; Richard C. Reuben, ‘First Options, Consent to Arbitration, and the Demise of Separability: Restoring Access to Justice for Contracts with Arbitration Provisions’ (2003) 56 SMUL Rev. 819

<sup>159</sup> *Hill v. Gateway 2000, Inc.*, 105 F.3d 1147 (7th Cir. 1997)

the terms.<sup>160</sup> The same issue can be found in the case of *Lieschke v RealNetworks*.<sup>161</sup> The claimants maintained that they had not been able to consent to an arbitral clause because it was hidden among the general conditions. However, the court refused this claim and cited that the clause contained in a click-wrap license agreement is an agreement in writing under the FAA. Moreover, the arbitration clause did not need to be highlighted. Therefore, the court held that an arbitration clause, which the user had to accept before downloading the software, was enforceable.<sup>162</sup>

In comparison with England and Wales courts, the USA courts have broadly validated the arbitration in online consumer transactions.<sup>163</sup> However, England and Wales courts share a common law tradition with the USA; they have implemented radically different consumer rules. The UTCCR and the Arbitration Act 1996 follow an anti-contract approach to consumer arbitration in which consent plays less of a role in determining whether a term ought to be enforced unless the value of contract is more than £5000. This approach contrasts with the current USA approach which emphasizes contract and consent as primary issues whether in consumer contracts or otherwise.<sup>164</sup>

#### **4. Conclusion**

Since trade carried out on the Internet goes beyond national boundaries, those opposing approaches based on how free the consumer is to choose to go to arbitration. The way that determine who is qualify as consumer and how consumers are sufficiently informed would lead to significantly different legal responses and would raise the issue of conflict of laws in international consumer transactions in cases where determining who the consumer is unclear or where the consumer has a mixed purpose, such as small enterprises or family businesses. In addition, the conflict between freedom of contract and the protection of the weaker party relate to theories of consent to arbitration, which raises the issue of the arbitrability of consumer disputes. Questions of arbitrability imply this tension because it puts a limitation on arbitration and its enforcement, and this requires courts to choose between these two competing norms. The England and Wales approach differs significantly from the USA approach regarding basic consumer contract

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<sup>160</sup> *ibid.* 105 F.3d 1147 (7th Cir. 1997)

<sup>161</sup> *Lieschke v RealNetworks* 2000 WL 198424 N.D.Ill. Feb. 11, 2000

<sup>162</sup> *ibid.*

<sup>163</sup> Rustad and Onufrio, 'Reconceptualizing Consumer Terms of Use for a Globalized Knowledge Economy' (n 104)

<sup>164</sup> See Overby, 'An Institutional Analysis of Consumer' (n 155)

law policy. The England and Wales courts, which tend to favour rule of law values, often interpret arbitration issues in a way that is more concerned with preserving judicial access rights. In contrast, USA courts, which tend to favour freedom of contract values, often interpret arbitration issues in a way that promotes arbitration. However, the emphasis should be on the consumer's informed consent and not only on consumer arbitration.

It might be inaccurate, in practice if not in theory, to conclude that both parties are consumers. However, identify international online consumer from other types of online contractual parties is still difficult in order to ensure a clear consent of the parties to arbitrate. Nevertheless, the consent must be explicit to the level that shows the consumers are sufficiently aware of the existence of the arbitration clause. The requirement of separate arbitration agreement signed by the both parties can provide a reasonable solution.

## **Chapter 5: The Law Applicable to Arbitrability: When Rights Collide**

### ***1. Introduction***

As we have seen in chapters 3 and 4, international online consumers have, under different conditions and circumstances, the freedom to submit to arbitration in England and Wales and the USA. In this context, where international online consumer contracts are concluded between parties that belong to different jurisdictions, a consideration of different jurisdictional grounds and conflicting interests cannot be ignored. Therefore, arbitrators' authority to determine disputes involving international online consumers should be questioned in terms of how arbitrators should handle these disputes and their jurisdiction to do so. This chapter will attempt to determine what the applicable law should be and why.

Determining the appropriate applicable law to govern arbitrability might be seen as one of the most problematic issues in the field of conflict of laws. By analysing the applicability of traditional arbitration rules as autonomous procedure and judicial procedure, it can be said that the basic problem that arbitrators face in determining the applicable law upon the arbitrability is the conflict between the contractual and jurisdictional nature of international online consumer disputes. The general principle in arbitration, the principle of party autonomy, allows parties the freedom to choose the applicable law.<sup>1</sup> Likewise, national arbitration laws (England and Wales and the USA) and international conventions applicable to international arbitration, allow the parties to choose the governing law.<sup>2</sup> Thus, the arbitrator may uphold the express choice of law in an international online consumer contract and/or in the arbitration agreement. In this case, the law chosen by parties is the governing law of the arbitrability of international consumer disputes, whether it is the law of the consumer country, the law of the business country, or the law of a third country.

Arguably, such a choice of law in international online consumer contracts is often represented by the business under choice of law clause. This mainly refers to 'the

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<sup>1</sup> John Collier and Vaughan Lowe, *The Settlement of Disputes in International Law Institutions and Procedures* (Oxford University Press 2000) 240

<sup>2</sup> *ibid.*

business's home' country. This means the express choice of law under the principle of party autonomy, which the arbitrators may uphold, might completely deprive online consumers of the protection awarded to them under the law of their country of domicile.<sup>3</sup> In addition, the choice of law in arbitration agreements may be interpreted to refer to exclusive court jurisdiction with the authority to supervise the arbitration process and settle disputes regarding arbitrability.

Moreover, a consideration of different jurisdictional grounds and conflicting interests cannot be ignored given that consumer courts have often had difficulties trying to assert a jurisdiction and apply its laws to international online consumer disputes.<sup>4</sup> As a consequence of this conflict, a different jurisdiction might be presented as the appropriate form which indeed represents a different applicable law for the arbitrability. The important questions are: which of these forms should govern international online consumer agreements? for what reason should a particular form of law be considered adequate?

In order to answer the above, the arbitrability of international online consumer disputes must be analysed from two perspectives: first, as a conflict of law issue based on a choice of law problem; and second; as jurisdictional issue. Due to the contractual nature of international online consumer contracts, this chapter will argue that the conditions and the requirement to confirm the validity of an arbitration agreement in international online consumer disputes would be different depending on the approach applied. This may create a patchwork of laws in regards to what law should be applied to consumer arbitration. As such, there is no guarantee that the consumer law is the applicable law, based on the conflict of laws issue only, due to the contractual and jurisdictional nature of international online consumer disputes. The arbitrability will also be analysed as a

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<sup>3</sup> It is important to emphasize here that the rule of party autonomy of online consumer is not without limitations. The mandatory rules of consumer protection regarding the party autonomy aim to protect consumers from exclude the application of law of his "the consumer's" country by chosen "agreed" to another "the business's" country law. The Rome I Regulation (The Rome Convention) forbids parties to choose law (choice of law clause) can result of depriving the consumer from the protection afforded to him by the law of the country where his habitual residence. However, in this context, the consumer protection rules refer to consumer's place of residence, whereas a consumer may have more than one residence at the same time. This is to prevent its being abused, in international cases such as online consumer disputes; this can be repugnant to public policy. See the Rome I Regulation, Article 6 (1) states: "[a] contract concluded by consumer [...] shall be governed by the law of the country where the consumer has his habitual residence"; The Rome I Regulation, Article 6 (2) states : "[...] such a choice may not, however, have the result of depriving the consumer of the protection afforded to him[...]".

<sup>4</sup> See chapter 2, section 2.2.1

‘jurisdictional issue’ which confirms the jurisdiction power of the arbitrator or holds that the dispute falls within the exclusive jurisdiction of a national court based on the subjective or objective arbitrability of international online consumer disputes. This chapter will argue that when the contractual nature and jurisdictional nature of international online consumer transactions collide, these rules may not exclude the powers of the national court of consumer in respect of arbitral proceedings. These issues will be analysed in the following sections under ‘contractual theory’ and ‘jurisdictional theory’. What follows is an attempt to answer these questions with a theoretical and factual approach in order to establish a ‘judicial protection’ for claims regarding the arbitrability of international online consumers in the courts where the consumer is domiciled. The argument can be made here that, even though when parties choose to opt into arbitration it means they are in a way agreeing to exclude the courts from acting as their arbiter, this does not mean they are in any way excluding the court from supervising the arbitration process. Thus, taking the middle ground between the contractual nature and jurisdictional nature of international online consumer transactions might provide the consumer with better protection, especially in the online environment.

## ***2. Uncertainty of the law that governs the arbitrability of international online consumer disputes***

In general, the arbitration agreement is an important indicator for the arbitrator. It represents the parties’ willingness to arbitrate their disputes. It is also an important indication of applicable law, substantive law and procedural law of arbitration.<sup>5</sup> It is the first place where arbitrators are required to look to determine their jurisdiction and the issue between parties.<sup>6</sup> Arbitration, as a private justice with autonomous procedure, does not require parties to choose a law applicable to the arbitration agreement that has a connection to the parties, the contract or the dispute.<sup>7</sup> In other words, if the parties choose the law of a particular state, this state law need not be connected with the transaction.<sup>8</sup> Consequently, a number of different laws may potentially govern the arbitrability of international online consumer disputes; the law applicable at the seat of arbitration (the

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<sup>5</sup> Andrew Tweeddale and Keren Tweeddale, *Arbitration of Commercial Disputes International and English Law and Practice* (Oxford University Press 2007) 217

<sup>6</sup> *ibid.* 216

<sup>7</sup> Simon Greenberg, Christopher Kee, and J.Romesh Weeramantry, *International Commercial Arbitration* (Cambridge University Press 2011) 101

<sup>8</sup> *XL Insurance Ltd. v. Owens Corning* [2000] 2 Lloyd’s Rep 500 (QB)



place of arbitration);<sup>9</sup> or the law of arbitration agreement (the chosen law by the parties). It is important to mention that the law applicable to the arbitration agreement is not necessarily the same law governing the contract. The latter might be different from the law of the seat of arbitration (place of arbitration) and from the law of arbitration agreement.

In international online consumer disputes, many laws may have relevance: connecting factors such as the place of concluding the contract and the place of arbitration are considered as challenging issues in determining the applicable law to provide consumer protection, let alone the fact that the exact location where the parties concluded the international online contract could not be identified.

The arbitrability of international online consumer disputes therefore inspire controversies as to which law should govern such disputes in order to provide protection. Due to the special status of the consumer as a weaker party, it is not simply a question of finding the appropriate law for the consumer internationally. In order to achieve protection internationally, other issues of a legal norms and technology nature are involved and cannot be ignored. As a consequence of the legal norms and technology nature of international online consumer disputes, different types of law might be presented as the appropriate form of applicable law. The important questions are: which of these forms should govern the arbitrability of international online consumer transactions and for what reason should a particular form of law be considered adequate?

Equally, it is important to keep in mind that consumer protection rules are mandatory rules in England and Wales and impose limitations on party autonomy irrespective of the law chosen by the parties. Thus, its provisions cannot be overridden by the choice of the parties. This can be seen in the Arbitration Act 1996, Article 89(3): 'Application of unfair terms regulations [...] apply whatever the law applicable to the arbitration agreement'.<sup>10</sup> This means that they are not waivable rules as they are subject to public policy concerns and are designed to protect public rights of consumers. Therefore, consumer protection rules should always be applied. Owing to the fact that in international online consumer contracts, consumers are more likely to be unaware of the significance of the protection

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<sup>9</sup> The law of the seat may restrict the arbitrability of international online consumer disputes, for instant under England and Wales Arbitration Act 1996 a claim is incapable of settlement by arbitration if it less than (£5,000).

<sup>10</sup> Arbitration Act 1996, Article 89(3)

awarded to them by mandatory rules of their country, in certain instances, as demonstrated in Chapter 3 and 4, the inequality in bargaining power merely by itself is not sufficient reason to restrict the party autonomy regarding the choice of law. This is because the USA treats the consumer contract like any other commercial contract according to its contractual autonomy tradition.<sup>11</sup> To this extent, it should be clarified here that the applicable law, whether chosen by parties or by the arbitrator in the case where there is an absence of a choice of law, might be a foreign law for the consumers. A foreign law may deprive consumers of the protection awarded to them under the national mandatory rules of their country of domicile.

Arguably, the conflict of laws rules that concern what law should be applied to international online consumer disputes for consumers involved in arbitration are not well established. This is because, as demonstrated in chapter 2, there are no specific instruments governing the choice of law clause in international online consumer contracts, namely between parties from EU member states (England and Wales) and non-EU states (the USA).<sup>12</sup> Subsequently, there are no international rules which stipulate that the arbitrator has to apply the protection rules of the consumer country of domicile whether there is a choice of law clause or not. To this extent, it can be argued here that the law that should be applicable by the arbitrator to determine the arbitrability is uncertain. Given that the contractual nature of international online consumer contracts is not certain enough, as demonstrated in the previous chapter,<sup>13</sup> regarding the party autonomy of the consumer, the conditions and the requirement to confirm the validity of an arbitration agreement in international online consumer disputes could be different based on the law applied. The law applicable to the arbitrability of international online consumer disputes is subject to differing opinions and approaches.

The arbitrability of international online consumer disputes can be seen as a conflict of laws issue based on a choice of law problem, which creates a patchwork of laws in regards to what law should be applied to consumer arbitration. The arbitrability can also be seen as a jurisdictional issue as it confirms the jurisdiction power of the arbitrator and/or holds that the dispute falls within the exclusive jurisdiction of a national court based on the

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<sup>11</sup> Restatement (Second) of Conflict of Laws, Chapter 8, Section 186, states that "[i]ssues in contract are determined by the law chosen by the parties"; See also Uniform Commercial Code .2001, Section 1-103,

<sup>12</sup> See chapter 2, section 2.3

<sup>13</sup> See chapter 4

subjective or objective arbitrability of international online consumer disputes.<sup>14</sup> Hence, when the contractual nature and jurisdictional nature of international online consumer collide, it is difficult for the arbitrability to function in order to fine-tune any legal position and prevent it from leading to unfair or unpredictable results internationally.

From the theoretical standpoint, two theoretical approaches may have significance in order to answer the above questions: the law that should be applicable and the reason. It seems necessary to analyse those perspectives of the arbitrability by a theoretical approach, mainly with contractual theory and jurisdictional theory, in order to decide which of them is best suited to governing the arbitrability.

### **Contractual theory (*lex contractus*)**

Under this theory, parties are the masters of the arbitration agreement<sup>15</sup> and mandatory rules should only be relevant if they form part of the *lex contractus* or prove the invalidity or illegality of the parties' contract (such as a contract made by a minor).<sup>16</sup> Hence, at its most basic, the principle of this theory refers to the contract and/or the agreement between the parties which will constitute the resources of that legal system apply upon their disputes.<sup>17</sup>

From an arbitrator perspective, under this theory, arbitration agreements must be kept, to the extent that such agreement is valid, it considers as a legal system binding for both parties. To a large extent, it can be said that the arbitrator is the one who determines the applicable law upon the arbitrability of disputes. In doing so, this may lead to a choice of law problem. However, there are three main reasons to support this theory. First, arbitrators are more likely to respect the arbitration agreement, including the choice of law clause, under the principle of party autonomy because their authority is derived from it.<sup>18</sup> Second, the arbitrator is not under an obligation to comply with foreign mandatory rules other than those mentioned in the arbitration agreement.<sup>19</sup> Third, the arbitration

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<sup>14</sup> See chapter 3

<sup>15</sup> Andrew Barraclough and Jeff Waincymer, 'Mandatory Rules of Law in International Commercial Arbitration' (2005) 6 *Melb. J. Int'l L.* 205

<sup>16</sup> *ibid.* 209

<sup>17</sup> Maurice Bourquin, 'Arbitration and Economic Development Agreements' (1960) 15 *Bus. Law* 860

<sup>18</sup> Mohammad Reza Baniassadi, 'Do Mandatory Rules of Public Law Limit Choice of Law in International Commercial Arbitration' (1992) 10

<sup>19</sup> Andrew T. Guzman, 'Arbitrator Liability: Reconciling Arbitration and Mandatory Rules' (2000) 49 *Duke Law Journal* 1279

agreement is evidence of the parties' consent and the law chosen by them.<sup>20</sup> Moreover, consumer protection rules are usually national mandatory rules whereas international arbitrators have no national forum.<sup>21</sup> Thus, other than those of the chosen applicable law, all national rules are foreign rules to the international arbitrator.<sup>22</sup> Therefore, the arbitrator's duty is to apply the mandatory rules of the parties' choice of law. In other words, it can be said that arbitrators can simply exclude the mandatory consumer protection rules by substituting them for the terms of the parties' contract. This is because the arbitrator applies the national mandatory rule of the parties' choice of law only.

Arguably, the non-application of consumer law, because it is a foreign law for arbitrators or it is not the chosen law by the parties, may lead to annulment of the arbitration award under public policy in the consumer country of domicile if it is the place of the enforcement. This is because the consumer protection rules do not have the extra application to override the choice of law in the pre-award stage internationally. Indeed, the consumer country of domicile has exclusive jurisdiction for certain matters related to consumer disputes – under both subjective and objective arbitrability. The national court of the consumer country would not recognize any forum (private or state) to decide the case of a consumer. Nevertheless, such intervention by a national consumer court would only be at the final stage of arbitration as the enforcement place of the award. Yet, international arbitrators do not perceive themselves as protectors of national public policy.<sup>23</sup> In addition, it is not entirely clear to what extent arbitrators should take into account national mandatory rules of the enforcement place,<sup>24</sup> in particular, when there is a weaker party and legal protections on the line.

Therefore, in order to answer the above question, some argue that treating the arbitrability<sup>25</sup> as a choice of law problem is not satisfactory because it confuses the problem of the jurisdiction between the court and the arbitral tribunal with the problem

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<sup>20</sup> *ibid.* 1280

<sup>21</sup> Stefan M. Kröll Julian D.M. Lew, Loukas A. Mistelis, *Comparative International Commercial Arbitration* (Kluwer Law International 2003) 420

<sup>22</sup> *ibid.*

<sup>23</sup> P. Mayer 'Reflections on International Arbitrator's Duty to Apply the Law' in J. D. M. Lew and L. A. Mistelis (eds.) *Arbitration Insights: twenty Years of the Annual Lecture of the School of International Arbitration* (Kluwer Law International, The Hague 2007) 303- 304

<sup>24</sup> *ibid.*, 330

<sup>25</sup> Haris Pamboukis, 'On Arbitrability,; the Arbitrator as a Problem Solver' in Loukas A Mistelis and Stavros L Brekoulakis (ed), *Arbitrability: International and Comparative Perspective* (Kluwer Law International 2009) 126

of choice of law through the notion of arbitrability.<sup>26</sup> Hence, an arbitrator has to distinguish the problems of jurisdiction from the problem of the applicable law. Thus, the arbitrator should determine the issue of the arbitrability of international online consumers by the jurisdiction rules. This would lead to the consequence that arbitrability should be treated as a jurisdictional issue (under jurisdictional theory) instead of a choice of law problem (under contractual theory).

In short, from the author's standpoint, this theory cannot be acceptable regarding international online consumer as weaker party because it makes the arbitration entirely subject to the freedom of the parties. As such it will have a negative impact on the consumer as the weaker party in the arbitration.

### **Jurisdictional theory**

Unlike contractual theory, jurisdictional theory emphasises national sovereignty. Under it, every activity occurring within the territory of a state is necessarily subject to its jurisdiction.<sup>27</sup> This includes the arbitration and the party autonomy of the parties.<sup>28</sup> This means that domestic laws regulate all aspects of arbitration including the validity of the arbitration agreement, the powers of the arbitrators and the enforcement of the award.<sup>29</sup> Internationally, these domestic laws will be one of two state laws in accordance with the New York Convention 1985 – the laws of the seat and the laws of the country where enforcement is sought.<sup>30</sup> Thus, in order to determine the arbitrability, the arbitrator must act like a local judge and apply its own domestic law which is the law of the seat of arbitration.<sup>31</sup> The mandatory consumer rules in this case should be applied via the conflicts rules of the seat of arbitration. In other words, the national court of the consumer should have exclusive jurisdiction in regards to international online consumer disputes via the conflicts rules of the seat of arbitration. In such scenario, it can be said that the jurisdictional theory has the potential to provide protection for consumers regarding the issue of the law applicable to arbitrability of international online consumer disputes. That is to say, the law of the national court of a consumer might be able to decide the

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<sup>26</sup> *ibid.*

<sup>27</sup> Barraclough and Waincymer, 'Mandatory Rules of Law in International Commercial Arbitration' (n 15) 209

<sup>28</sup> *ibid.*

<sup>29</sup> *ibid.*

<sup>30</sup> The New York Convention 1985, Article V

<sup>31</sup> *ibid.*, (n 27) 209

arbitrability of such disputes. However, internationally, this is dependent on the conflict of laws provisions at the seat of arbitration. Those rules should require the arbitrator to respect the rules of exclusive jurisdiction of another legal order and override the expressed choice of law clause.

However, it can be argued that this is a complicated task in practice in order to apply the jurisdictional theory to international online consumer disputes. One could imagine an international online consumer as a minor (under age) entering into an arbitration agreement. The position of the minor is no different from the consumer; the limitation upon the party autonomy of an online consumer and the minor to enter into a contract are to some extent similar. Both suffer from a lack of capacity and a lack of mutuality; both are normally protected from waivers of their right as a weaker party in the contract and the arbitration agreement. In addition, the definition of both ‘minor’ and ‘consumer’ varies from country to country. It should be borne in mind that the general rule is that any natural or legal person who has capacity to enter into a valid contract also has the capacity to enter into an arbitration agreement. The New York Convention and the Model Arbitration Law require the capacity of the parties, including the consumer as an individual, to enter into an arbitration agreement ‘under the law applicable to them’.<sup>32</sup> Thus, the capacity of an individual to enter into a contract is determined by the state of his place of domicile.<sup>33</sup> However, in the context of an international contract, it may also become necessary to have regard to the law of contract.<sup>34</sup> This means that there will be, at minimum, a mix of two state laws applied: the chosen law, the parties’ law and the law of the seat of arbitration if they are different from each other. The parties’ law should apply to determine the capacity of the parties. In this case, if a party lacks capacity then the arbitration should be restricted (not arbitrable).

