

UNIVERSITY OF NEWCASTLE UPON TYNE
NEWCASTLE LAW SCHOOL

**CONSUMER PROTECTION AGAINST UNFAIR
CONTRACT TERMS**

**In the Light of the Jordanian Civil Code and the English Regulations on Unfair
Terms in Consumer Contracts 1999**

By: Firas Yosef *KASASSBEH*

Supervisor: Ian Dawson

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Abstract

Consumer Protection Against Unfair Contract Terms in the Light of the Jordanian Civil Code and the English Regulations on Unfair Terms in Consumer Contracts 1999

By: Firas Yosef Kasassbeh

Supervisor: Ian Dawson

The purpose of this Thesis is to test the ability of Jordanian law to protect consumers against unfair contract terms. In doing this, a comparison is made between the Jordanian Civil Code (hereafter the JCC) and the English Regulations on Unfair Terms in Consumer Contracts 1999 (hereafter the Regulations). The writer believes that examining the effectiveness of a law enacted to challenge unfair terms in consumer contracts entails that three main areas should be treated: the scope of protection provided by that law, the test of fairness it generates and the enforcement mechanism it uses. The wider and clearer the scope is, and the clearer the test is, the more effective protection can be expected in favour of consumers. Also, given the position of the consumer as a weak party in the contract, the effectiveness of the enforcement mechanism is linked with the deployment of public enforcement besides individual enforcement.

By depending on the notion of adhesion contracts to protect consumers, Jordanian law has, to a large extent, failed to provide consumers with an acceptable level of protection. The Thesis shows that the scope of the notion of adhesion contracts is extremely narrow, falling short of covering all consumer contracts; or, at least, is not clear enough to establish certainty encouraging consumers to litigate. The test of fairness is also a source of uncertainty, since its main features are not set out clearly. Moreover, the enforcement of such protection is not effective since it has been left in the hands of individuals.

This is far from being the case under English law, despite the existence of various defects and points of uncertainty throughout the Regulations. The Regulations were enacted to deal specifically with unfair terms in consumer contracts. Generally speaking, they appear to be, well established to undertake this task: the scope of

protection is reasonably evident and wide; the test of fairness is, generally, clear; and the model of enforcement is, to a large degree, successful.

Therefore, the English Regulations could represent a suitable example to be followed by any new Jordanian legislation aiming at protecting consumers against unfair terms, provided that the defects appearing in the Regulations are avoided and that any special characteristics of Jordanian consumers and the Jordanian legal system are taken into consideration.

Dedication

To my Mother...

To the souls of my Father and my sister Najah in the hereafter...

*To those who are fighting for justice, no matter who and where they
are...*

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List of Abbreviations

ACC	<i>Adalah</i> Centre-Cases, ' http://www.adaleh.info/AdalehSearch/form_diligence.aspx >
ACR	An Administrative Cassation Ruling
ACRs	Administrative Cassation Rulings
AIJ	Arabic Insurance Journal
AJ	<i>Al-Azhar</i> Journal
CCR	A Civil Cassation Ruling
CCRs	Civil Cassation Rulings
CIC	The Council of the Jordanian Insurance Commission
CJE	Cambridge Journal of Economics
CLJ	The Cambridge Law Journal
CLP	Current Legal Problems
CLSR	The Computer Law & Security Report
CLT	Consumer Law Today
CMLR	Common Market Law Review
Colum. L. Rev.	Columbia Law Review
DGC	The Director General of the Jordanian Insurance Commission
DTI	The Department of Trade and Industry
ECC	An Egyptian Civil Cassation
ECJ	The European Court of Justice
E. Rev. of Private Law	European Review of Private Law
Harv. L. Rev.	Harvard Law Review
IC	The Jordanian Insurance Commission

ICCLR	International Company and Commercial Law Review
JBAJ	The Jordanian Bar Association Journal
JBL	The Journal of Business Law
JCA	The Jordanian Consumers' Association
JCC	The Jordanian Civil Code
JCL	Journal of Contract Law
JCP	Journal of Consumer Policy
JGCM	Journal of the Governmental Cases Management
JIBL	Journal of International Banking Law
JIFM	Journal of International Financial Markets
JJ	The Judicial Journal
LQR	The Law Quarterly Review
LS	Legal Studies
LSGG	Law Society's Guardian Gazette
MLR	The Modern Law Review
NLJ	New Law Journal
OFT	Office of Fair Trading
OHLJ	OSGOODE Hall Law Journal
OJEC	Official Journal of the European Communities
OJLS	Oxford Journal of Legal Studies
QCC	Qanoun.Com-Cases, ' http://www.qanoun.com >
Sh.CA	A Ruling Taken by the <i>Shari'a</i> Court of Appeal
Sh.CAs	Rulings taken by the <i>Shari'a</i> Court of Appeal
SJ	The Solicitors' Journal
SLT	The Scots Law Times

The Directive	The Directive on Unfair Terms in Consumer Contracts 1993
The <i>Director</i> Case	<i>Director General of Fair trading v First National Bank Plc</i>
The Director	The Director General of Fair Trading
The Draft Bill/the New Legislation	The Draft Bill attached to the Report on Unfair Terms in Contracts (Law COM No 292, Scot Law COM No 199) which produced in Feb 2005
The Journal	The Ottoman Journal of Legal Rules 1876
The Regulations	The Regulations on Unfair Terms in Consumer Contracts 1999
The <i>Shari’a</i>	Islamic Law
UCTA	Unfair Contract Terms Act 1977
UDJ	The University of Damascus Journal of Social and Applied Sciences
Util. Law Rev.	Utilities Law Review

Introduction

1. This Thesis

1.1. Scope, purpose & general structure

This Thesis addresses consumer protection against unfair terms in contracts in the light of the JCC and the English Regulations as the main laws tackling unfair terms in Jordan and England. This is not to say, however, that the study is restricted to these two laws. Reference to other laws in Jordan and England is made wherever necessary.

Also, as far as the scope of the study is concerned, it should be clear that, although the writer will refer to economic matters, this is still a legal study. Since it is not a study in economics, not too much attention will be paid to economic factors or findings. Here, legal considerations such as the certainty and fairness of the law should prevail over economic considerations such as achieving economic efficiency or harmonisation in the market. That is why the study does not discuss such matters in any depth.

The study seeks to test whether Jordanian and English laws have succeeded in delivering the protection the consumer needs in the face of unfair terms. The hypothesis put forward by the writer is that Jordanian law has, by depending restrictively on the provisions concerning adhesion contracts to protect consumers against unfair terms, failed in achieving effective consumer protection in this area. This is the main issue to be examined in this Thesis.

Investigating the effectiveness of a law generated to deal with unfair terms in consumer contracts entails, in the writer's view, that three main areas should be explored: the scope of protection offered by that law, the test of fairness it employs and the enforcement mechanism it deploys. Certainty and breadth are relevant here. The broader and clearer the scope is, and the plainer the test is, the more effective protection one can expect in favour of consumers. In addition, given the position of the consumer as a weak party in the contract, the effectiveness of the enforcement mechanism depends on the deployment of public enforcement besides individual enforcement.

The Thesis consists of five Chapters. The Preliminary Chapter focuses on certain introductory issues, such as who the consumer is, why and how he should be

protected against unfair terms. This includes a discussion of the rationale for such protection, techniques of controlling unfair terms in contracts and an overall proposition of the provisions on unfair terms in Jordan and England in and outside the JCC and the Regulations.

Chapter One concerns the scope of the protection against unfair terms the consumer enjoys in England and Jordan. The first limb of this Chapter explores the scope of the English Regulations. This includes the following main areas: the relationship between the Regulations and the Unfair Contract Terms Act 1977 (hereafter UCTA); excluded terms; excluded contracts; important areas left uncertain; parties to contract; and choice of law clauses.

The scope of S 204 of the JCC policing unfair terms in Jordan is dealt with in the second limb under five headings: defining the “contract of adhesion”; the position of insurance contracts; private and administrative contracts; written and oral terms; and the narrowness/width of the Jordanian provision compared with the Regulations.

In Chapter Two, the English test of fairness and the Jordanian test of oppression are examined. The English limb of the Chapter contains the following key headings: rules determining fairness; the requirement of good faith; the requirement of balance; the relationship between the requirements of good faith and balance; factors to be taken into consideration in assessing the fairness; the requirement of plainness and intelligibility; and the effect of an unfair term on the consumer and the continuation of the contract. Then, the Jordanian side revolves around discovering and explaining the concept of oppression.

And, given the considerable role the writer thinks that a list of unfair/potentially unfair terms can play in the test of fairness/oppression, a part of the Chapter will be devoted to analysing the lists which both English and Jordanian laws contain.

The issue of enforcement will be the subject matter of Chapter Three. This discusses the role that has been played by private enforcement in England and Jordan and the availability of public enforcement in both countries. In particular, the discussion of the English situation covers the following issues: the prevention of the continued use of unfair terms; the role of the Office of Fair Trading (hereafter OFT) under the Regulations as well as the Enterprise Act 2002; qualifying bodies’ role; and the court’s role. In the Jordanian context, the concern will be whether or not Jordanian law offers any public enforcement, and this will be handled through discussing the availability of pre-emptive intervention and public action in Jordan and what role the

Jordanian Consumers' Association (hereafter JCA) can play in public enforcement. Then, the effectiveness of public and private enforcement will be assessed through a comparison of the two techniques.

The final Chapter presents main results and conclusions of this research. It shows whether or not Jordanian law has, indeed, failed to provide the consumer with the protection that he deserves, both in general and in comparison with the English Regulations in the light of the three standards that have been employed to measure effectiveness: the breadth and clarity of scope, the plainness of the test of fairness/oppression and the existence of public enforcement. Recommendations as regards improving the current legal situation in Jordan and England will, also, be made in this Chapter.

1.2. Importance & methodology

Inspired by his career in the Jordanian judiciary, the writer is intensely interested in the issue of fairness and how to protect weak parties against unfair contracting. In particular, it has been observed by the writer that the consumer as a weak party has not been granted special protection against unfair terms by the Jordanian legislature. This is despite the importance of the existence of such protection, given the fact that it is inevitable that every person in the community, even legal persons, would be a consumer in one occasion or more. This situation is obvious where the Jordanian law does not discriminate consumer contracts from other civil contracts. The modern classification of commercial contracts and consumer contracts is not yet known in Jordan.

Having regard to this, and from the perspective that the study is dealing with the important issue of consumer protection against unfairness in contracts, this study seems to be highly significant. Consumer protection generally, and against unfair terms specifically, is no longer a matter of accessory. Rather it became a necessity because it concerns every person in society as well as society as a whole. This would explain the attempts that have been made to attach the concept of "consumer" with the concept of "citizen"¹. Further, this study is to the same extent significant by reason of the fact that it is the first study ever conducted which treats in depth the issue of consumer protection against unfair terms under Jordanian law.

¹ See Feldman L, *Consumer Protection*, (New York: West Publishing Co, 1978), p 5; Cartwright P, *Consumer Protection and the Criminal Law*, (Cambridge: Cambridge University Press, 2001), p 4.

The methodology adopted in this study might also enhance its significance. The research can be described as a critical analytical comparative study. Although the comparison with the English Regulations, specifically, might have been imposed, at the beginning, by personal motivation since the writer is an overseas student reading for the PhD in England, the choice of this law appeared afterwards to be ideal. On the one hand, the Regulations are a relatively recent law, benefiting from the English experience in fighting unfair terms, which, when compared with the Jordanian experience, seems to be considerably richer. On the other hand, the Regulations seem to represent a good case for comparison due to the European touch that has coloured the English law on unfair terms, which has added vital input to the English experience in the field of unfair terms. The Regulations implement a continental measure, which is the Directive on Unfair Terms in Consumer Contracts 1993¹ (hereafter the Directive) containing minimum provisions² on consumer protection against unfair contractual terms to be applied by Member States³. Moreover, the Regulations seem in line with the aim of this study to test the law in the three specific areas mentioned above (the scope of protection, the test of fairness, and enforcement), given that the Regulations were enacted to deal with unfair terms in consumer contracts specifically with the result that some clarity and breadth could be expected, and so is a sort of public enforcement. This, if correct, will be seen in the main body of the Thesis.

The analysis, criticism and comparison serve in achieving the main aims of the Thesis as set out above. A comparison between Jordanian and English laws is made in each Chapter, wherein the first limb explores the attitude under the English law followed by second limb devoted to discussing the situation in Jordan. This does not prevent comparisons from being made at the sections' or sub-sections' level, where possible and appropriate. The comparison chiefly helps in determining whether or not the existing law in Jordan is sufficient, as far as consumer protection against unfair terms is concerned. The comparison and analysis of Jordanian and English laws brings to the surface points of agreement and divergence between them; advantages and disadvantages; and weaknesses and strengths in comparison with one another, and

¹ Council Directive of 5 April 1993 on Unfair Terms in Consumer Contracts, Directive 93/13/EEC OJ L95 21 April 1993 p 29.

² This is in contrast with the Directive 2005/29/EC on Unfair Commercial Practices which introduces a general duty on businesses not to trade unfairly with consumers. This Directive is concerned with maximum harmonisation of law.

³ Reg 3(1) of the Regulations defines Member State as a state which is a contracting party to the European Economic Area Agreement signed on 2nd May 1992.

without such comparison. Then, the lessons that these laws could learn from each other, if any, are highlighted. However, and as made clear earlier, the study is not restricted only to the Regulations and the JCC. Therefore, the comparison might, when the research requires, extend to other laws even within the one legal system, such as comparing a provision relating to the Regulations with its equivalent in UCTA.

Finally, The criticisms agitated in this study have the aim of helping the law producer, especially in Jordan, to appreciate the shortcomings in the law and, if convinced by the findings of this study, to respond accordingly.

2. Lack of law is a problem for the study and a problem of the study

The reader of this Thesis will notice that there is lack of court decisions in Jordan on the key issues addressed in it, such as the scope of protection available under the provisions policing contracts of adhesion and the test established by the law to assess the oppressiveness of a term in question. Such decisions are rather important given the nature of the JCC as a non-detailed piece of legislation, especially as regards unfair terms in contracts which are treated in only two Sections, Ss 104 and 204. As such, the lack of such important decisions is a problem for the study.

It might be argued that this undesirable situation could be attributed to two reasons. The first is the role of the court in Jordan, which cannot be compared with that in England. Under Jordanian law, and as a codified system, the rulings of courts are only an ancillary source of law¹. Therefore, they do not endeavour to establish rules in an unsettled or unclear area of law. Secondly, judgments made in courts other than the Court of Cassation are not published, but rather are to be found in each court's archive. Only judgments made by the Court of Cassation are reported in the monthly report issued by the Jordanian Bar Association or the Judicial Institution.

However, none of these justifications are satisfactory, because they cannot explain the full silence of the judiciary, represented mainly by the Court of Cassation, as to this part of the law. Such barriers do not prevent the courts from having their say in relation to other matters of less importance, and this study is replete with decisions

¹ See S 2 of the JCC which provides that "2- If the court finds no provision in this Code [this applies to all other enactments] applicable to the issue in question it shall resort to the rules of Moslem *Fiqh* (Jurisprudence) which are more adaptable to the provisions of this Code, and in case there is none it shall resort to the principles of the *Shari'a*. 3- And, if there is none, resort shall be made to custom, and if there is none then to the rules of equity... 4- In all the above, guidance shall be drawn from judicial decisions and jurisprudence provided that they are not repugnant thereto".

on unsettled areas. Rather, it is the task of the courts to settle any controversial or problematic legal text, and the judiciary knows that very well. Consequently, a question might be raised over whether this situation is an expression of legislative failure to set out a clear piece of legislation delivering effective protection to the consumer/adherent against unfair terms. Therefore, the lack of judicial judgments is a point on which the research can build and, hence, is a problem of the study.

Preliminary Chapter

Theoretical and Legal Framework of Consumer Protection

Against Unfair Terms

1. Introduction

This Chapter focuses on certain preliminary issues which will help in understanding the environment in which the provisions on unfair terms in consumer contracts in the JCC and the Regulations operate. These issues can be summarised in some simple questions, such as: who is the consumer? Why and how to protect him against unfair contract terms?

In answering these questions, the Chapter discusses the rationale for protecting the consumer against unfair contractual terms. This discussion represents the “theoretical framework” of the Chapter’s title. Also, techniques of controlling unfair terms in consumer contracts are explored, along with an overall proposition of the provisions on unfair terms in Jordan and England in and outside the JCC and the Regulations. This exploration constitutes the “legal framework” mentioned in the title. This is not to say, however, that this Chapter is the only place where these provisions are addressed; indeed, reference to such provisions, or many of them, will be made throughout the Thesis wherever it is necessary.

It is worth mentioning finally that as a Preliminary Chapter it will not be a detailed one. The issues discussed herein are set out briefly because, albeit important, they are not the core of the Thesis. Rather, they are of an introductory nature, facilitating the task of the subsequent Chapters by providing a general understanding of the problem of unfair terms in consumer contracts and the different solutions adopted and suggested in response to it.

2. Rationale for protecting the consumer against unfair contractual terms

Treating rationales for intervention to protect consumers is not beyond the scope of this Thesis because it helps in understanding the bases on which consumer protection stands. It also allows the efficiency of the provisions putting such an intervention in operation to be evaluated. Thus it may affect the argument concerning intervention in a particular area falling within the theme of the study. However, such treatment will

not go deeply. It is deemed sufficient merely to examine briefly the main grounds of intervention.

As will be seen, the grounds for protecting consumers against unfair terms in contracts do not, to a large extent, differ from those justifying their protection in other contexts. Similarly, it could be said that the reasons exculpating intervention against unfair terms on the consumers' front are, to a large extent, consistent with rationales for fighting them in other arenas.

Before discussing rationales for this protection it is appropriate to throw some light on the concept of the "consumer" who is the subject of this study, since the qualifications of this person seem to be relevant to, if not a part of, the rationales for his protection.

2.1. Who is the consumer?

2.1.1. Introduction

One of the features of modern law is the acknowledgment of consumer contracts as against commercial contracts¹. The emergence of this category of contracts came as a result of the need that some special standards be applied to contracts to which the consumer is party. Although consumers' disparity to be protected refers, as made clear elsewhere², to the era of industrial revolution, recognising the necessity of passing legislation on consumer protection began only with the beginning of the past century, and heightened after the World War II with the emergence of the so-called "consumerism" movement.

Thus, the evolution triggered in this area of law could be, in principle, ascribed to the industrial revolution. However, contemporary (twentieth century) interest in protecting consumers is the natural result of the combination of factors arising from the matrix of this revolution and facilitating the passage of protective legislation at the expense of the traditional rule of *laissez-faire*. The most important of these are: the technological change which is directly attributable to the industrial revolution³; the political climate which came to prevail in the first half of that century and took an attitude against big business and monopoly power; the social developments

¹ Brownsword R, 'The two laws of contract', (1981) 125 SJ, p 279, reiterated in Brownsword R, 'the Philosophy of Welfarism and its Emergence in the Modern English Law of Contract' in Brownsword R, G Howells and T Wilhelmsson (Editors), *Welfarism in Contract Law*, (Aldershot: Dartmouth, 1994), p 44.