The difference between a minor and a consumer is that consumer disputes are more complicated. Determining the capacity of a minor in regards to the given informed consent is based on a subjective issue, ie age, whereas for a consumer it is based on an objective reason. As explained in chapter 3 and according to the CJEU, in case *Francesco Benincasa v. Dentalkit Srl*,<sup>35</sup> the capacity of a consumer must be decided based on the

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<sup>32</sup> The New York Convention 1958, Article V(a)

<sup>33</sup> Nigel Blackaby, Alan Redfern, and Martin Hunter, *International Arbitration* (5th edn, Oxford University Press 2009) 96

<sup>34</sup> The New York Convention 1958, Article V(a)

<sup>35</sup> Case C-269/95, *Francesco Benincasa v. Dentalkit Srl*, [1997] ECR, I-3767

position of the person concerned in a particular contract, ‘having regard to the *nature and aim* of that contract and not to the subjective situation of the person concerned’.<sup>36</sup> Under such a determination, the arbitrator would be required to establish all the consequences that arise under all national laws (the chosen law, the parties’ law and law of the seat of arbitration) in order to ensure that such a person is considered as a consumer and has the capacity of a consumer and an individual. Then, the arbitrator should apply the conflict rules of the seat to apply the mandatory rules of the consumer that determines arbitrability (subjective arbitrability) and the jurisdiction (under the jurisdictional theory) of such disputes by the state of the consumer’s domicile. It is very complicated for arbitrators to apply this to every international online consumer transaction in order to determine the capacity of an international online consumer. It is not certain enough, from the author’s point of view, to fine-tune any legal position and prevent it from leading to an unfair and unpredictable result. This is especially so when there is no uniform definition for consumer and, unlike the example of the minor, the definition of consumer is based on objective not subjective elements that can be easily determined by a foreign court or by the arbitrator. Therefore, a consumer who lacked capacity under one of the two laws might rely on this reason to avoid the contract obligation and the arbitration agreement.

### **Hybrid theory?**

It appears that neither the contractual nor jurisdictional theory present a consistent solution for the issue of the arbitrability of international online consumer disputes, namely, the imbalance between the mandatory protection consumer rules and party autonomy. This is because certain elements from both the above theories that can affect the arbitrability control the arbitration. For example, parties control the agreement to arbitrate and the choice of law, and the arbitrator is under an obligation to comply with those elements mentioned in the arbitration agreement. In contrast, the states control the enforceability by denying the arbitrability of disputes as it is contrary to the public policy when it violates the mandatory rules of consumer protection. This logically leads to the adoption of a hybrid theory as it can act as a balance between the above two theories even though such a theory would need to prioritise how and where the balance should lie in order to determine who is a consumer.

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<sup>36</sup> *ibid*, para 12

The different perspectives of consumer and the different functions of law in England and Wales and the USA in regards to whether online consumer disputes should be considered through state or private dispute resolutions will create difficulties in finding such a balance at the international level. This is also the case with the differences between the subjective and the objective arbitrability of consumer disputes, which create an imbalance between the protection rules of consumers and the principle of party autonomy of consumers. Party autonomy should play a greater role than it does in litigation; arbitrators should show no regard for mandatory rules other than those of the law chosen by the parties. Therefore, it can be argued that there is no obligation to apply these types of mandatory rules of international online consumers unless there is an internationally-agreed definition of consumer in order for the arbitrability to impose fundamental standards on the legal relationship between the parties in arbitration. Without this, the situation would be quite confusing.

Having said the above, online consumers are a weaker party and deserve certain protection in international contracts. Such protections have to be similar to the ones found in the consumer's country of domicile. However, if the arbitrator applied the mandatory consumer protection rules, this would raise a conflict of laws issue as the jurisdiction rules in the consumer's location (ie into England and Wales) apply only if the business directed its activities to the consumer whereas the jurisdiction rules of business (ie, the USA) apply wherever the business activity is.<sup>37</sup>

Consequently, for the arbitrator, this situation will be determined from the law of the seat as a matter of practice to avoid their award being annulled by the national court of the arbitration seat. The reason for this is that, in the case of international online consumer disputes, those disputes are arbitrable in general but the arbitrability is limited by different mandatory rules of the consumer's country of domicile. Some of those rules limit the party autonomy and others limit the value of disputes.<sup>38</sup> In this scenario, arbitrators are not bound by the national mandatory consumer rules in a way that consumer law should be the applicable law to all aspects of the arbitrability of consumer disputes. Instead, they are only obliged by the law chosen by the parties or by the laws of the seat of arbitration.<sup>39</sup>

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<sup>37</sup> See chapter 2, section 2.2

<sup>38</sup> See chapter 3, section 3.3

<sup>39</sup> Alexander KA Greenawalt, "Does International Arbitration Need A Mandatory Rules Method ?" (2007) 319 85.



Both laws may have a different effect on the arbitrability of disputes and the jurisdiction of the arbitrator. This does not mean that they are constrained from applying foreign laws but it does mean that they must do so by recourse to the conflict of laws rules of those two laws.<sup>40</sup> At the same time, the grounds for refusal of recognition and enforcement of foreign arbitral awards under Article V of the New York Convention, specifically those relating to the validity of the arbitration agreement, the arbitral authority or the arbitral procedure, refer to the law of the country either where the award was made or where the arbitration took place, and all these elements point to the law of the seat.

Furthermore, the national mandatory consumer rules do not provide the international online consumer with an adequate degree of protection as it does not impose a clear legal duty on arbitrators to comply with it. These issues will be analysed in the following subsections.

### **2.1 Protection rules of the consumer's country of domicile are not obligatory for international arbitrators**

Arbitrators are not obliged to involve the law of the consumer's country of domicile if it is not the choice of law or the law of the arbitration seat. From a theoretical standpoint, this situation seems to be quite complex.

From a factual point of view, the legal rules on arbitrability are significantly different in England and Wales and in the USA. Consequently, it is questionable how the arbitrator will determine the arbitrability, in order to achieve effective resolution for international online consumer disputes. The issue of the determination of the applicable law may have some difficulties. For example, in the England and Wales Arbitration Act 1996, the application of unfair terms regulations to consumer arbitration agreements should apply regardless of the law applicable to the arbitration agreement.<sup>41</sup> What is particularly important in the example given is the application of the unfair terms regulation is for domestic disputes only. Moreover, the Regulation considers a term to be unfair, in accordance with Article 1(q) of its Annex, when it excludes or hinders the consumer's right to take legal action or exercise any other legal remedy, 'particularly by requiring the

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<sup>40</sup> Barraclough and Waincymer, 'Mandatory Rules of Law in International Commercial Arbitration' (n 16) 210

<sup>41</sup> Arbitration Law 1996, Article 89 (3)

consumer to take disputes exclusively to arbitration not covered by legal provisions'.<sup>42</sup> Indeed, this provision protects a consumer's fundamental right to a fair trial, ie 'judicial protection'.<sup>43</sup> At the same time, it limits the arbitrability of the dispute by turning it back to the national court of the consumer. The previous provision can be avoided by an express choice of a law of a foreign country. However, the non-application of such a provision is clearly decisive for the outcome at the enforcement level. In other words, such a rule has no effect when the dispute is before the international arbitrator, its only effect is to deny the enforceability of an arbitral award in the consumer country. This is because there are no clear obligations on arbitrators to apply the foreign mandatory legal rules if they do not form part of the chosen law or the seat of arbitration.

The above type of mandatory protection rules is belong to the country of one of the parties (ie the consumer) which is closely connected to the issues in dispute but whose law is not the applicable law. Even though this is the case, those mandatory rules are considered to be foreign rules because they are different from the applicable law and foreign to the international arbitrator. In this situation, the mandatory protection rules control the arbitrability only when the national court of the consumer is the seat of arbitration or the place of enforcement. Whilst the parties may choose a foreign law to determine the arbitrability, such a choice will be irrelevant to the seat of arbitration and enforcing courts. Thus, the competent court will determine the arbitrability by its own national law. While, the arbitrator will follow the law of the court at the seat of arbitration, it is questionable whether the law of the enforcing court needs to be taken into account by the arbitrator.

The New York Convention 1958 Article V(1)(a) refers to the law of the country where the award was made to refuse the recognition and the enforcement of the award. However, the New York Convention 1958 does not include any provision that obligates the arbitrator to comply with foreign mandatory rules. As Mayer explains, this absence is due the fact that mandatory rules were 'hardly ever discussed' at the time the Convention was adopted.<sup>44</sup> Nonetheless, the express wording of Article V(2)(a) provides that an arbitral award may be refused if 'the subject matter of difference is not capable of settlement by the arbitration under the law of that country'. The phrase 'that country' refers to the

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<sup>42</sup> The Unfair Terms in Consumer Contracts Regulations 1999, Schedule 2, paragraph 1(q)

<sup>43</sup> Maud Piers, 'Consumer arbitration in the EU: a forced marriage with incompatible expectations' (2011) 2 Journal of International Dispute Settlement 209–230

<sup>44</sup> Pierre Mayer, "Mandatory Rules of Law in International Arbitration", (1986) 2 Arb. Int'l. 274

country where recognition and enforcement of the award is sought.<sup>45</sup> However, when the dispute is before an arbitral tribunal (arbitrator) there is no legal rule in this regard that the law of the enforcing court needs to be taken into account by the international arbitrator.<sup>46</sup>

In 1980, a working group of the Commission on Law and Commercial Practices of the International Chamber of Commerce prepared a draft on the law applicable to international contracts, known as the ICC Draft Recommendations. The draft provides for two alternatives. Alternative 2 will be discussed here.<sup>47</sup> It provides that:

[E]ven when the arbitrator does not apply the law of a certain country as the law applicable to the contract he may nevertheless give effect to the mandatory rules of the law of that country if the contract or parties have a close contact to the country in question especially when the arbitral award is likely to be enforced there, and if and in so far as under the law of that country those rules must be applied whatever be the law applicable to the contract.<sup>48</sup>

Thus, in order to give effect to the mandatory protection rules of the place of enforcement, there should be a close connection between the country of the place of enforcement and the contract or the parties. However, if the arbitrators are willing to take into consideration the mandatory consumer protection rules as they are relevant to the possible place of enforcement, the protection rules of consumer requires the application of consumer's habitual place of residence rules. On one hand, the habitual place of residence is not certain. On the other hand, the consumer's country of domicile is rarely the place of enforcement of the arbitral award. This is because online consumers can conclude a contract with a business from different places away from his country of domicile, for example, an online contract can be concluded in Scotland as the habitual place of residence whilst the consumer country of domicile is England. Even in cases where the

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<sup>45</sup> The New York Convention 1958, Article V; See also Di Pietro, 'General Remarks on Arbitrability under the New York Convention' in Loukas A Mistelis and Stavros L Brekoulakis (ed), *Arbitrability: International and Comparative Perspectives* (Kluwer Law International 2009) 96

<sup>46</sup> Stavros L. Brekoulakis, 'Law Applicable to Arbitrability: Revisiting the Revisted LEXFORI' in Eds Loukas A Mistelis and Stavros L Brekoulakis (ed), *Arbitrability: International and Comparative Perspective* (Kluwer Law International 2009) 109

<sup>47</sup> ICC Draft Recommendations, Alternative 1: "[E]ven when the arbitrator does not apply the law of a certain country as the law governing the contract he may nevertheless give effect to mandatory rules of the law of that country if the contract or the parties have a close contact to that country and if and in so far as under its law those rules must be applied whatever be the law applicable to the contract. On considering whether to give effect to these mandatory rules, regard shall be had to their nature and purpose and to the consequences of their application or non-application." See Baniassadi, 'Do Mandatory Rules of Public Law Limit Choice of Law in International Commercial Arbitration' (n 18) 64

<sup>48</sup> *ibid.* 65

consumer's country of domicile is the potential place of enforcement because his domicile is the only connection between him as an international consumer and the online contract itself, such as in digital products which do not require physical delivery, the arbitrator might not consider the place of enforcement as sufficient connection even if a close connection between the contracts and the consumer country of domicile were to be assumed. An illustration of this can be found in the arbitral award that was issued for Austrian company (seller) v Dutch company (buyer) on 11 January 1982 by the Amsterdam Grain Trade Association.<sup>49</sup> In that case, a connection with Austria existed exclusively from the fact that the seat of the seller was situated in that country. The product which had been sold was of Dutch origin, the buyer was Dutch, the transaction took place through a German broker, the sale took place at FOB Europoort with the price expressed in German Marks, and, moreover, by telex the seller requested payment to its account through a bank in Germany. Consequently, the arbitrator denied the application of Austrian law.<sup>50</sup>

Nevertheless, the arbitrators are still obligated to comply with two other types of rules. Firstly, the mandatory rules of a national court of referral, whose application may depend on whether the dispute has any territorial link with the country of national court of referral. For example, it is the country where the main contract was concluded. However, this type is out of the scope of the thesis as it is arguable that the court would intervene to safeguard the exclusive jurisdiction of consumer disputes to another court unless there are uniform rules in regard to the arbitrability of international consumer transactions which are not established yet. Secondly, the mandatory rules of the national court of the seat of arbitration which are always the most significant rules for the arbitrator to apply, especially if there is any territorial link with the seat. This is because the national court of the seat of arbitration is where the award can be effectively challenged.<sup>51</sup>

Consequently, the applicable laws that can be applied to determine the arbitrability stem from the chosen law in the arbitration agreement or from the law of a national court of the seat of arbitration. If they are different, the arbitrator will apply only the mandatory rules of these resources for two reasons. First, the law of the arbitration seat in order to avoid their award being annulled by the national court if it contrary to the public policy

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<sup>49</sup> Award of 11 January 1982, Vol. VIII Y. B. Com. Arb., 1983, 158, 160.

<sup>50</sup> *ibid.*

<sup>51</sup> Brekoulakis, 'Law Applicable to Arbitrability: Revisiting the Revisited LEXFORI' (n 46) 108

of the seat.<sup>52</sup> Second, the choice of law because the authority of the arbitrator derives from the arbitration agreement which is represented by the autonomy of the parties and their choice of law. In addition, there is no basis for an arbitrator to ignore the express choice by parties just because it is contrary to one of the national mandatory rules.

The situation described above is due to the private nature of arbitration as a form of private dispute resolution that is founded on the agreement of the parties based on the principle of party autonomy. Furthermore, as will be explained in the following subsection, there is an absence of a clear legal duty on international arbitrators to comply with consumer protection rules.

## **2.2 An absence of a clear legal duty on international arbitrators to comply with consumer protection rules**

In general, international and national laws include rules that oblige the arbitrator to comply with foreign mandatory rules.<sup>53</sup> However, in international online consumer disputes there is no clear legal duty that obligates the arbitrator to override parties' choice of law even when the consequences of their choice is to exclude the application of consumer protection rules.

The Rome Convention on the Law Applicable to Contractual Obligations 1980 (Rome Convention)<sup>54</sup> contains special rules that limit the ability of the parties to choose the governing law of the consumer contract even though there is a choice of law clause, thus embracing the duty to comply with foreign mandatory rules.<sup>55</sup> The most important one in this respect is Article 5(2) in the Rome Convention as it states that:

... a choice of law made by the parties shall not have the result of depriving the consumer of the protection afforded to him by the mandatory rules of the law of the country in which he has his habitual residence ... if in that country the conclusion of the contract was preceded by a specific invitation addressed to him or by advertising, and he had taken in that country all the steps necessary on his part for the conclusion of the contract.

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<sup>52</sup> *ibid.* 111

<sup>53</sup> Julian D.M. Lew, Loukas A. Mistelis, *Comparative International Commercial Arbitration* (n 21) 421

<sup>54</sup> This Convention is implemented in England and Wales by the Contracts (Applicable Law) Act 1990. However, the Rome Convention has been replaced by the Rome I, Rome II Regulations, which also applies to England and Wales, Scotland, and Northern Ireland. It also applies between each of those jurisdictions.

<sup>55</sup> The Rome Convention 1980, Articles 3, 5 and 7; the Rome I Regulation Articles 3,6 and 9

Article 5(2) stipulates the application of mandatory consumer protection rules of the consumer's habitual – this is even if there is a clause in the contract pointing to another country's law.

In the USA, section 187(2)(b) of the Restatement (Second) of Conflict of Laws (1971) includes a rule that limits the ability of the parties to choose the governing law. It also provides a duty to comply with foreign mandatory rules if 'the chosen state would be contrary to a fundamental policy of a state which has a materially greater interest than the chosen state in the determination of the particular issue'. Section 1-301(e) of the UCC also contains rules explaining the duty to comply with foreign mandatory rules when one of the parties is a consumer.<sup>56</sup>

However, these mandatory rules are in reality conflict of laws rules. They apply under certain conditions as in Article 5(2) or section 187(2)(b). This means that an important examination has to be made for mandatory rules to be applicable by an international arbitrator. This should first be done on the conditions for applicability of mandatory rules to a dispute to override the chosen law as an applicable law (an express choice of law) and thus to comply with foreign mandatory rules such as consumer protection rules. Second, it should be done by examining to whom the mandatory rules need to be applicable (who is a 'consumer').

The application of those conflict of laws rules to international online consumer disputes may lead to novel difficulties in regard to who is a consumer as explained in chapter 4. In addition, arbitrators are not obliged to conduct such an examination by other mandatory rules in national arbitration laws unless there is no choice of law. Section 46 of the Arbitration Act 1996 in England and Wales states that an arbitrator should apply the conflict of laws rules if there is no choice of law by the parties. Otherwise, arbitrators shall decide the dispute in accordance with the law chosen by the parties as applicable to the substance of the dispute. In other words, any particular type of conflict of laws rules does not oblige arbitrators to apply conflict of laws rules if there is a choice of law.<sup>57</sup>

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<sup>56</sup> The Uniform Commercial Code, 1-301(e)(2) "Application of the law of the State or country determined pursuant to subsection (c) or (d) may not deprive the consumer of the protection of any rule of law governing a matter within the scope of this section, which both is protective of consumers and may not be varied by agreement: (A) of the State or country in which the consumer principally resides, unless subparagraph (B) applies; or (B) if the transaction is a sale of goods, of the State or country in which the consumer both makes the contract and takes delivery of those goods, if such State or country is not the State or country in which the consumer principally resides."

<sup>57</sup> The Arbitration Act 1996, Section (46)

Likewise, in the US, the FAA does not impose an obligation on the arbitrator to comply with foreign mandatory rules.<sup>58</sup> Neither does it impose any conflict of laws rules on the arbitrator.

In this case, an arbitrator sitting in London is not obliged by the rules of the Rome Convention 1980 under conflict of laws rules if there is a choice of law referring international online consumer disputes to the law of a foreign country. However, arbitrators are obligated to heed the mandatory consumer rules in England as a seat of arbitration to avoid their award being annulled or if there is no choice of law. The same applies to an arbitrator sitting in New York.

Overall, the absence of a clear legal duty to comply with consumer mandatory rules means that an arbitrator is going to determine the arbitrability and the consumer capacity by the chosen law. This is because of two reasons. First, the arbitrator's allegiance to the chosen law as their authority stems from it. Second, the principle of arbitration law binds arbitrators to apply the law chosen by the parties when a conflict of laws has occurred which encourages the arbitrator to set aside the mandatory rule of consumer law. Derains confirmed this view by stating that: '[T]he principle whereby arbitrators are bound to apply the law chosen by the parties is sometimes all that is needed for them to set aside a mandatory rule foreign to that law'.<sup>59</sup>

### ***3. The consumer country of domicile should be the arbitration seat***

As demonstrated previously in this chapter, the law applicable to an arbitration agreement from a choice of law clause deprives the consumer of the protection that is awarded to him under the law of his country of domicile. This is because of the absence of a clear legal duty for international arbitrators to comply with consumer protection rules. International arbitrators do not perceive themselves as the protectors of national public policy or domestic mandatory rules apart from the rules of the chosen law or the law of the arbitration seat.

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<sup>58</sup> Gary B. Born, *International Commercial Arbitration*, (2nd edn, Kluwer Law International, The Hague, 2001) 537

<sup>59</sup> Yves Derains, "Public Policy and the Law Applicable to the Dispute in International Arbitration", (New York 1986) ICCA Congress Series No. 3, Sanders (eds.) (1987) 227

Whilst arbitrability has to be seen from the context of the international online consumer, as a weaker party deserves special protection, in order to improve a legal position and prevent an unpredictable or unfair outcome, it will be argued here that the law of the consumer country of domicile as the seat of arbitration is more likely to provide an international online consumer with legal and judicial protection. There are several reasons for this. First, this is related to the argument made in chapter 2 concerning the important role of international arbitration as a legal adjudication process according to laws and legal rules. Therefore, arbitration should include those mandatory rules of the weaker party's jurisdiction in order to achieve a balance similar to the one at domestic level. Otherwise, it loses its legitimacy as a legal adjudication process and as an alternative dispute resolution method for international online consumers. Furthermore, the gap between the arbitrator and state judge of the consumer country of domicile would be very big in regard to international online consumer disputes when determining what is or is not permitted. As Martin explains, in most international e-commerce disputes the consumer is the victim.<sup>60</sup> As such, arbitration of international online consumer disputes should be based on an argument that there should be no discrimination between litigation and arbitration since both forms have public consequences. In addition, arbitration cannot be an entirely private dispute resolution method since the courts support arbitration through their supervision and enforcement of the award.<sup>61</sup> This public element that affects the arbitrability of consumer disputes is not part of the substantive law that governs the relationship between the parties. Thus, the principle of party autonomy may well be balanced with consumer protection by and/or through the law of the consumer's country of domicile as the arbitral seat and as the applicable law (procedural law) to determine arbitrability. This requires the supervision of the consumer court because the arbitrator will consider the consumer protection rules under the supervision of the consumer court as the seat of arbitration. However, such supervision is not granted yet by the law.

Second, treating the consumer country of domicile as the seat of arbitration provides a balance between party autonomy and consumer protection rules. It is clearly an advantage for consumers for two reasons: first, by allowing the determination of the validity of the choice of law to be under the law of the consumer country of domicile; second, the courts

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<sup>60</sup> Mary Shannon Martin, —Keep it Online: the Hague Convention and the Need for Online Alternative Dispute Resolution in International Business -to-Consumer E-Commerce, (2002) 20 B.U. Int'l. L.J.125

<sup>61</sup> Julia Hörnle, *Cross-border Internet Dispute Resolution* (Cambridge University Press 2009) 70



of the consumer country can effectively provide judicial intervention if it is the court of the arbitral seat. Subsequently, treating the consumer country of domicile as the seat of arbitration guarantees the consumer ‘the judicial protection’. Thus, it can be said that the right to litigate disputes over online arbitration agreements and processes in the courts of his country of domicile as a weaker party cannot be ignored. In such a way, international online consumers will have common ground between their right to arbitrate international disputes and the right to litigate their disputes, namely on grounds of inarbitrability. In other words, the legal protection and the judicial protection, regarding the arbitrability or any procedural issues over online arbitration agreements and processes in the courts of his country of domicile can be granted. This is because the partnership between courts and arbitration, the assistance and/or the intervention, would allow the national court at the seat of arbitration to have the jurisdiction to supervise the arbitration process at the beginning and during and after the award has been made.<sup>62</sup>

There is no extraterritorial jurisdiction can be exercised by the court of consumer domicile within or out of the EU. Therefore, the ‘juridical seat’ of arbitration in the consumer court at his domicile seems to be a reasonable approach that can guarantee the international online consumer the right to litigate their disputes over international arbitration in their country of domicile. There are a number of strong arguments in favour of this approach.

To begin with, in order to overcome the issue of the lack of extraterritorial jurisdiction to provide a balance before, during and after the arbitration process and actions, there is a need to establish the ‘juridical seat’ in the consumer country of domicile. The word ‘juridical’ is not irrelevant or a word to be ignored in ascertaining what the ‘seat’ is.<sup>63</sup> This is especially when there is a need to answer the question of the arbitrability (subjective or objective arbitrability) of consumer disputes. This approach corresponds

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<sup>62</sup> Within EU member states, the jurisprudence of the CJEU, namely case *Mostaza* where emphasizes that the power of the national court is regarded as necessary for ensuring that the consumer enjoys effective protection, Case C-168/05, *Mostaza Claro v Centro Móvil Milenium SL* [2006] E.C.R. I-10421, para.39; See also chapter 3, section 4.1.1

<sup>63</sup> In according to Justice Akenhead:

“It means and connotes the administration of justice so far as the arbitration is concerned. It also implies that there must be a country whose job it is to administer, control or decide what control there is to be over arbitration”, *Braes of Doune Wind Farm (Scotland) Ltd v Alfred McAlpine Business Services Ltd* [2008] EWHC 426 (TCC) para. 15

with the ‘seat theory’<sup>64</sup> which asserts that the arbitral proceedings are governed by the law of the place in which the arbitration is held and has its seat, the *lex arbitri* is the *lex loci arbitri*<sup>65</sup> which broadly corresponds with the arbitration law in England and Wales and the USA. That is to say, internationally within the scope of this thesis, arbitration laws give the court at the arbitral seat the power to entertain an application to compel (stay or dismiss) the arbitral process under its local public policy ground. This indeed affect the arbitrability of international online consumer disputes.

Secondly, this approach is also consistent with the ‘jurisdictional theory’ approach as the arbitral tribunal, like the court in the country in which it has its seat, is governed by the law of that country. Thirdly, this position is supported by Article V(1)(e) of the New York Convention and by Article 18 of Brussels I Regulation. Fourthly, the New York Convention implies that a failure to comply with the law of the seat (ie the consumer country of domicile) may render the award unenforceable in any other foreign court (ie the business country of domicile). Moreover, as demonstrated in the first part of this chapter, the arbitrator cannot ignore the mandatory protection rules of the consumer if it is the *lex loci arbitri*. Finally, yet importantly, the consumer country of domicile as a judicial seat of arbitration has an interest in the maintenance of the principle of fairness, in particular, consumer protection rules.

However, such rules to establish the consumer country of domicile as the seat of arbitration, the ‘judicial seat’, are not well established for international online consumer disputes. This will be considered in greater depth in the following subsections.

### **3.1 Establishing the ‘juridical seat’ in the consumer domicile**

As mentioned above, arbitration laws of the two jurisdictions<sup>66</sup> give the courts of the arbitral seat, ‘the courts of the country that its law is applicable law’, the authority to supervise the arbitral process and to exercise an exclusive judicial intervention.<sup>67</sup> More importantly, this is in line with Article V(1)(e) of the New York Convention 1958 which

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<sup>64</sup> Collier and Lowe, *The Settlement of Disputes in International Law Institutions and Procedures* (n 1) 213

<sup>65</sup> *ibid.*

<sup>66</sup> In England and Wales, Section 2(1) of the Arbitration Act 1996 states that grounds for challenging an arbitral award, embedded in Sections 67, 68 and 69 of the same Act, apply when England or Wales is the arbitral seat. Likewise, in the USA, Section 10 of the FAA 1925 includes grounds for vacation of the arbitral award that only apply if the arbitral seat is in the USA.

<sup>67</sup> Redfern and Hunter, *law and practice of international commercial arbitration* (Sweet & Maxwell 2004) 85, 439, 440

provides that the competent court to set aside an arbitral award is ‘the Court where an award was made’ or ‘the Court under the law of which the award was made’.

However, the court must have a clearly established jurisdiction as the arbitral seat in order to ensure an effective protection by the above definition under the New York Convention 1958. In this regard, Lord Oliver in *Hiscox v Outhwaite*<sup>68</sup> noted that an arbitral award was not made in England even though it was the arbitral seat. His Lordship explained that the arbitral award was made in Paris because award was signed there.<sup>69</sup> In other words, there is a distinction between ‘the Court where the award was made’ and ‘the arbitral seat’. The latter, in the above case, refers to the law applied upon the procedure issue and the former refers to the place where the arbitration took place, ie the place where the arbitral award became official and its judicial procedures were completed. Thereby, the court where the arbitral award was made deprived the English court of the jurisdiction to entertain the claimant’s applications.<sup>70</sup> The above distinction, however, was under the UK Arbitration Act 1975. The English and Wales Arbitration Act 1996, Section 53, provides that whenever England or Wales is the arbitral seat, the arbitral award is made there notwithstanding where it is signed, posted or delivered to the parties. Thus, it can be said that the award was made in England and Wales if its procedures law was the applicable one despite the place of arbitration actions being elsewhere, such as the hearings. This can be seen clearly in the case of *Braes of Doune Wind Farm v Alfred McAlpine*.<sup>71</sup> The contract in this case provided for ‘the courts of England and Wales [to] have exclusive jurisdiction to settle any dispute arising out of or in connection with the contract’. Alongside this, the arbitration clause stated that any dispute or difference arising out of or in connection with this contract shall be referred to arbitration. The clause stated that arbitration is ‘subject to English law and the seat of the arbitration shall be Glasgow, Scotland’.<sup>72</sup> Thus, it can be said that if the juridical seat of the arbitration was in Scotland, the English courts had no jurisdiction to entertain an application regarding arbitration agreement and process.<sup>73</sup> Bearing in mind that there is an express reference to

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<sup>68</sup> *Hiscox v Outhwaite* [1992] 1 A.C. 562

<sup>69</sup> *ibid*, p. 594-5

<sup>70</sup> *ibid*.

<sup>71</sup> See *Braes of Doune Wind Farm v Alfred McAlpine* [2008] EWHC 426 (TCC)

<sup>72</sup> The use of the "jurisdiction" words in this case suggested some form of control upon arbitration. This is because the application of Section 2 of the Arbitration Act 1996 states “(1) the provisions of this Part apply where the seat of the arbitration is in England and Wales or Northern Ireland”.

<sup>73</sup> In this case the Claimant applies for leave to appeal against this award upon a question of law whilst the Defendant seeks in effect a declaration that this Court has no jurisdiction to entertain such an application

Scotland as the seat, this state of affairs could be applied to international online consumer disputes. Justice Akenhead held that England was the seat of arbitration and Scotland the venue, thus the reference to Glasgow was no more than the place for the location of the hearings.<sup>74</sup> The key part of this case illustrates that, where the procedural law is specified in an arbitration agreement, it will usually ‘dictate the seat of the arbitration’ even where another seat is specified in the contract. In other words, where the parties agree that the laws of one country will govern and control arbitration, the place where the arbitration will be heard will not dictate what the governing or controlling law will be.<sup>75</sup>

Likewise, the US Federal Court of the Southern District of New York, in the case of *International Standard Electric Corporation v Bidas Sociedad Anonima Petrolera, Industrialy Comercial*,<sup>76</sup> explained that an arbitral award was made at the arbitral seat and the phrase ‘under its law the award was made’ in Article V(1)(e) of the New York Convention refers to the procedural law of arbitration. It does not refer to the substantive law applicable to the dispute. In that case, an Argentinean company and an American company signed a contract in which the Argentinean company purchased 25% of one of the American company’s subsidiaries in Argentina. The contract included an arbitration clause that referred any future dispute to one or more arbitrators appointed by the International Chamber of Commerce (hereinafter ICC). The contract also included a choice of law clause that made the contract subject to the law of the state of New York. A dispute arose between the parties and the ICC determined Mexico City as an arbitral seat and so Mexican law was applied to the procedures. After the arbitral process ended, the American company brought an action in the US Federal Court of the Southern District of New York to vacate the arbitral award alleging that the named court had jurisdiction to vacate the award because New York law was applicable to the contract. The Court refused this allegation. It stated that it had no jurisdiction to vacate the award. The reason was that the phrase ‘under laws of which the award was made’ in Article V(1)(e) of the New York Convention 1958 referred exclusively to the procedural law and not to the substantive law.<sup>77</sup> The Court also explained that the only place to vacate the arbitral award

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and for leave to enforce the award. *Braes of Doune Wind Farm v Alfred McAlpine* [2008] EWHC 426 (TCC)

<sup>74</sup> *ibid*, [2008] EWHC 426 (TCC)

<sup>75</sup> *ibid*,

<sup>76</sup> *International Standard Electric Corporation v Bidas Sociedad Anonima Petrolera, Industrialy Comercial* 745 F.Supp. 172 (S.D.N.Y. 1990)

<sup>77</sup> *ibid*,

was Mexico because it was the arbitral seat and its law was applicable to the procedures of the arbitral process.

As such, it can be said that the arbitral seat dictates the procedural law of arbitration and the latter dictates the ‘juridical seat’. The seat of the arbitration and the choice of procedural law will almost inevitably coincide,<sup>78</sup> however, an exclusive jurisdiction clause may also determine ‘the juridical seat’.<sup>79</sup>

In the event of an international online consumer dispute, an exclusive jurisdiction clause gives rise to an issue based both on the online contract jurisdiction and consumer protection rules.<sup>80</sup> An international arbitrator will thus have to determine not only whether or not each of the local forums and an international arbitral forum have jurisdiction but also the scope of jurisdiction of each forum. From the author’s perspective, this can be unacceptable to arbitrability. Two states may have conflicting mandatory rules where the consumer country of domicile overrides the arbitration in favour of consumer protection such as in England and Wales, and the other state overrides consumer protection in favour of arbitration such as the USA. This is mainly in situation where a consumer had no opportunity to read the terms before entering in an online contract.<sup>81</sup>

As such, the judicial seat could guarantee international consumers the right to litigate disputes over online arbitration agreements and/or process in the courts of their country of domicile. However, questions regarding the principle and the approach do arise.

### **3.2 The power to supervise the arbitration process**

The principle of autonomy allows the parties to an arbitration agreement to waive their right to litigate their disputes before a court. However, as it has been explained in chapter 3, arbitrability determines whether the parties can settle their disputes in ‘state or private justice’ in relation to the facts in their dispute. The basic reason that justifies the important role of the court in the supervision of the arbitration process is indeed related to the nature of arbitration as a private proceeding with a public consequence that concerns matters of public interest. In addition, in regards to online consumer disputes, the limitation upon

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<sup>78</sup> *C v D* [2007] EWCA Civ 1282

<sup>79</sup> *ibid* (n 73)

<sup>80</sup> See the argument in this regard at chapter 2

<sup>81</sup> See chapter 3 and 4 regarding the different approach and functions under the subjective arbitrability of international online consumer, and how they being address at England and Wales and the USA.

the parties' autonomy and the freedom of both businesses and consumers to opt out of arbitration is also related to matters of public interest. In addition, the parties often require the assistance and/or the intervention of the courts in arbitration in order to remove difficult issues from the way of such proceedings and to reach an effective outcome. One of these issues that touches the public interest (ie public policy) is the determination of the arbitrability of consumer disputes. Accordingly, the seat of arbitration might affect the consumer protection rules based on public policy, whether in support or against the arbitration. This is especially the case where the jurisdiction and contractual natures of arbitration collide regarding the arbitrability of international online consumer disputes.

From a factual standpoint, the duty of the court at the seat of arbitration is to approve the arbitration, as a legal adjudication process, in accordance with its laws and legal rules in the pre-award stage and post-award stage. Therefore, the judicial seat has the power to supervise the arbitration procedure. It can be said that when contracting online within Europe, consumers are immune from any enforceability of unfair choice of court agreement.<sup>82</sup> However, there is no similar protection regarding the seat of arbitration internationally.<sup>83</sup> The parties usually choose the seat of the arbitration, whether directly or indirectly.<sup>84</sup> Directly can be by a term or clause concluded in their contract. In such a case, as explained in the first part of this chapter, the arbitrator will uphold the express choice of parties in regards to the seat of arbitration regardless of whether one of the parties is a consumer or whether the transaction has no real connection with the chosen seat.<sup>85</sup>

Indirectly, the seat of arbitration can be chosen by the arbitral tribunal, mainly when parties did not agree to the arbitration agreement and/or left such a choice to the arbitrator to do so. In such a way, simple words can conflict in determining the seat of arbitration.<sup>86</sup>

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<sup>82</sup> According to the Brussels Regulation, Article 17, the consumer cannot be deprived of the protection afforded to him under any other agreement unless in particular circumstances which should also be in favour of the consumer.

<sup>83</sup> At the international level, the Brussels Regulation does not apply to arbitration and, the Hague Convention does not apply to consumer contract.

<sup>84</sup> Section 3 of England and Wales Arbitration Act 1996 provides that the seat is designated by the parties or by the arbitral or other institution or person vested by the parties with powers in that regard, or by the arbitral tribunal so authorised by the parties; Similar rules under the UNCITRAL Model Law in Art.20 (1), and the ICC Rules which state in Art.14 (1)

<sup>85</sup> Collier and Lowe, *The Settlement of Disputes in International Law Institutions and Procedures* (n 1) 240

<sup>86</sup> See (n 73); See also the recent case of *Christian Kruppa v Alessandro Benedetti and Bertrand des Pallieres* [2014] EWHC 1887 (Comm)

For example, if an arbitration clause provides for ‘Swiss arbitration’ then the seat of arbitration would normally be in Switzerland. Thus, the law that governs the arbitrability would not be English law unless there is an exclusive jurisdiction clause that refers the disputes to English law.

In both situations a foreign arbitral seat would leave the national courts of the consumer with no role to play before and during the arbitration proceedings in order to protect consumers. This is opposite to the role of the national courts of the consumer, if it was the judicial seat of the arbitration.<sup>87</sup>

In this scenario, the arbitration seat for international online consumer disputes could be anywhere in the world whereas a foreign arbitral seat other than the consumer country of domicile would deprive the consumer of the right to litigate disputes over online arbitration agreements and processes specifically on the ground of inarbitrability. This is mainly because the national law of the seat (other than consumer country of domicile) will be the main applicable law to determine the arbitrability issue.<sup>88</sup> This is in order to confirm the jurisdiction power and the authority of the arbitrator and to impose a fundamental standard on the legal relationship between the parties.<sup>89</sup>

In other words, the judicial seat of the arbitration usually determines the applicable procedural law, the *lex arbitri*, and legal implications of conflict of laws including the role of national courts in relation to arbitration and arbitrability.<sup>90</sup> The courts at the seat of arbitration may support and intervene in the process with rulings on the validity of the arbitration agreement or by staying legal proceedings in favour of arbitration by rulings

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<sup>87</sup> The only way the court would interfere is when the parties and the arbitrator have not determined the arbitral seat. In England and Wales, Section 3(c) of the Arbitration Act 1996 states that, in order to determine the arbitral seat that is left undetermined all the relevant circumstances should be taken into consideration; see *Dubai Islamic Bank PJSC v Paymentech Merchant Services Inc*, [2001] 1 Lloyd’s Rep 65. In the USA, Section 303 of the Federal Arbitration Act 1925 refers to Article 3 of the Inter-American Convention, which determine the seat of arbitration in accordance with the rules of procedure of the Inter-American Commercial Arbitration Commission. Article 16 of the IACAC Rules of Procedure, the arbitral tribunal shall determine such place, having regard to the circumstances of the arbitration.

<sup>88</sup> In accordance to the decisions of Colman J

*“... an agreement as to the seat of an arbitration is analogous to an exclusive jurisdiction clause. Any claim for a remedy going to the existence or scope of the arbitrator’s jurisdiction or as to the validity of an existing interim or final award is agreed to be made only in the courts of the place designated as the seat of the arbitration.”*, see *A v B* [2007] 1 Lloyd’s Rep 237 and *A v B* (No. 2) [2007] 1 Lloyd’s Rep 358; *C v D* [2007] EWCA Civ 1282

<sup>89</sup> For example, the English Court of Appeal, in case *Sulamerica v Enesa*, upheld the High Court’s decision that the law of the seat (England) should apply, in this case, despite the fact that all other factors pointed to the law of Brazil. *Sulamerica v Enesa* [2012] EWCA Civ 638

<sup>90</sup> Brekoulakis, ‘Law Applicable to Arbitrability: Revisting the Revisted LEXFORI’ (n 46) 109

on subjective arbitrability against consumers. In practice, within the scope of this thesis, this would happen if the seat of arbitration was in the USA where the federal policy favours arbitration even in consumer contracts.<sup>91</sup>

Overall, in the case of international online consumer disputes, the arbitrability of these would depend on the arbitration law, ‘the procedural law’, at the seat of arbitration whereas the national court as the judicial seat of arbitration is the only court that has the supervisory jurisdiction over the arbitral process. It is clear that the supervisory role of the national courts of the consumer is necessary in a pre-award stage through the seat of arbitration.

### **3.3 The principles of fairness and the choice of foreign arbitral seat**

A choice of foreign arbitral seat for international online consumer disputes means that the consumer cannot refer disputes related to online arbitration agreements and processes to the court of his domicile. While parallel courts and arbitration proceedings arise when the validity of the arbitration and the jurisdiction clause is upheld by the arbitral tribunal but not by the court of consumer, in the event of international online consumer disputes the role of the judicial seat of arbitration is to decide whether a dispute is arbitrable or not. In this sense, the selection of the arbitral seat should be one of the most important choices to make during international online consumer contract negotiations. However, a consumer (ie an online consumer) by definition does not negotiate their contract. To this extent, the consumer should have two options to override the choice of foreign arbitral seat. The consumer can rely on the control of unfair contract terms (unfairness test), which is embedded in the UTCCR in England and Wales, or rely on the doctrine of unconscionability of adhesion contracts in the USA (the unconscionability rules), which are found in section 2-302 of the UCC.<sup>92</sup>

Under the UTCCR as explained in chapters 3 and 4, the fairness of the terms often involves two requirements which the consumer contract should be tested against: i) the absence of good faith; and ii) the significant imbalance between parties which is caused by the the absence of good faith. As for the choice of arbitration seat, it can be considered

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<sup>91</sup> See chapter 3, section 4.2

<sup>92</sup> Regarding the doctrine of unconscionability see chapter 3, section 4.2 and chapter 4 section 3.3



like any other term in the consumer contract or agreement. There is no reason, from the author's point of view, not to apply a fairness test to such a clause. This is due to the following reasons. First, the UTCCR states in Article 5(5) that there is a non-exhaustive list of the terms which may be regarded as unfair.<sup>93</sup> Second, the same justification seems, to some extent, relevant between the 'jurisdiction clause', the choice of court clause and a choice of foreign arbitral seat from an international online consumer perspective, in relation to changing the normal system of litigation. Furthermore, unlike the arbitration clause, both jurisdiction clause and the arbitration seat clause are not listed under schedule 2 of the UTCCR.<sup>94</sup>

Thus, from a practical standpoint, the problem is that a choice of an arbitral seat clause based on the above two requirements would have the same impact as unfair terms. In other words, a foreign arbitral seat clause does create a significant imbalance to the detriment of the consumer in a way contrary to good faith. Arguably, arbitral seat clauses by their nature raise a significant imbalance in favour of the business due to the differentiation of consumer definitions, namely between England and Wales law and USA law. In the event of a dispute, as mentioned above, the seat of arbitration usually determines the applicable procedural law, the *lex arbitri*, and legal implications of conflict of laws including the role of national courts in relation to arbitration and arbitrability.

Regarding the fairness issue, following the English common law, the court in *Standard Bank London Ltd v Apostolakis & Anor*<sup>95</sup> held that the choice of the jurisdiction clause was unfair according to the UTCCR because the two above requirements were satisfied. Justice Steel, who delivered the judgment, asserted that:

The defendants (consumer) submit that jurisdiction clauses of the kind provided for in the present case are prima facie unfair by reason of the imbalance of convenience between the parties, bearing in mind that it is the potential for unfairness rather than the actual unfairness in the particular case that matters. The degree of imbalance and consequent unfairness, it was suggested, was exaggerated in the present case by the alternate jurisdictions made available to the claimant but not to the defendants. Whilst in some case the unfairness might be

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<sup>93</sup> The Unfair Contract Terms in Consumer Contracts Regulations 1999, Article 5(5) "Schedule 2 to these Regulations contains an indicative and non-exhaustive list of the terms which may be regarded as unfair".

<sup>94</sup> The Unfair Contract Terms in Consumer Contracts Regulations 1999, Schedule 2

<sup>95</sup> *Standard Bank London Ltd v Apostolakis & Anor* [2002] CLC 939

overcome by careful explanation of its meaning and effect, in the present case no explanation, let alone a translation, was made.<sup>96</sup>

In *Buck*<sup>97</sup> Justice Ramsey also reached the same conclusion in regard to overcoming the unfairness of the arbitration clause, which is one of the listed terms of the UTCCR, by careful explanation of its meaning. Otherwise, the arbitration clause is unfair and thus unenforceable because it needs to be more prominent than just a box in the contract listing all the terms.<sup>98</sup>

By applying such conclusions upon the choice of arbitration seat, this would mean that the potential for unfairness rather than the actual unfairness is what matters to render the choice of arbitration seat an unfair term. Bearing in mind that a ‘more fully, clearly and prominently’ set out clause would avoid the inconvenience that results in all cases at a domestic level. Arguably, internationally, the imbalance does not result from the inconvenience of the designated clauses only; the jurisdiction clause, the arbitration clause and the seat of arbitration internationally have a genuine unfairness element.