² See *infra*, p 36 et seq.

³ See further, *Ibid*.

represented by the levels of affluence and knowledge achieved by consumers in that period by virtue of, among other reasons, the activities of civil rights movements promoting through the media, popular press, and demonstrations the rights of consumers; and the hardships consumers experienced because of marketing practices, such as the deceptive promotion and false information about the products, their qualifications and quality.¹

2.1.2. Trends in the definition of the consumer

The above is a preamble on the origin of the notion of consumer/consumerism. Moving to the theme of this sub-section which is the definition of the “consumer”, although this term has become well known, its definition differs from one field of science to another. Even within a particular field, there may be no consensus on the definition given to it. The law is no exception, and here the definition of the consumer also remains unsettled². Legislation has not reached an agreement on who the consumer is. Neither have jurists of the law.

At the legislative level, this is not restricted to laws from different countries but it is also the case with the legislation belonging to one national legal system. In England, for example, the definition given to the “consumer” under the Fair Trading Act 1973³ is different from that provided by UCTA and the Regulations. And the two latter pieces of legislation take different approaches to who is the consumer, despite the fact that they operate in the same area namely unfair terms in contracts. Such divergences may not, however, be due to the controversial nature of the concept merely. Rather, it may also refer to the process of making the contours of the area targeted by the particular legislation in the light of the legislative policy behind its enactment (mainly, the problems intended to be solved by the legislation). Thus, a specific definition might be put in place ‘for the purposes’ of the particular legislation.

On the juristic front, there are many directions in defining the consumer. Firstly, some commentators support a narrow definition of the “consumer”, stressing that the consumer transaction is that which aims at satisfying his, or his family’s, private

¹ See further, Feldman L, op.cit pp 12-29.

² See, Beale H, A Hartkamp, H Kotz and D Tallon (General Editors), *Contract Law*, (Oxford: Hart Publishing, 2002), p 28.

³ s. 137 (2).

needs¹. So, the transactions concluded to satisfy the requirements of his profession would be considered as non-consumer contracts even if they did not form part of his business. Under this approach, the lawyer who buys a computer to use in his office is not a consumer. The reason behind this trend might be that the professional who contracts in this way may suffer from lack of experience but does not, surely, suffer from economic inequality with the seller or supplier. Then, it can be argued that the balance exists between the contractors.

The second direction discriminates between contracts which are part of the contractor's profession and those which are not². The latter contracts, along with contracts concluded to satisfy personal needs, are consumer contracts although they serve the professional in his profession. This approach is very close to an economic definition, suggesting that the consumer is the person who contracts on goods or services for purposes other than for selling them again³. According to this view, the lawyer in the above example is a consumer since he is not a trader dealing in computers in the market. The ground of this direction is the contractor's lack of experience compared with the supplier. Such an imbalance will not be rectified even if the two are in equal financial positions.

On the other hand, the concept of the consumer has, according to one line of thought, been restricted to transactions the subject matter of which is goods⁴. This has the effect of excepting services from being the subject matter of consumer contracts. Conversely, another trend suggests that: "consumerism is not limited to the market place. It is just as concerned with the supply of services as with goods. The consumer merely becomes the client, or patient, or whatever, rather than the shopper"⁵.

Arguing in favour of this direction or that requires a full understanding of the rationales for protecting consumers. These can explain whether specific groups of persons, such as professionals when contracting on goods or services relating to their

¹ *Al-Rifae'i A, the Civil Protection of the Consumer*, (Cairo: Dar Unnahdah Al-Arabiah, 1994), p 21 (in Arabic); *Jumai'e H, Consumer Protection*, (Cairo: Dar Unnahdah Al-Arabiah, 1996), p 13 (in Arabic).

² *Mashaqbih J, the Civil Protection of Consumer from Defective Industrial Products*, a Master Dissertation, *Al El-Bait University, Al-Mafraq*, 2003, p 14 (in Arabic).

³ Kolb J and S Ross, *Product Safety and Liability*, (New York: McGraw-Hill, 1980), p 30 et seq, cited in *Al-Hajjar M, Consumer Protection in Jordan*, A Master Dissertation, University of Jordan, Amman, 1985, p 19 (in Arabic).

⁴ *Cornu G, La Protection du Consommateur, Travaux de L'association Capitant*, 1973, p 136, cited in *Al-Rifae'i A*, op cit p 20.

⁵ Kennedy I, *the Unmasking of Medicine*, (London: George Allen & Unwin: 1981), p 117. See, also, *Calais-Auloy J, Droit de la Consommation, Précis Dalloz, 3ème édition*, 1992 p 3; *Ghestin J, Traité de Droit Civil: les Obligations, la Contract*, ém éd 1988, p 46, both are cited in *Al-Rifae'i A*, op cit p 20.

profession but not part of it, require to be protected or not. Studying such rationales is the task of the following sub-sections, 2.1.3, 2.2 and 2.3.

2.1.3. General features of the “consumer”

Despite the lack of agreement over some specific aspects of the definitions given to this concept, there are some features which distinguish the “consumer” from other persons in the community. These are:

- 1- The consumer is the final person in the chain of the process of distributing products or services, in the sense that he is the one who benefits from the subject matter of the contract by using or consuming it. Accordingly, the consumer is known as the “recipient”. Such a feature definitely covers cases where the consumer defined as a person who contracts “for personal or familial purposes” and, however debatable, “for purposes beyond his profession, if any”.
- 2- The consumer is the person who has, generally speaking, no experience in relation to the contract concluded (its terms, conditions and subject matter). This is due to the fact that the contract is not part of his profession, and, in most cases, he enters into it for the first and the last time or, at least, on a very limited number of occasions.
- 3- One of the most interesting features of the predominant legal concept of the “consumer” is that it is determined by the nature of the opponent (the provider) who, for the purposes of allowing his partner in the transaction to enjoy the benefits stemming from being a consumer, must be a seller or supplier (business or businessman/woman). To make this clearer, the transaction must be part of the provider’s business. In this, the law implies that the consumer needs to be protected only if his counterpart is stronger than him in aspects such as financial power or experience.

2.2. Argument against intervention

It is fairly obvious that the modern law of contract is “interventionist”¹. This contradicts the classical law perspective, which had prevailed in the era prior to the twentieth century, central to which was the notion of “freedom of contract”². Yet, the preference of non-interventionist law remains able to recruit partisans, however few, in the fields of law and the economy. Therefore, it is appropriate, before addressing rationales of intervention, to mention the main grounds of the non-interventionist tendency.

2.2.1. The general stand

One of the strongest grounds on which opposition to intervention is based is the notion of the “efficient competitive market” or “consumer sovereignty”, which will be discussed further below. Suffice it to say here that, according to this notion, the market has its own disciplinary rules capable of curing any problem and guaranteeing that the consumer’s will will be dominant. For this reason, if the law has a role to play in the market it will be to not intervene. In other words, it has the role of guaranteeing the effectiveness of the market through the setting up and enforcing of the structure in which the market operates by means of laws aiming at, for example, curtailing monopoly (via competition law), determining the rights of ownership (via property law) and protecting the latter (via criminal law)³.

Besides this, some adherents of the idea of non-intervention put their faith in non-legal techniques of intervention such as the economic methods, discussed below⁴, by virtue of which consumers can impose their rights before producers or traders through, for example, banding together in pressure groups⁵.

A final ground for a non-interventionist strategy is the likelihood that intervention could create results harmful for both the market and consumers because setting minimum standards in consumer contracts may restrict the latitude of the

¹ See, Brownsword R, ‘The Philosophy of Welfarism and its Emergence in the Modern English Law of Contract’ in Brownsword R, G Howells and T Wilhelmsson (Editors), *Welfarism in Contract Law*, (Aldershot: Dartmouth, 1994), p 21.

² Grubb A and Furmston M (Editors), *The Law of Contract*, 2nd Ed, (London: LexisNexis, 2003), p 24.

³ Cartwright P, op cit p 7.

⁴ See *infra*, pp 23,24.

⁵ See, Scott C and J Black, *Cranston’s Consumers and the Law*, 3rd Ed (London: Butterworths, 2000) p 12.

consumer in choosing the transaction which suits him and may minimize the offers that he can receive.¹

2.2.2. As regards unfair terms specifically

The classical view, as expected, argues against intervention against unfair terms. However, the aversion to intervention this time is restricted to substantive fairness. Here, the idea is that there should be no ground for intervening merely because of lack of substantive fairness. This is to say, in the absence of procedural unfairness represented by, for example, fraud, duress and incapacity, intervention is not justifiable.

Some of the grounds on which the argument against intervention in the field of unfair terms is based were mentioned in the context of the aversion to intervention in general as discussed above. Grounds other than these are set out by Hugh Collins², and three of them merit mention, namely:

Firstly, that what is deemed as unfair, in most instances, turns out to be illusory. An example of this contention is that most terms considered unfair are balanced by corresponding terms to the benefit of the consumer, such as a term providing for a lower price.

Secondly, as a result of the fact that real unfairness can be found only in very few cases, the best solution would be economic, achieved by curing the market failure which causes the unfairness through, for example, eliminating obstacles obstructing competition and providing more information.

Thirdly, that there is the danger that legislative intervention, which is the main technique of legal intervention, will prompt uncertainty in the area of unfair terms. This is because an attempt to deliver the substantive fairness which employs open-ended, discretionary standards will affect the calculability of the legislation in the sense that it makes it harder for the parties to the contract to predict on which basis their contract will be judged and, accordingly, whether it will be enforceable or not. Consequently, businesses will refrain from, or hesitate to enter into, contracts.

¹ Howells G and S Weatherill, *Consumer Protection Law*, (Aldershot: Dartmouth, 1995), p 29.

² Collins H, *Regulating Contracts*, (Oxford: Oxford University Press, 1999), p 256 et seq.

Hugh Collins strongly questioned these three grounds. On the first proposition, although he acknowledged that not all of what seem, at first glance, to be unfair contracts are indeed so, he believed that unfair contracts do exist where, for example, the price paid is excessive or the allocation of contractual risk is one-sided, and under a sufficient test taking the whole picture into consideration, this will be proved¹. On the second proposition, he took the view that it is true that the market failure can be reduced through, for instance, furnishing more information and fighting monopolies, but, regardless of the fact that such efforts would be costly, whatever improvements are made still cannot achieve a perfect market². This argument is consistent with the notion that the idea of a perfect market is unrealistic, which will be discussed below. On the third proposition, he stressed, on the one hand, that uncertainty will seldom affect decisions on whether or not to enter into transactions. On the other hand, he argued that general clauses such as good faith will have the effect of achieving results corresponding to the expectations of traders regarding the validity of the contracts, who will be shocked if the legal system consents to enforce harsh contractual terms³.

Adams and Brownsword admitted that it is hard to defend the classical view. However, they found this possible from, firstly, a theoretical perspective, because respecting the contractors' autonomy entails that their genuine contractual choices must be enforced and not those which the judge thinks it would be reasonable for them to have made. Secondly, from an economic welfare-maximising perspective, freely-concluded agreements must be considered as the best evidence of the parties' preferences, and therefore it may amount to a mistake to try to adjust them because arbitrary decisions might be generated. In conclusion, they made it clear that intervention to achieve substantive fairness might put the rationality of the law in question. Therefore, it is the task of modern law adopting intervention in such a way to articulate a defensible conception of fairness in order to justify such intervention.⁴

In the end, although it was said that there is some retreat at the level of disposition to intervene legally in favour of consumers⁵, an interventionist law remains, at least at this moment, the preferable mechanism for consumer protection. It

¹ Ibid, p 257 et seq.

² Ibid, p 279 et seq.

³ Ibid, p 270 et seq.

⁴ Adams J and R Brownsword, *Key Issues in Contract*, (London: Butterworths, 1995), pp 256,257.

⁵ Howells G and S Weatherill, *op cit* p 29.

is worthwhile, therefore, to briefly consider the grounds for such a direction, and this is the task of the next sub-section.

2.3. Grounds for intervention

Many considerations have been resorted to in order to justify intervention in favour of consumers. Among these grounds are market-based justifications (such as market failure, information deficit and wealth redistribution) and non-economic justifications (such as inequality of bargaining power, equity, standard form contracts, paternalism, and consumerism)¹.

Two points can be made on the justifications of intervention in the consumer field (including the above grounds). Firstly, some of the grounds on which intervention is based are, one believes, a mere description of a situation and have contributed nothing to explaining why the intervention has taken place. By way illustration, the idea of “paternalism” as a ground for intervention suggests that the state would intervene in favour of, but against the will of, individuals to protect them on the assumption that it knows better than them. This is because they may have insufficient information to act in the light of which or they may act irrationally even in the existence of such information. The question that must be asked here is what the reasons are which spur the state to intervene in such a way. Namely, is it the task of the state to educate people in how to enter contracts irrespective of the nature or the position of the contractors? Intervention under the banner of paternalism gives no answer to such a question.

Equally, intervention on the ground of consumerism itself needs a ground. It was the view of some commentators that the fact that one contracting party is a consumer is a sufficient cause to intervene in favour of him². Some commentators have rightly criticized the suggestion of such a ground for intervention³. The writer, also, believes that it is ironic to envisage that the law should intervene in favour of a group of people and “full stop”, viz.; because they are members of that group without

¹ See, among others, Ramsay I, Rationales for Intervention in the Consumer Marketplace: An occasional paper prepared for the OFT, Dec 1984, p 15 et seq; Cartwright P, op cit p 18 et seq; Brownsword R, ‘The Philosophy of Welfarism and its Emergence in the Modern English Law of Contract’, in Brownsword R, G Howells and T Wilhelmsson (Editors), *Welfarism in Contract Law*, (Aldershot: Dartmouth, 1994), pp 44, 133; Howells G and S Weatherill, op cit p 17.

² Brownsword R, ‘The Philosophy of Welfarism and its Emergence in the Modern English Law of Contract’, in Brownsword R, G Howells and T Wilhelmsson (Editors), *Welfarism in Contract Law*, (Aldershot: Dartmouth, 1994), p 44.

³ Howells G and S Weatherill, op cit p 17.

explaining why this group deserves to be protected. Hence, consumerism may constitute a cause for intervention provided that it is tied with the deeper reasons justifying intervention thereupon.¹

The second point is that the said grounds are, by and large, adequate to provide rationales for intervention, and each one of them has contributed, in one way or another, to reaching the current situation where the need to intervene to protect consumers' interests and regulate their affairs is almost unquestioned. Nonetheless, this does not mean that they are a patchwork. Rather, they overlap considerably, since many of them are no more than the second faces of the others, or some of their aspects or reasons. Having said this, the writer is of the opinion that these rationales can be joined in two main grounds: correcting market failure and achieving equity².

The first main rationale, briefly treated in the previous sub-section, is the strongest economic rationale for intervention³ and came as a response to the theory of efficient competitive market under which, as said before, there is no need for intervention by the state in favour of consumers since the market itself will do the job and provide them with the protection they need.

There is a need here to shed further light on this latter idea in order to understand the market failure rationale. The idea of an efficient market is based on the assumption that an unregulated competitive market will give birth to an efficient exploitation of resources and, accordingly, intervention by the state is only justified where it is directed to remove barriers blocking the smooth operation of the market. Once the perfect competitive market is achieved, it is not the task of the state, it is argued, to cure the problems that consumers face; rather it is best left to the market to do this by expelling businesses which show poor performance. The consumer himself is the main actor in this process. He is in a superior position, allowing him to "exit" (leave the undesirable product [transaction] to another). In this way and as a sovereign economic actor, he can influence producers or sellers through sending signals to them expressing his genuine wishes. For example, when the consumer dismisses a transaction/product, the producer or seller has to respond in a way satisfying the

¹ See, also, p 22.

² See, Ramsay I op cit p 12; Howells G and S Weatherill, op cit p 43.

³ Ramsay I, op cit p 15.

consumer's desires; otherwise the former will, at the end of the day, lose his customers and, consequently, be forced to exit the market¹.

Proponents of this idea suggest that the market which is able to undertake such a task is that which is efficient. In order to achieve such a market, certain conditions must be met. These conditions are that:

- 1- There are numerous buyers and sellers in the market, rendering the activities of a particular economic actor of minimal impact on the market;
- 2- There is free entry into and exit from the market;
- 3- The product sold in the market is homogenous. This means that, in a particular market, the sellers sell the same product;
- 4- The economic actors in the market have ideal information with regard to the products sold, their nature and value;
- 5- All the costs of producing a good are borne by the producer, and, at the same time, all the costs of consuming that good are borne by the consumer; in economists' terms there are no "externalities".²

If these conditions were met in reality, proponents as well as opponents to the idea, one can guess, would find that measures put in place to protect consumers were harmful rather than beneficial except to the extent that they were directed to cure failures in market mechanisms.

However, and on the basis of these conditions, opponents to this notion (the efficient market) envisage it as a dream that has no chance of surviving in reality. In the words of Howells and Weatherill, it is "as alluring as it is unrealistic"³. Depending on this, they perceive market failure as a rule and not as exception, because the requirements of an efficient market are unlikely to be met. Firstly, competition is not always available due to, for example, monopoly (the dominance of one supplier) or oligopoly (the dominance of a small number of large suppliers). Secondly, free entry to the market is not always available since there may be barriers, such as high costs or legal requirements (for instance the requirement that a person has attended training courses before he can offer a service). Thirdly, product homogeneity cannot be

¹ Ibid, pp 22, 38; Scott C and J Black, op cit p 27.

² See, Trebilcock M, C Tuohy and A Wolfson, *Professional Regulation*, (Ontario: Ministry of the Attorney General, 1979), p 47.

³ Howells G and S Weatherill, op cit p 1.

guaranteed, due to possible qualitative differences among products. Fourthly, there are informational gaps between the consumer and the seller, mainly because perfect and correct information is not always available to the former. Fifthly, it is inevitable that the costs of production and consumption will not be fully borne by the supplier and consumer. Rather, the problem of “externalities” will certainly appear because third parties will bear some of the product costs. For example, a car which is sold will, when used thereafter, damage the environment in which, and the road on which, it is used. But such damage is not costed into the market price and, therefore, will be borne by neither the supplier nor the consumer but by third parties. Finally, and mainly as a consequence of the foregoing findings, consumers may not seek to satisfy their interests in accordance with the model of the rational actor that economists expect.¹

The second main rationale is equity. This rationale is described as the non-market based approach, embodying the social and ethical objectives of intervention. What this approach includes may be extracted from the distinction between two aspects of equity: distributive and corrective justice. In the former aspect, intervention aims at remedying the imbalanced outcomes of the transactions reflecting the imbalanced distribution of resources (knowledge, organisation, rights) between consumers and producers. The intention is directed, specifically, to vulnerable groups of consumers such as those with low incomes, the elderly and youth. The latter aspect is directed to preserve consumers’ entitlements against the absence of reciprocity of duties and rights between individuals and groups which might happen in society.²

Intervention under the banner of equity varies from one legal system to another. In many cases the aim of intervention is to achieve equity in the contracting process and its outcomes (procedural and substantive fairness). However, the modern tendency concentrates, in addition, on the equity of the process by which decisions treating consumers’ interests are made. This explains the growing role that groups representing consumers play in influencing the process of making such decisions at the political level.