Despite the fact that the choice of arbitration seat can be a ‘potentially’ unfair clause, the main obstacle still exists in order to grant exclusive jurisdiction to consumer’s court of domicile in or outside the EU Member States. There is no guarantee that the same protection can be extended to international online consumer disputes. This is for two reasons. Firstly, as it has been argued before, the Brussels Regulation does not address the jurisdiction issue directly even if it seems consistent with the principle of the Unfair Terms Directive which invalidates any unfair clause in a consumer contract. Secondly, arbitration is excluded from the scope of the Brussels I Regulation.<sup>99</sup> The impact of these issues will be discussed in the coming subsections.

However, arguably, a foreign arbitral seat contains an actual unfairness element. A foreign arbitral seat can be a ‘potentially’ fair clause when it is chosen by the power of the parties (party autonomy) in a fully informed, transparent and prominent way in the same way as in *Standard Bank London* and *Buck*. Even though this state of affairs could come to pass in a situation involving international online consumers, these are most likely not aware of the significant consequences of choosing a foreign arbitral seat. For

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<sup>96</sup> See Case *The Standard Bank London Ltd v Apostolakis & Anor*, [2001] EWHC 493 (Comm)

<sup>97</sup> See Case *Mylcris Builders Ltd v Buck*, [2008] EWHC 2172 (TCC)

<sup>98</sup> For further details in regard to this case, see chapter 3, subsection 4.1.2

<sup>99</sup> The Brussels I Regulation, Article 1(2)(d) “The Regulation shall not apply to: (d) Arbitration”, will be argued in depth the coming subsection.

example, the issue of costs would constitute the actual unfairness as ‘costs in an adjudication can be very significant,’<sup>100</sup> potentially hindering the consumer’s right to take legal action in a foreign state. In *Buck* the court referred to the cost as a *further* element of imbalance to the detriment of the consumer. This was also the case in *Standard Bank London* where the court considered the potential cost alongside the inconvenience of the jurisdiction clause.<sup>101</sup> However, the unfairness of cost in some cases<sup>102</sup> might be overcome by careful explanation of its meaning or setting it out in more fully informed, transparent and prominent words. In other words, the ‘potential cost’<sup>103</sup> is insufficient to establish for the international online consumer the right to litigate disputes over arbitration agreements in his domicile unless there is an unfair term. Besides, the choice of the arbitrable seat could be reasonably justifiable according to the law of the business country and the law of the seat.

In the USA, the Supreme Court enforced the choice of forum clause outside the consumer’s home court even though it was likely that the consumer had never read the clause and the clause itself was not the subject of any negotiation between the parties. This was clear in *Carnival Cruise Lines*<sup>104</sup> where the Supreme Court approved the fairness regarding the place of the forum for any future dispute with the consumer from the point of view of the business interests.<sup>105</sup> As a result, the court will not view the choice of the place of business as an arbitral seat as an unconscionably ‘unfair’ choice.

However, as explained in chapter 3, the US Supreme Court focused on both the individual’s ability to pay and the actual costs of arbitration.<sup>106</sup> This was without clarification about how high the costs must be to deter the consumer from vindicating their statutory rights.<sup>107</sup> Nonetheless, the latter requires proof that the consumer is

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<sup>100</sup> *Picardi (t/a Picardi Architects) v Cuniberti and another* [2002] EWHC 2923, paras 131,133

<sup>101</sup> *The Standard Bank London Ltd v Apostolakis & Anor*, [2001] EWHC 493 (Comm); [2002] C.L.C. 939

<sup>102</sup> In England and Wales, in cases where the claims are more than £5,000.

<sup>103</sup> Where the amount of the claims was more than £5000 and the arbitrator’s fees are comparatively significant.

<sup>104</sup> *Carnival Cruise Lines, Inc. v. Shute*, 499 U.S. 585 (1991) , 585, 586

<sup>105</sup> *ibid*, “In this case, there is no indication that the petitioner set Florida as the forum in which disputes were to be resolved as a means of discouraging cruise passengers from pursuing legitimate claims... the petitioner has its principal place of business in Florida, and many of its cruises depart from and return to Florida ports...”, 499 U.S. 585 (1991), 595

<sup>106</sup> Jennifer L. Peresie, ‘Reducing the presumption of arbitrability’ (2004) 22 Yale Law & Policy Review 453

<sup>107</sup> See eg, *Bradford v. Rockwell Semiconductor Sys., Inc.*, 238 F.3d 549, 557 (4th Cir. 2001) at 557(the court determined the ability of party to pay the arbitration cost based on the cost impact on the individual party’s situation); *Morrison v. Circuit City Stores, Inc.*, 317 F.3d 646, 660 (6th Cir. 2003) at 669 (the court

financially incapable of covering these costs. To this extent, the arbitrability will remain uncertain. More evidence can be added from the case *Anders v Hometown Mortgage Services, Inc.*<sup>108</sup> Even though this case deals with a choice of court clause, there is no reason not to apply it to choice of an arbitral seat clause in international online consumer disputes. In this case, the loan agreement between Mr Anders and Hometown Mortgage included an arbitration clause. He alleged that the arbitration clause should not be enforced because he was financially incapable of meeting the costs of the arbitral process. The United States Courts of Appeal refused his claim and explained that he had failed to prove that he was financially incapable of participating in the arbitral process.<sup>109</sup> This means that the cost is also insufficient to establish a consumer's right to litigate disputes over online arbitration agreements and process in his own domicile, England, instead of the USA. This issue is of great importance and should be considered as a violation of consumer protection policy, not only because of the difference in legislative rights but because consumers will have no other access to justice.

Regarding the procedural issues, the consumer cannot litigate a dispute over arbitration agreements and process in his domicile even if the main two requirements (being contrary to good faith and causing a significant imbalance) are satisfied. This is because the court at the seat of arbitration is competent to challenge the arbitration process and award whereas the consumer's courts have difficulty in asserting their jurisdiction and applying their law where there is an expressly stated clause regarding the seat of arbitration, ie 'the judicial seat'.<sup>110</sup>

Consequently, there is a need to analyse the interface between those legal rights that can logically be shaped and enforced in accordance with the will of the parties concerned (the right to arbitrate) and those rights which are dependent upon the parties' country of domicile (the right to litigate). It seems necessary to strike a balance between all aspects

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determined the ability of party to pay the arbitration cost based on the cost impact to a similarly situated "group of plaintiffs").

<sup>108</sup> 346 F.3d 1024 C.A.11 (Ala.), 2003

<sup>109</sup> *ibid*, 1028.

<sup>110</sup> This issue will be discussed in the following subsection, however, its important to mention here that the Hague Convention on Choice of Court Agreement excluded the international online consumer disputes from its application. Furthermore, Article 5 (2) of the Hague Convention state that "A court has jurisdiction under paragraph 1 shall not decline to exercise jurisdiction on the ground that the dispute should be decided in a court of another State"; whereas, in accordance with *Sulamerica v Enesacase* "this will always be a matter of contractual interpretation, taking into account "the wider commercial and legal context in which the arbitration agreement is set", *Sulamerica v Enesacase* [2012] EWCA Civ 638

of arbitrability between the function of the consumer as a weaker party and the interests of the trader at the international level. This is the argument of the following subsection.

### **3.4 The freedom to arbitrate versus the right to litigate**

It has been argued in this thesis that England and Wales and the USA have completely different approaches regarding the arbitrability of international online consumer disputes. Within these jurisdictions those rights collide. The courts, which have the authority to compel arbitration proceedings, have a power to protect the consumer.<sup>111</sup> It is important to mention that the right of online consumers to litigate is well-established under England and Wales law<sup>112</sup> at least within EU Member States due to the Brussels regime, which consists of the Brussels I Regulation and the Brussels Convention 1968.<sup>113</sup> The Brussels I Regulation contains rules with which the consumer will not be deprived of their judicial protection. Therefore, in order to maintain access to ‘state justice’ a consumer may bring proceedings against a business in the courts where the consumer is domiciled. However, the waiver of such rights is by an arbitration agreement or jurisdiction clause. Traditionally, in most cases,<sup>114</sup> such a defence should be established by evidence showing that a consumer, voluntarily and intentionally, waived their right to litigate. The determination of such a defence is based on the conditions that confirm the arbitration agreement and/or clause in online consumer disputes.<sup>115</sup> All the above issues reflect on the arbitrability issue;<sup>116</sup> this brings us on to the question of which court may have jurisdiction in order to direct that arbitration before and during the process to maintain an effective outcome. Do the abovementioned rules establish the jurisdiction on claims regarding the arbitrability in the courts where the consumer is domiciled? Should this be extended to international online consumer disputes? Is this an acceptable solution? In

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<sup>111</sup> Case C-168/05, *Mostaza Claro v Centro Móvil Milenium SL* [2006] E.C.R. I-10421, para.39; See also chapter 3, section 4.1

<sup>112</sup> The Civil Procedure Rules (CPR) 1998, No. 3132; The Unfair Terms in Consumer Contracts Regulations 1999, No. 2083

<sup>113</sup> This is due to the important steps which has been taken towards harmonising the EU laws to protect their consumers within its jurisdiction; See Council Regulation (EC) No 44/2001, on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, 22 December 2000, The amended Brussels Regulation No 1215/2012, L 351/1

<sup>114</sup> In case where arbitration is consider as legal processes function according to law and legal rules.

<sup>115</sup> For more analysing in that regard see chapter 4

<sup>116</sup> For example, public policy in favour of arbitration or against arbitration, are different regarding the enforcement of arbitration agreement, namely, when the party autonomy of consumer espouses the right to go to arbitration.

order to answer these questions it is necessary to analyse the interface of juridical protection between state and private justice.

Regarding state justice, Article 18 of the Brussels I Regulation gives the consumer the right and the option to bring any action related to the dispute either in the courts of his domicile or in the courts of the business's domicile.<sup>117</sup> It also restricts the right of the business to sue the consumer in a place other than the consumer's domicile.<sup>118</sup> It is important to keep in mind here the narrow definition of consumer to provide such a judicial protection. Arguably, with special consideration to the consumer as the weaker party, in its wider concept judicial protection is still limited. Therefore, definite protection cannot be guaranteed internationally. This is because arbitration is excluded from the scope of the Brussels I Regulation.<sup>119</sup> In other words, the scope of applicability of the Brussels I Regulation does not extend to the litigation of disputes related to arbitration agreements and process in the consumer's country of domicile. This is to say arbitration is considered a different form of justice, ie 'private justice'; the Brussels I Regulation is only designed to apply to litigation within 'state justice' only. Strong evidence for this can be seen in the case of *Marc Rich & Co AG v Societa Italiana Impianti PA*.<sup>120</sup> In that case, the CJEU had to determine whether court proceedings to appoint an arbitrator fell within the scope of the arbitration exception under the Brussels Convention 1968. It stated that:

[B]y excluding arbitration from the scope of the Convention of 27 September 1968 on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters (which the Brussels I Regulation has the same scope of it),<sup>121</sup> [...] the Contracting Parties intended to exclude arbitration in its entirety, including proceedings brought before national Courts ... the Convention does not apply to

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<sup>117</sup> The Brussels I Regulation, of Article 18 (1) of the amended Brussels Regulation No 1215/2012 (recast) states that: "A consumer may bring proceedings against the other party to a contract either in the courts of the Member State in which that party is domiciled or, regardless of the domicile of the other party, in the courts for the place where the consumer is domiciled".

It should be noted that Article 16 under the old Brussels Regulation, No 44/2001, states that "1. A consumer may bring proceedings against the other party to a contract either in the courts of the Member State in which that party is domiciled or, in the courts for the place where the consumer is domiciled. 2. Proceedings may be brought against a consumer by the other party to the contract only in the Courts of the Member State in which the consumer is domiciled."

<sup>118</sup> The Brussels I Regulation, of Article 18 (2) states: "Proceedings may be brought against a consumer by the other party to the contract only in the courts of the Member State in which the consumer is domiciled".

<sup>119</sup> The Brussels I Regulation, Article 2 (d), "the Regulation shall not apply to: arbitration".

<sup>120</sup> Case C-190/89 [1991] ECR I-3855. 3903, Para. 21

<sup>121</sup> EU Commission, Proposal for a Council Regulation (EC) on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters, COM (1999) 348 final 99/0154 (CNS)

Court proceedings which are ancillary to arbitration proceedings, for example the appointment or dismissal of arbitrators.<sup>122</sup>

The CJEU explained that the arbitration exception extends to court proceedings that are ancillary to arbitration. Such a statement could be interpreted to mean that the court proceedings could extend to include the national court at the seat of arbitration.<sup>123</sup> Furthermore, there are various court proceedings that are ancillary to arbitration. Court proceedings are definitely ancillary to arbitration if their subject matter is to determine the arbitrability, recognition and enforcement of arbitral awards, or the vacating of an arbitral award.<sup>124</sup> Under those circumstances, the determination of the arbitrability will be left to the discretion of the national court at the seat of arbitration; the recognition and enforcement of judgments given by the courts that disregard an arbitration clause is uncertain; the recognition and enforcement of judgments on the validity of an arbitration clause or setting aside an arbitral award is also uncertain. To a large extent, this is a limitation upon the judicial intervention of the consumer country; the exercise of extraterritoriality cannot be applied over an arbitration process for the annulment of the arbitration award. In contrast, the consumer does not have a right to litigate disputes in the courts of his country of domicile when they are related to online arbitration agreements and processes. Internationally, in online scenarios, such a situation would lead to a wide range of legal uncertainty about determining the arbitrability.

It can be noted here that a possible solution to improve the current situation, at least within the EU, was suggested in the Green Paper in 2009. This amounted to extending the application of the Brussels I Regulation to arbitration.<sup>125</sup> The amended Brussels Regulation in 2012 provides clarifications on the application of the Regulation to arbitration proceedings. In its Recital<sup>126</sup> it states that the Regulation should not apply to

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<sup>122</sup> *ibid* (n 122)

<sup>123</sup> The Report from the Commission on the application of Council Regulation (EC) No 44/2001 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, Brussels, COM(2009) 174, 9; Green Paper on the review of council Regulation (EC) No 44/2001 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, Brussels, COM(2009) 174, 8; See also Case C-190/89 *Marc Rich v. Società Italiana Impianti*. [1991] ECR I-3855. 3903

<sup>124</sup> Other examples of ancillary proceedings are proceedings aimed at appointing or removing an arbitrator, and fixing the seat of arbitration, *ibid*, COM(2009) 174, 9

<sup>125</sup> *ibid*, Green Paper, COM(2009) 174, 9

<sup>126</sup> The Brussels I Regulation has been repealed and replaced by Regulation (EU) No 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (recast) (“Recast Regulation”). The Recast Regulation came into force on 10 January 2015.

arbitration in the same way as the previous version of the Regulation Article 2(d).<sup>127</sup> Within the EU Member States, courts recognise and enforce arbitral awards under the New York Convention 1958, which takes precedence over the Brussels Regulations.<sup>128</sup> It seems, therefore, that a Member State court can recognise arbitral awards even if there has been a conflicting judgment in another Member State.<sup>129</sup> Here, it can be understood that the question of arbitrability is left to the discretion of the national court in each Member State to examine under the New York Convention 1958.

As explained in chapter 2, under the English jurisdiction rules the determination of the proper court to adjudicate international online consumer disputes follows the ‘directing activities’ approach. In accordance with these rules, the contract either has to have been made within the jurisdiction of England and Wales or contain a term to the effect that the court in England and Wales shall have jurisdiction to determine any claim in respect of the contract.<sup>130</sup> It has been argued that an international online consumer domiciled in England and Wales has the right to litigate an international dispute only when the online business has directed its activity at their domicile. Otherwise, the jurisdiction of the court cannot be established unless the online contract has clauses stipulating that a court of England and Wales is the competent court. This could be resolved by agreement between parties. However, in this case only these courts have jurisdiction to examine the validity of an arbitration agreement and thus refer parties to arbitration, or stay or dismiss proceedings.

In contrast, in the USA, the idea of allowing the consumer to litigate international disputes in his domicile is not well-established. For example, section 2A-106(2) of the UCC states that: ‘(I)f the judicial forum chosen by the parties to a consumer lease is a forum that would not otherwise have jurisdiction over the lessee, the choice is not enforceable’. Section 2A-106(2) of the UCC does not provide the consumer with the right

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<sup>127</sup> The Brussels I Regulation, Article 1.2, (d), the Regulation shall not apply to: arbitration; The new provision Recital (12) states that: “The Brussels Regulation does not apply to any action or ancillary proceedings relating to the establishment of an arbitral tribunal, arbitrators’ powers, the conduct of arbitration, or the annulment, review, appeal, recognition or enforcement of an arbitral award”, The Brussels I Regulation, Recital (12), Regulation (EU) No 1215/2012, OJ L 351/1

<sup>128</sup> See Article 73(2) of the Brussels Regulation (recast)

<sup>129</sup> Sarah Garvey, Brussels Regulation (Recast): Are You Ready?, 18 Mach 2015 available at : [http://www.allenoverly.com/publications/en-gb/Pages/BRUSSELS-REGULATION-\(RECAST\)-ARE-YOU-READY.aspx](http://www.allenoverly.com/publications/en-gb/Pages/BRUSSELS-REGULATION-(RECAST)-ARE-YOU-READY.aspx) (accessed 1/6/2015)

<sup>130</sup> Practice Direction supplements Section IV of Civil Procedure Rules 1998 (CPR) Part 6, para 6; See chapter 2, subsection 2.2.1



to litigate disputes relating to a lease contract in his domicile unlike the jurisdiction rules in England and Wales which enforce the choice of court agreement against the consumer. A number of judicial tests require an examination of whether the defendant has the requisite minimum contacts with a consumer country of domicile. Analysis of the ‘directing activities’ approach has been extensively carried out in chapter 2 of this thesis, there is no need to repeat it here. Nevertheless, it is important to emphasise that the USA doctrine may result in depriving the consumers of the protection afforded to them by the laws of their countries of domicile.

It can be argued that under the *forum non-conveniens* approach in common law, the chosen court might reject its jurisdiction if it finds that it is not the appropriate forum for adjudicating the dispute due to the lack of connection between the activity and the forum state. However, the Hague Convention on Choice of Court Agreement limits the court from exercising such a right in a case where there is an exclusive court agreement between contractual parties.<sup>131</sup>

Accordingly, the viability of incorporated clauses including the choice of arbitration seat might not necessarily be viewed in the same way between EU Member States and non-EU Member States. In such situations, the authority to compel (stay or dismiss) arbitration would have different dimensions based on court proceedings at the seat of arbitration, whether in support of or against arbitration in consumer disputes.

#### **4. Conclusion**

In this chapter, the author has argued that it is unclear how an arbitrator will act when the consumer arbitration is bound by the mandatory rules of the consumer country of domicile whereas the law chosen by the parties does not restrict the arbitrability of consumer disputes. Therefore, it has been argued in this chapter that legal protection which restricts the party autonomy of online consumers only may have no effect in international online consumer disputes if it is not protected by the ‘judicial seat’. Arbitrability to this extent is uncertain. This is unless the protection rules are applicable even if the contract or arbitration agreement contains a choice of law other than the law

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<sup>131</sup> Article 5 (2) of the Hague Convention state that “A court has jurisdiction under paragraph 1 shall not decline to exercise jurisdiction on the ground that the dispute should be decided in a court of another State”; see also Faye Fangfei Wang, *Internet jurisdiction and choice of law: legal practices in the EU, US and China* (Cambridge University Press 2010) 19

of the consumer country of domicile. As a result, consumer protection rules may not impose a fundamental standard regarding who is a consumer on the legal relationship between the parties and the arbitrator as a third party internationally. Therefore, it has been argued that stipulating the consumer domicile as the seat of arbitration will provide the application of the law of consumer as well as the judicial protection with some certainty for international online consumer disputes.

In general, the findings of this chapter can be categorised under two perspectives: notional and factual. The notional findings represent the challenges which exist in the theory regarding the conflict of laws issue and the jurisdiction issue. As a result, neither the contractual nor jurisdictional theory present a complete solution for the issue of the arbitrability of international online consumer disputes, namely, the imbalance between the mandatory protection consumer rules and party autonomy. However, ‘the seat of arbitration theory’ corresponds with reasonable justifications, in order to fill the gap between the international arbitrator and the state judge of the consumer country of domicile. The seat of arbitration refers to the ‘judicial seat’ of arbitration; its procedure law is the proper law to answer questions regarding the arbitrability of international online consumer disputes. Thus, any extra protection guaranteed by the law of the consumer country of domicile would lose its purpose if it were not chosen as the ‘judicial seat’.

As for the factual findings, there are a number of different arbitration laws which can potentially relate to the arbitrability of international online consumer disputes. The main two are: (a) the law to which the parties have agreed that the arbitration agreement is to be subject; (b) the law that relates to the place in which the arbitration is held.

The basic principle of party autonomy is that the parties who have the right to arbitrate have the freedom to choose the exclusive jurisdiction of a court and applicable law. On that basis, as a conclusion, international online consumers may be deprived of their rights, ie the right to legal protection and the right of judicial protection regarding the arbitration agreement and process. As such, one could object that the mandatory rules of the law chosen by the parties or that apply in the seat of arbitration should apply in such way to hold up the imbalance between parties autonomy and the protection of the weaker party (consumer) at the international level. It is suggested that a possible solution is to ensure the ‘judicial seat’ of arbitration is in the consumer country of domicile. It has been argued

that such an approach would be fairer and more reasonable because it gives the court, the 'judicial seat' of arbitration, the proper discretion to validate the jurisdiction clause based on its procedural fairness. However, jurisdiction rules represent a real challenging issue in attempts to gain an adequate overview of the arbitrability of international online consumer disputes. The lack of uniformity in arbitration law damages the arbitrability of international online consumer disputes.

In this and the following chapter, the author will attempt to offer a balance between arbitration theories as much as possible with the parties' autonomy as a doctrine and the reinforcement of the consumers' interests.

## **Chapter 6: Transnational Approach to the Arbitrability of International Online Consumer Disputes**

### ***1. Introduction***

As demonstrated in the previous chapters, the lack of uniformity in arbitration laws damages the arbitrability of international online consumer disputes. The parties have the freedom to choose where the arbitration process takes place and they are also free either to choose the law of the place where the arbitration is held or to opt for a different legal system. The laws of the place of arbitration and its influence on arbitrability can give rise to different conclusions. This division of arbitration laws affects arbitral tribunal awards for which there is no universally accepted standard for arbitrability.

Most international online consumer transactions have connections of equal importance with several legal orders. In the event of international online consumer disputes, this online connection between international contractual parties and the arbitral tribunal raises a complicated balance between the principles of consumer protection and the principles of the party's autonomy. Due to the role of the Internet in such types of transactions, the localization of international online consumer contracts within a particular national system may be arbitrary. It is also a complex process to achieve.

When arbitration law and consumer law interact internationally through the Internet they generate a unique set of challenges for the arbitrator to deal with. This is especially where a number of different arbitration laws can potentially be related to the arbitrability of international online consumer disputes, in particular, for those disputes where there is an imbalance of power between the parties.

Although arbitration is seen as a genuine alternative dispute resolution mechanism for international online consumer disputes, a new method for reconsidering the question of the arbitrability of international online consumer disputes is required.<sup>1</sup> A question which different national laws, provides different answer to it, particularly, within the scope of this thesis England and Wales and the USA. In this regard, the transnational approach

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<sup>1</sup> The recent developments call for an examination of the traditional regulation of international online consumer contracts in the process of economic globalization, the irruption of Internet trade, see the adoption of UNCITRAL Model Law on Electronic Commerce and UNCITRAL Model Law Commercial Arbitration are both used as a transnational guide to develop the national laws.

might be a good method to use to tackle the middle ground between two different policies regarding the arbitrability of such disputes. The pertinent question in this regard is how to fine-tune any legal position in international online consumer transactions and prevent it from leading to unfair or unpredictable results internationally

This chapter will justify the transnational approach to determine the arbitrability of international online consumer disputes as a *legal method* by an arbitrator in a pre-award stage. This is based on the notion that any limitations against arbitration should rely upon the ability of a consumer to arbitrate their disputes under subjective and objective circumstance.

## **2. Transnational law or a transnational approach?**

The definition of transnational law is open to debate. There are as many possible definitions of transnational law as there are authors dealing with the subject. Some define it by its sources while others define it by its content.<sup>2</sup>

However, generally, the terms like ‘transnational law’ or expressions such as *lex mercatoria*<sup>3</sup> are often used in legal terminology especially in the context of international commercial arbitration to denote non-national or supra-national legal rules or general principles of law employed by arbitration tribunals in the course of dispute settlements.<sup>4</sup> Broadly speaking, transnational law encompasses all laws that govern commercial activities or events that take place beyond national borders of countries, including public and private international law and the general principles of law.<sup>5</sup>

Whatever the definition is, the main purpose behind transnational law theory, as applicable to international commercial transactions, is that because national laws do not reflect the realities of international business life, especially in the current information

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<sup>2</sup> Emmanuel Gaillard, ‘Transnational Law : A Legal System or a Method of Decision Making ?’ (2001) 17 59–71

<sup>3</sup> The concept of transnational commercial law is closely related to that of *lex mercatoria*, so much that some authors equate the latter with the former. See for example: E. McKendrick R. Goode, H. Kronke, *Transnational Commercial Law : primary materials* (Oxford University Press 2007), 6

<sup>4</sup> Bamodu G (2001) Extra-national legal principles in the global village: a conceptual examination of transnational law. *Int ALR* 4(1)

<sup>5</sup> P. C. Jessup, *Transnational Law* (Yale University Press 1967) 34

age,<sup>6</sup> there is a need to avoid conflict between and the vagaries of domestic laws in international commercial transactions.<sup>7</sup>

International online consumer contracts are also part of international business activity and part of the online world. In this area, the arbitrability of international online consumer disputes has been fragmentary since both the protection of the weaker party (the consumer) and the principles of party autonomy have been taken into account. Furthermore, international private law is not well coordinated and so it is not expressly provided which law international online consumer disputes should be subject to in arbitration. This would and should raise a number of divergent views in national court practices as in arbitral practice in the event of international online consumer disputes.

However, there are common criticisms of transnational law theory, such as its lack of authority, predictability and consistency. Some arguments have even denied its existence and its qualification as a legal concept.<sup>8</sup> Hence, a contract intended to be subject to transnational law would be a stateless and lawless contract, and so would have no binding force.<sup>9</sup> Nevertheless, the debate has been strongly renewed, it focus on the very existence of rules as an alternative to the traditional choice-of-law approach other than those found in a given legal system, with the potential to be selected by parties and arbitrators, in the event of international disputes.<sup>10</sup> In online environment, the system of national law and the transnational internet are inherently irreconcilable.<sup>11</sup> To resolve that tension, the present author agree with Kohl argument that private international law rules should be transferred from the states' national laws into transnational rules.<sup>12</sup>

However, in regards to transnational law, the specific question would be whether transnational law is a legal system that an arbitrator might use as an applicable law or

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<sup>6</sup> Jorge Jaramillo-Vargas, 'Lex Mercatoria - A Flexible Tool to Meet Transnational Trade Law Needs Today' (2002) 1 Rev. E-Mercatoria

<sup>7</sup> *ibid.*

<sup>8</sup> Keith Highet, 'Enigma of the Lex Mercatoria' (1988) 63 Tul. L. Rev. 613

<sup>9</sup> *ibid.*

<sup>10</sup> Gaillard, 'Transnational Law : A Legal System or a Method of Decision Making ?' (n 2)

<sup>11</sup> Kohl U, Jurisdiction And the Internet: A Study of Regulatory Competence over Online Activity (Cambridge University Press 2007) 28

<sup>12</sup> *ibid.*, Kohl argues that '*The system of national law and the transnational internet are inherently irreconcilable. To resolve that tension, regulators are faced with a very simple choice indeed: either makes law more transnational or online activity less transnational. And this is always the only choice: there is no middle way, no grey between the black and the white. Just as you cannot squeeze a size 14 person into a size 8 jacket, you cannot hold into national laws whilst at the same retaining the transnational internet.*'

whether it is a useful approach for the arbitrator to adopt an applicable law to which he can address the arbitrability in the course of reaching a fair result.

Among the supporters of the transnational law theory, there are three main views that have been identified for how such goals may be achieved. First, that transnational law being an autonomous body of law with customary rules constituted in the framework of international trade as a neutral and third legal system applicable to international transactions. This can be created by the international business community which is independent from the legal system of any given country. Hence, it can be said that transnational law is a set of ‘general principles, and customary rules spontaneously referred to or elaborated in the framework of international trade, without reference to a particular national system of law’.<sup>13</sup>

The second view suggested that the transnational law is a body of general principles of law based on common sense which is recognized by significant numbers of national laws which give them effect. Those general principles of law should represent the fundamental idea of justice that can be found in different national laws.<sup>14</sup> They are also different from the legal rules as they are transnational in their origin and not created by private actors because they draw their binding force from national laws.<sup>15</sup> Accordingly, transnational law can be used by the arbitrator as a source of interpretation or amplification of international contractual clauses.<sup>16</sup>

The third view is that transnational law is neither an autonomous legal order nor a body of principles but a special process (a method of decision-making) followed by the arbitrator when he is called upon to judge international commercial disputes. In this approach, the arbitrator considers all the legal systems connected to the matter of the dispute and selects those rules, not from a particular law selected by a traditional choice of law process but from a comparative law analysis, which will enable him to apply the rules which appear most appropriate to solve the controversy.<sup>17</sup>

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<sup>13</sup> Goldman, Berthold, ‘The applicable law: general principles of law — the *lex mercatoria*’, in Julian D.M. Lew (eds.), *Contemporary Problems in International Commercial Arbitration* (Springer Netherlands 1986) 113-125

<sup>14</sup> Matthias Lehmann, ‘A Plea for a Transnational Approach to Arbitrability in Arbitral Practice’ (2004) 42 *Colum. J. Transnat’l L.* 753

<sup>15</sup> *ibid.*

<sup>16</sup> Hight, ‘Enigma of the *Lex Mercatoria*’ (n 8) 624,628

<sup>17</sup> Gaillard, ‘Transnational Law : A Legal System or a Method of Decision Making ?’ (n 2)

The main difference between the first two views can be simplified. The first support the idea that transnational law should have its own sources and rules or while the second it is just based on consistent principles that can be applied to similar facts in international commercial disputes. Nevertheless, in both ways the main purpose is to yield similar outcomes in the event of international commercial disputes.

The third perspective, however, is completely different. According to Gaillard transnational law can be a legal method that opposed to a legal system. The transnational law approach:

consists of ... deriving the substantive solution to the legal issue at hand not from a particular law selected by a traditional choice of law process, but from a comparative law analysis which enables the arbitrators to apply the rule which is the most widely accepted, as opposed to a rule which may be peculiar to a legal system or less widely recognized.<sup>18</sup>

Accordingly, transnational law uses a specific methodology (comparative law analysis) rather than tries to fit the concept into narrow boundaries of legal definitions. Such a method is a procedural tool used differently from the others previously mentioned. This is because it is not outside court intervention as private actors do not create them. Instead, the arbitrator will depend on rules made by state authorities.

In contrast to this idea, national and international law have an essential role to play in comparative law analysis, especially in aspects uncovered by the general principle of law such as the capacity of consumers as contractual parties, consent and interest. This method can be consistent with any given case at hand by providing a solution to the legal issue, mainly the question of arbitrability, not from a particular law selected by a traditional choice of law process but from a comparative law analysis which will enable the arbitrators to apply the rule of weaker parties which is the most widely accepted based on the facts of the disputes. This means that the international arbitrator *should* be able to provide a balance for the weaker party regarding what law should be applied. This can include hard laws, soft laws, regulation, national harmonisation and international harmonisation. This will be discussed in following subsections.

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<sup>18</sup> *ibid.* (n 2) 62



## **2.1 In relation to arbitrability**

The main issue that arbitrability of international consumer disputes raises in connection with the jurisdiction of the USA and England and Wales is the imbalance between party autonomy and consumer protection rules. The tension between these two poles represents different treatment of arbitrability as well as different individual and state interests. In any event, how can the applicable law to the arbitrability be determined internationally, and what approach is followed in this regard are the most basic questions at the centre of this thesis concerning the arbitration of international online consumer disputes. The former is a question of contract interpretation, whether a contract has a ‘consumer nature’ or not, whilst the latter pertains to complex considerations of public policy which involves ideologies and commercial policies that vary from country to country.

As demonstrated in chapter 5, the determination of the legal system under which the arbitration takes place is important because it is that legal system which governs some very important issues, such as the capacity of contractual parties, consumer protection rules and the validity of the arbitration in a consumer contract. However, the task facing the arbitrator is even more difficult when the parties involved disagree on the issue of arbitrability, especially when there is uncertainty as to which law should govern the arbitrability of international online consumer disputes. It has been suggested, in chapter 5, that the consumer is the weaker party and as such his country of domicile should be the seat of arbitration.<sup>19</sup> However, such rules are not well-established under unfairness rules in England and Wales nor in the USA under the unconscionability rules. The controversy becomes more intense when the subject of debate is whether such an online contract is a consumer contract or not given that there is no universally accepted standard for who constitutes an online consumer.

Furthermore, determining the arbitrability in case of international online consumer disputes is not limited to its legal aspects but also includes the economic interests of each party and the public interests of each jurisdictions, especially when each party mistrusts the other’s legal system.<sup>20</sup> For international online consumers, the USA has been strict in

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<sup>19</sup> See chapter 5, section 3

<sup>20</sup> Companies currently resist selling to consumers in other countries because of laws that generally require merchants to sue consumers in their home locations, see Amy Schmitz, ‘American Exceptionalism in Consumer Arbitration’ (2013) 10 *Loy. U. Chi. Int’l L. Rev.* 82

favouring the arbitrability of consumer disputes under the FAA, whilst England and Wales have limited the arbitrability of these disputes due to consumer protection concerns. It is clear that because of the public policies involved, parties wish to apply their own laws to the issue of arbitrability.<sup>21</sup>

As it has been argued through, the global reach of the Internet poses challenges to legal systems in regards to international online consumer contracts. Therefore, arbitrators should compromise with each legal system when dealing with arbitrability of international online consumer disputes. The determination of the choice of law, being agreed through a non-negotiable online contract, may have some difficulties in order to protect the weaker party in arbitration. The difficulty in distinguishing between B2B and B2C in international online contracts may lead to validating the choice of law clause against a consumer in the same way as B2B contracts, which is usually in online contract (i.e. adhesion contract) the law of the seller.<sup>22</sup> In this scenario, when determining the arbitrability of international online consumers and the applicable law upon them, the arbitrator should play an important role by providing a balance between the party autonomy and the protection rules of the consumer as the weaker party. Assuming that arbitrators aim to get as near as reasonably possible to a correct picture of reality.<sup>23</sup> The determination of the arbitrability should include the consent and the applicable law of the arbitration from the law of both parties, giving them the opportunity to consider the similarity of the norms, principles, rules and contractual clauses employed in such international online consumer transactions, regardless of the place where any disputes fall to be resolved. This solution clearly requires a comparative law analysis by the arbitrator as a method by which the arbitrator can determine the applicable law of arbitrability for international online consumer disputes. This would not be the case if there were uniform rules in regards to the arbitrability of international consumer disputes which have not yet been established.

However, it might be argued that the main issue in the transnational law method is that an arbitrator cannot override the parties' express choice of law.<sup>24</sup> This is contrary to the

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<sup>21</sup> See Lehmann, 'A Plea for a Transnational Approach to Arbitrability in Arbitral Practice' (n 14) 756

<sup>22</sup> See Chapter 2

<sup>23</sup> William W. Park, 'Arbitrators and Accuracy' (2010) 1 *Journal of International Dispute Settlement*, 25, available at: <<http://jids.oxfordjournals.org/content/1/1/25.short>> (accessed 10/09/2014)

<sup>24</sup> AFM Maniruzzaman, 'The Lex Mercatoria and International Contracts: A Challenge for International Commercial Arbitration?' (1999) 14 *American university international law review*. 657

parties' will. Since arbitration itself is based on party autonomy (contractual theory), the arbitrator should be mandated to decide the dispute in accordance with the contract.<sup>25</sup> Thus, if the arbitrator overrides party autonomy and decides it according to some other law, it presumes to rewrite the bargain which he has no right to do, at least within the common law jurisdictions.<sup>26</sup> Furthermore, such a method would, as a result, apply the law of the state that permits the arbitrability more often than others do.<sup>27</sup> Otherwise, it gives an incentive to arbitrators to deny the application of mandatory laws because arbitrators tend to uphold their own jurisdiction over disputes where mandatory laws are applicable to protect those state interests, in this case consumer interests.<sup>28</sup> Therefore, applying the transnational approach as a legal method to determine the law that governs arbitrability appears to be frustrated and difficult to predict.<sup>29</sup>

Nevertheless, the above argument does make sense within international online consumers' contracts as the consumers do not freely waived their rights. From the author's perspective, the existence of a transnational approach is required by the nature of international online consumer disputes. For example, the arbitrability of international online consumer disputes is determined by two different laws at least; the chosen law by the parties and the law of the seat of arbitration. Those two laws under contractual theory are more likely to be found in the national law of the seller in international online consumer contracts based on the principle of party autonomy, which gives parties the freedom to choose the applicable law, and the substantive and procedure law. Whereas, the arbitrator has to provide answer to the questions regarding the arbitrability of international online consumer disputes in accordance with the choice of law imposed by the business. This could lead to inappropriate conduct in favor of the business and reflect negatively on the integrity of international arbitration from the consumer's perspective.<sup>30</sup> The question is whether an arbitrator should validate or override such a choice of law similar to the situation under the Rome I Regulation. In other words, should an arbitrator treat a consumer arbitration agreement according to the express choice of law clause imposed by the business similar to a consumer contract under the Rome I Regulation by overriding the choice of law clause and applying the law of consumer habitual residence?

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<sup>25</sup> *ibid.* 678

<sup>26</sup> *ibid.* 679

<sup>27</sup> See Lehmann, 'A Plea for a Transnational Approach to Arbitrability in Arbitral Practice' (n 14) 760

<sup>28</sup> *ibid.* 760

<sup>29</sup> *ibid.*

<sup>30</sup> This issue will be explained in the following section.

If the arbitrator chooses to do so and overrides the choice of law, which the author believes he should, this means that the arbitrator has to start a new search to see which law is ‘the most appropriate’.<sup>31</sup> Otherwise, a choice of law clause imposed by the business would deprive the consumer of the protection that is awarded to him under the law of his domicile or habitual residence. Either way, it can be said that the arbitrability should not be determined according to a chosen law imposed by the seller. International online consumers have less bargaining power in any international online contract or agreement, and the arbitrator should have a significant role to protect the weaker party. Such a role will be discussed in following part of this chapter. At this point, it can be said the transnational law approach still has a distinct advantage over the previous argument, as it increases the effectiveness of arbitration.<sup>32</sup>

Overall, it can be argued that applying the transnational law method allows for a more comprehensive and balanced view of arbitrability than the exclusive determination under a particular national law. By doing so, an international online consumer appears to be more protected in international arbitration. The integrity of international arbitration, in particular from the consumer’s perspective, should be preserved, as a fair degree of autonomy with consideration to online consumers’ interest as weaker parties.

## **2.2 In relation to international online consumer disputes**

As demonstrated in chapter 4, the controversial notion of the consumer in an international online contract is one of the most problematic aspects for an arbitrator to determine arbitrability due to the special characteristics of the consumer as a weaker party. The common law jurisdictions within the scope of this thesis, England and Wales and the USA, continue to differ in both theory and practice regarding the protection of consumers. They maintain different perspectives on how to define online consumers as weaker parties.<sup>33</sup> The lack of an international legal definition to identify a consumer in an international online contract has, within the scope of the thesis, a profound implication on the law of England and Wales where the protection of the consumer is higher than in the USA. The application of the consumer definition in England and Wales appears problematic. First, the way to determine who is a consumer, which is an objective

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<sup>31</sup> Gaillard, ‘Transnational Law : A Legal System or a Method of Decision Making ?’ (n 2) 62

<sup>32</sup> This will be explained in following section and sub-sections. See section 3 of this chapter

<sup>33</sup> See chapter 4

approach, covers only natural persons acting for purposes outside his trade, business or profession. Through such acts, a natural person can be treated as a consumer who is considered by the law as a weaker party deserving certain protection. Second, the determinations of party autonomy depend on the way that a consumer is identified. Different determinations of online contracts mean that different rules are applicable to the arbitrability of disputes. This is because the gap between the two jurisdictions is big, with every national law having its own specificities in regards to international online consumer disputes. Such specificities have a connection with the public policy and public interests which are quite difficult to ignore at the seat of arbitration and/or at the enforcement place.

Recently, there have been some regional attempts to remove international online activity over the Internet from the domain of national law. For example, in 2013 a Directive on Alternative Dispute Resolution for consumer disputes (EU ADR Directive)<sup>34</sup> as well as a Regulation on Online Dispute Resolution for consumer disputes (EU ODR Regulation)<sup>35</sup> were introduced in the EU. Together, they aim to establish an ODR system and platform for all types of domestic and cross-border consumer disputes throughout the EU as they would apply to all contractual consumer disputes arising from sales of goods and provision of services.<sup>36</sup> This attempt has increased the importance of online consumer contracts and in particular cross-border trade by providing a sufficient amount of access to out-of-court resolutions for online cross-border consumer disputes.<sup>37</sup> Nevertheless, they essentially apply within the EU and would not solve the England and Wales and USA problem. In other words, they only apply to contracts where both parties (business and consumer) are located in the EU, which means they do not function in international disputes if one of the parties (ie the business) is outside the EU.<sup>38</sup>

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<sup>34</sup> Directive 2013/11/EU Of The European Parliament and of The Council of 21 May 2013 on Alternative Dispute Resolution For Consumer Disputes and amending Regulation (EC) No 2006/2004 and Directive 2009/22/EC (Directive on consumer ADR) ; The Out-Of-Court Settlement of Consumer Disputes, COM (1998) 198

<sup>35</sup> Regulation (Eu) No 524/2013 Of The European Parliament and of The Council of 21 May 2013 on online dispute resolution for consumer disputes and amending Regulation (EC) No 2006/2004 and Directive 2009/22/EC (Regulation on consumer ODR)

<sup>36</sup> Regulation on consumer ODR, Article 2 *“This Regulation shall apply to the out-of-court resolution of disputes concerning contractual obligations stemming from online sales or service contracts between a consumer resident in the Union and a trader established in the Union”*.

<sup>37</sup> Commission Staff Working Paper Executive Summary of the Impact Assessment, at 69, SEC (2011) 1409 final (Nov. 29, 2011).

<sup>38</sup> Regulation on consumer ODR, Article 2 (1): *“This Regulation shall apply to the out-of-court resolution of disputes concerning contractual obligations stemming from online sales or service contracts between a*

As the Internet extends beyond EU countries, online consumer disputes might occur between users from EU countries and non-EU countries. This argument is not an attempt to undermine the significance of the EU's achievement and its high level of consumer protection without restricting the consumer's access to court. However, the proper function of the Internet as a transnational communications medium and the nature of the online consumer contract within this medium cannot be limited to EU Member States only. Thus, the only thing that can be said here is that this approach is not expediency and responded to international online consumer disputes when they deal with traders outside the EU Member States. This would leave international online consumers with no means of obtaining remedies in respect to their international online contracts and disputes.

Internationally, it is important to find converging lines between online consumers and their transnational activity on the Internet in multiple-forum and multiple-law litigation. Such a dividing line in international online consumer contracts and disputes might be done with no reference to national or regional rules. However, it should aim to move such disputes from both national and international private law to transnational law. The idea behind this is to provide a transnational basis for facilitating resolution of disputes in order to benefit both consumers and businesses alike in international online transactions. An example of such an attempt can be seen in the UNCITRAL ODR Working Group which has representatives from over 60 nations, including the USA. This is an attempt to move away from domestic consumer protection law and embrace a form of transnational consumer protection law in the shape of the Substantive Legal Principles that are yet to be developed.<sup>39</sup> However, the UNCITRAL Procedural Rules do theoretically cover B2C disputes but it does not focus on them (ie online consumers). In other words, they do not make a distinction between B2B and B2C disputes but apply to all types of disputes.<sup>40</sup> Nevertheless, the UNCITRAL rules can provide a solution for the problem. It can produce a model laws that explicitly applicable to international online consumer contracts. Such a model laws can influence the development of actual legal systems of

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consumer resident in the Union and a trader established in the Union through the intervention of an ADR entity listed in accordance with Article 20(2) of Directive 2013/11/EU and which involves the use of the ODR platform”.