The major factor in creating inequity is the “inequality of bargaining power” between the trader and the consumer. Although this factor has been presented as a

¹ For further discussion, see Ramsay I, op cit p 16; Scott C and J Black, op cit p 30 et seq; Cartwright P, op cit pp 18-27; Howells G and S Weatherill, op cit p 1 et seq.

² Ramsay I, op cit pp 12, 57.

separate rationale, representing both the efficiency failure and the equity failure¹, the writer views it as a cause of inequity. As such, it constitutes part of the equity rationale. In any case, this carries no more than a hypothetical categorisation which will not affect the solid overlap between the rationales constituting grounds for intervention. Therefore, it should be admitted that the notion of “inequality” also overlaps with the market failure rationale in that, as will be seen below, many of the factors said to be reasons for market failure are, at the same time, causes or features of “inequality”. The proposition that “inequality” is the main cause for inequity entails that the two main rationales (efficiency and equity) have a mutual relationship. Market failure, which is the opposite of market efficiency, would badly affect equity, and vice versa; and, the existence of fair dealing in the market would boost the scale of the market efficiency. In the words of Ramsay, “an efficient policy is ultimately justified by equity since consumers are able to obtain goods and services of a quality, on terms, and at the price that they are willing to pay”². However, it cannot be denied that although the equity rationale overlaps with the efficiency rationale, it represents moral values of honesty and fair dealing to be activated irrespective of whether or not they are consistent with the purposes of market efficiency³.

Since it is the cornerstone in the equity rationale, there is a need to diagnose the sources of “inequality”. It was suggested that “inequality” is the axiomatic yield of market failure embodying in one of the following aspects:

- 1- Excessive market power (for example, monopoly power and the use of standard form contracts, although the latter aspect is questioned).
- 2- Situations where consumers are unable because of lack of information or seller practices (such as the door-to-door selling which involves psychological techniques taking advantage of the fact that the consumer is in his own home), or transactional incapacity to make a rational market decision (due to, for instance, youth, insanity, a desperate need for the product, or illness).⁴

The “inequality” portrayed by the writer as the cause of inequity could be seen, on the other hand, as a result of the failure of equity. This happens when the enforcement of

¹ Ibid, p 49 et seq.

² Ibid, p 12.

³ See, *ibid*, p 57.

⁴ Ibid, pp 49-54.

interventionist legislation is left to individuals. This may lead to a market discrimination restricting the benefit of that intervention to those consumers who decide to challenge actions violating that legislation. Surely, there will be others who are not, for financial or other reasons, able to do so, and who are then deprived of the protection they need.¹

Aspects of “inequality” as set out above remind one of the considerations on which the English theory of “unequal bargaining power” was based. The English notion of “inequality” has come across many considerations similar to those mentioned above. In cases where the issue of “inequality of bargaining power” has been raised, considerations such as the informational gap (involving the consumer’s ignorance, lack of experience, or absence of advice), poverty, infirmity, and excessive market power² seem to be at the heart of the English doctrine of inequality.³

However, trying to establish “inequality”, which is the subject of this analysis, on the same dimensions and considerations upon which the English doctrine was based may not, from the writer’s perspective, be wise. The English doctrine may reflect the English approach of intervention in favour of substantive fairness, but it may not be automatically applicable in other jurisdictions. This opinion is sustained by the very important fact that there is no general principle of inequality of bargaining power in England. The courts which have taken the initiative to create such a principle appear to have abandoned this attempt⁴. Therefore, the English common law notion of “inequality” is in itself unclear⁵. It is thus not helpful in providing enlightenment on the meaning of a general notion of “inequality”, especially when used to justify a European statutory intervention such as in the case of the Directive⁶. The same could be said as for the Jordanian case. Thus, there is a need to take the “inequality” rationale more broadly to cover the trader’s exploitation of his superior bargaining strength (in terms of wealth, resources, information...etc) to affect the outcome of the contract. Hence, it is only the abstract, wide meaning of “inequality”,

¹ Ibid, p 55.

² See, for example, the judgment of Lord Denning made in the leading case on the doctrine: *Lloyds Bank Ltd v Bundy* [1975] QB 326.

³ See further, McGhee J (Editor), *Snell’s Equity*, 31st Ed, (London: Sweet & Maxwell, 2005), p 227 et seq.

⁴ McKendrick E, *Contract law*, 4th Ed (London: Macmillan, 2000), pp 351,362.

⁵ Ramsay I, op cit p 10.

⁶ Recitals 5,9, and 16 to the Directive.

taking into consideration both procedural and substantive unfairness, that can be accepted as a universal rationale for intervention.

Another point to be discussed here is to what extent the standardised nature of the contract constitutes an independent rationale for intervention. This question is important since many legislators (for example, the English legislator in relation to the Regulations) have offered protection to the consumer only in cases where the disputed contract is standard. In more radical cases, others (for example, the Jordanian legislator in relation to the JCC) have not paid attention to the nature of the contractor (whether he is a consumer or not), but rather the nature of the contract (whether standard or not) is the issue at stake. It is no surprise, then, that one school of thought has linked the protection provided to the consumer with the standard nature of the contract¹. This school opposes those who take the view that the protection targets the consumer on the basis that he is the weak side in the transaction.

However, one seems to have no choice but to reject the argument of this school, and this is for a couple of reasons. Firstly, there are situations in the legislation mentioned above (by way of example) where the protection is, mainly, directed to cure the potentially unfair outcomes resulting from the weakness of the contractor, regardless of whether or not the contract is standard. More importantly, the issue of restricting the coverage of the Directive, from which the Regulations are derived, to standard contracts was an undetermined issue before producing the final draft of the Directive. More importantly, as will be seen below, the two main rationales for intervention as set out above point to one general rationale which is the weakness of the consumer.

This does not mean, however, that standardisation is not a basis of intervention. The writer envisages that the correct position of this notion lies in the fact that the standard contract is, to a large extent, an aspect or factor of the market power that traders have which may play a role in allowing them to treat consumers unjustly. Viz.; and in short, it is not in itself a rationale, but an aspect of, or factor in, the consumer weakness and trader strength.

After all, the ground for intervention for the sake of consumer protection can be summarized in the fact that the consumer is a party to the contract who is deemed to be economically weaker, less experienced and legally less educated than the trader.

¹ See, Nebbia P, *Unfair Terms in Consumer Contracts: English and Italian Law on Unfair Terms in the Light of Directive 93/13*, a PhD Thesis, University of Southampton, 2003, p 106 et seq.

This analysis would clearly uphold the opinion of those who support the welfarism-based rationale on the account of consumerism¹. The consumerism rationale suggests that the trend of modern law towards consumer protection is no more than discrimination in favour of consumers, no matter whether or not they are the weaker parties in transactions. However, there is evidence that this is not the case. Some provisions of the English legislation (the Regulations) were designed to protect consumers on the basis that they are in a weak position. An example of this is the restriction of the protection afforded to the consumer, under the Regulations, to non-negotiated contracts. Equally, in Jordan, the protection available to the consumer against unfair terms under the adhesion contract notion is built obviously on his weakness relative to the trader.

Having said this, the final question to be raised in this sub-section is what the motive is behind the state's welfarist intervention in favour of the weak parties to contracts. The answer lies in the role that the contract plays as a mean of achieving social and economic goals. A state has no interest in leaving some sectors of its citizens vulnerable to unfair treatment; rather it will intervene to rescue them from such treatment once they have been exposed to it. Otherwise, there may be an undesirable, direct impact on the stability of the state itself. No wonder, then, that the courts in Jordan, for example, link the protection against unfair terms both before and after the enacting of the JCC to the notion of public policy, i.e. the public interest².

3. Techniques of controlling unfair terms in consumer contracts

Techniques of consumer protection against unfair terms appear in two main categories: legal techniques and economic techniques. Legal techniques are subdivided into legislative and judicial techniques, on the one hand, and private and public law techniques on the other.

¹ See, Beale H, A Hartkamp, H Kotz and D Tallon (General Editors), op cit p 21; Saleem E, *the Insurance Contract Under the Egyptian and Lebanese Laws*, Part 1, (Beirut: Addar Al-Jame'yeh, 1997), p 170 et seq (in Arabic); The opinion of the ECJ in *Shearson Lehman Hutton Inc. v TVB Treuhandgesellschaft für Vermögensverwaltung und Beteiligungen mbH* (Case C-89/91) [1993] para 18.

² See *infra*, p 29.

3.1. Economic techniques v legal techniques

3.1.1. Economic techniques

The economic techniques can be classified within the so-called “ultra-preventive control”¹, and have a role supportive to the legal techniques used by a state to challenge unfair terms. Hence, treating this issue, briefly, in this sub-section is not irrelevant.

The first important type of these techniques will be achieved when consumers gather in unions or associations, in a process which will definitely improve their position vis-à-vis businesses. *Inter alia*, this would allow for their interests to be collectively safeguarded by enabling consumers’ associations to enter into collective negotiations with traders over contractual terms on their behalf, and opening the door for the application of legal techniques using the collective action method in protecting such interests.

However, it should be clear that the role that this technique can play fluctuates from one legal system to another; although, generally speaking, various legal systems seem reluctant to grant wide powers to bodies such as consumers’ associations.

As we will see, some countries (England is an example²) grant these associations the competence to represent consumers before the courts to defend their rights in a fair, balanced contract. However, and as will also be seen³, the right of the Consumers’ Association to protect consumers in England, which comes under the Regulations, is not restricted to the stage of allegations before the courts, but extends to encompass pre-litigation stages.

Opposite to this, the JCA has not, as will be fully shown later, been granted the right to speak on behalf of consumers before the courts because of a lack of legal capacity. For the same reason, it is not expected that any collective contracts to which the JCA is party will be enforced if the issue goes to the court. This is in spite of the acknowledgment of contracts of this sort in the context of labour law (i.e. collective contracts to which the Labourer’s Association is party), which should not however be seen as a precedent since it comes by virtue of the explicit provision of S 2 of the

¹ Calais-Auloy E (Chairman), Clearing of the Market: the Mechanism for Controlling Unfair Terms (Article 7), a workshop held in Brussels Conference, Unfair Terms’ Directive- Five Years on: Evaluation and Future Perspective, 1-3/7/1999, pp 174,175.

² See *infra*, p 213 et seq.

³ See, *Ibid*.

Labour Act 1996¹. This is not to downplay the other roles that JCA (like all consumers' associations around the world) can play, notably as regards spreading information, making consumers aware of their rights and, in the meantime, causing traders to worry about their reputation.

Other less important economic techniques can be found, for example, in the self-regulation technique, which is the gathering of businesses in the form of a trade association which provides standards controlling the conduct of those businesses accepting its authority². Such standards may protect the consumer in the face of the harsh behaviour of a member business. This technique, however, is seriously defective mainly because constituting, joining and continuing with such a union is, in general, voluntary, depending on the choice of the members/targeted members. And for this reason, it often fails to deliver the aims that stand behind its establishment³.

Also, the free market notion can be deemed as a sort of economic technique of consumer protection. The role this notion can actually play in protecting consumers is debatable and was dealt with earlier in this Chapter⁴.

3.1.2. Legal techniques

3.1.2.1. Legislative technique v judicial technique

a) Legislative technique

This technique appears in one or both of the following scenarios:

The first is the Enacting of a special Act to protect consumers generally, or to protect them against unfair terms specifically, or to deal with the issue of unfair terms no matter whether or not the contract at issue is a consumer contract.

All types of control encompassed under this technique, as mentioned above, have been used under English law. On the contrary, the Jordanian legislator has never intervened in this way to protect consumers or other weak party against unfair terms. However, experience shows that the protection of weak parties in contracts has been the motive behind interventions in many fields, such as labour, tenancy, insurance and transport, which means that it shall not be surprising if the Jordanian legislator

¹ The Labour Act No 8/1996.

² Black J, 'Constitutionalising Self-Regulation', (1996) 59 MLR pp 26-28; Scott C and J Black, op cit p 40.

³ Scott C and J Black, op cit p 508.

⁴ See *supra*, p 12 et seq.

produces an Act to deal with consumer affairs including unfair contract terms. This would follow the modern trend in law which distinguishes between consumer and non-consumer contracts, putting the issue of protecting consumers in the eye of the legal concern.

In the second scenario, specific terms or types of terms are nominated as void or voidable, or as desirable and then to be imposed. This technique is widely used in England. As will be seen, both UCTA and the Regulations contain lists of unfair terms (in UCTA) and potentially unfair terms (in the Regulations). And, the Supply of Goods and Services Act 1982 and the Sale of Goods Act 1979¹ both provide for some terms to be inserted into the contract independently of negotiation between the contractors. However, the nomination is not restricted to these enactments but goes beyond them to extend throughout much other legislation.

In Jordan, the use of this device can hardly be noticed since there is no special list of unfair, or potentially unfair, terms. Instead, the nomination of such terms is scattered throughout the legislation and conventions ratified by Jordan.²

b) Judicial technique

Under this technique, either by virtue of legislation (in Latin law system adopted by Jordan) or the legal system the state follows (in common law system adopted by England), the courts have the authority to protect the weak party (the consumer) against unfair terms in contracts. So, in the Latin law system this technique seems not to be purely judge-made, but rather it may be seen as indirect legislative control. However, because consumer protection in Jordan under S 204 of the JCC is based on the adhesion contracts notion created by the judiciary, and because the courts have a wide authority in applying it, the writer views it as a judicial technique and this is a mere hypothetical division.

While it seems that this technique is of very limited importance in England, given the existence of UCTA and the Regulations³, the law in Jordan still places a significant role on it. This is clear from the fact that the main device aiming at controlling the fairness of the contract, which is the notion of the contract of adhesion, is totally in the hand of the courts. In dealing with contracts of adhesion, the courts

¹ Ss. 12-15.

² See *infra*, p 44 et seq, Fig.1.

³ On the judicial control of unfair terms in England, see *infra*, p 46 et seq.

have the authority to mitigate the oppression of the contract through altering the unfair term it includes in favour of the adherent, or ruling it out totally (the direct method) and, in some cases, interpreting it in a way benefiting the adherent party who has no say in drafting the contract (the indirect method)¹.

This appears to be at odds with the role the courts have in creating legal rules in the legal systems adopted by Jordan and England. To clarify this, it must be remembered that judicial decisions are only an ancillary source of law in the Latin system adopted by Jordan². In contrast, the role of the courts in creating the law in states adopting common law system, such as England, is rather more significant where judicial decisions are the most important source of law apart from legislation.

However, giving the Jordanian courts such authority remains in line with the general direction of the JCC central to which the issue of preventing the law from being inflexible and then unable to face ongoing legal problems.³

3.1.2.2. Private technique v public technique

From the perspective of the form of enforcement the law offers, techniques of protection can be classified into private and public techniques. Usually, the enforcement of the law is left in the hands of individuals to seek remedies. However, some laws provide for public enforcement besides private enforcement. In many countries, the law provides for the content of the contract to be controlled before presenting it to the public, or that the contract shall be subject to administrative revision even after its conclusion. The methods of such control differ from one law to another, and the extent of authority given to the body designated by the law to undertake this duty similarly varies.

Along with the private technique, the public technique has been experienced in both Jordan and England. In Jordan, the public technique is used in a very limited sphere namely in insurance contracts, and the means used to this effect is the pre-validation by a governmental Committee before proposing the contract to the public⁴. In England, however, it has been employed to serve in a much wider area covering all consumer contracts. The Regulations entitle the OFT and some qualifying bodies to

¹ S 240(2) of the JCC provides that, in contracts of adhesion, the interpretation that is favourable to the adherent party shall prevail.

² See *supra*, p 5.

³ See, on this, *Al-Far A, the Sources of Obligations in the Civil Code*, (Amman: Daruth Thaqafah, 1998), p 10 (in Arabic).

⁴ See *infra*, p 227 et seq.

negotiate with the issuers of contracts in the hope of eliminating any term seemingly unfair in the eyes of the OFT or the qualifying body considering the complaint¹, and in the case of failure they are entitled to seek injunctions by the court in favour of terminating the use of such a term.

In both countries, the public technique is carried out by administrative bodies, and therefore it would not be inaccurate to call it the administrative technique, although the court still has a role to perform according to the relevant laws in both countries.

4. Review of legal provisions aiming at protecting consumers in the face of unfair terms

4.1. Introductory remarks

At the outset, it has to be taken into consideration that the subject discussed in this section is treated in more depth in later Chapters. In fact, the Regulations and the JCC's few provisions on contracts of adhesion share the main body of the Thesis. However, there will be room for the Directive (as the father of the Regulations), the common law provisions and UCTA to be compared and discussed.

It follows from the above that the provisions of common law and UCTA are also referred to wherever necessary in the Thesis so as to illustrate the provisions of the Regulations or to evaluate the impact of these laws on the necessity and effectiveness of the protection which the Regulations generate. Such a comparison is needed since the creation of the Regulations is, in principle, a European requirement rather than an English need. This is not to belittle the role they play in filling the legal vacuum in England with regard to protecting consumers against unfair terms.

The same could be said as regards the general rules of the JCC, especially where many of the provisions which will be compared with their English counterparts have nothing to do with the provisions put in place to deal with adhesive contracts.

¹ See *infra*, p 207 et seq.

4.2. Provisions in Jordan

4.2.1. Ancillary (indirect) provisions: public policy and abuse of right

4.2.1.1. Public policy

S 164(2) of the JCC provides that the contract shall not contain a term which contradicts public policy. Despite constant references to the idea of public policy throughout the legislation¹ and the judicial rulings², there is no sufficient clarity on what it means. Perhaps this has nothing to do with the sufficiency of Jordanian law, but is rather due to the idea itself which is, as is well-known, a nebulous concept, differing from time to time and from one place to another.³

Of these enactments and rulings, only the JCC and a few judgements may provide enlightenment on the Jordanian vision of public policy. While S 163 (3) of the JCC, does not define “public policy”, it provides for some main issues to be of public policy, such as legal provisions relating to: personal status (like capacity and succession); the transfer of property; the procedures prescribed for disposition of *Al-Waqf* (Moslem trust) and its property; immovable property; the property of an interdicted person; the property of the State; the obligatory fixing of prices; and all legislation enacted to deal with consumers’ needs in exceptional circumstances.

What this Sub-section is alluding to through the examples set out above was openly suggested by one of the decrees taken by the Court of Cassation, limiting issues of public policy to those supervised by the public authority because of the need to subject them to unified rules⁴. In an earlier decision, the Court defined the term breaching the public policy as that which transgresses an imperative legal rule put in

¹ In addition to the JCC, see, for example, Public Congregations Act No 7/2004, s. 8; Investment Act No 68/2003, s. 21; Trade Names Act No 22/2003, s. 4; the Media Act No 71/2002, s. 20; the Criminal Act No 54/2001, s. 147; the Arbitration Act No 31/2001, s. 54; Patents Act No 32/1999, s. 4; Companies Act No 22/1997, s. 11; Civil Procedures Act No 24/1988, ss. 25, 71, 75 and 110; the Labour Act No 67/1971 (revoked), s. 64; Crafts and Industries Act No 9/1966, s. 5; Criminal Procedures Act No 9/1961, ss. 7, 171, and 213; the Magistrate Courts Act No 15/1952, s. 12; Tribes’ Courts Act 1933, ss. 12, 13.

² See, among many, CCRs: 2716/2003 ACC; 2100/2003 ACC; 870/2002 ACC; 575/2001 JJ 2001; 123/1999 JJ 1999; 1552/1993 JBAJ 1994 p 2947; 1225/1989 JBAJ 1991 p 1399; 343/1976 JBAJ 1977 p 184; 227/1973 JBAJ 1973 p 1370; 130/1968 JBAJ 1968 p 455; 394/1964 JBAJ 1965 p 197; 168/1959 JBAJ 1959 p 271; 45/1952 JBAJ 1953 p 75.

³ Theoretically, at least, this is how the English law, also, sees the notion (see, Grubb A and Furmston M (Editors), op cit p 868). In Jordan, and by way of example, the provisions concerning the venue jurisdiction used to be of public policy under Jordanian law and Ottoman law prior to it. At present, it is no longer so, (See CCRs: 105/1991 JBAJ 1992 p 1860; 1022/1993 JBAJ 1994 p 1547; 2317/2001 ACC).

⁴ CCR 159/1988 JBAJ 1990 p 1113.

place so as to protect the public good¹. However, resorting to boundless concepts such as the public good remains unhelpful in defining public policy. But, it can be argued that the generality and breadth of the definition is an indication of the flexibility of the notion rather than a court failure in interpreting or implementing the law. Therefore, it would be difficult, and possibly unnecessary, to restrict the courts' discretionary authority in relation to this notion if they are to be able to apply the soul of the law whenever the fixed rules do not work.

Looking at these rulings together, they resemble a good definition, one would think, which suggests that public policy is a collection of imperative rules against which the parties cannot agree because such rules relate to crucial collective interests which are important to the safety and the maintenance of the community and its prosperity². Among these are the rules aimed at policing the market in order to maintain economic growth according to economic planning. However, the notion is not restricted to the economic movement but goes beyond that to cover all activities whether they are political, social or religious. At the heart of these interests is the protection of the weak party in the legal relationship (say a contract) which is supposedly an individual matter but, eventually, has an effect on the public interest³. If weaker parties are not treated fairly, this will certainly jeopardise the safety and stability of the whole community. Building on this, public policy may have a great impact on the protection the consumer needs in the face of the use of unfair terms in contracts, and might, accordingly, be a strong rationale for intervention in favour of the consumer, as already seen⁴.

When applying this to the Jordanian case, it is evident that public policy had played, prior to the enacting of the JCC, an undeniable role in prohibiting unfair terms under the banner of protecting community interests. It was also the reason for declaring some of them null in the JCC. As an example, some of the sets of terms prohibited by S 924 of the JCC⁵ had already been prohibited by virtue of public policy. In a decision taken before the enacting of the Code, the Court of Cassation had referred to this reality, holding that in insurance contracts the insured's, or the injured person's, right in receiving remuneration is a matter of public policy and, therefore,

¹ CCR 411/1984 JBAJ 1985 p 152.

² See, *Saleem E*, op cit pp 171, 172.

³ Ibid.

⁴ See *supra*, p 22.

⁵ See *infra*, p 189 et seq.

any oppressive term put in place so as to deprive this person from such a right is void¹. This rule found its way into the JCC and became one of the categories of terms banned under S 924.

Even after the enactment of the JCC, the public policy notion still possesses a pivotal role in protecting weak parties, including consumers, against oppressive terms. This is because the JCC may fall short of covering all cases in which consumers suffer from unfair contractual terms; and, as will be seen in the next Chapter, this is the case. The provisions set for the sake of protecting weak parties against unfair terms relate mainly to the notion of contracts of adhesion, and not all consumers are adherent parties in the light of the conditions the notion assumes in the parties addressed by its provisions. For instance, one significant category of weak parties (consumers) is tenants, and these have, by virtue of public policy, been afforded the protection which they are denied under the contract of adhesion notion. The Court of Cassation's opinion is that the provisions of the Landlords and Tenants Act² are of public policy and, on this basis, the Court has nullified some terms because they contradict these provisions³.

Moreover, some fatal terms, which have never been touched by the JCC or any other Act, have been set aside by virtue of the notion of public policy to the benefit of weak parties, and especially consumers. The public policy notion was the reason behind ruling out terms aiming at depriving a weak party from the right to take the dispute to the court or altering the jurisdiction in favour of the seller or supplier. Although the motive behind the courts' intervention to nullify such terms might not be the protection of the weak party, since intervention in the name of public policy cannot be restricted to the aim of protecting weak parties, the beneficiary of such an intervention in almost all cases is the consumer. This is because the seller or supplier is the stronger party who has the intention of and an interest in not going to the court at all, or, instead, going to arbitration, or changing the jurisdiction of venue.

The Court of Cassation took the view that any term in a contract having the effect of rendering the right of litigation fruitless is void. Therefore, the term in a tenancy contract providing for the damage caused by the tenant to be allocated by the

¹ CCR 377/1973 JBAJ 1974 p 879.

² The first Act enacted for the purposes of regulating the contracts concluded between tenants and landlords/ladies was the Landlords and Tenants Act No 23/1941 which came into force on 2 Sep 1941. This Act has been amended several times and the current Act is No 30/2000 coming into force on 31 Aug 2000.

³ See, CCR 1533/1997 JJ 1997.

landlord who need not to prove the existence of such damage is void, since such a term aims at depriving the tenant from the right of defence and, subsequently, renders useless any attempt by him to litigate. This would mean that he was deprived of the right to litigate, which is against public policy.¹

On the attempts to avoid the normal way of litigation before the court through arbitration, the issue dealt with under the English Regulations' grey list², Jordanian law recognises the vital role that arbitration plays in settling disputes. However, the Court of Cassation established that any attempt to misuse the arbitration device through diverting it from the end for which it was created, which is to get an easy and fast resolution, and instead using it to exploit weak parties, goes against public policy. Therefore, the term entitling a foreign arbitrator to hear the dispute instead of the Jordanian court is void³. Similarly, the term providing for the arbitrator's award to be a final decision, with no appeal possible, is void as well⁴.

As for attempts to change the rules of jurisdiction⁵, the Court reached the verdict that the clause in a contract of maritime carriage allowing for the jurisdiction of the competent Jordanian court to be moved to a foreign court is void. This was because the provision of S 215 of the Maritime Trade Act No 12/1972 giving Jordanian courts the competence to hear disputes generating from these contracts is of public policy. Similarly, the Court reserved the jurisdiction of the District Court of First Instance of *Aqaba* in hearing a dispute over the tenancy of an estate (a flat) despite the existence of a term in the contract providing for another court to be the competent court⁶.

4.2.1.2. The doctrine of abuse of right

This doctrine is highly likely to be the ground on which the prohibition of oppressive terms in adhesion contracts is based in Jordan⁷. However, the importance of this notion, as with public policy, comes from the fact that the protection afforded by S 204 of the JCC concerning contracts of adhesion is too limited. In contrast, the doctrine of abuse of right, which covers all contracts regardless of whether they are

¹ CCR 509/1987 JBAJ 1987 p 1588.

² See *infra*, p 156 et seq.

³ CCRs 411/1984 JBAJ 1985 p 152; 1637/2002 ACC.

⁴ CCRs 140/1980 JBAJ 1981 p 49; 623/1989 JBAJ 1991 p 1244; 948/1998 JBAJ 1999 p 1880.

⁵ CCR 597/1983 JBAJ 1984 p 195. See, also, CCR 1198/1997 JJ 1997.

⁶ CCR 859/2001 ACC. On the view of common law as for ousting the court's jurisdiction, see *infra*, p 175.

⁷ See *infra*, p 187 et seq.

adhesive or not and even extends to cover non-contractual actions, goes further in protecting consumers whenever the right to include terms in a contract is misused.

The rulings taken by the Court of Cassation show nearly nothing in relation to the effect that this notion has on the usage of oppressive terms, which means that it has not been resorted to by contractors seeking to strike out such terms. However, comparable judgments taken by the Egyptian Court of Cassation have highlighted the fact that some terms in tenancy contracts have been nullified because their inclusion in the contract constitutes an abuse of right, even though these are not adhesive contracts regardless of the fact that tenants are consumers and, in any event, weak parties in need of protection. For example, the Court found that a landlord was not right in the action he brought in the hope of rescinding the contract on the basis that the tenant was in breach of one of its terms preventing him from transferring his right in using the hired property to a third party¹.

4.2.2. Main (direct) provisions

4.2.2.1. The statutory situation before the enactment of the JCC: the absence of direct protection against unfair terms

Neither the issue of consumer protection as a whole nor the issue of protecting adherents or consumers specifically against unfair terms were addressed directly under the Ottoman Journal of Legal Rules 1876 (the Ottoman Code of Civil & Commercial Rules, hereafter the Journal)². Rather, the dominant rule under the Journal is the sanctity of the contract and the terms it contains. This attitude, as expressed by S 83 of the Journal, reflects the Islamic way of treating unfair terms in general which allows for a contractual term to be legitimate unless it contravenes the *Shari'a* (Islamic law, hereafter the *Shari'a*). Following the *Hanafiyah* School of *Fiqh* (Islamic jurisprudence)³, the Journal differentiates between two types of invalid contracts: *Al-batilah* (void) and *Al-fasidah* (voidable) contracts. S 110 provides that a void sale contract is one that is basically and descriptively unlawful in its base, subject matter, purpose or that is deficient in the form prescribed by the law for its

¹ See *Lashob M*, the Adhesion Contract Under the Algerian and the Comparative Laws, a Master Dissertation, University of Algeria, Algiers, 1987, pp 167, 168 (in Arabic).

² According to S 1448 (1) of the JCC, this legislation is still in force in Jordan to the extent that it does not contravene the provisions of the JCC.

³ One of the four famous Schools of thought, established by *Abu Hanifah Al-Nu'man* in the eighth century AC. The rest are: *Al-Malikiyah*, *Al-Shafiyah*, and *AL-Hanbaliyah*, established by: *Malik*, *Al-shafe'y*, and *Ahmad Ibno Hanbal* respectively.

conclusion, and that such a contract has no effect and cannot be ratified. A voidable sale contract is, according to S 109, one which is lawful in its base but not in its description, and that once the reason of its invalidity is removed it becomes valid.

In the writer's view, there are several reasons to believe that the provisions of the above two Sections are not restricted to sale contracts, as a first glance would suppose:

Firstly, these Sections reflect, as mentioned above, the Islamic Jurisprudence, which is the source of all the provisions of the Journal, and which does not restrict them to sale contracts.

Secondly, the above Sections are the only provisions in the Journal addressing the issue of the invalidity/avoidance of contracts. It is inconceivable that other contracts not belonging to the category of sale contracts are left without provisions regulating when they are valid and when they are not.

Thirdly, these Sections are the origins of the Jordanian provisions on the issue of the validity of contracts which appear in Ss 168-170 of the JCC, and these are not restricted to sale contracts.

The importance of mentioning these provisions lies in the fact that one of the reasons rendering the contract *fasid* (voidable) is when it contains a *fasid* (voidable) term. This brings us to the question of what makes a term *fasid*. According to the *Hanafiyyah* School of Islamic jurisprudence, which is adopted by the Journal, the term of the contract is *prima facie* valid as long as, on the one hand, it is not prohibited by the *Shari'a*, and, on the other hand, that it is a natural result or requirement of the contract (such as the term giving the vendor the right to possess the good until the price is paid by the purchaser¹), or has the effect of emphasising the contract or adapting its content (such as the term stipulating that the purchaser shall provide a property by way of mortgage to the benefit of the seller, ensuring that the former will fulfil his

¹ See, the Journal, s. 186.

obligations¹), or it is not to the mere benefit of one of the contracting parties unless tolerated by the customs and usages.

This attitude left the door wide open for contracting parties to include in the contract any terms they wanted within the limits indicated above. However, the last condition in the above list represents a provision leading to some hope with regard to consumer protection. The reason for prohibiting any term not emphasising the contract or constituting a natural requirement of it, but which is included only in favour of one party, has nothing to do with the protection of the consumer or the weak party. Rather, it is concerned with easing the execution of the contract and closing the door in the face of any sort of usury, which is utterly odious under Islamic law to the extent that any benefit generated from a contract exceeding what it naturally generates shall, in principle, be deemed usury². Even so, the consumer or the weaker party in the contract could find a shelter in this provision since such terms are, normally, exploited by the stronger party who is not, for sure, the consumer to take advantage on the account of the latter. What could undermine the effect of this provision, however, is the reservation that it should not go against the custom or usage, which means, in practice, that the majority of contractual terms of this kind are immune from the prohibition.

If this provision had any positive impact prior to the enacting of the JCC, the case is not so after that, despite the fact that the Journal remains an operative statute. This is because some of these conditions are no longer the same under the JCC. Although it virtually replicates the earlier conditions, the JCC enters a crucial amendment striking the prohibition of terms which affect the balance of the contract in the manner seen above. The approach taken by the JCC in S 164 is to leave it open to the contractual parties to include the terms they want insofar as this is consistent with the law. After referring, in Para (1) of this Section, to the parties' right to include any term that emphasises or adapts the contract, Para (2) provides for the parties to include in the contract any term beneficial to one of them or both of them unless it is prohibited by law. The stand of the JCC can be attributed to two reasons:

¹ See, *ibid*, s. 187.

² See, The Ministry of Islamic Affairs, Saudi Arabia, 'The position of usury', <http://moamlat.alislam.com/Display.asp?f=Page2113&id=1153&t=sub&idhits=5365&diac=1> > (in Arabic).

Firstly, that the issue of consumer and weak party protection was not among the motives for the amended provision, and, then, such parties lost nothing, in the view of the legislator, as a consequence of amending that provision.

Secondly and more significantly, one can venture to say that the legislator was not aware, when enacting the JCC, of the importance of the amended provision in tackling imbalanced terms. Or, on the assumption that he was aware of this fact, the triggering of the notion of the contract of adhesion in the JCC for the first time in Jordan might have been seen by the legislator at that time as an outstanding innovation that would demolish the element of unfairness in contracts, and therefore that there was no need for the amended provision which is of limited impact and would put at risk, at the same time, the parties' right to contract freely. This analysis seems to be upheld by the fact that, on the issue of freedom of contract, the Jordanian legislator in the JCC has abandoned the *Hanafiyah* School of Islamic jurisprudence which was the favourite School to the Ottoman legislator, turning instead to the *Hanbaliyah* School which is, in the words of the Explanatory Memorandum, "the best School that makes it easy for the people to contract freely"¹.

It can be concluded from all the above that the situation under the Journal, as with the principle situation adopted under the JCC (leaving aside the provisions dealing with contracts of adhesion), supports the freedom of contract. Although this attitude does not, if taken widely, serve the issue of consumer protection against unfair terms, it expresses the sanctity of the contract under the *Shari'a* as ideally represented by the Prophet (PBUH)'s narration stating that:

“المسلمون على شروطهم إلا شرطاً حرم حلالاً أو أحل حراماً”². This narration can be translated as follows: “Muslims shall respect the stipulations they agree on as long as they do not contradict the *Shari'a*”.

¹ The Explanatory Memorandum of the JCC, Part One, published by the Jordanian Bar Association, p 93 (in Arabic).

² Collected by *Al-Termithy and Abu Daood*, (see, the Ministry of Islamic Affairs – Kuwait, *Al-Waei Al-Islami* Magazine, 'http://alwaei.com/topics/current/article.php?sdd=1054&issue=480' (in Arabic).

4.2.2.2. The current situation: provisions in the JCC

4.2.2.2.1. The notion of contracts of adhesion

The notion of adhesion contracts, as represented by S 204 of the JCC, is a central topic of this Thesis in terms of the Jordanian part of the study. This is because it is the only general provision put in place in Jordanian law to deal with unfair contract terms. The discussion which follows introduces the background in which this notion originated and developed.

a) The story of contracts of adhesion and the problems they present¹

With the coming of the nineteenth century, the traditional way of entering contracts - based on the individuality of the parties which involved free negotiation and face-to-face dealing, and administered by the market economy through the law of supply and demand - diminished as a result of the appearance of the so-called “contracts of adhesion”. Such contracts have, generally speaking, spread across the world to cover all the countries irrespective of their political or economic dogma, whether capitalism, socialism or communism, though they have appeared more apparently in countries embracing the last two ideologies due to the huge monopolistic utilities they have established as instruments serving in the application of these ideologies.

This sort of contract can be fundamentally distinguished by their competence to be used in any agreement concerning a specific good or service with every member of the public, and by the absence of the possibility of negotiating their terms². Due to these characteristics they are widely known as “take it or leave it contracts”³.

The most important factor that played a role in triggering such a drastic development in the realm of contracts is to be found in the demands of the industrial revolution, which yielded mass production by using new technology opening the door for producing unlimited numbers of typical articles. This phenomenon simultaneously

¹ Generally, “contracts of adhesion” mirror “standard contracts” in England. They have arisen as a result of the same factors, and grew in the same environment, created by the industrial revolution. So, to a large extent, they are typical. And, therefore, the historical background of the contracts of adhesion treated in this sub-section is applicable to standard contracts. It is worth remembering, however, that there might be other conditions to be met in the adhesive contract other than standardisation, (On this, see *infra*, p 100 et seq).

² For this reason these contract are always compared with bargaining contracts, (See, *Al-Ateer A, Terrestrial Insurance in Jordanian Law*, (Amman, *Daruth Thaqafah*: 1995) p 93 (in Arabic)).

³ More extremely, some commentators draw an analogy between entering into a standard form contract and signing a blank cheque (See Rakoff T, ‘Contracts of adhesion: an essay in reconstruction’, (1983) 96 Harv. L. Rev. p 1200).

required the mass production of standardised contracts¹. This led to the stage of industrial capitalism which has the effect of widening the economic gap between suppliers and consumers, and even among suppliers themselves². A corollary of such a disparity was the significant inequality of bargaining power between suppliers and consumers. The former at least have some of the advantages of: the size, allowing them to deal with a large number of persons not on an individual basis; the availability of advice and time before concluding contracts; and the non-competitive position. Consumers, however, usually have none of the foregoing advantages.