<sup>39</sup> Julia Hornle, ‘Encouraging Online Dispute Resolution in the EU and Beyond- Keeping Costs Low or Standards High?’ [2012] Queen Mary School of Law Legal Studies Research Paper 122/2012

<sup>40</sup> A/CN.9/WG.III/WP.112/Add.1 - Online dispute resolution for cross-border electronic commerce transactions: draft procedural rules; A/CN.9/716 UNCITRAL Report of Working Group III (Online Dispute Resolution) Meeting 17 January 2011

arbitration for dealing with international online consumer as weaker party. Such model law could be added as an option to national arbitration law at least to enable the assessment of more complicated issues where the public policy is different in regards to international online consumer disputes. Otherwise, it can always be argued that any appropriate approach regulating international online consumer disputes, cannot achieve its aim if it is not applicable regardless of the place where the disputes fall to be resolved.

Nevertheless, neither of the attempts that have been advanced above satisfactorily deals with arbitration or answers the question of which national law is applicable to international online consumer disputes. The reason behind this is related to the different aims and objectives in the way consumer redress should be achieved in the UNCITRAL and the EU. Whereas the UNCITRAL rules do not aim to harmonise or change domestic laws, focusing instead on the improvement of consumer redress where currently none exists, the EU's aim to harmonise consumer protection rules only covers particular sectors and/or only particular regions. As a consequence, there are legal gaps in the coverage of international online consumer dispute resolutions.<sup>41</sup> This shows a common disagreement on arbitrability of such disputes reflecting different public interests that largely depend on state policy. Consequently, the controlling jurisdictions may not be the consumer country of domicile nor their rules to be applied on arbitrability issues, namely before and during the arbitration process.<sup>42</sup>

Arguably, transnational rules as a comparative legal analyse derived from various national legal systems as a comparative law analysis may stand a better chance when taking into account that there is no accepted definition of 'consumer' between England and Wales and the USA. Therefore, under a transnational approach, the author suggests that arbitrators may be more able and willing to decide international online consumer disputes and the various definitions of consumer and their protections can be used to determine the appropriate role of arbitrator.

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<sup>41</sup> Hornle, "Encouraging Online Dispute Resolution in the EU and Beyond- Keeping Costs Low or Standards High ?" (n 39); Darin Thompson, 'Online Dispute Resolution Expansion in the EU' (2012) 22 *Computers & Law* 31

<sup>42</sup> In accordance to New York convention 1958, Article II

### **3. The role of arbitrator in a transnational approach**

#### **3.1 Handling the procedure**

Any type of adjudicator, whether a judge or an arbitrator, is required to ensure the procedural fairness between the parties in their proceedings.<sup>43</sup> This procedural fairness requires that consumers are treated equally and given an opportunity to opt out of arbitration on a voluntary and fully informed basis.<sup>44</sup> In the case of international online consumers, this procedural fairness may not be enough if they are not considered in their treatment as the weakest party in the international online contract. It is reasonable to say that the arbitrator should consider the specific situation of the international online consumer as the weaker party and provide a safe ground for them to stand up sufficiently against the business.

However, the authority of the arbitrator is derived from the party's agreement and contract. As demonstrated in chapter 5, arbitrators are bound by the party's choice of law and the rules of the chosen law, which are most likely imposed by the business and that determine the procedural, substantive law and the seat of arbitration.<sup>45</sup> International online consumers often suffer from imbalance; a transnational paradigm would raise questions regarding the adjudicatory role and the ethical role of arbitrators. These questions are mainly related to the arbitrator's neutrality,<sup>46</sup> independence or impartial manner,<sup>47</sup> all connected to their decision-making obligations.<sup>48</sup>

Regarding the adjudicatory role, there are fundamental differences in the adjudicative function between the arbitrator and the state judge. For example, arbitrators and judges are subject to different review processes: judges' decisions are judicially reviewable for

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<sup>43</sup> English Arbitration Act 1996, article (1)(a) provides that "the object of arbitration is to obtain the fair resolution of disputes by an impartial tribunal without unnecessary delay or expense"

<sup>44</sup> See chapter 4; See also Rule Colin, *Online dispute resolution for business: B2B, ecommerce, consumer, employment, insurance, and other commercial conflicts* (Jossey-Bass, 2002), 280; Julia Hörnle, *Cross-border Internet Dispute Resolution* (Cambridge University Press 2009), 215

<sup>45</sup> See chapter 5, section 2

<sup>46</sup> The reason for using "neutrally" rather than "equal treatment" as treating the international online consumer in the same manner as the business would lead to unfair result.

<sup>47</sup> It important to be noted here that English Arbitration Act 1996 does refer to impartiality only, however, Impartiality and independence are actually two sides of the same coin: what matter is that both indicate absence of bias as the arbitrator will be neutral as between the parties in performing his duties; See Redfern and Hunter, *law and practice of international commercial arbitration* (Sweet & Maxwell 2004). 201

<sup>48</sup> Susan D Franck, 'The Role of International Arbitrators' (2006) 93 ILSA Journal of International & Comparative Law 515



substantive and procedural errors<sup>49</sup> whilst arbitrators' decisions are judicially reviewable regarding the procedural aspects of the award only.<sup>50</sup> Regarding the ethical role of arbitrators, this is mainly related to arbitrators' behaviour to conduct a fair determination of legal rights of the parties.<sup>51</sup> For example, disclosure of relevant information and conflicts of interest is a duty owed by appointed arbitrators.<sup>52</sup> There are doubts about which information an arbitrator may define as impartial in arbitration proceedings<sup>53</sup> and there are also doubts that arbitrators can maintain an independent and impartial role in regard to consumers as weaker parties. This is especially when an arbitrator has a direct financial relationship, most likely with the business.<sup>54</sup> Furthermore, the authority of the arbitrator is most likely derived from an arbitration clause in an adhesion online contract.

Arguably, it might be better if we look beyond those differences to what they share a common functional similarities in regard to international online consumer disputes. The adjudicatory role of both arbitrator and national judge is to render decisions, by submitting evidence and offering reasoned arguments, according to law and legal rules with their procedural discretion and decisions being subject to judicial review.<sup>55</sup> Those differences, the authority, financial relationship and the judicial review, do not and should not become disqualifying factors unless there are 'justifiable doubts' regarding the neutrality of the arbitrator according to the law and legal rules.<sup>56</sup> Any doubts should be

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<sup>49</sup> *ibid.*

<sup>50</sup> William W. Park, 'Duty and Discretion in International Arbitration' (1999) 93 AM. J. INT'L L. 815

<sup>51</sup> See the Code of Ethics for Arbitrators in Commercial Disputes, (Code of Ethics) a special committee of the American Arbitration Association (AAA) and the American Bar Association, this Code is intended to apply to all such proceedings in which disputes or claims are submitted for decision to one or more arbitrators appointed in a manner provided by an agreement of the parties, by applicable arbitration rules, or by law. Effective March 1, 2004

<sup>52</sup> Adriana Collazos Ortiz, 'The importance of ethics in the role of arbitrators' [2013] *Revista Análisis Internacional* 39–53

<sup>53</sup> The courts in England and Wales have defined "independence" in arbitration proceedings in different way than USA; For example, in England and Wales, the disclosure is determined by "real danger of bias" test, in the case of *AT&T v. Saudi Cable*, the court held that the test is in terms of real danger rather than real likelihood, See *AT&T v. Saudi Cable*; [2000] EWCA Civ 154;

In contrast, the U.S. Supreme Court in *Commonwealth Coatings v. Cont'l Cas. Corp.*, held that inadvertent non-disclosure of a business relationship with a party did create an appearance of bias and partiality, *Commonwealth Coatings Corp. v. Cont'l Cas. Corp.*, 393 U.S. 145, (1968); see also Franck, 'The Role of International Arbitrators' (n 48) 18; Hörnle, *Cross-border Internet Dispute Resolution* (n 44)120; Ortiz, 'The importance of ethics in the role of arbitrators' (n 52) 42

<sup>54</sup> See Lucille M Ponte, 'Getting a Bad Rap? Unconscionability in Clickwrap Dispute Resolution Clauses and a Proposal for Improving the Quality of These Online Consumer 'Products'' (2011) 26 *Ohio St. J. on Disp. Resol.* 119, 140; see also Stavros Brekoulakis, 'On Arbitrability: Persisting misconceptions and new areas of concern' in Loukas A Mistelis and Stavros L Brekoulakis (ed), *Arbitrability: International & Comparative Perspectives*, (Kluwer Law International, 2009) 27

<sup>55</sup> Franck, 'The Role of International Arbitrators' (n 48)

<sup>56</sup> *ibid.*; See also, *Commonwealth Coatings Corp v. Continental Casualty Co*, Mr Justice White and Mr Justice Marshall, found that arbitrator are often part of the market and "because they are men of affairs,

solved in favour of disclosure, such as under ‘ethics rules’.<sup>57</sup> International online consumers can challenge arbitrators’ decisions in terms of inappropriate conduct and ‘misconduct’ where there is an indication that the arbitrator is not acting in an impartial or independent manner.<sup>58</sup> This can be based on information either disclosed or undisclosed and<sup>59</sup> either during the arbitration proceedings<sup>60</sup> or enforcement proceedings.<sup>61</sup>

Moreover, the duty of the arbitrator is to act fairly and impartially.<sup>62</sup> Therefore, they are required by law to give the parties a ‘reasonable opportunity’<sup>63</sup> and/or a ‘full opportunity’ as required by the UNCITRAL Model Law as a transnational law.<sup>64</sup> Arbitrators have a responsibility not only to the parties but also to the process of arbitration itself.<sup>65</sup> Such responsibilities suggest that arbitrators tend to exhibit a great deal of care to retain the

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not apart from, but of the marketplace, that they are effective in their adjudicatory function ...but it is enough for present purposes to hold, as the Court does, that where the arbitrator has a substantial interest in a firm which has done more than trivial business with a party, that fact must be disclosed”. 393 US 145, 89 SCt 337 (1968) 150, 152–3.

<sup>57</sup> Ortiz, ‘The importance of ethics in the role of arbitrators’ (n 52); See, the Code of Ethics AAA (n 51 ); See also IBA-Guidelines on Party Representation in International Arbitration, Adopted by a resolution of the IBA Council - International Bar Association, 25 May 2013, For example in addressing issues of Misconduct, the Arbitral Tribunal should take into account: (a) the need to preserve the integrity and fairness of the arbitral proceedings and the enforceability of the award; (b) the potential impact of a ruling regarding Misconduct on the rights of the Parties; (c) the nature and gravity of the Misconduct, including the extent to which the misconduct affects the conduct of the proceedings.

<sup>58</sup> Franck, ‘The Role of International Arbitrators’ (n 48)

<sup>59</sup> See Case *Sierra Fishing Co v Farran* [2015] EWHC 140 (Comm); [2015] 1 All E.R. (Comm) 560; See also Silvano Domenico Orsi, ‘Ethics in International Arbitration : New Considerations for Arbitrators and Counsel’ (2013) 3 The Arbitration Brief 92–114

<sup>60</sup> English Arbitration Act 1996, article 24(1) (a) (providing that a court can remove an arbitrator if where “circumstances exist that give rise to justifiable doubts as to his impartiality); For the USA see, *Commonwealth Coatings v. Conti'l Cas. Corp.*, 393 U.S. 145, (1968), 393 U.S. 145, 150 (1968).

<sup>61</sup> In this case parties can rely on the New York Convention 1958, For example, under the Federal Arbitration Act 1925, Section 10 - Same; vacation; grounds; rehearing “*in any cases within the United States court in and for the district wherein the award was made may make an order vacating the award upon the application of any party to the arbitration (1) where the award was procured by corruption, fraud, or undue means; (2) where there was evident partiality or corruption in the arbitrators, or either of them; (3) where the arbitrators were guilty of misconduct in refusing to postpone the hearing, upon sufficient cause shown, or in refusing to hear evidence pertinent and material to the controversy; or of any other misbehaviour by which the rights of any party have been prejudiced; or (4) where the arbitrators exceeded their powers, or so imperfectly executed them that a mutual, final, and definite award upon the subject matter submitted was not made.*”

<sup>62</sup> The English Arbitration Act 1996, article (33)(1) The tribunal shall (a) “*act fairly and impartially as between the parties, giving each party a reasonable opportunity of putting his case and dealing with that of his opponent*”.

<sup>63</sup> The English Arbitration Act 1996, article (33)(1) (a)

<sup>64</sup> The UNCITRAL Model Law on International Commercial Arbitration (1985), as amended (2006) " Article 18 embodies the principles that “*the parties shall be treated with equality and given a full opportunity of presenting their case*”

<sup>65</sup> The Code of Ethics (n 54), CANON I: “*An arbitrator should uphold the integrity and fairness of the arbitration process*”.

integrity of the process.<sup>66</sup> In doing so, the arbitrator is required to adopt procedures ‘suitable’ to the circumstances of the particular case<sup>67</sup> regarding the procedural and evidential matters in order to provide a fair means for the resolution of the matters that need to be determined.

However, when the subject of debate is whether such an online contract is a consumer contract or not, there is no universally accepted standard for who qualifies as an international online consumer. Although there are weaker parties, legislators in both jurisdictions have drafted contrasting policies regarding arbitration as a true alternative dispute resolution for online consumer disputes. As a result, they have still not adopted a broad definition of consumer nor determined how an arbitration clause is to be interpreted by an arbitrator nor what law is to be applied internationally. Therefore, the neutrality of an arbitrator is still questioned as a systemic bias issue as the arbitrability of international online consumer disputes fall under a different policy in England and Wales and the USA. This issue should be abandoned in favour of emphasising the characteristics of arbitration as an attractive dispute resolution method for international online consumers.

As such, it is argued in the following two subsections that it is reasonable and legally justifiable to reconsider the ‘suitable’ role of arbitrators. The question is how effective can national and international arbitration rules be under a transnational law approach in order to fine-tune any legal position and prevent it from leading to unfair or unpredictable results internationally? The consumer as the weaker party should be protected by the rules through the arbitrator, before and during the arbitration.

### **3.2 Before arbitration**

As demonstrated in chapters 3 and 4, there are limitations upon party autonomy in consumer contracts. Those limitations aim to provide protection to consumers, as the weakest party, from any unexpected unfair terms incorporated within their contract such as an arbitration clause. The protection against such terms is mainly based around the way in which the informed consent of the consumer is approved. In other words, a certain level of qualification is required before an online consumer can opt out of arbitration. In

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<sup>66</sup> Franck, ‘The Role of International Arbitrators’ (n 48)

<sup>67</sup> The English Arbitration Act 1996, article (33)(b) “adopt procedures suitable to the circumstances of the particular case, avoiding unnecessary delay or expense, so as to provide a fair means for the resolution of the matters falling to be determined.”

such situations, it is important for the arbitrator to check any specific qualifications of the consent. This reflects the will of the parties to submit their disputes to arbitration and grants the arbitrator jurisdiction to settle the dispute, and without it the arbitrators have no power. Accordingly, the consent of international online consumers is considered the most significant of the substantive requirements for arbitration.<sup>68</sup> Arbitration is seen as contractual in nature under the contractual theory where the will of the parties play an important role in submitting to arbitration. The consent turns to be the core for the determination of the arbitrability in international online consumer disputes. It can be argued that the consent submitted through international online contract cannot specify the parties' intent on all terms and conditions.<sup>69</sup> International arbitrators, thus, have to take into consideration the intentions of the consumer as the weaker party. In considering an international online consumer contract as an adhesion contract, an online consumer should give their consent on contract terms (ie jurisdiction, choice of law and arbitration clause) in a voluntary and fully informed basis, without undue influence or language mistake.<sup>70</sup>

Whereas the arbitrability is seen as a jurisdictional issue between the state and private justice under jurisdictional theory, the adjudicatory role of the arbitrator and his authority are based on the consent of the parties. The lack of consent, whether or not in consumer contracts, will put a limitation on arbitration and on the arbitrator's power to decide an online dispute. This reflects on the arbitrability of the dispute and extends to the enforceability of the arbitral award. On this basis, where there is a lack of bargaining power, there should be a lack of consent and the opposite may also be true. Hence, the role of arbitrators, in order to guarantee their jurisdiction, is to ensure that there is a sufficient level of consent in international online consumer contracts, namely to the arbitration clause. In other words, due to the lack of bargaining power there should be clear and unmistakable evidence that an online consumer did agree to arbitration. Such a determination should be based on an international standard of sufficient consent. However, there is no standard for determining such consent in international online consumer transactions so the way the arbitrator may determine the consent in

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<sup>68</sup> Christoph Schreuer, 'Consent to Arbitration' [2005] 5 Transnational Dispute Management, available at: <[http://www.univie.ac.at/intlaw/con\\_arbitr\\_89.pdf](http://www.univie.ac.at/intlaw/con_arbitr_89.pdf)> (accessed 08/01/2015)

<sup>69</sup> See chapter 4, section 3

<sup>70</sup> See (n 44)

international online consumer disputes is controversial, namely between England and Wales and the USA.<sup>71</sup>

It is important first to define what rules control the validity, from a comparative law perspective. The analysis of such a point has been done thoroughly in Chapter 3 and 4. It is necessary to mention here that in regard to English law, those qualifications regarding the consent can be found in England and Wales under the UTCCR.<sup>72</sup> It can also be found in the USA under the US Restatement Second of Contract 1981.<sup>73</sup> Under both regulations, there is a fairness test to ensure a certain level of consent to arbitration from a domestic perspective of online consumer contracts. England and Wales, under the Unfair Terms Regulations 1999, have the unfair test, which is a combined test of two requirements to invalidate a contractual term including the arbitration clause. These two requirements measure the terms based on whether or not they are ‘contrary to the good faith and cause a significant imbalance’.<sup>74</sup> In the US, the fairness test is under the ‘unconscionability test’ which also examines the consent of contract terms. However, based on this test ‘the terms must not only be surprising, but also highly adverse to the deal’<sup>75</sup> otherwise the contractual term is invalidated.

Arguably, from a common law perspective it can be said that there is a shared underlying idea about how to approve consent in an online consumer contract (adhesion contract). In both jurisdictions, the consent should be actual consent.<sup>76</sup> The ‘actual consent’ here is under the objective theory of the consent, which does not test the subjective state of mind of the parties but instead whether there is genuine consent to the contract and to the terms incorporated within it. However, this genuine consent in an international online consumer contract is not enough, the terms in the consumer contract also have to be consented to with good faith or as the legislator in the USA described it, ‘manifestation of intention’.<sup>77</sup> This notion of good faith in both jurisdictions is measured by the level of imbalance that the arbitration clause may cause to the interests of consumers.<sup>78</sup> Therefore, from the

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<sup>71</sup> The analysis of consent has been done thoroughly in the chapter 3 and 4

<sup>72</sup> The Unfair Terms in Consumer Contracts Regulations 1999, Article 5

<sup>73</sup> The US Restatement Second of Contract 1981, Article 2(1)

<sup>74</sup> See Chapter 4, section 3.4

<sup>75</sup> See Comment on Section 211 of the Restatement (Second) of Contracts 1981

<sup>76</sup> See Chapter 4, section 3.4

<sup>77</sup> For England and Wales see Ewan Mckendrick, *Contract Law* (10th edn, Palgrave Macmillan 2013) 24; For the USA see Richard C. Reuben, ‘First Options, Consent to Arbitration, and the Demise of Separability: Restoring Access to Justice for Contracts with Arbitration Provisions’ (2003) 56 SMUL Rev. 819

<sup>78</sup> Susan Bright, ‘Winning the Battle against Unfair Contract Terms’ (2000) 20 Legal Studies 331–352

author's perspective, the notion of good faith is intended to be used within the arbitrability of consumer contracts as open or restricted procedures of arbitration based on the level of imbalance that the arbitration clause may create for online consumers in both jurisdictions.

However, from an analytical point of view, there is no clear answer as to what the concept of good faith means as it is based on different fundamental elements related to economic, legal and social standards that vary between England and Wales and the USA.<sup>79</sup> From a legal point of view, apart from those under the UTCCR,<sup>80</sup> English law does not refer to good faith in rules. However, it does determine consumer consent to an arbitration clause based on the amount of potential claim, whether above or less than £5,000.<sup>81</sup> It should also be borne in mind that such an issue may be raised before and after the arbitration proceedings.<sup>82</sup> The final question here is, therefore, what legal basis should the international arbitrator use for assessing the consent of an international online consumer in an independent manner? The answer is not straightforward. Neither theory nor practice has an answer to the question of the validity of arbitration clauses in international online consumer disputes. The reason for this relates to the various aspects of the arbitration clause (form, substance, scope, capacity, valid representation and objective arbitrability of disputed claims). Those aspects are also regulated by domestic arbitration laws. As yet, it remains unclear what actions constitute an international online consumer contract or when there is a lack of specific notice of the arbitration clause.<sup>83</sup>

Furthermore, internationally, there are nine theories to determine what law should be applicable to an arbitration clause in international online consumer disputes. As Blessing explains, all these nine 'solutions' have also been advocated and used in practice in

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<sup>79</sup> Bernardo M. Cremades, 'Good Faith in International Arbitration' (2012) 27 AM. U. INT'L L. REV 761

<sup>80</sup> This is because the Unfair Terms in Consumer Contracts Regulations 1999 is literally copy of EC Directive on the Unfair Term in Consumer Contracts, of the integration of the United Kingdom (England and Wales) into the European Community; See The Law Commission and the Scottish Law Commission, Unfair Terms in Consumer Contract Unfair: a new approach? (2012), para 9.51; See also: Terms in contract (2005) Law Com No.292; Scot Law Com No.199, para 3.116

<sup>81</sup> See chapter 3 and 4

<sup>82</sup> Simon Greenberg, Christopher Kee, and J.Romesh Weeramantry, *International Commercial Arbitration* (Cambridge University Press 2011)167

<sup>83</sup> See Chapter 4, section 3

arbitration involving B2B disputes.<sup>84</sup> They are as follows:

- (a) the law of the place where the arbitration agreement has been concluded or, more practically, where the arbitration clause deploys its effects, ie the law of the country where the arbitral tribunal has its seat.
- (b) the law of the seat of the arbitral tribunal (or of the place of arbitration), ie the *lex arbitri*.
- (c) the proper law of the arbitration agreement, to the extent that such proper law was chosen by the parties or can be established under the circumstances.
- (d) the proper law of the substantive contract in which the arbitration clause is embedded (*lex causae*);
- (e) the law of the parties, or of one of them;
- (f) the law of the country whose courts would have jurisdiction absent an arbitration clause;
- (g) the law of the country where the arbitral award is (most likely) to be enforced (which of course leaves us with the uncertainty and indeed speculation where enforcement proceedings might take place);
- (h) a combination of laws which may be contemplated under any one of the foregoing seven solutions;
- (i) a national or denationalized approach, according to which the arbitration clause should be governed by common and fundamental principles of law.