From the standpoint of enterprises, standard form contracts have evident commercial advantages for businesses dealing with a considerable number of consumers and suppliers in that they do not need to undertake impractical, time-consuming negotiation³. Moreover, standardised terms are an important element in calculating and allocating risks, allowing for those which cannot be calculated (such as unforeseeable contingencies) to be dismissed altogether. This is to say that standard form contracts are designed to ensure the certainty of results and, in some cases, to avoid undesirable consequences for the form issuer.⁴

Not only sellers or suppliers benefit from using this kind of contract. It could also be said that the whole of society, including consumers, benefit from lower prices resulting from the reduction of administrative costs accompanying the use of standard form contracts.⁵

However, standard form contracts have a bad reputation due to the absence of freedom of contract. It follows that they should not be tolerated or approved without scrutiny, even when they arise as a result of business necessities, or of satisfying practical needs. The problems with this kind of contract are threefold. Firstly, they are imposed by massive companies with strong bargaining power; secondly, they cannot be avoided, since the vast majority of present-day contracts are of this kind⁶; and thirdly, they are not, and are designed not to be, read by consumers, and if read, they

¹ Yates D, *Exclusion Clauses in Contracts*, 2nd Ed, (London: Sweet & Maxwell, 1982) p 1; Kessler F, 'Contracts of adhesion – some thoughts about freedom of contract', (1943) Colum. L. Rev. p 631.

² Lashob M, op cit p 9.

³ Yates D, op cit p 2.

⁴ Ibid, p 3.

⁵ See Slawson W, 'Standard form contracts and democratic control of lawmaking power', (1971) 84 Harv. L. Rev. pp 531, 552; Yates D, op cit p 2.

⁶ In Slawson's eyes, "Standard form contracts probably account for more than ninety-nine percent of all contracts now made", (Slawson W, op cit p 529).

are not comprehensible enough to be understood¹. Such characteristics shift the nature of the contract from being a yield of the parties bilateral will to be a one-sided outcome and, in many instances, a mere mechanism to run utilities under the banner of the law of economics (*droit economique*)². No wonder then that the new system of contracting gives the contractual relationship the taste of oppression insofar as it is used as a device to exploit the economic power enabling the party who has it to impose an undesirable contractual situation on the other contracting party³.

As a reaction to the appearance of this sort of contract, jurists and judges in France⁴ at the beginning of the twentieth century called for the adoption of a new regime to police these contracts and to prevent them from affecting too harshly the weaker contracting parties. *Salleilles* was the first jurist to note the necessity of protecting the weaker contracting party against the adhesive provisions. He suggested that the dominant principle of “the sovereignty of the will” or “the contract is the law of the contracting parties”, which respects highly the parties’ choices (i.e. that they are free to contract, free to arrange their obligations under the contract without any external interference), should not be applied to contracts of adhesion.⁵

The following two sub-sections of this Chapter and many sections of the later Chapters address the main features of this type of contract, its development, and the techniques used in law, mainly in the JCC to resist the unfairness it produces.

b) The notion of the contract of adhesion and Islamic Law (the *Shari’a*)

As the notion of the contract of adhesion is not Islamic, it has not been the subject of discussion by Islamic jurists. Nonetheless, the roots of the notion might be found in Islamic law in that it is clear that monopoly is repugnant to the *Shari’a* which devotes

¹ See, Rakoff T, op cit p 1179; Slawson, W op cit p 530; *Imran A, Consumer Protection During the Conclusion of the Contract*, (Alexandria: *Monsha’at Al-Ma’arif*, 1986), p 28 (in Arabic).

² The “*droit economique*” term means that there is a strong relationship between the law and the economy which entails that they affect one another and aim to serve the human society. (See *Barteli H, Science Economique et travail, Trav. de l’ universit  de grenoble*, 1975 p 44, cited in *Lashob M*, op cit p 11).

³ Yates D, op cit p 2. See also *Lashob M*, op cit pp 10,11.

⁴ England, which was at the heart of this development, experienced the same circumstances led to the born of the theory of contract of adhesion. However, the legal response here was different, (See *supra*, p 36 n 1).

⁵ *Berlioz G, Le Contract d’ Adhesion*, Paris, 1973, p 5, cited in *Lashob M*, op cit pp 5,6.

many of its provisions to fighting against monopolization as a form of unjust exploitation.¹

In the face of the monopolistic power appearing in earlier stages of the Islamic state, the *Shari'a* prohibited many transactions that may lead to the appearance, or could constitute an aspect, of monopolisation, besides the prohibition of monopolisation itself. The first is the contract concluded exclusively between an urban seller and a Bedouin (a desert inhabitant or person dwelling outside the city). Such a transaction would, of course, benefit the seller who would appear to be a monopolistic power able to sell at a very high price. At the same time would harm the urban population, who would be deprived of a necessary good, as well as the Bedouins who would be obliged to buy at an uncomfortably high price.²

The second is a transaction made by way of "*Talaqqy Al-rokban*" which was deemed, on one interpretation, as a form of exercising monopoly. According to this interpretation, a contract made by "*Talaqqy Al-rokban*" happens when a seller hears that a big caravan loaded with goods is approaching a city or a country. He then meets it outside the city or country and buys all the goods, a situation which will allow him to practice monopolisation over the goods sold as he will be the sole trader of the goods the caravan brings.³

What should be noted is the strong link in the *Shari'a* between the exercise of monopoly and the necessity of the goods. It seems that the latter is a substantial requirement in prohibiting the former. In the opinions of three of the most famous scholars of the *Shari'a* (*Al-Shafe'y*, *Ibno Hanbal*, and *Mohammad Ibnol Hassan*), the repugnancy of monopoly under the *Shari'a* is based on three conditions, among them that the monopolised good is a food and that such monopolisation may harm the public. Similarly, *Imams Malik and Abu Yosof* concentrated on the harmful nature of the prohibited monopolisation, though they did not confine the monopolised goods to food but rather widened their ambit to encompass all goods as long as the market would be badly affected had it appeared in need of them.⁴

¹ See The Explanatory Memorandum of the JCC, op cit p 113; *Hussain N, the General Theory on the Criminal Protection of the Consumer*, (Cairo: Annasr Al-Thahabi Press, 1998), p 10 (in Arabic); *Al-Sharnabasi R, Consumer Protection under the Islamic Jurisprudence*, 1st Ed (Cairo, Al-Amanah: 1404 Islamic Calendar (1984)), p 18 (in Arabic).

² See, *Assanhory A, the Sources of the Right Under the Islamic Law: a Comparative Study with the Western Jurisprudence*, Part 1 (Cairo: Dar Unnahdah Alarabiah, 1967), pp 90, 91 (in Arabic).

³ Ibid, p 87 et seq.

⁴ Ibid, p 83 et seq.

It is interesting that the *Hanafiyyah* School of Islamic jurisprudence did not concentrate merely on the ethical face of the problem, tying it to the trader's attitude as to whether or not to practice monopoly. Rather, the ruler and/or the court are entitled to ban monopoly in practice. This could be achieved by pricing the monopolised goods, in a process which had no more than informational benefit, since the transaction in question would be valid even when made under monopolisation so long as the people were aware of the reasonable price of these goods and therefore they had the opportunity to refuse to enter into the contract. Alternatively, the ruler and/or the court are authorized to force the trader exercising monopolistic power to sell the goods at a reasonable price, and two cases of disobedience after notification would lead to him being jailed.¹

To sum up, it is by no means surprising that the *Shari'a* has not recognised from the beginnings the theory of contracts of adhesion, since this is of recent origin as a result of practical needs which have arisen in the last four centuries. In the meantime, it must be borne in mind that such theory bears relation to Islamic philosophy aiming at protecting public and individual interests, as is obvious from the prohibition of monopoly and some of its causes.

c) The legal nature of the adhesive transactions

The legal nature of the adhesion contract has been the subject of studies of many writers, whose perspectives on this issue has been divided on the this issue in three directions:

1- The route taken mainly by public law jurists who argued that any transaction appearing to be concluded under adhesion is not of a contractual nature. The reason behind this reading was the predominance of the seller or supplier's one-sided will over the whole contractual process, represented by the absence of negotiation. On this ground, it is the disparity in bargaining powers of the parties to the contract that motivated these jurists to deny its contractual nature. Alternatively, a contract of this sort, according to this perspective, is an "institution" in the form of a law or regulation generated by the issuer's sole will.²

¹ Ibid, pp 83, 84.

² See, Ibid, p 79; *Sultan A, the Sources of Obligations Under the Jordanian Civil Code*, 1st Ed (Amman: the University of Jordan Press, 1987), pp 51,52 (in Arabic).

Duguit, who was one of the partisans of this direction, noted that the contract of adhesion has nothing to do with the traditional theory of contract except in name. If an adhesion contract was put under the microscope, it would be obvious that such a contract is a mere “*volonte reglementaire*” (order) made by a sole will in the hope of being joined silently by another will.¹

Likewise, *Salleilles* took the same view when describing contracts of adhesion as contracts “in which one predominant unilateral will dictates its law to an undetermined multitude rather than to an individual...as in...transportation contracts of big railroad companies and all those contracts which, as the Romans said, resemble a law much more than a meeting of the minds”². The result is that the source of the legal relationship between the parties to the contract of adhesion cannot be found in the contract itself; rather it is embodied in the sole will of the issuer of the contract³.

The difference between *Salleilles* and *Duguit*, however, lies in the issue of interpretation. According to *Salleilles*, it is the will of the issuer which should be taken into consideration in interpreting the contract, since there is no joint will of the contracting parties. This process looks like the interpretation of the law in that the court struggles to reach the legislator’s will. In *Duguit*’s view, while it is true that the contract of adhesion is in a position similar to the law, its interpretation is not similar to that of the law because the court is obliged not only to explore the will of the issuer but also, and in the first place, to take into account the interests of the utility itself, the public, and the consumers.

To understand the stance taken by *Duguit*, one should pay attention to the fact that he believed that the contract of adhesion is a sort of law, but did not envisage the possibility that such a law could be created by the will of a contracting party. Rather, he argued that the law is the creature of public interest or, to borrow his expression, “the social requirements”. What is interesting in this context is that such a view is the rationale for the court’s intervention in the contractual process, exculpating its authority to amend or eliminate the burdensome terms as they may harm the utility which is party to the contract before anybody else.⁴

¹ See *Lashob M*, op cit pp 29, 30.

² This description is quoted by *Ehrenzweig* from *Salleilles*’s book, *de la Declaration de Volontè*, (1901), p 229, (see, *Ehrenzweig A*, ‘Adhesion Contracts in the Conflict of Laws’, (1953) 53 *Colum. L. Rev.* p 1075, n 17).

³ *Salleilles R*, *de la Declaration de Volontè*, (1901), pp 229, 230, cited in *Lashob M*, op cit pp 39, 40.

⁴ *Duguit L*, *l’ Etat et le Droit Objectif*, pp 55,432; *Duguit L*, *les Transformations de Droit Privé*, p 115 et seq, both are cited in *Lashob M*, op cit pp 41.

2- The second direction, which is dominant in the legal realm, is that adopted mainly by civil law jurists who suggested that the absence of negotiation and the inequality of bargaining positions between the issuer of the contract and the adherent should not preclude the transaction from being a real contract, even if it represents a special category of contracts. These jurists argued that the absence of negotiation does not amount to duress, since the pressure to which the weaker party is subjected is not due to psychological factors, but rather has to do with social and economical factors which do not have the effect of undermining his consent. Such absence can be treated not by denying the contractual nature of a real contract or even its validity, nor by providing the court with open authority to interpret the contract, but by strengthening the weaker party economically through establishing consumers' associations and legally through legal intervention aimed at policing contracts of adhesion.¹

In their response to the second basis on which the supporters of the idea of “non-contractual nature of adhesion contracts” relied (i.e. the inequality of economical powers between the parties to the adhesion contract), the jurists supporting the “contractual nature of adhesion contracts” rightly refuted such an argument, suggesting that economic inequality between parties to the contract is a natural phenomenon which can be found even in non-adhesive contracts.²

This opinion seems to be the closer to the correct legal logic, since, firstly, it is not easy to attribute the adhesion contract to the sole will of one of its parties. It is true, legally speaking, that the sole will can give birth to an *actiones legis*, but such an action cannot be called a “contract”. Furthermore, the supporters of the “non-contractual nature direction” may find themselves unable to explain the binding nature of the adhesion contract on the weaker party who is not party to it. This is because this contract is, pursuant to their opinion, a sole-will creature, and it is more than axiomatic that the action based on a sole will cannot transcend to oblige the others who are not part of the *actiones legis*³. Furthermore, the authority to generate

¹ See Morqus S, *Al-Wafi: Commentary on the Civil Code - Part 2, the Obligations*, 4th Ed (Cairo: Sadir Library Press, 1987), p 184 (in Arabic); Assanhory A, *the Sources of the Right Under the Islamic Law: a Comparative Study with the Western Jurisprudence*, Part 1 (Cairo: Dar Unnahdah Alarabiah, 1967), pp 79,80 (in Arabic); Assaddeh A, *the Theory of Contract in the Arabic Countries Law*, (Beirut: Dar Unahdhah Al-arabiah, 1974), p 141 (in Arabic).

² Assanhory A, *Al-Waseet in the Civil Law*, Part 1, 3rd Ed (Beirut: Al-Halabi Publishing Ltd, 1998), p 247 (in Arabic).

³ Ss 208 and 209(1) of the JCC concentrate on this legal rule by providing respectively that “the contract shall not prescribe an obligation on a third party but it may earn him a right” and “ if a person

laws of any form is one of the aspects of sovereignty that the public authority has never been ready to leave it be practiced by individuals or even utilities¹.

May be for all the above reasons, the Jordanian legislator, like many Arabic legislators², prefers the direction which supports the contractual nature of adhesion transactions, and therefore treats the problem of contracts of adhesion within the Civil Code.

3- In between the above two directions, there is a third perspective which suggests, generally speaking, that the contract of adhesion has both contractual and non-contractual elements. Being in this position does not, however, mean that the jurists supporting this opinion are of one colour. *Demogue*, who seemed to be of this opinion, acknowledged the contractual nature of such a contract, but suggested that it includes a private benefit which is of the essence of the public interest³. On the other hand, there is another approach within this direction which suggests that the contract of adhesion is a mixture of contractual and regulative provisions⁴.

4.2.2.2.2. Scattered rules designed for specific contracts

Some rules in Jordanian law provide some relief to consumers against unfair terms in specific contracts. Such rules are abundant in English law⁵. However, because of their specificity and the existence of general laws dealing with the issue of unfair terms, they appear to be of little importance in England. In Jordan, rules of this sort are, as Figure 1 below shows, very limited and, albeit specific, have considerable importance in the light of the fact that the field of consumer protection against unfair terms suffers, as will be seen throughout this study, from a lack of sufficient law. It is, therefore, important to mention them here.

undertakes to render a third party bound by some obligation, the third party shall be free to fulfil the undertaking of the undertaker who will be, alone, responsible for compensating the party to whom the undertaking has been made if the third party refuses to execute that undertaking”.

¹ This is, also, the opinion of *Dereux* (see, *Lashob M*, op cit p 37).

² For example, the Egyptian Civil Code, ss. 100, 149; the Iraqi Civil Code, s. 167; the Syrian Civil Code, s. 101 (See, The Explanatory Memorandum of the JCC, op cit p 114).

³ *Assaddeh A*, op cit p 141, n 1.

⁴ *Gouionien, le Principe de l'Autonomie de la Volonté, Thèse, Dijon, 1912, pp 227-303, cited in Lashob M*, op cit p 51.

⁵ See, for example, Disability Discrimination Act 1995, s. 26; Consumer Protection Act 1987, s. 7; Public Passenger Vehicles Act 1981, s. 29; Consumer Credit Act 1974, s. 173; Solicitors Act 1974, Ch. 47, s. 60(5); Defective Premises Act 1972, s. 6.

Name of the Act/Convention¹	Section(s) No	The provision(s)
Warsaw Convention for the Unification of Certain Rules Relating to International Carriage by Air, 1929.	23(1)	“Any provision tending to relieve the carrier of liability or to fix a lower limit than that which is laid down in this Convention shall be null and void...”
Maritime Trade Act No 12/1972.	214 215	A term providing for the liability of the carrier as a result of the loss or damages caused to the goods to be under the sums specified by the Act shall be void. A term which has the effect of exempting the carrier from the liability that he bears under the law; or changing the burden of proof to his benefit; or going against the rules of jurisdiction shall be void.
Athens Convention relating to the Carriage of Passengers and their Luggage by Sea, 1974.	18	“Any contractual provision concluded before the occurrence of the incident which has caused the death of or personal injury to a passenger or the loss of or damage to his luggage, purporting to relieve the carrier of his liability towards the passenger or to prescribe a lower limit of liability than that fixed in this Convention except as provided in paragraph 4 of Article 8, and any such provision purporting to shift the burden of proof which rests on the carrier, or having the effect of restricting the option specified in paragraph 1 of Article 17 [allocating the jurisdiction], shall be null and void...”
The JCC	270 506(1)	A term excluding the liability of the party arising under tort shall be void. A term absolving the vendor from the liability for the price of the property he sold in case it is found to be belonging to a third

¹ It can be understood from S 24 of the JCC that the provisions of the conventions ratified by Jordan have advantage over the local legislation. This Section provides that the provisions dealing with the law applicable to the dispute (Ss 11–23 of the JCC) shall not be applicable if there is a provision to the contrary in an international treaty to which Jordan is a party.

The JCC	<p>640</p> <p>790</p> <p>1343, 1398</p>	<p>party shall be void and the whole contract shall be voidable.</p> <p>A term in the loan contract providing for a benefit in favour of the lender in excess of securing the latter's right shall be void.¹</p> <p>A term intended to exclude or limit the liabilities of the independent contractor or the engineer arising when the building collapses shall be void.</p> <p>A term in a mortgage contract providing for the ownership of the mortgaged property to be shifted to the mortgagee should the mortgager be unable to satisfy his obligation under the contract shall be void.</p>
United Nations Convention on the Carriage of Goods by Sea (The Hamburg Rules) Hamburg, 1978.	23 (1)	<p>"...A clause assigning benefit of insurance of the goods in favour of the carrier, or any similar clause, is null and void".</p>
Montreal Convention for the Unification of Certain Rules for International Carriage by Air, 1999.	<p>21</p> <p>26</p> <p>47</p>	<p>"For damages arising under paragraph 1 of Article 17² not exceeding 100,000 Special Drawing Rights for each passenger, the carrier shall not be able to exclude or limit its liability".</p> <p>"Any provision tending to relieve the carrier of liability or to fix a lower limit than that which is laid down in this Convention shall be null and void..."</p> <p>"Any contractual provision tending to relieve the contracting carrier or the actual carrier of liability under this Chapter or to fix a lower limit than that which is applicable according to this Chapter shall be null and void..."</p>
The Banks Act No 28/2000.	40(a)	<p>A term stipulating that the party who seeks to benefit from services of the Bank must enter a contract with an alliance to that Bank shall be void.</p>

¹ This provision reflects the Islamic attitude towards usury entailing that any loan shall be free of whatsoever monetary benefit to the lender. However, the Jordanian legislator restricts this provision to civil contracts; therefore, it is not applied to commercial contracts.

² And this Paragraph states that "The carrier is liable for damage sustained in case of death or bodily injury of a passenger upon condition only that the accident which caused the death or injury took place on board the aircraft or in the course of any of the operations of embarking or disembarking".

<p>Carriage of Goods by Roads Act No 46/2002.</p>	<p>22(a) 33</p>	<p>A term excluding or limiting the legal liability of the carrier arising as a result of damages he, or his subsidiary, causes shall be void. A term stripping the competence of the Jordanian courts to hear the dispute over the contract, except in case of arbitration, shall be void.</p>
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Fig.1. Miscellaneous terms which affect consumers declared unfair under Jordanian law.

4.3. Provisions in England

4.3.1. Common law

English common law has no general, open test of fairness. This was due to the perception, built on the notion of the freedom of contract, that the fairness or balance of the contract, in the absence of duress, fraud and incapacity, is the business of the parties and not the court¹. However, this does not mean that courts were not concerned with the substantive fairness in reality. Rather, they preferred to establish the invalidation of terms on the basis of procedural defects, even though it was the substantive unfairness which was actually targeted. Hence, common law involved various indirect sets of rules to control unfair terms in contracts, the most important of which are incorporation of terms and construction. These are discussed very briefly below.

4.3.1.1. Incorporation of terms

According to this rule, the party can rely upon the term only if it is effectively incorporated into the contract, and the term will not be deemed so unless he takes adequate (reasonable, fair) steps to bring it to the attention of the other party². This rule is grounded on the rationale of consensus; i.e. that the term has received the acceptance of both parties. However, the form of the step that draws the term to the attention of the other party is not fixed, but is rather a question of fact which differs

¹ Howells G and S Weatherill, op cit pp 306 et seq; Devlin P, *the Enforcement of Morals*, 11th Ed (Oxford, Oxford University Press, 1989), p 47. See, also and as an example, *Photo Production Ltd v Securicor Transport Ltd* [1980] AC 827.

² This rule was laid down by the Court of Appeal in *Parker v South Eastern Railway Company* (1877) 2 CPD 416. On this, see Beale H, A Hartkamp, H Kotz and D Tallon (General Editors), op cit p 498.

from one case to another¹, and it is for the party seeking to benefit from the term to prove its existence. Such an adequate step could be achieved by, for example, “printing [the term] in red ink with a red hand pointing to it”².

The shortcoming of this rule, however, stems from the fact that it does not cover signed documents regardless of whether the signing party is aware of the term in question or not. Thus, the party will be bound by the contract once he signs it even if he does not read the contract or the included term is in “regrettably small print”³.

This assertion will not be affected by the fact that the consumer can benefit from the remedy of rectification, available under equity, to rewrite the document in his favour if, and only if, the terms of the document do not accord with the true agreement concluded between him and the other party. This rule is applicable only to mistakes arising from the way in which the transaction has been expressed in writing, and not to mistakes occurring in the transaction itself.⁴

Therefore, the consumer who is obliged by a term in a signed document with which he was not acquainted will not find protection in the rule on rectification because such a rule has nothing to do with the latter case. The rule on rectification supposes that both parties are fully aware of the terms of the transaction, but that the instrument in which such terms are expressed falls short of expressing the true agreement because one or more terms have been omitted, added or expressed incorrectly. In other words, there are two transactions: the one agreed between the parties and the one the document records. The case which is treated by the incorporation rule is one where a party to the contract is not acquainted with the disputed term, and, therefore, it was the duty of the other party who wants to rely on that term, to draw his attention to it adequately. This is not covered by the rectification remedy which does not generally apply to unilateral mistakes.

4.3.1.2. Construction

Even if the term has been incorporated into the contract there will be a chance to render it ineffective through the rules of construction, chief among which is the *contra*

¹ See, *Laceys Footwear (wholesale) Ltd v Bowler International Freight Ltd* [1997] 2 Lloyd's Rep 369, Brooke J.

² *Thornton v Shoe Lane Parking Ltd* (1970) 2 QB 163, Lord Denning, repeating his expression in *J. Spurling, Ltd. v Bradshaw* [1956] 2 All ER 121.

³ *L'Estrange v F Graucob Ltd* [1934] 2 KB 394. See, also, *Thompson v London, Midland and Scottish Railway Company* [1930] 1 KB 41.

⁴ See, McGhee J (Editor), op cit p 331 et seq.

proferentem rule. This doctrine is deployed mainly in relation to exemption clauses, and entails that the term must be construed strictly against the party who put forward such a term and seeks to rely on it.

The scope of the common law *contra proferentem* rule was, in some cases, unclear, forming a source of uncertainty. Examples of this could be found in *K Szymanowski & Co v Ernest Beck & Co Ltd*¹. In this case, the contract included a clause whereby goods delivered were deemed to be in satisfactory condition unless a complaint was made within 14 days of receiving them. The clause was declared ineffective to exclude liability for short delivery (i.e. for goods not delivered) despite the fact that the complaint was made more than 14 days after receiving the goods. This finding was seen as an attempt by the court to stretch the legal principle to achieve the aim of curing a lack of balance at the expense of the certainty of the law². After a decision of this sort, traders will come to the conclusion that the wider the term is the less likely they will be subject to such a decision, but it will not be guaranteed that this will be the case.

Even worse, in *Hollier v Rambler Motors (AMC) Ltd*³ the Court of Appeal declared a clause excluding liability for “damage caused by fire to customers’ cars on the premises” as ineffective on the basis that it did not cover liability for negligently inflicted fire damage because there was no explicit reference to negligence. Such a decision was seen as coming close to rewriting the contract to meet what the court perceived to be fairer, because what the court pronounced here has nothing to do with construction, but is rather a process of finding ambiguity where none exists⁴.

On this case, it could be added that the Court decision was a mere expression of aversion towards exception clauses in that it rendered the clause fruitless in all cases. By way of imagination, there are three situations that might be targeted by such a broadly worded clause. The first situation is intended fire damage. The clause could not, of course, cover this situation because it is a crime the responsibility for which cannot be excluded by a contractual term. The second situation is where the fire was

¹ [1923] 17 Ll. L. Rep 97. See, also, *Wallis, Son & Wells v Pratt & Haynes* [1911] AC 394; *Andrews Brothers (Bournemouth) Ltd v Singer & Co, Ltd* [1934] 1 KB 17; *White v John Warrick & Co Ltd* (1953) 1 WLR 1285.

² Dickie J, the Impact of EC Directive 13/93 (Unfair Terms in Consumer Contracts) in the UK, a Master Dissertation, the University of Leeds, 1996 p 60.

³ [1972] 2 QB 71.

⁴ Howells G and S Weatherill, op cit p 309; See, also, Bradgate R, Experience in the United Kingdom, a paper presented in the Brussels Conference, the ‘Unfair Terms’ Directive- Five Years On: Evaluation and Future Perspective, 1-3/7/1999 p 36.

caused neither intentionally nor negligently. In this case the repairer would not be responsible for the damage since he was a bailee, and therefore it can be said that this case was not the aim of such a clause. The final situation is negligence. This was the only situation in which the repairer could benefit from the clause, and it is plausible that the clause was included to cover it. Ironically, the Court stipulated that negligence should have been mentioned overtly, whereas it was the only case that, logically, the clause targeted. Therefore, it is right to say that the clause was rendered legally and practically meaningless in the name of hostility towards exclusion clauses.

However, these were not the only cases in which the courts' authority in interpreting terms was used to serve goals beyond construction. Rather it seems that it was a trend involving a significant number of cases. The words of Lord Diplock in *Photo Production Ltd v Securicor Transport Ltd*¹ highlighted this trend. His Lordship pointed to the fact that "the reports are full of cases in which what would appear to be *very strained constructions* have been placed upon exclusion clauses, mainly in what today would be called consumer contracts and contracts of adhesion".

4.3.1.3. The common law techniques: a closing note

As a general note on common law devices, it was suggested that, along with the uncertainty they create which confuses those contractors who have to deal with them, they are also ineffective. With some skilled drafting, they can easily be beaten. So, if a term was "clearly worded and effectively incorporated into the contract", it will be enforceable against the other party although it might be unfair.²

Thus, it is clear that the common law tactics put in place to control unfair terms could not hide the need for statutory intervention which was achieved with the arrival of UCTA and, with regard to consumer contracts specifically, the Regulations. It was suggested that the birth of the latter pieces of legislation would have the effect of reducing the dependence on such tactics with the result that they would not be needed any more³. This is seemingly true. Logically, when courts find direct, explicit provisions allowing them to impose what they believe to be fair, they will not resort to indirect techniques. However, this is not to say that indirect techniques have

¹ [1980] AC 827.

² Bradgate R, op cit p 36.

³ Lowe R and G Woodroffe, *Consumer Law and Practice*, 5th Ed (London: Sweet & Maxwell, 1999) pp 121, 123; Nebbia P, *Unfair Terms in Consumer Contracts: English and Italian Law on Unfair Terms in the Light of Directive 93/13*, a PhD Thesis, University of Southampton, 2003 p 10; Dickie J, op cit p 60.

disappeared entirely. There is evidence that they are still able to play a role in the era post the enactment of UCTA and the Regulations¹. But, as has been said with regard to the *contra proferentem* rule², questions of incorporation and interpretation implicit in enquiry as to fairness of terms but remain as devices of final resort.

4.3.2. UCTA

The abstention of common law from interfering directly to deal with substantive unfairness in contracts led to the enactment of UCTA. This Act, which came into force on the first of February 1978, was the first legislation dealing with unfair terms in contracts on a general basis, viz.; not restricted to specific types of contracts. However, important types of contracts are not covered by its operation. As far as consumers are concerned, the important exceptions are insurance contracts, contracts relating to the creation or transfer of an interest on land or to the termination of such an interest, and contracts relating to the creation or transfer of securities or of any right or interest in securities³.

Treating terms covered by UCTA has taken two forms. First, exceptionally, certain types of terms are rendered ineffective. In following this path, the Act relies on the premise that social policy refuses to deprive a contracting party from those specific rights targeted by the outlawed exclusion clauses⁴. Terms subjected to this harsh penalty are: terms excluding or restricting liability for death or personal injury resulting from negligence⁵; terms contained in or operating by reference to a guarantee of the goods and aiming at excluding or restricting liability for the loss or damage provided the goods are of a type ordinarily supplied for private use or consumption, and that the loss or damage arises from the goods proving defective while in consumer use or results from the negligence of a person concerned in their

¹ See, for example, *Interfoto Picture Library Ltd v Stiletto Visual Programmes Ltd* [1989] QB 433; *Grogan v Robin Meredith Plant Hire* [1996] 53 Con LR 87; *Laceys Footwear (wholesale) Ltd v Bowler International Freight Ltd* [1997] 2 Lloyd's Rep 369; *Zeus Tradition Marine Ltd v Bell*, [2000] 2 Lloyd's Rep 587; *Tektrol Ltd v International Insurance Co of Hanover Ltd*, [2005] 2 Lloyd's Rep 701; *Blackburn Rovers Football & Athletic Club plc v Avon Insurance plc*, [2005] EWCA Civ 423.

² *Sinochem International Oil (London) Co Ltd v Mobile Sales and Supply Corporation* [2000] 1 Lloyd's Rep 339, Lord Mance, para 27. See, also, Koffman L and E Macdonald, *the Law of Contract*, 5th Ed (London: LexisNexis, 2004), p 196.

³ Sch 1, paras 1(a), (b), and (e).

⁴ Mulcahy L and J Tillotson, *Contract Law in Perspective*, 4th Ed (London: Cavendish Publishing Ltd, 2004), p 189.

⁵ s. 2(1).

manufacture or distribution¹; terms excluding or restricting liability for breach of the obligations arising from S 12 of the Sale of Goods Act 1979 or S 8 of the Supply of Goods (Implied Terms) Act 1973 (the seller's implied undertakings as to title in sale of goods and hire purchase contracts)²; in consumer contracts specifically, terms aiming at excluding or restricting liability for breach of the obligations arising from Ss 13, 14 or 15 of the 1979 Act or Ss 9, 10 or 11 of the 1973 Act (the seller's implied undertakings as to the conformity of goods with description or sample, or as to their quality or fitness for a particular purpose in sale of goods and hire purchase contracts)³; in consumers contracts again, terms excluding or restricting liability in respect of the goods' correspondence with description or sample, or their quality or fitness for any particular purpose⁴; and, finally, terms excluding or restricting liability for breach of the obligations arising under S 2 of the Supply of Goods and Services Act 1982 (implied terms about title in certain contracts for the transfer of the property in goods)⁵.

Secondly, the Act subjects terms other than the foregoing to the reasonableness test. Central to this test is whether the term in question was "a fair and reasonable one to be included having regard to the circumstances which were, or ought reasonably to have been, known to or in the contemplation of the parties when the contract was made"⁶. As regards exclusion or restriction of liability for the breach of the statutorily implied terms under sale of goods and hire purchase contracts (Ss 6(3) and 7(3), (4)), determining whether a term to this effect satisfies the requirement of reasonableness shall include consideration of particular matters⁷ as follows:

"(a) The strength of the bargaining positions of the parties relative to each other, taking into account (among other things) alternative means by which the customer's requirements could have been met.

(b) Whether the customer received an inducement to agree to the term, or in accepting it had an opportunity of entering into a similar contract with other persons, but without having to accept a similar term.

(c) Whether the customer knew or ought reasonably to have known of the existence

¹ s. 5.

² s. 6(1).

³ s. 6(2).

⁴ s. 7(2).

⁵ s. 7(3A).

⁶ s.11(1).

⁷ s.11(2).

and extent of the term (having regard, among other things, to any custom of the trade and any previous course of dealing between the parties).

(d) Where the term excludes or restricts any relevant liability if some condition is not complied with, whether it was reasonable at the time of the contract to expect that compliance with that condition would be practicable.

(e) Whether the goods were manufactured, processed or adapted to the special order of the customer.”¹

There are two important points to be highlighted as to these guidelines. First, although the Act limits their effect to terms covered by Ss 6 and 7, they are, in practice, “regarded as being of general application to the question of reasonableness”². Secondly, the above guidelines are not exhaustive. Even in cases where it was decided that they are relevant, the courts have usually had regard to other considerations. In *Overseas Medical Supplies Ltd v Orient Transport Services Ltd*³, for example, Potter LJ outlined many factors to be taken into consideration in assessing the reasonableness of the term at issue in that case. Among these factors are: “the way in which the relevant conditions came into being”; that the relevant clause must be assessed as a whole instead of taking any particular part of it in isolation; “the reality of the consent of the customer to the supplier’s clause”; and the availability of insurance.⁴

The importance of the Act for consumer protection cannot be denied. As shown above, there are some terms declared null only if they are found in consumer contracts. The courts have noted this and have behaved accordingly. In commercial cases the courts have frequently taken a “hands-off” approach in applying the Act, whereby experienced businessmen who represent companies of equal bargaining power are allowed “to be the best judge of the commercial fairness of the agreement which they have made; including the fairness of each of the terms in that agreement” and therefore the court should not interfere unless it is “satisfied that one party has, in effect, taken unfair advantage of the other or that a term is so unreasonable that it

¹ sch 2.

² *Stewart Gill Ltd v Horatio Myer & Co Ltd*, [1992] 1 QB 600, Stuart-Smith LJ. See, also, *Overseas Medical Supplies Ltd v Orient Transport Services Ltd* [1999] 2 Lloyd's Rep 273, Potter LJ, para 10; *SAM Business Systems Ltd v Hedley & Co* [2003] 1 All ER (Comm) 465, para 68; *Granville Oil and Chemicals Ltd v Davies Turner and Co Ltd* [2003] EWCA Civ 570, Tuckey LJ, para 5.

³ [1999] 2 Lloyd's Rep 273.

⁴ *Ibid*, para 10.

cannot properly have been understood or considered”¹. In contrast, the Act has been seen as playing “a very important role in protecting vulnerable consumers from the effects of draconian contract terms”².

Notwithstanding this, and for many reasons, the Act falls short of achieving what had been hoped for in the battle against unfair terms. Firstly, despite its title, the Act does not deal with all contractual terms but is concerned only with exclusion clauses. This means that other kinds of terms are left untouched by the Act, no matter how unfair or problematic they are in terms of effect and number. Secondly, even within this narrow scope the Act is not armed with a public enforcement mechanism, but is rather left in the hands of individuals. In addition to the fact that the Act has missed benefits that could be achieved by the use of such a method of enforcement, on which some light will be shed in Chapter Three, its absence leads to increasing the level of uncertainty already generated by the Act. That the test imposed by the Act is very general has made it very hard to predict the outcome of litigation brought pursuant to its provisions. This would explain why the judicial approach as to what constitutes a reasonable term differs from one case to another, thus depriving the considerable body of reports on the reasonableness test from creating precedents which would contribute to increasing certainty in this field³. This fact makes traders reluctant to insert exclusion clauses into contracts, and leads consumers to be reluctant to challenge them before the courts once they are included. And, probably for the same reason, the appeal courts have shown some reluctance to interfere in the decisions of the first instance courts. In *George Mitchell (Chesterhall) Ltd v Finney Lock Seeds Ltd*⁴, Lord Bridge voiced the opinion that:

“There will sometimes be room for a legitimate difference of judicial opinion as to what the answer should be, where it will be impossible to say that one view is demonstrably wrong and the other demonstrably right. It must follow, in my view, that, when asked to review such a decision on appeal, the appellate court should treat the original

¹ *Watford Electronics Ltd v Sanderson CFL Ltd* [2001] EWCA Civ 317, Chadwick LJ, para 55. See, also, *Granville Oil and Chemicals Ltd v Davies Turner and Co Ltd*, [2003] EWCA Civ 570, Tuckey LJ, para 31; Stone R, *the Modern Law of Contract*, 6th Ed (London: Cavendish Publishing Ltd: 2005), pp 249, 250.

² *Granville Oil and Chemicals Ltd v Davies Turner and Co Ltd*, [2003] EWCA Civ 570, Tuckey LJ, para 31.

³ See, Beale H & Others (Editors), *Chitty on Contracts*, 29th Ed (London: Sweet & Maxwell, 2004), Vol 1, p 842; Stone R, op cit p 244.