Except for the last two (h) and (i), due to the special characteristics of international online consumers as weaker parties, if the arbitrator refers to one of the seven ‘solutions’, the consent and the good faith in arbitration clause would be tested and analyzed in the context of a jurisdictional objection. In such a case, for example, within England and Wales, as mentioned above, the validity of the arbitration clause in a consumer contract is not connected with the fairness test only but with the amount of potential claim. If the dispute is above £5,000 then the consent of arbitration is determined by a fairness test (good faith). In this case, Lord Millet provided a solution that could be useful for an arbitrator in international consumer disputes when he held that the good faith should be tested from ‘a practical standpoint’ by asking if the term were drawn to the consumer’s

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<sup>84</sup> Marc Blessing, ‘The Law Applicable to Arbitrability’ [1999] *Improving the Efficiency of Arbitration Agreements and Awards: 40 Years of Application of the New York Convention IICCA Congress Series*, 1998 Paris Volume 9, 168-188

attention whether it is likely that they would be surprised by it or would accept it.<sup>85</sup>

However, it is more reasonable to state that for online contracts, international consumer disputes are more likely to be less than £5,000. In addition, an arbitration clause can be hidden in the ‘small print’ of the contract. Therefore, it may be necessary for the arbitrator to consider the accessibility of the arbitration clause as a determination of good faith.

From a comparative law perspective, the USA does not make such a distinction in regard to the amount of potential claim. The lack of specific notice of the arbitration clause alone does not invalidate the arbitration clause if it is clear before the conclusion of the contract and the consumer has an objective opportunity to read the contract.<sup>86</sup> In such cases, the arbitration clause is valid even when the online consumer signs it without reading.<sup>87</sup> From the author’s point of view, it can be argued that both jurisdictions have a common law system. Thus, the arbitrator can rely on Lord Millet’s dictum when the dispute is above £5,000.

However, in England and Wales, if the dispute is less than £5,000, then the consent to the arbitration clause has to be provided *after* the dispute arises. Otherwise, the arbitration clause is not binding and automatically unenforceable, and as such the dispute is not arbitrable. This is a definitive ground to vacate the arbitration process and award within England and Wales. Therefore, it may be necessary for an arbitrator to consider another rule, such as the admissibility of the arbitration clause internationally.<sup>88</sup>

The above analysis brings us to the last two solutions (h) and (i). These can be used as a transnational method to assess the appropriateness of the consent in England and Wales and the USA by considering two different aspects: the economic situation and the fairness of the possible outcome. As such, the consent should be objectively reasonable from both parties’ perspectives but, in particular, for the international online consumer as the weaker party. Both legal systems of the parties (England and Wales and the USA) have adopted similar (or at least compatible) approach to interpret the consent of the consumer,

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<sup>85</sup> See chapter 4, subsection 3.4.1, case *Director General of Fair trading v First National Bank*, [2001] UKHL 52

<sup>86</sup> See chapter 4, subsection 3.4.2

<sup>87</sup> *Grimm v. First National Bank of Pennsylvania*, 578 supd 2d 785 (WDP 2008); See also Jonathan Hill, *Cross-Border Consumer Contracts* (Oxford University Press 2008) 208

<sup>88</sup> Admissibility is a concept concerns the power of a tribunal to decide a particular claims at a particular point in time in view of possible temporary or permanent defects of the claim; See Jan Paulsson, ‘Jurisdiction and admissibility’ [2005] *Global Reflections on International Law, Commerce and Dispute Resolution*



such as the objective theory. For example, if the dispute is less than £5,000, the consent of the international online consumer can rely on the ‘cost test’<sup>89</sup> defense against the consent of the arbitration clause in an adhesion contract within the USA if the proceedings of arbitration entail unreasonably high costs.<sup>90</sup> A combination of both laws (England and Wales and the USA) as a transnational legal method by the arbitrator might be a step forward for securing a uniform legal system around international online consumer disputes between common law countries.

Moreover, the consent of the international online consumer as a weaker party should be subjectively fair and objectively reasonable as far as the arbitrator seeks to promote certainty across multiple commercial relationships where the terminology of the online consumer is inconsistent. A good example in that direction can be seen under the CISG.<sup>91</sup> The scope of CISG application does not extend to sale of goods bought for personal, family or household use unless the business neither knew nor ought to have known that the goods were bought for any such use.<sup>92</sup> The assessment of the contract as an online consumer contract is subject to an individual assessment by both parties. In order to determine the intent of a party, Article 8 of the CISG requires tribunals to interpret contracts according to the understanding that a reasonable person of the same kind as the other party would have had in the same circumstances.<sup>93</sup> This includes all relevant circumstances of the contract, namely the negotiations that the parties have established between themselves. This is also found under the UNIDROIT Principles as transnational principles where direct tribunals take a two-step approach to interpretation; first to look at the unilateral subjective intent of each party but if that intent cannot be determined or was not made known to the other party, to then interpret the contract objectively.<sup>94</sup>

Consequently, the consent can and should be interpreted unilaterally under the different jurisdictions of the parties, which may not accept an online consumer opting out of

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<sup>89</sup> Alexander J. Belohlávek, *B2C Arbitration: Consumer Protection in Arbitration* (Juris Publishing 2012) 327

<sup>90</sup> See chapter 3 section 3.2

<sup>91</sup> United Nations Convention on Contracts for the International Sale of Goods (1980) (CISG) uniform and fair regime for contracts for the international sale of goods between private businesses, excluding sales to consumers and sales of services.

<sup>92</sup> International Sale of Goods Convention (CISG), Article 2 (a)

<sup>93</sup> International Sale of Goods Convention (CISG), Article (8) (2) (3)

<sup>94</sup> UNIDROIT Principles of international commercial contract 2010, Article. 4.2.

arbitration; any subjective or objective uncertainty in regard to an arbitration clause should be solved in favour of consumers as the weaker parties.

In sum, it can be said that there is no reason to prevent arbitrators from evaluating the consent of international online consumers as weaker party through an independent comparative law analysis.<sup>95</sup> In one hand, all aspects surrounding international online consumer disputes, the amount of potential claim, the background of the parties and their real intentions and objectives (purpose of the contract) which underline their contractual relationship are, in essence, objectively determined by the courts in consumer cases within the scope of this thesis.<sup>96</sup> On the other hand, under the transnational approach, the role of arbitrators can extend to take into consideration consumers as weaker parties under subjective and objective circumstances.

### **3.3 During the arbitration**

Another important factor that should be taken into consideration when dealing with an international online consumer as a weaker party is the applicable law and rules. The question of which law should be applied as mandatory upon the arbitrability has been subject to dispute within the scope of this thesis. In a non-negotiated contract, all parties (business and consumer), as will be explained below, belong to two opposing interest groups in how the arbitrability should be determined.

Arbitration as autonomous procedure, shaped by the parties' power, is the starting point of any analysis regarding the applicable law. As demonstrated in chapter 5, the law chosen by the parties to apply to an international contract (or part of it) is usually respected in arbitration, within England and Wales and the USA, as common law countries. The arbitrator, therefore, has no obligation other than the choice of law clauses to apply any other rules that do not constitute part of the chosen law.<sup>97</sup> At this point, it can be argued that there is no stipulation which is the law applicable upon the choice of law in international online consumer arbitration agreements. In that respect, the issue of the applicable law to the arbitrability of international online consumers would arise if the arbitrability had to be decided by any of the choice of law clauses imposed by the seller.

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<sup>95</sup> This is based on the assumption that arbitrators, like judges, do not like to have their awards annulled, set aside or denied enforcement.

<sup>96</sup> See chapter 3 and 4

<sup>97</sup> See chapter 5, section 2

In such a situation of power imbalance, any extra protection guaranteed by the law of the consumer country of domicile would lose its purpose. This might seriously undermine the effectiveness of consumer protection.

In addition, arbitration as a legal adjudication process has public consequences. The arbitrability of international online consumer disputes is subject to public policy concerns and receives a different treatment in England and Wales to the USA. Under the contractual and jurisdictional theory,<sup>98</sup> two different laws, at least, influence the determination of the arbitrability of international online consumer disputes, the chosen law by the parties and the law of the seat (judicial seat) of arbitration. In a situation of power imbalance, the court of the consumer lacks the jurisdiction to determine the arbitrability of international online consumer disputes unless it is the enforcement place of the award.<sup>99</sup> Furthermore, depending on the courts at the seat of arbitration asserting personal jurisdiction of international online consumer are under the ‘directing activities’ approach in England and Wales and the USA.<sup>100</sup> Based on this approach, evidence that the business has targeted the consumer in his country of residence is required as merely being a consumer is not enough in itself to apply consumer law.<sup>101</sup>

This, from the author’s perspective, leaves a non-negotiated online contract between a business and an international online consumer in the hands of the business initially and then in the hands of the arbitrator. As a result, arbitration might not deliver the certainty that international online consumer parties require if arbitrators apply the governing rules imposed by the business only.<sup>102</sup> The consumers are in need for protection during the arbitration as weaker parties. The arbitrator should be a part of the solution to ensure the balance is maintained between international consumers and online businesses in the event of a dispute. Yet, there is no indication for the arbitrator as to which jurisdiction has laws better suited to answer this problem nor where the award will be enforced. Furthermore, there is a lack of clarity here in terms of the factual and legal elements regarding the arbitrability of international online consumer disputes.

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<sup>98</sup> See chapter 5, section 2

<sup>99</sup> See chapter 5, section 3

<sup>100</sup> See chapter 5, section 3

<sup>101</sup> See chapter 2, subsection 2.2

<sup>102</sup> Bering in mind, the arbitrator is more likely chosen by the business.

The arbitrator's obligation is to render a decision based upon the law; the law applicable to the choice of law clause needs to be determined even where the parties have agreed upon a choice of law clause.<sup>103</sup> The process that the arbitrator is required to go through to determine the applicable law to give effect to a choice of law clause and whether it is enforceable or not requires application of conflict of laws rules.<sup>104</sup> This means that the law applicable to the choice of law clause is not necessarily the same law stipulated in the clause.<sup>105</sup>

In the online environment, the different elements connected with the dispute do not always lead to the same conflict of laws rules. As such, these rules do not always lead to the same applicable substantive law.<sup>106</sup> The process of linking international online consumer disputes to the possible applicable law has not been settled yet internationally. For example, in order to find the most appropriate law and apply it to the international online consumer dispute, it may be possible for an arbitrator to rely on some connecting factors to find a connection between the purpose of the contract and a legal system with a potentially applicable law. However, different factors lead to different conflict of laws rules and different potentially applicable laws. It could be the personal law of the consumer; the personal law of the business; the law of both parties' domicile; the law of the country where the contract has been concluded (*lex loci contractus*); the law of the country where the contract has been performed (*lex loci solutionis*); the law of the forum (*lex fori*); or the law of the country to which the contract is most closely connected to.<sup>107</sup>

In that regard, within the common law countries, Born suggests a way of finding the applicable conflict of laws rules to determine the law that will govern the choice of law clause.<sup>108</sup> The arbitrator should apply the conflict of laws rules of the law mentioned in the choice of law clause itself. This is based on two interpretations behind a choice of a particular law. First, it can be interpreted as an implied choice of conflict of laws rules of the chosen law. Second, it might be considered to mean that one legal system must govern the various aspects of the parties' dispute.<sup>109</sup> However, the problem with such a solution

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<sup>103</sup> Gary B. Born, *International Commercial Arbitration* (2<sup>nd</sup> edn, Kluwer Law International, The Hague 2001) 552

<sup>104</sup> *ibid.* 551,552

<sup>105</sup> Peter Nygh, *Autonomy in International Contracts* (1<sup>st</sup> edn, Clarendon Press, Oxford 1999) 84

<sup>106</sup> *ibid.*

<sup>107</sup> See Ruth Hayward, *Conflict of Law* (4th edn, Cavendish Publishing Limited 2006) 3

<sup>108</sup> Born, *International Commercial Arbitration* (n 103), 552

<sup>109</sup> *ibid.*

relates to the contractual nature of international online consumer disputes. In other words, such solution is not suitable for international online consumers as weaker parties involved in non-negotiated contracts. Thus, it is necessary to have rules that are flexible.

Regarding the flexibility of rules, Maniruzzaman<sup>110</sup> explains that there are three other methods arbitrators can use for the determination of the applicable law to the choice of law. Those three methods are used for the determination of the applicable law where there is an absence of an express choice of law governing an arbitration agreement. First, the application of the conflict of laws systems to which the subject matters of the arbitration proceedings has the closest connection.<sup>111</sup> Second, the arbitrator's discretion in favouring the application of the rules and standards which are the most appropriate to decide such a dispute with reference to a conflict of laws rule.<sup>112</sup> Third, the arbitrator's discretion can directly apply a particular law without any express reference to a conflict of laws rule.<sup>113</sup>

However, the large amount of discretion that the arbitrator enjoys regarding the applicable substantive law to the choice of law clause is not limited to these three methods. In both jurisdictions, arbitrators enjoy a large amount of discretion for determining the applicable conflict of laws rules. They both grant the arbitrator discretion in choosing the applicable law reference to a conflict of laws rule when the parties have not been able to agree on applicable law at all or the choice of law clause is invalid. According to the English Arbitration Act 1996, arbitrators enjoy a greater discretion in determining the applicable conflict of law rules. This can be found in Article 46(3) where it states that 'the tribunal shall apply the law determined by the conflict of laws rules which it considers applicable'.<sup>114</sup> Likewise, the Departmental Advisory Report on the Bill of the Arbitration Act 1996 (DAC Report) affirms that the arbitrator is not limited by any guidelines when choosing the applicable conflict of laws rules where there is no choice or agreement. In such circumstances, in accordance with the DAC Report, an arbitrator must decide what conflict of laws rules are applicable and use those rules in order to determine the applicable law even if it is not necessarily the English conflict of

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<sup>110</sup> A. F. M. Maniruzzaman, 'Conflict of Laws Issues in International Arbitration : Practice and Trends' (1993) 9 *Arb. Int'l.*, LCIA 371

<sup>111</sup> Rome Regulation on the Law Applicable to Contractual Obligations, Article 4(3) and 4(4)

<sup>112</sup> AFM Maniruzzaman, 'Conflict of Laws Issues in International Arbitration : Practice and Trends' (1993) 9 *Arbitration International*, LCIA.

<sup>113</sup> Born, *International Commercial Arbitration* (n 104) 552; See also Hörnle, *Cross-border Internet Dispute Resolution* (n 44) 64

<sup>114</sup> The Arbitration Act 1996, Article 46

laws rules.<sup>115</sup> Similarly, in the USA, the FAA does not impose any choice of law rules on the arbitrator. Thus, he can apply conflict of laws rules that he considers applicable and suitable.<sup>116</sup> This confers wide discretion upon arbitrators to conduct arbitration as they consider appropriate rather than a strict consideration of a particular law.

From the author's point of view, it is legally justifiable to confer wide discretion upon arbitrators to decide procedural matters on which the parties have expressly not agreed. Each of the arbitration laws has its own specific features and attention should be paid to ensure the relevant arbitral procedure is appropriate for the case in hand. The nature of such disputes requires such a comparative law analysis to determine the dispute, whether consumer disputes or not, in order to determine the validity of the choice of law clause, and in consequence determine the subjective and objective arbitrability where necessary.

In sum, a transnational law approach sounds reasonable when dealing with international online consumer disputes between England and Wales and the USA. Nevertheless, some doubts remain. For instance, the arbitrator, whether nominated by both parties (business and consumer) or appointed independently, may fail to act impartially by favouring one of the parties' laws or by having pre-conceived prejudices about the issues in dispute.<sup>117</sup> In addition, the neutrality of the arbitrator has often been approached from a different jurisdictional angle in England and Wales and the USA.<sup>118</sup> International online consumers have been left without adequate protection and the business without guidance regarding the enforceability of the arbitration provisions internationally between England and Wales and the USA.

Moreover, a difficult balance must be struck to deter inappropriate conduct where there is a weaker party. Any behaviour in favour of the weaker party may create a risk of

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<sup>115</sup> The Departmental Advisory Report on the Bill of the Arbitration Act 1996, para 225 : "for the situation where there is no choice or agreement. This again is the language of the Model Law. In such circumstances the tribunal must decide what conflict of laws rules are applicable, and use those rules in order to determine the applicable law. It cannot simply make up rules for this purpose. It has been suggested to the DAC that more guidance be given as to the choice of a proper law, but it appears to us that flexibility is desirable, that it is not our remit to lay down principles in this highly complex area, and that to do so would necessitate a departure from the Model Law wording."

<sup>116</sup> Born, *International Commercial Arbitration* (n 103)537

<sup>117</sup> Greenberg, Kee, and Weeramantry, *International Commercial Arbitration* (n 82) 274

<sup>118</sup> See (n 56)

allegations of bias by the stronger party; clear minimum standards regarding the judicial procedure for arbitration that involves a consumer as a weaker party are required.<sup>119</sup>

The arbitrator must not show favouritism to any of the parties, however, arbitrator should be required to alert the weaker party regarding his legal right. Hence, the requirement for independence must be entitled to provide all relevant information, more than 'disclosure' to both parties on which the weaker party may wish to act to his advantage. Furthermore, the matters on which its order or decision is likely to be based should also be clear for the consumers in plain and intelligible language.

#### ***4. Conclusion***

In this chapter, the author has argued that a new method for reconsidering the question of the arbitrability of international online consumer disputes is required. An arbitrator should have a significant role to play to ensure fair access to state and private justice for an international online consumer as the weaker party. Arbitrators, however, are bound by two factors, namely the party agreement/contract and the rules of law. As a result, the applicable law is the most critical legal issue in determining the arbitrability of international online consumer contracts and the arbitration process. A method for decision-makers is required to tackle the middle ground between two different policies regarding the arbitrability of international online consumer disputes. A transnational law approach might be a good method in order to establish a fair degree of party autonomy and reinforce the protections of consumer interest internationally.

In order to accomplish this task, the author intends to assess the way the transnational approach may be understood. Then, the author will try to justify the transnational approach practice. By practice the author means the way the procedure legal rules are interpreted, applied and perceived by international arbitrators regarding the arbitrability of international online consumer disputes between England and Wales and the USA.

Where the lack of uniformity in national arbitration law damages the arbitrability of international online consumer disputes, in both the procedures and in substantive issues, the applicable law to international online consumers causes huge controversy. This

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<sup>119</sup> There is no express requirement under the English Arbitration Act 1996 for an arbitrator to act independently, however, arbitrator can be challenge, and the award can be set aside on the grounds of lack of impartiality or failure to conduct the proceedings properly; see Arbitration Act 1996, sections 67 and 68

controversy causes divisions when attempts are made to determine the applicable law for the arbitrability of international online consumer disputes. The division has more than a merely theoretical aspect. It also involves legal and factual issues such as consumer autonomy as the weaker party.

Arbitration is private justice and so the arbitrator's duty is to provide justice and render decisions according to law and legal rules. Arbitrators have to take into consideration the perspectives of the different jurisdictions (England and Wales and the USA) to determine whether international online consumer disputes are arbitrable or not. This can be done based on the facts of the dispute and the exercise of comparative law analysis (the transnational law method) as the two systems are entirely separate and subject the arbitrability of international online consumer disputes to different rules. Arguably, the transnational approach can be used by arbitrators as a verification method to determine the specific issue of fact and law regarding the subjective and the objective arbitrability of international online consumer disputes.

The peculiarity of international online consumer as weaker party and the urgency in which the disputes must be settled is based in part on the ethical and adjudicatory role of the arbitrator. The arbitrator must draw his own comparative law analysis as a verification method to determine the arbitrability in the view of all parties. The amount of disputes and the cost of arbitration are important factors; the arbitrator could depend on them as a means of determining the arbitrability of international online consumer disputes and the possible fair outcome.

Ultimately, national and international arbitration laws should articulate clearly what conduct is expected from arbitrators when there is a weaker party in order to avoid inappropriate conduct. In doing so, the applicable law, whether it has been chosen by the parties or the arbitrator, should not cast doubt upon the legitimacy of the arbitrability of international online consumer disputes under his country of domicile.



## **Chapter 7: Conclusion**

### ***1. Introduction***

The purpose of this study was to identify the points of balance in relation to arbitrability in international online consumer disputes so as to meet the consumer's need as the weaker party to gain access to an effective legal mechanism for the resolution of disputes.

Two different legal regimes were selected for carrying out the research analysis: the laws of England and Wales law and the federal laws of the USA. These systems were chosen due to the distinctive approach of each in dealing with arbitration in online consumer disputes. They differ in their responses to the challenge of reconciling legitimacy in arbitration and the extent to which they acknowledge that the challenge exists. Therefore, the study has provided a critical analysis of the different solutions adopted towards arbitration in England and Wales and the USA. This involves the consideration of different policy objectives in England and Wales and the USA. Under the laws of England and Wales, consumer disputes are viewed as sensitive matters of public policy, to be debated and resolved before the national court. Federal arbitration laws, however, favour and promote arbitration for the resolution of consumer disputes. This thesis has evaluated the main differences and similarities between the two approaches in order to identify the balance points, so that arbitration might be allowed to play the critical role that is expected of it as an effective legal mechanism for international online consumer disputes.

The thesis therefore sought to answer two key questions as applied to the legal systems analysed:

1. Should there be a transnational standard to determine the arbitrability of disputes involving online consumer contracts?
2. How can transnational standards be established for determining the arbitrability of international online consumer disputes?