⁴ [1983] 2 AC 803. Quoted later by Slade LJ in *Phillips Products Limited v T Hyland & Hamstead Plant Hire Co Ltd* [1987] 2 All ER 620.

decision with the utmost respect and refrain from interference with it unless satisfied that it proceeded on some erroneous principle or was plainly and obviously wrong.”

On the contrary, and even with the presence of different approaches as to what the reasonable terms would be, using the same approach of a mixture enforcement methods (public and individual) taken under the Regulations with regard to the Act would have rendered the problem less severe, because terms which failed in the reasonableness test could not be used in any future contracts either by the same trader or by any other trader. This would have given rise to the desired level of protection afforded to the consumer and to certainty as well, since both the trader and the consumer would be to a large extent aware of the ground on which they were standing when concluding a contract.

An overall evaluation of the law on unfair terms before the Regulations shows that consumers were not exclusively or even mainly targeted by this law. Further, such a law was not accessible or comprehensible to consumers and that is because, among other reasons, it was distributed in different places¹.

Bearing in mind the points of weakness set out above, it is no wonder that the OFT noticed, before the end of the first year after it had been given the new task of being the public enforcer of the Regulations, that “the use of unfair terms in consumer contracts is widespread and amounts to a serious problem in the United Kingdom”. This is, of course, despite the presence of UCTA and the common law techniques which declared many of these terms void.²

By way of conclusion, all the above findings raise to the surface the fact that although the Regulations were generated by virtue of a European Directive, they seem to be an English need. The Regulations are one of the main subjects of this Thesis and their historical background is addressed briefly in the following sub-section.

4.3.3. The Directive on which the Regulations are based

4.3.3.1. Brief background

The Directive on Unfair Terms in Consumer Contracts 1993 is arguably the most significant piece of legislation ever passed by the European legislator in the field of

¹ See further, Bradgate R, op cit p 38.

² OFT, Bulletin Issue No 2, Sep 1996, p 5, para 1.1.

contract law¹. The roots of the 1993 Directive go back to the principles of the European Community declared in its establishing Treaty, the 1957 Treaty of Rome. The original Article 2² of the Treaty reads:

“The Community shall have as its task, by establishing a common market and progressively approximating the economic policies of Member States, to promote throughout the Community a harmonious development of economic activities, a continuous and balanced expansion, an increase in stability, an accelerated raising of the standard of living and closer relations between the states belonging to it.”

However, the problems facing the consumer, including those related to unfair contract terms, were on the agenda of the Community at a later date. The first step towards the Directive was a resolution of the European Council taken in 1975³ which gave birth to the preliminary programme of consumer protection and information policy annexed to the resolution⁴. Stressing the need for implementing the Community policy as appeared in the above Article 2⁵, and observing what has been previously noticed outside the Community that in a modern market economy “the balance between suppliers and customers has tended to become weighted in favour of the supplier”⁶, the programme aimed, generally, at protecting the consumer’s interests as summed up by a statement of the following rights:

- “- the right to protection of health and safety;
- the right to protection of economic interests;
- the right of redress;
- the right to information and education;
- the right of representation (the right to be heard).”⁷

¹ Lockett N and M Egan, *Unfair Terms in Consumer Agreements*, (Chichester: Chancery Law Publishing Ltd, 1995), p 7.

² By virtue of Art 2 of the Treaty of Amsterdam 1997 (OJ 1997 C 340/173), the text of this Article was replaced with another close formula.

³ Council Resolution of 14 April 1975, OJ 1975 C92/1.

⁴ Preliminary programme of the European Economic Community for a consumer protection and information policy OJ 1975 C92/2.

⁵ Ibid, para 2.

⁶ Ibid, para 6.

⁷ Ibid, para 3.

This objective was reaffirmed under the second programme triggered by the European Council in 1981¹, a programme put in place so as to continue measures of protecting and informing consumers begun under the 1975 programme².

As to unfair contract terms, the 1975 programme had, as a part of protecting the consumer's economic interests, referred to the problem of certain unfair sales practices, and in particular that the consumer should be protected against "the abuse of power by the seller, in particular against one-sided standard contracts [and] the unfair exclusion of essential rights in contracts"³. In the 1981 programme, reference was also made to this problem⁴. However, a proposal for a Directive to protect the consumer against unfair terms was not among the proposals submitted by the Commission to be discussed by the Council and to be subsequently produced as Directives on the relevant issues⁵.

Three years later, the Commission circulated a consultation paper entitled "Unfair Terms in Contracts Concluded with Consumers". This step was opposed by the commercial sector in the Community, who argued that the proposal was "overprotective" and that the commercial enterprises had every right to include one-sided terms in their standard contracts. On the contrary, consumer organisations stressed, unsurprisingly, the need for such protection, a need which would increase with the approach of the single market.⁶

The paper was followed in 1986⁷ by a call for the proposal of a draft Directive on Unfair Contract Terms as prescribed by the Commission in "A New Impetus for Consumer Protection Policy"⁸.

Before that, in 1985, the European Commission published its White Paper on the completion of the internal market⁹ (the "area without internal frontiers in which the free movement of goods, persons, services and capital is insured..."¹⁰). This

¹ Council Resolution of 19 May 1981 on a second programme of the European Economic Community for a consumer protection and information policy, OJ 1981 C133/1, Annex, para 2.

² Ibid, para 8.

³ Preliminary programme of 1975, op cit para 19(i).

⁴ Council Resolution of 19 May 1981, op cit Annex, para 28.

⁵ Ibid, para 29.

⁶ Lockett N and M Egan, op cit p 14.

⁷ Council Resolution of 23 June 1986 concerning the future orientation of the policy of the European Economic Community for the protection and promotion of consumer interests, OJ 1986 C167/1.

⁸ Commission of the European Communities, A New Impetus for Consumer Protection Policy, COM (85) 314 final 1985, para 30 and the Annex.

⁹ Commission of the European Communities, Completing the Internal Market, COM (85) 310 final 1985.

¹⁰ Single European Act 1987, art 13.

focused on the completion of the market programme, which the Directive on Unfair Terms itself was a part of, and the measures to be taken to achieve this. The importance of this White Paper stems from the fact that it was the basis of the Single European Act 1987 identifying 31 December 1992 to be the deadline for establishing the internal market¹. It was recognised in the Paper that “a genuine common market cannot be realised by 1992 if the Community relies exclusively on Art 100 of the EEC Treaty”². The obstacle that Art 100 was constituting was embodied in the decision-making mechanism it provided for, stipulating that the Council should act unanimously when adopting measures with the aim of completing the internal market. This had the effect of rendering any endeavours in this direction capable of being defeated by a veto of only one Member State. The Single Act has, under Art 18, changed this by inserting in the latter Treaty Art 100A which runs:

“...the Council shall, acting by a qualified majority on a proposal from the Commission in co-operation with the European Parliament and after consulting the Economic and Social Committee, adopt the measures for the approximation of the provisions laid down by the law, regulation or administrative action in Member states which have as their object the establishment and functioning of the internal market”.

The Directive on Unfair Terms was adopted on 5 April 1993 under the latter Article as a part of the 1992 programme³. It was thought that the Directive would help in establishing the internal market through encouraging consumers to contract outside their own countries. This would be achieved, partially, by raising their confidence which might be affected when contracting on contracts governed by laws other than those of their Member States. Such a goal is likely to be met if they enter into contracts which are free of unfair terms⁴. Sellers and suppliers would mutually benefit from the removal of unfair terms through increasing their sales both at home and throughout the Member States. Eventually, this would create a healthy atmosphere of competition in the market which would serve all parties⁵.

¹ Single European Act 1987, art 13.

² para 61.

³ See, Recital 1 to the Directive.

⁴ Recital 6 to the Directive.

⁵ Recital 7 to the Directive.

On 1 January 1995 the Directive became law applying to all contracts concluded from that date forth.¹

4.3.3.2. Twenty years, isn't too long?

The Directive had a gestation period of almost twenty years from the time when the need for such a measure was realised in 1975 till it entered into force at the Community level at the beginning of 1995. A legitimate question, accordingly, is what the reasons were behind such a delay. It can be said that three factors contributed to delaying the adoption of the Directive for such a long period of time. These factors are:

- 1- The recognition at the European Council level that the implementation of the 1975 programme, where the problem of unfair terms was addressed for the first time, should take full account of studies and other work already conducted by the Member States, consumer organisations and international bodies (such as: the United Nations, its Educational and Scientific Organisation, the World Health Organisation, the Nordic Committee on Consumer Matters and the Council of Europe) so as to enable the Community to take advantage of the work completed in the field of consumer protection². It is obvious from this that there was a lot of work to be done after adopting the 1975 programme, which was a step needing to be followed by many other steps. Such work mainly consisted of comprehensive studies of how to reach the goals of the Community regarding an effective consumer protection.
- 2- The economic recession which occurred during the 1970s as a result of the oil crisis of 1973 had an adverse influence on the consumer protection programmes. Overlooking the fact that recession affects consumers as much as other agents in the economy, if not more, governments and the industrial sector argued that the execution of these programmes would constitute an

¹ The Directive, art 10.

² See, preliminary programme of 1975, op cit para 48 and nn 5, 10.

extra financial burden on them at an inconvenient time when economic growth was slow.¹

- 3- A large number of Member States were busy during the 1970s, 1980s and the outset of the 1990s with introducing their own domestic legislation in the area of consumer protection against unfair terms. Therefore, the Community's endeavours towards producing a measure in that area had to wait until the dust of this legislative movement settled. Figure 2 below gives examples of these laws which had been made at Member States level during that period².

¹ Commission of the European Communities, A New Impetus for Consumer Protection Policy, op cit p 4.

² See, Nebbia P, Unfair Terms in Consumer Contracts: English and Italian Law on Unfair Terms in the Light of Directive 93/13, a PhD Thesis, University of Southampton, 2003, p 75.

Year	Member State	The law produced
1974	Denmark	Marketing Practices Act
1976	Germany	AGB-Gesetz (Standard Terms and Conditions of Contract Act)
1977	Britain	UCTA
1978	France	<i>Loi Scrivener</i>
1979	Austria	Consumer Protection Act (KSchG)
1983	Luxembourg	<i>Loi relative à la protection du consommateur</i> (Consumer Protection Law)
1984	Spain	<i>Ley general para la defensa de los consumidores y usuarios</i> (General Law on Consumer Protection)
1985	Portugal	Decree Law No 446/85
1991	Greece	Consumer Protection Act No 1961/91
1992	Netherlands	<i>Burgerlijk Wetboek</i> (Civil Code)

Fig.2. A table showing the legislative movement in the field of consumer protection in Member States in the period falling between 1974 - 1994.

4.3.3.3. Implementing the Directive in England

The Directive was implemented in England by the Unfair Terms in Consumer Contracts Regulations 1994¹. These Regulations came into force on the first of July 1995, which means that England implemented the Directive six months later than the Directive required, exposing itself to actions of the *Francovich*² type by those who suffered loss as a result of this delay which, it seems, the English government was fortunate to escape.

Nonetheless, a question mark remains on the reason behind this delay, viz.; whether it happened accidentally due to a practical, routine problem (such as the fact that Scotland is civil law jurisdiction which could make UK implementation more difficult), or because of repugnancy towards the legislation itself. It is hard to find a straight answer on this issue because it would not be expected that the government would frankly express its objection towards the legislation, if it had any. However, there are hints, albeit not strong, in favour of the assumption that English hostility to the Directive led the government to be reluctant to apply it. The first such signal can be inferred from the government attitude towards an early draft on unfair terms which was proposed under “A New Impetus for Consumer Protection Policy”. The Department of Trade and Industry (hereafter DTI) expressed misgivings because the proposals on consumer protection that this paper mentioned were substantially broader than existing English legislation³. Although this attitude was expressed with regard to all of the proposals made under this paper, including the draft on unfair terms, the DTI’s objection was based on a justification which applied exactly to the situation as regards unfair terms at that time; i.e. that the draft was much wider than UCTA. The second signal appeared after the Directive was implemented in England. The government showed reluctance in transposing the provisions of the Directive as intended by the European legislator. Such hesitation appeared clearly in refusing both the representative action at the beginning, and to allow for Consumers’ Associations to have such right afterwards. This issue is discussed further later in this Chapter and in Chapter Three.

¹ SI 1994/3159.

² *Andrea Francovich and Danila Bonifaci and others v Italian Republic* (Joined cases C-6/90 and C-9/90) [1991]. This judgment states that a Member State is required to compensate those individuals who suffered loss and damage resulted from failure to transpose a Directive to the domestic law.

³ See, Lockett N and M Egan, op cit p 14.

Nevertheless, it is not easy to be certain that hostility to the Directive was the reason behind such a delay, because the Directive on Unfair Terms was only one among many Directives where the UK government failed to fulfil its European obligations to enter them into its legislation in a proper way or at the proper time. Reports of the European Court of Justice (hereafter ECJ) overflow with cases proving this¹. Neither is it likely, in the writer's opinion, that the government would choose such an impractical way to express its objection.

On the criticism directed to the manner of implementation, the 1994 Regulations have been seen by some commentators as defective for various reasons. Among these are, firstly, the bad formula embodied in the fact that the terms of the Regulations are similar to those of the Directive which is drafted in a broad, continental style. Even if it was acceptable for the Directive to appear in this form as a statement of aims to be achieved, this is not so with regard to the Regulations. A text which is drafted as a Directive will carry some vagueness if used as Regulations². Secondly, the Regulations were criticised for not properly implementing the Directive's provision on enforcement, an issue which is dealt with in depth in Chapter Three. Thirdly, the Regulations were seen as a "clumsy" method of implementation since they trebled the layers of examining terms in England by adding the test of the Regulations to the tests of common law and UCTA. To avoid this, there was a missed opportunity to merge the Regulations with UCTA in one Act.

Another missed opportunity to cure all of these defects was when the 1994 Regulations were replaced by the 1999 Regulations (the current Regulations)³, which came into force on 1 October 1999. The 1999 Regulations succeeded to some extent in improving the provisions on enforcement by extending the enforcing bodies to include other organisations besides the OFT⁴, but failed to deal with problems other than this. The 1999 Regulations make the situation worse in relation to the ambiguity of their terms since they follow the structure and the wording of the Directive even more closely than their predecessors.

¹ See, so far as Directives are concerned, during 2005 and 2006 only and by way of example, *Commission of the European Communities v UK* (C-385/04) [2006] OJ C 10, p 4; *Commission of the European Communities v UK* (C-505/04) [2005] OJ C 315 p 7; *Commission of the European Communities v UK* (C-349/03) [2005] ECR p 00; *Commission of the European Communities v UK* (C-6/04) [2005] ECR p 00; *Commission of the European Communities v UK* (C-323/05) [2005] OJ C 271 p 15; *Commission of the European Communities v UK* (C-126/05) [2005] OJ C 132 p 13.

² Hedley S, 'Contract', (1996) 49 (1) CLP, p 8.

³ SI 1999/2083.

⁴ See *infra*, p 205 et seq.

4.3.3.4. Impact of implementing the Directive in England

The impact that the English law has received as a result of implementing the Directive is undeniable. Three of the most significant effects need to be discussed in this connection: taking the English law a further important step as for consumer protection; doubling the legislation dealing with unfair terms in consumer contracts; and allowing the civil law to be part of English law. All of these points are referred to, and some of them are discussed deeply, elsewhere in this Thesis. For now, a summary will suffice:

- 1- Taking the English law further in terms of consumer protection: Given, in particular, that the Directive became law at a time when England was lagging behind other Member States in relation to consumer protection against unfair terms¹, the Directive had the impact of improving English law in this field. This is clear from two considerations, although points 2 and 3 below could be relevant also. Firstly, the Directive's approach as to unfair terms in consumer contracts appears to be more unified than English law used to be. After implementing the Directive, courts have no longer been pushed to have recourse to different, and sometimes "unwieldy", tools in both common law and legislation, such as UCTA, *contra proferentem*, duress and incorporation of terms². Secondly, the Directive has brought to English law the public action as a way of pursuing unfair terms. The representative action, whose advantages, in the writer's opinion, should hardly be controversial, was not recognised by English law prior to the Directive³.
- 2- Doubling the legislation dealing with unfair terms in consumer contracts: Art 8 of the Directive runs, "Member States may adopt or retain the most stringent provisions compatible with the Treaty in the area covered by this Directive, to ensure a maximum degree of protection for the consumer". The minimum nature of the Directive here offered the UK the latitude to maintain UCTA besides the Regulations and to generate further enactments in the field of

¹ See *supra*, p 60, Fig. 2.

² See, Dickie J, *op cit* p 64.

³ The novelty of the public action in England will not be affected by the fact that "group litigation", as a multi-party action, is well known in this country, since this action remains, at the end of the day, a sort of individual enforcement, (On this type of action, see Plant C, W Rose, S Sime and D French (Editors), *Civil Practice*, 4th Ed, (Oxford, Oxford University Press: 2003), pp 173 et seq, 1584 et seq).

unfair terms. However, although the aim of this Article is “to ensure a maximum degree of protection for the consumer”, the existence of UCTA along with the Regulations has worked against this aim since such a situation has sometimes rendered the provisions of the law in operation in this area overlapping, incomprehensible or even inaccessible. All this could work to the disadvantage of the consumer, who is the target of maintaining the extra protection.

- 3- Bringing the civil law: Until very recently, the developments in the law of contract in civil law world have rarely attracted the attention of the English judiciary¹. However, European legislation has contributed towards changing this situation. At the moment, the civil law can be seen as part of English law². For its part, the Directive on unfair terms has left the fingerprint of civil law on English law, particularly by inserting concepts novel to the latter, such as “good faith”³ and “fairness”. This fact, one would believe, might have a positive influence that may go beyond the issue of controlling unfair terms to establish general requirements of fairness and good faith in English contract law.

5. Concluding remarks

Despite its preliminary nature, which may deter finding significant conclusions, the Chapter has showed in discussing the development of law at the level of consumer protection that the need to protect consumers is no longer in question. The dominant trend in the issue of consumer protection is in favour of legal intervention. It can be inferred that such intervention is likely to increase and to attract more and more attention by virtue of an awareness of consumer rights among governments, consumers and consumers’ associations.

Corresponding to this, consumer protection specifically against unfair terms has taken several steps forward in the past few decades. We have seen that, by degrees,

¹ See, Stone R, op cit pp 17, 18.

² See, for example, the Principles of European Contract Law 1999 which are to be applied as general rules of contract law in the European Community. These Principles will apply if the parties agree that their contract is to be governed by them, (Art 1.101).

³ Although English law has been familiar with the concept of good faith in the sense of honesty in fact or a clear conscience, a general principle of good faith was, except in specific areas, unfamiliar to English contract law (see *infra*, p 119)

the classical legal attitude restricting interference merely to cases of procedural unfairness has, to a large extent, become unsuitable. This means that securing substantive fairness is no longer an accessory issue. Similarly, alternative economic solutions such as free competitive market, however helpful, were not able to fill the gap created as a result of the absence of legal intervention in favour of substantive fairness. It should be clear, however, that this is not to say that the debate concerning intervention to achieve substantive fairness is over.