In searching for answers to these questions, the study builds upon the analysis of available case law, existing valid legislation and a review of the written literature on arbitration as an alternative means of resolution in disputes involving consumers. There are a number of particular conditions which distinguish consumer contracts from other online

contracts. The most important of these is that in international online consumer contracts there is an actual, or at least perceived, inequality of bargaining power. As a result of such an imbalance, consumers are often protected in contracts based on the idea of protecting the weaker party. This has considerable potential to limit the party autonomy and impose restrictions on the ability of the party to make valid agreements on the arbitration of their disputes.

It was contended that the issue of arbitrability in the context of the validity of the arbitration clause and/or agreement could arise at a different stages, either before the court or the arbitrator. The main argument used by academics in support of this view is that online consumer contracts are not freely negotiated between the parties. The imbalance between the principle of party autonomy and the actual consent of the consumer as the weaker party can affect the arbitrability by challenging the validity of arbitration agreements and awards. However, this research has found that there is no specific or uniform definition of the term “consumer”. The consequences of the principle of party autonomy and the actual consent depend on the way the online consumer is identified.

The courts in England and Wales and the USA have consistently supported the right of fair process for the consumer in arbitration, but the application of the legal rules that justify the arbitration of online consumer disputes has been inconsistent. The laws of England and Wales provide a special legal protection based on the characteristics of the consumer and the amount of the transaction. USA federal law provides protection based on the general principles of contract law and the general economic situation of the party, without distinguishing between consumer and business. As a result, the competent courts have considerable discretion in applying the relevant rules and their mandatory provisions. This is because the relevant statutes do not directly address the issue of arbitrability.

The study presents the view that the lack of uniformity in arbitration law damages the arbitrability of international online consumer disputes. It also reveals that an adequate transnational standard for determining the arbitrability of international online consumer is not an impossibility.

## ***2. Findings of the Study***

### **2.1 Should there be a transnational standard to determine the arbitrability of disputes involving online consumer contracts?**

The author attempted to demonstrate that arbitration is possibly the only way that international online consumers can gain access to justice in disputes involving the jurisdictions of England and Wales and the USA. The possibility of having international online consumer disputes arbitrated is based on a number of factors.

First, it facilitates access to justice when there are conflicts of jurisdiction. The current rules governing conflicts of law fail to offer international online consumers effective judicial protection. This is due to the uncertainty of the procedures that determine the exclusive jurisdiction of the court, the applicable law and the enforcement of foreign judgments. Owing to the absence of clear uniform rules in this regard, there will be a gap between making a complaint to a seller and going to court. Hence a legal solution has to be found that will fill the gap between addressing the dispute to the business concerned and taking the latter to court. A balance must therefore be found between the needs of the consumer as the weaker party and the interests of the business at the international level with regard to the arbitrability of their disputes.

Second, online consumer disputes are arbitrable in principle in both of the jurisdictions that were analysed. Therefore, arbitration may defuse the conflict or prevent its aggravation where the availability of other effective means of dispute resolution with the power of enforcement are not readily available. Arbitration, by comparison with litigation and mediation, holds the better possibility for international online consumers to settle their disputes through an autonomous, judicial and enforceable procedure.

However, it was recognized that as soon as an attempt is made to apply arbitration to international online consumer disputes, some aspects of arbitration appear to lose their lustre from the consumer's viewpoint. Uncertainty regarding the arbitrator's independence, accessibility, costs, and a perceived lack of transparency in comparison with litigation are all negative factors that may be used to oppose the assertion that arbitration offers an effective and appealing choice for international online consumers. It was also observed that the chosen jurisdictions are common law countries, whereas in dealing with online consumer cases, there have different legal systems that deal with such

cases and these employ different approaches towards the arbitrability of such disputes. The existence of different approaches means that arbitrability is subject to different restrictions, making the arbitration subject to a review process under a different public policy. Arbitrability, therefore, should be considered as an important aspect of the operation of justice with regard to international online consumer disputes.

Chapter 3 demonstrated that the arbitrability of international online consumer disputes are bound by two factors: the party's autonomy and the rules of consumer protection. The principle of party autonomy, within the scope of the thesis, is employed in online consumer contracts to a different extent in England and Wales and the USA. In England and Wales, the law provides special legal protections restricting the consumer party's autonomy in arbitration, whereas in the USA protection is afforded according to the general law of contract principles. Any conflict between those principles reflects on the legitimacy of international arbitration as an alternative legal adjudication process regarding the manner in which the arbitrability of international online consumer disputes is determined. It was argued therefore in chapter 4 that the uncertainty over the legal nature of the process during the entire procedure is due to the differences in national rules in the way that they protect the consumer as the weaker party where there are power imbalances. The author has argued that there is no clear definition of who the consumer *is*, which affects the decision as to who actually is the weaker party standing in need of protection. In Chapter 4, the author also examined and evaluated the notion of the consumer. The aim in so doing was to determine the key factors necessary to provide a balance between the function of the online consumer as weaker party and the interests of business in the international online environment. It was found that the legal definition of a consumer is narrow, and is applicable only to small and specific categories of internet users. This definition is so restrictive that only natural persons undertaking activities other than business or professional activities are deemed to constitute consumers.<sup>1</sup> Such a situation challenges the notion of arbitration as a fair and equitable means of dispute resolution for all those international online "consumers" outside of the narrow definition. Affecting also the arbitrability of such disputes.

Some key theories on arbitrability were examined in Chapter 5. These were contractual theory, jurisdiction theory, and seat theory. The study found that neither the contractual

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<sup>11</sup> For a fuller discussion see chapter 4, subsection 2.2

nor jurisdictional theory present a complete solution to the central problem of the arbitrability of international online consumer disputes, namely, the lack of balance between the competing principles and interests of mandatory consumer protection rules and party autonomy. Arbitration tribunals have the right and duty to deal with the issue of arbitrability on their own initiative. However, the law applicable to questions of arbitrability and the range of restrictions imposed upon consumer autonomy vary from one country to another. At the same time there are a number of different arbitration laws, which can potentially relate to the arbitrability of international online consumer disputes. The main four laws are: (a) the law of the arbitration agreement; (b) the law(s) of the parties; (c) the law relating to the place in which the arbitration is held; (c) the law of the enforcement country. In Chapter 5 it was demonstrated that, under current arbitration rules in England and Wales and the USA, arbitrators are legally free from the duty to comply with mandatory rules of consumers that do not belong to the chosen law in the underlying contract. Arbitrators, unlike judges, derive their authority from the party agreement and are therefore bound by the choice of law clause. On that basis, international online consumers may be deprived of their rights, that is, the right to legal protection and the right of judicial protection at their domicile before and during the arbitration process. However, arbitrators have shown willingness to apply the mandatory rules of the place of arbitration to avoid the vacation of the arbitral award due to violation of public policy. The study found that the lack of uniformity in arbitration laws damages the arbitrability of international online consumer disputes and creates a patchwork of laws as regards the laws that are applicable to online consumer arbitration.

A number of common themes emerged from the three chapters in distinct areas where consumers as the weaker party failed to obtain a subjectively fair process with a reasonable cost. These were:

*(a) The legal capacity of the consumer*

The freedom of the parties and their power to agree to arbitration as a form of private justice is based on the legal capacity of the parties involved. Any natural or legal person who has the capacity to enter into a valid contract also has the capacity to enter into an arbitration agreement. However, the legal capacity of the online consumer is defined by the scope of the consumer protection rules regarding the validity and enforceability of the arbitration clause in online consumer contracts. These protective elements are dependent

on the consumer's knowledge of the existence of the arbitration clause. The consumer's level of awareness is important, as when it is adequate it helps to hold the balance against the business for the consumer as the weaker party. The problem lays with the definition of the term "consumer", since it restricts protection to natural persons only, and the invalidation of the arbitration clause is due to the inequality of bargaining power in the choice of arbitration. The scope of protection is also based on the nature and aim of the contract, which is to be determined objectively. For that outcome, the nature and purpose of the contract and any other objective circumstances must be taken into consideration. The national court has to determine, on a case by case analysis, not only whether the consumer has understood the arbitration clause but also whether the latter has accepted it in a voluntary and fully informed way. In order to impose fundamental standards of rights on a legal relationship between parties in arbitration, the objective approach cannot be sufficiently certain.

As demonstrated in Chapter 3, national arbitration laws in the USA and England and Wales are primarily enacted to regulate domestic online consumer transactions, but do not address international online consumer contracts based elsewhere. Determination of the fairness of the arbitration clause therefore depends on the national law of the court handling the dispute. The English Arbitration Act 1996 distinguishes between business contracts and consumer contracts on the on the basis of the validity of the pre-dispute arbitration clause and the potential value of the claim. The Act treats any arbitration clause in a consumer contract as unfair if the value of the claim is £5,000 or less. However, if the value of the claim is more than £5,000, the validity of an arbitration clause will be governed by ordinary contract law rules. In the USA, however, the federal arbitration rules do not contain such distinctions, and thus the validity of the arbitration clause is governed by ordinary contract law rules. Under ordinary contract law, the consumer's consent to the arbitration clause is measured according to the objective standard of consent. According to this standard, the parties will be considered to have consented to the contract if they appear to be in agreement, without consideration of the subjective situation of the person concerned. In this case the arbitrability of the online consumer is subject to restrictions on the validity of the pre-dispute arbitration clause only, which is determined objectively.

The consent of the international online consumer as a weaker party should be subjectively fair and objectively reasonable insofar as the arbitrator seeks to promote certainty across multiple commercial relationships where the terminology of the online consumer is inconsistent. The actual consent should imply that the parties were able to pursue their own interests in the arbitration.

***(b) Applicable law and rules***

One of the main objectives of arbitration as a means of alternative disputes resolution within the scope of the study is facilitate access to justice in international online consumer disputes. The current rules applicable to the online consumer do not foster this objective. There are no international rules stipulating that the arbitrator has to apply the protection rules of the consumer's country of domicile, whether or not there is a choice of law clause.

For example, let us say that a natural person from England concluded an online customised software contract with a company based in the USA. This software is for both personal and professional use. The online contract included an arbitration clause to be invoked in the event of disputes. In this case, there are different rules of law and convention that govern such online contracts, whether the national law of the business country of domicile in the USA, or the national law of the domicile of the consumer in England. Moreover, the arbitrators themselves may be from a third jurisdiction chosen as the seat of arbitration, whereby its law will also be involved. The arbitrator's jurisdiction, as opposed to that of a national judge, derives its authority solely from the will of the parties. In the absence of governing rules for international online consumer transactions, the arbitrator is very likely, as explained in Chapter 5, to determine the arbitrability by the chosen law of the online contract or from the law of the national court of the seat of arbitration. On that basis, international online consumers may be deprived of their rights: the right to legal protection and the right of judicial protection at their domicile before and during the arbitration process. This would not be the case if there were uniform rules in regard to the arbitrability of international consumer disputes. These, however, have not yet been established. Furthermore there are nine theories for determining the law that should be applicable to the arbitration clause in international online consumer disputes. This issue clearly requires a comparative law analysis by the arbitrator as a means of for determining the applicable law of arbitrability for international online consumer disputes.

*(c) Choice of seat: costs and inconvenience of litigation in a foreign court*

In Chapter 5, it was suggested that, in order for arbitration to be a fair process justifying the cost of the legal fees, the consumer's country of domicile should be the arbitration seat. This corresponds to a reasonable justification under the "seat of arbitration" theory. Treating the consumer's country of domicile as the seat of arbitration provides a balance between party autonomy and the protection rules of the consumer. Imposing a foreign arbitral seat on the consumer means that the latter cannot litigate disputes over arbitration agreements and processes in the courts of his country of domicile. The courts of the consumer's country of domicile can effectively provide judicial intervention if it is the court of the arbitral seat. Consequently, treating the consumer's country of domicile as the seat of arbitration guarantees the consumer an extra judicial protection. Nevertheless, the study found that the choice of seat represents a challenging issue similar to the issue of the choice of court clause. Neither the unfairness rules in England and Wales<sup>2</sup> nor the unconscionableness rules in the USA<sup>3</sup> can effectively guarantee the consumer's right to litigate disputes over arbitration agreements and processes in his country of domicile. The high costs and inconvenience of litigation in the foreign court cannot lead to the invalidation of the choice of seat clause unless it is done in bad faith under article 5 of the Unfair Contract Terms Regulations 1999. The two defences also rarely lead to the invalidation of the choice of seat clause in the USA, unless the consumer has proved that he is financially incapable of participating in the arbitral process. It has been suggested in Chapter 5 that a possible solution is to ensure that the 'judicial seat' of arbitration is in the consumer's country of domicile. It has been argued that such an approach would be fairer and more reasonable because it gives the court, the 'judicial seat' of arbitration, the proper discretion to validate the jurisdiction clause based on its procedural fairness. However, jurisdiction rules face a challenging issue when the attempt is made to gain an adequate overview of the arbitrability of international online consumer disputes, since evidence is required that the business has targeted the consumer in his country of residence.

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<sup>2</sup> These rules are embedded in the Unfair Contract Terms in the Consumer Contracts Regulations 1999

<sup>3</sup> These are embodied in Section 2-302 of the Uniform Commercial Code



## **2.2 How can a transnational standard for determining the arbitrability of international online consumer disputes be established?**

This study suggests the need for reconsidering the questions of arbitrability in international online consumer disputes so as to ensure arbitration as an effective and attractive means of disputes resolution for the consumer. It shows that national arbitration laws do not all stand on an equal footing regarding the arbitrability of international online consumer disputes, and it is thus difficult to identify the crucial element needed to apply the law of the consumer's country of domicile. The Internet as a 'borderless' environment raises conflicts of jurisdiction issues related to various connected factors, such as the place where the contract was concluded, the place of performance, place of the web server and the place of the parties' residence and/or domicile. Currently, different connection factors lead to different conflict of law rules which lead to different consequences in regard to international online consumer disputes. This may open up possibilities of abuse of right as it remains unclear what actions constitute international online consumer consent when there is a lack of specific notice of the arbitration clause. Meanwhile, the objective approach, that of recognising a natural person as the consumer in order to determine the pre-contractual and contractual obligations bar certain types of consumer from arbitration.

The results of this research support the idea that the arbitrability of international online consumer disputes is a sensitive area in law, and an important question for the operation of justice, due to the nature of the international online consumer as the weaker party. Arbitrability therefore should have a transnational standard to determine arbitration as an adequate method of dispute resolution for international online consumer disputes.

In the event of an international online dispute, it is supremely important that the arbitration should avoid any disrespect to basic legal obligations and to render an award that is recognised and enforceable under the New York Convention 1958. This convention is the only international treaty with provisions for the recognition and enforcement of arbitral awards and it also contains some provisions concerning arbitration agreements between the England and Wales and the USA. Furthermore, the convention has its own mechanism for the recognition and enforcement of arbitral awards, and the contracting parties within the convention must recognise and enforce the arbitral award as the final judgment of its courts. The author argues that this convention

apply to international online consumer disputes if they are considered commercial disputes under the national law. However, there is no clear dividing line for deciding whether such an international online contract should be considered an online B2B or an online B2C contract. The protection of the consumer is a matter of public policy, and therefore the enforcement of an arbitration clause under the New York convention may be refused if the arbitration clause violates the public policy of the enforcing state. The challenging issue for the arbitrator is to identify those rules that would cause a competent court to set the award aside or deny its enforcement in the interest of striking at proper balance between the interests of the business and the consumer. The arbitrator has no indication as to which jurisdiction's law is better suited to answer this problem, nor as to where the award will be enforced, making it impossible for the arbitrator to know in advance which procedural standards must be met.

Currently, the conditions and the requirements for confirming the validity of the arbitration agreement in the event of a dispute differ in accordance with the conflict of laws rules applied by the competent court or the arbitrator. This situation raises the question of: (i) which mandatory rules are relevant to determine who can submit to arbitration, and (ii) what type of international online consumer disputes can be submitted to arbitration. Those challenges of the applicable law in respect to consumer protection in international online consumer arbitration are making it increasingly difficult for national and supranational laws to ensure adequate protection for consumer. As demonstrated in Chapter 3, arbitrability can be divided into two categories, the subjective and the objective. The notion of arbitrability was presented from different perspectives in Chapter 5, which explained that it can be seen either as a problem of jurisdiction or one of conflict of laws. Meanwhile, the treatment of arbitrability by a national judge can be totally different from its treatment by an international arbitrator. An analysis of jurisdiction rules and applicable law led to the conclusion that those rules have not been made to embrace international online consumer disputes. The author argues that these rules should create a balance between the interests of the consumer and those of the business. The arbitration law should mirror important issues concerning the autonomy of parties, give priority to consumer protection in his domicile and address the jurisdiction issue of determining arbitrability.

*(a) Composite rules*

In the event of international consumer disputes, the transnational nature of the Internet and the system of national law are of an irreconcilable nature. Therefore, the author argued in Chapter 6 that the solution to the problem of arbitrability is to be found partly in the role of arbitrator. Arbitrators, like judges, do not like to have their awards annulled, set aside or denied enforcement. The arbitrator should ensure that arbitration delivers the various advantages of arbitration as an effective method of dispute resolution for the international online consumer, and at the same time, ensure that his arbitral award will be capable of withstanding judicial challenge. In order for the award to be enforceable, the arbitrator must take into account the consumer's jurisdiction, which may not accept the arbitrability of consumer disputes under specific conditions. In other words, arbitrators have to take into account different jurisdictions, some of which may not find it acceptable for online consumers to opt for arbitration without their meeting specific conditions that place emphasis on the question of whether or not the party is a consumer. This should be done according to the facts of the dispute and as an exercise in comparative analysis of the law of both parties. It was posited that a transnational law approach provided a better means for the contract parties and the arbitrator to avoid any disrespect in relation to the contract or the basic legal obligations in international online consumer transactions. For example, the arbitrability of international online consumer disputes is determined by at least two different laws, the law chosen by the parties and the law of the seat of arbitration. Those two laws, under contractual theory, are more likely to be found in the national law of the business in international online consumer contracts and are more likely to be based on the principle of party autonomy, which gives parties the freedom to choose the applicable law, and also the substantive and procedural law. This could lead to inappropriate conduct that favours the business and reflects negatively on the integrity of international arbitration from the consumer's perspective, for the simple reason that those laws were imposed by the seller/business in the first place. The nature of the international online consumer, as the weaker party, requires a comprehensive and neutral analysis of all the possible rules and barriers that may hinder the ability of the online consumer to submit his case to arbitration in England and Wales and in the USA. Hence, applying composite rules would allow for a more comprehensive and balanced view of arbitrability than the exclusive determination under a particular national law. Arbitrators can rely on rules such as informed consent and the cost of arbitration to

determine the arbitrability of international online consumer disputes from both the subjective and objective perspective of the weaker party. The arbitrator can conduct such activity without disrespecting the principle of the autonomy of the parties or the rules for the protection of the consumer.

*(b) Essential guarantees*

The consumer should not be obligated by the arbitration clause unless his consent to the arbitration clause is clear and the resort to arbitration is not involuntary. One of the main concerns in this regard is how to provide a method of acquiring the necessary information so that the arbitration may maintain the balance between business and consumer.

Currently, the information requirements rules do not address the main issue of the content of the unfair terms or the imbalance in bargaining power between business and consumer. In England and Wales, the pre-dispute arbitration clause continues to be arranged by private negotiation under the UTCCR, which, before processing the unfair terms and acting rationally in response to them, needs to identify the category of consumer it is dealing with. Although the protection against unfair terms in a narrow sense is provided by law to consumers, the law is still not able to influence the substance of the unfair terms, or any other online terms.

In Chapter 6 it was argued that an arbitrator, like a judge in a court of law, is required to apply the fundamental principles of justice and procedural fairness. Therefore, as far as international online consumers are concerned, a verification method is needed for determining the consumer as the weaker party in disputes. Such a verification method should be carried out by the arbitrator in order to establish a balance between party autonomy and the reinforcement of the consumers' interest internationally. In doing so, the arbitrator has to determine the choice of law and consider the legal system of the weaker party. This can be done by a comparative legal analysis of both parties' legal system, rather than making exclusive use of a particular national legal system based on the autonomy of only one party. However, in England and Wales and the USA, the same problem has found different solutions. In such a situation, the comparative law analysis should be between the two legal systems so that the arbitrator may gain an adequate overview, be able to determine the arbitrability and provide a balance between the principle of party autonomy and the consumer functioning as the weaker party. This judgment should be based on the facts of the dispute.

The author chose therefore to rely on two key factors to be considered when dealing with the consumer as the weaker party: the cost of arbitration and the fairness of the possible outcome. Those goals are clearly linked to the need to examine and evaluate the arbitrability of international online consumer disputes according to an acceptable procedural standard. The arbitrator should rely on these two factors when dealing with the consumer as the weaker party in order to achieve reasonable results from the point of view of both parties. The cost of arbitration should be considered in the field of jurisdiction due the existence of economic imbalance. The fairness of the possible outcome should be considered in terms of the inequality of bargaining power under the principle of party autonomy, namely with regard to the applicable law.

In such a situation, guaranteeing the arbitrator's impartiality is of capital importance in order to ensure that the system is fair and effective as a dispute resolution method for consumers. Any issue related to the impartiality of the arbitrator should be resolved by disclosure of information. Such a procedure must be established with respect for the online consumer as the weaker party. Transnational standards for the legal principles and rules that the arbitrator must apply to international online consumer disputes should be defined and integrated to ensure that the entire arbitration process is subjectively fair and objectively reasonable.

### ***3. Recommendations for Future Research***

The framework of the present work focused on the jurisdiction of England and Wales and the USA. In the light of the examination of these legal systems regarding the arbitrability of international online consumer disputes, this study has shown that the division of arbitration laws affects the arbitrability of such disputes at different stages. The study focused on the issue of arbitrability invoked by a party at the beginning of and during the arbitration. Future academic work could include further scrutiny of arbitrability by means of an examination of those issues that can be invoked prior to the court's decision on the recognition and enforcement of the award. Situations of this kind were touched upon in Chapter 5 under the heading of public policy as a justification for precluding arbitrability. Further study might examine whether a common core of transnational public policy rules for the consumer as weaker party could be brought into existence. Still later work could extend the analysis to cover the role of the arbitrator in other common and civil law jurisdictions and to assess the extent to which the application of uniform rules providing

protection for the weaker party could be a standard function of the arbitrator in the determination of the arbitrability of international online consumer disputes.

The author finds these points to be worthy of examination as they could contribute to the provision of a transnational standard regarding arbitrability and arbitration as judicial procedures and create transnational rules for reviewing the arbitrator's decision.

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