We have seen also that the legal techniques used in achieving goals of consumer protection differ from one legal system to another. It is obvious, however, that the most effective intervention will be achieved through legislative technique. As far as Jordan and England are concerned, the two main pieces of legislation produced to this effect are the subject of the next Chapters in terms of their scope, the tests they generate and enforcement.

Chapter One

Scope of the protection afforded by the Regulations and the JCC

1. Introduction

This Chapter treats the scope of the protection the consumer enjoys in England and Jordan against unfair contract terms. Such a scope has a clear relationship with the efficiency of the protection sought by the law, since it is axiomatic that the wider the scope of coverage, the more effective the protection will be.

The width of protection is not the only important issue in this regard. The clarity of the scope seems to be of the same importance if not more important, because it is more relevant to the consumer's recognition of the boundaries of his rights, which is relevant to the whole issue of enforcement addressed in Chapter Three of this study.

The first part of this Chapter is devoted to studying the scope of the English Regulations in six main areas: the relationship between the Regulations and UCTA as for points of harmony and conflict; excluded terms; excluded contracts; important areas left uncertain; parties to contract; and choice of law clauses.

As for the situation in Jordan, which is studied in the second part, the scope of S 204, by which the JCC polices unfair terms, is dealt with under five headings. These are: defining the "contract of adhesion"; the position of insurance contracts; private and administrative contracts; written and oral terms; and the width of the Jordanian provision compared with the Regulations.

2. Scope of the Regulations

2.1. Relation with UCTA

Currently, unfair terms in consumer contracts are governed by both UCTA and the Regulations. Having said this, the questions arise as to which enactment can be relied on to achieve the optimal result in protecting consumers against unfair terms, and whether or not the existence of the two enactments side by side beneficial or at least harmless. Such questions can be answered through exploring the scope of each enactment and its practical effectiveness.

The scope of applying each enactment seems to be incongruent. In some cases, UCTA is wider in application than the Regulations. This appears in the following points: Firstly, unlike the Regulations which have no application to contract terms as long as they have been individually negotiated¹, UCTA, except the Section restricted to deal with terms which have not been negotiated², can apply either to negotiated contracts or contracts which have not been individually negotiated. Secondly, while UCTA deals with terms in both consumer and business contracts, and regardless of whether or not either party acts in the course of business³, the Regulations solely apply to terms in contracts between a seller or supplier and consumer⁴. Lastly, if a contract is not a regular part of the buyer's business, it will be caught by UCTA as a consumer contract even if this buyer is a business⁵. In contrast, companies are not protected by the Regulations since the consumer must be a natural person⁶.

In other contexts, the scope of UCTA is narrower than that of the Regulations because it is, unlike the Regulations which deal with all unfair terms in consumer contracts, limited to exclusion and cognate clauses⁷. By way of illustration, a contractual term which gives a seller or supplier the right to forfeit a deposit or to increase his charges is within the ambit of the Regulations but, since this term does not appear as a limitary exclusion enabling a seller or supplier to evade his liability, it is not affected by UCTA.⁸

The divergences of scope between these two enactments, as set out above, create odd overlaps and loopholes and may cause confusion and complexity which are the last things that an area like consumer protection needs⁹. In *Interfoto v Stiletto*¹⁰, for instance, a clause held to be unincorporated at common law, would be immune

¹ See, reg 5(1).

² S 3(1) of UCTA states: "this section applies as between contracting parties where one of them deals as a consumer or on the other's written standard terms of business".

³ Ss. 6(3), 7(3).

⁴ See *infra*, p 82.

⁵ See *infra*, pp 88, 89.

⁶ *Ibid*.

⁷ s. 4.

⁸ See, Treitel G, *the Law of Contract*, 11th Ed, (London: Sweet & Maxwell, 2003), p 268.

⁹ Grubb A and Furmston M (Editors), *op cit* p 639; Oughton D and J Lowry, *Consumer Law*, 2nd Ed, (London: Blackstone press limited, 2000), p 399; Smith S, 'Contract', (1995) 48 (1) CLP p 26; Beale H, A Hartkamp, H Kotz and D Tallon (General Editors), *op cit* p 26; The Law Commission and the Scottish Law Commission, Report on Unfair Terms in Contracts- (Law COM No 292, Scot Law COM No 199), Feb 2005, para 2.4. ; Irvine W, 'The Unfair Contract Terms Regulations Mark II', (1999) SLT p 253.

¹⁰ *Interfoto Picture Library Ltd v Stiletto Visual Programmes Ltd* [1989] QB 433. See further *infra*, p 165.

against both UCTA because it was not an exclusion clause, and the Regulations because it was not included in a consumer contract¹.

Notwithstanding this, it might be argued that the Regulations and UCTA complement one another. This enables the Regulations to inject fairness where it would otherwise go lacking under UCTA, and vice versa². More significantly, a DTI consultation paper suggested that the tests of fairness under the Regulations and reasonableness under UCTA are likely to produce the same outcome in most cases³. If this is the case, this renders, at least, the problem of overlap between the two enactments of no practical significance. This is not to say, however, that the test under the Regulations replicates the reasonableness test, and hence does no more than apply a sort of reasonableness notion. The DTI acknowledged that the tests of fairness and reasonableness are not identical⁴. Thus, even if the existence of dual pieces of legislation is not exactly a nightmare, it is still a puzzle “over which [one] might lose some sleep”.⁵

A comparison between the effectiveness of the Regulations and UCTA scarcely helps in favouring one enactment on the account of the other. It can be seen, on the one hand, that the Regulations are more effective than UCTA because the former contain a pre-emptive general method of curing cases of unfairness besides the other method entitling a particular party to use the Regulations in a particular dispute. On the other hand, UCTA seems to be more effective because it, unlike the Regulations which provide for a mere grey list of unfair terms, contains a black list of automatically ineffective terms.

Ultimately, the conclusion would be that the existence of two separate enactments operating in almost the same field is an unhealthy sign, and therefore something must be done to rectify such a situation. The Law Commission and Scottish Law Commission have been considering the need for a unified piece of legislation on unfair contract terms, and have, for this purpose, published a Report

¹ Howells G and S Weatherill, *op cit* p 314.

² Gold S, ‘Civil way’, (1999) 149 NLJ p 1589, available in LexisNexis website.

³ DTI, Implementation of the EC Directive on Unfair Terms in Consumer Contracts 93/13/EEC: a Further Consultation Document, 1994, comment on art 3(1).

⁴ DTI, Implementation of the EC Directive on Unfair Terms in Consumer Contracts 93/13/EEC: a Further Consultation Document, 1994, p 3. See, also, Weatherill S, ‘Prospects for the development of European private law through ‘Europeanisation’ in the European Court - the case of the Directive on Unfair Terms in Consumer Contracts’, (1995) 3 *Eur. Rev. Private Law* p 322; Koffman L and E Macdonald, *op cit* p 270.

⁵ Brownsword R and G Howells, ‘The implementation of the EC Directive on Unfair Terms in Consumer Contracts - some unresolved questions’, (1995) *JBL* p 256.

along with a Draft Bill¹. It is proposed that the New Legislation will not only deal with the substance of the enactments being unified, but also aim at making it clearer and more accessible to the reader². The writer, after having a look at the potential unified Act, expects that all criticism to, and debate over, the complexities generated by the existence of the Regulations besides UCTA are highly likely to come to an end once such an Act comes into force.

2.2. Excluded terms

2.2.1. Terms reflecting statutory or regulatory provisions of English law, or the provisions of international conventions

As with UCTA,³ the Regulations do not apply to terms incorporated in order to comply with or reflect mandatory statutory or regulatory provisions of the UK law⁴, such as a term in a package holiday contract providing for the surcharge to be paid following the provisions of the Package Travel, Package Holidays and Package Tours Regulations 1992⁵. The Regulations, however, go beyond UCTA as they do not apply to terms which reflect statutory or regulatory provisions of any Member State or Community legislation which have effect in the UK without further enactment, nor to the provisions or principles of international conventions to which the Member States or the European Community are party.⁶

Attention should be paid to two points regarding the above provision. Firstly, the wording “mandatory statutory or regulatory provisions” in Reg 4(2), reflecting Art 1(2) of the Directive, also covers rules suggested by the law to be applied between the parties unless there are other agreements established to the contrary⁷. Accordingly, it seems that the above Regulation is fairly wide. However, a purposive interpretation may impose some flexibility which may have the effect of narrowing this blanket

¹ The Law Commission and the Scottish Law Commission, Report on Unfair Terms in Contracts- (Law COM No 292, Scot Law COM No 199), Feb 2005. Any reference, hereafter, to the Draft Bill, the Bill or the New Legislation should refer to this Bill.

² The Law Commission and the Scottish Law Commission, Unfair Terms in Contracts: a Joint Consultation Paper- (Law COM No 166 and Scot Law COM No 119), July 2002, p 1; The Law Commission and the Scottish Law Commission, Report on Unfair Terms in Contracts- (Law COM No 292, Scot Law COM No 199), Feb 2005, paras 1.16, 2.44.

³ s. 29(1).

⁴ reg 4(2)(a).

⁵ SI 1992/3288. See further, Lawson R, *Exclusion Clauses and Unfair Contract Terms*, 7th Ed (London: Sweet & Maxwell, 2003), p 199.

⁶ reg 4(2)(b). The Warsaw Convention for the Unification of Certain Rules Relating to International Carriage by Air 1929, which affects the consumers’ right in the sector of aviation, is a manifest example here.

⁷ Recital 13 to the Directive.

coverage. The reason for the exclusion provided under Reg 4(2) is set out in the preamble of the Directive, which states that the statutory or regulatory provisions of the Member States are presumed not to contain unfair terms, and therefore, there is no need to subject the terms which reflect them and the principles or provisions of international conventions to which the Member States or the Community are party to the general provisions contained in the Directive (the Regulations)¹. As a consequence, if the above presumption is rebutted, there will be scope for the application of the Regulations. This may apply, for example, to some of the provisions of the Sale of Goods Act 1979. This Act is based on the law merchant and commercial expectation, and some of its rules were included not because they are fair but rather due to the need for commercial certainty.²

Secondly, the reflection of the statutory or regulatory provision or the convention must be accurate; otherwise, there will be no room for excluding terms reflecting these provisions imprecisely, and there are some rulings taken by the ECJ which support this³. The same line was taken by the OFT, which considered a clause included in a ferry company's standard contract as vulnerable to the Regulations because it went beyond the Athens Convention relating to the Carriage of Passengers and their Luggage by Sea 1974, from which the clause was supposedly drawn⁴.

In Jordan, there is no direct answer on whether terms like those covered by Reg 4(2) are immune against the test of oppression set out under S 204 of the JCC. If the issue goes to court, it is likely that the result will be the same as if there is a provision to this effect in reality. The general rule in the JCC, as laid down in S 61, entails that "legality negates liability and, thus, whoever exercises his right lawfully is not responsible for remedying those who suffer as a result of such an act". It can be said, in the light of this provision, that a term permitted or imposed by a convention ratified by Jordan or the law, whether under imperative or default rules, will be declared fair without assessment. This conclusion is, firstly, consistent with the logic of the law, which does not impose or legitimate oppressive terms. Secondly, any suggestion to the contrary will generate a paradox within the law: a legal provision permits or imposes the term while a court prohibits it according to another legal provision.

¹ Ibid.

² Taylor M and A Naidoo, 'The draft Regulations to adopt the Directive on Certain Aspects of the Sale of Consumer Goods and Associated Guarantees - problems of the time of conformity for the quality obligation' <http://webjcli.ncl.ac.uk/2002/issue3/taylor3.html> para 7.

³ See, for example, *Cofidis SA v Jean- Louis Fredout* (C-473/00) [2002] I-10875, para 22.

⁴ OFT, Bulletin Issue No 1, May 1996, pp 28, 29.

The question which subsequently arises concerns whether or not it is preferable to include a direct provision to this effect when producing special legislation or additional provisions within the JCC dealing with unfair terms in contracts. The writer thinks that, since certainty is a virtue, such a provision is a necessity.

2.2.2. Terms which have been individually negotiated

2.2.2.1. Distinction between negotiated and non-negotiated terms

The Regulations do not apply to terms which have been individually negotiated¹. This is opposite to the original version of the Directive which covered all unfair contract terms without distinction between negotiated and non-negotiated contracts. That situation provoked division between the delegations, and eventually caused the legislation to be restricted to terms that have not been individually negotiated². Of course, the current situation was approved by those who criticised the coverage of all contractual terms whether negotiated or not as proposed under the draft Directive, which was seen as representing “a drastic restriction of the autonomy of the individual”³. This might be reinforced by commentators who took the view that such a restriction is not of significance since the vast majority of consumer contractual terms will fall within the scope of the Regulations regardless of this restriction⁴. However, since abuse might also appear in contracts which have been individually negotiated, this limitation was regarded as a weakness in the Regulations,⁵ which, according to Art 8 of the Directive, could have gone further to cover negotiated terms too.

Justification for excluding negotiated contracts could refer either to the priority of preserving the contractual freedom which was threatened by the first proposal of

¹ reg 5(1).

² Tenreiro M, ‘The Community Directive on Unfair Terms and national legal systems’, (1995) 3 Eur. Rev. of Private Law p 275; Hondius E, ‘The reception of the Directive on Unfair Terms in Consumer Contracts by Member States’, (1995) 3 Eur. Rev. of Private Law pp 243, 244; Wheeler S and Shaw J, *Contract Law*, (Oxford: Clarendon Press, 1994), p 671.

³ Brandner H and P Ulmer, ‘The Community Directive on Unfair Terms in Consumer Contracts: some critical remarks on the proposal submitted by the EC Commission’, (1991) CMLR, p 652. On this approval, see Monteiro A, ‘The impact of the Directive on Unfair Terms in Consumer Contracts on Portuguese law’, (1995) 3 Eur. Rev. of Private Law, p 235.

⁴ Beale H, Legislative Control of Fairness: the Directive on Unfair Terms in Consumer Contracts, in Beatson J (Editor), *Good Faith and Fault in Contract Law*, (Oxford: Oxford University Press, 1995), p 239; Smith S, ‘Contract’, (1994) 47 (1) CLP, p 6.

⁵ Brownsword R, G Howells and T Wilhelmsson, ‘The EC Unfair Contract Terms Directive and welfarism’, in Brownsword R, G Howells and T Wilhelmsson (Editors), *Welfarism in Contract Law*, (Aldershot: Dartmouth, 1994), p 278.

the Directive¹ or to problems raised by non-negotiated contract terms, *inter alia* and mainly, the consumer's unawareness of the inclusion of such terms². Abuse of bargaining power arising in standard form contracts, which may affect or even preclude free negotiation, seems to be central to the latter rationale since the consumer may conclude a contract without sufficient information about the implications³.

Another commentator⁴ distinguishes between the abuse of bargaining power and the clarity of the non-negotiated term. On this view, the contention that non-negotiated terms are indicative of the abuse of bargaining power is not persuasive since, among other reasons, the consumer still has the more important choice of whether or not to deal with the seller or supplier, and even in the case of monopoly, a contract with the monopolist is under suspicion whether or not such a contract is a standard one. This leads to the suggestion that there is no reason to treat non-negotiated contracts differently on this ground. On the other hand, there is every reason to equate non-negotiated terms with unfair surprise, since terms of this sort are often not fully understood or even read.

However, the approach concentrating on the unawareness of the consumer/the unfair surprise has no answer to the fact that a contractual term remains subject to the Regulations even if the consumer's attention was drawn to that term, or he was told to take legal advice on the transaction since it is the non-negotiable nature of the term and not the lack of awareness which is at stake⁵. Thus, the reasons for the protection against standard terms, in the writer's view, would be those mixed rationales appearing in the Preliminary Chapter above, which can be summed up in the fact that the consumer is a weaker party (in terms of, for example, bargaining power, information and experience) who needs to be protected against unfair terms in contracts. If he is to be afforded such protection, the legislator (the European legislator as for the Directive) would begin with the situation in which the consumer is in desperate need of protection and his weakness is so evident, which is standard contracts, the protection which has some consensus among Member States.

Reg 5(2) requires two cumulative conditions in a term to be regarded as not individually negotiated. First, the term shall be drafted in advance. Secondly, the

¹ Beale H & Others (Editors), *op cit* p 892; Wilhelmsson T, 'Private law in the EU: harmonised or fragmented Europeanisation?', (2002) 1 E. Rev. of Private Law, p 88.

² Collins H, 'Good faith in European contract law', (1994) 14 OJLS, p 239; Monteiro A, *op cit* p 237.

³ Weatherill S, *op cit* p 313.

⁴ Smith S, 'Contract', (1994) 47 (1) CLP, pp 6, 7.

⁵ Bright S and C Bright, 'Unfair terms in land contracts: copy out or cop out?', (1995) 111 LQR p 661.

consumer has, therefore, not been able to influence its substance. The criterion set out in this Regulation has received criticism due to the difficulties it generates and the ambiguity that some of its wordings carry.

Firstly, the wording “drafted in advance” seems to be problematic. On the one hand, it is not clear when the term can be deemed “drafted in advance”. An attempt was made to interpret this wording whereby a term will fall within the coverage of the Regulations if it was drafted prior to the process, or any negotiation, leading to an agreement¹. Thus, terms contained in a supplier’s standard terms which are applied to all consumer contracts without alteration (whether regularly or occasionally²) would fall within this provision³. It appears, accordingly, that such an ambiguity could have been avoided had the legislator replaced the wording “in advance” with “prior to...etc”.

On the other hand, such a wording puts the width of the criterion set out in this Regulation under suspicion, since it is not clear whether the word “drafted” allows for oral terms to be covered along with written terms. According to some writers⁴, since there is no drafted term at all in regard to oral agreements there is no room for applying this criterion even if an oral term was included in a take it or leave it contract, such as telling the consumer of standard terms when making a booking over the telephone. However, for others⁵, the criterion is articulate enough to encompass both oral and written terms. This opinion makes sense given that Recital 11 to the Directive emphasises that oral terms are covered by the Directive, and hence by the Regulations, while the first reading entails that they are outside the Regulations. Thus, the word “drafted” should, in the writer’s view, be read as “prepared”.

Secondly, it is implicit in the wording of the above Regulation that the Regulations do not cover a term if the consumer has been able to influence its substance even if it was drafted in advance. It can be asked, however, what this condition means. Must some amendment be made to the term in order to argue that

¹ Cooke J and D Oughton, *the Common Law of Obligations*, 3rd Ed, (London: Butterworths, 2000), p 510; Bone S, L Rutherford and S Wilson, *Unfair Terms in Consumer Contracts Regulations*, (Newcastle upon Tyne: Northumbria Law Press, 1996), p 19.

² Harvey B and D Parry, *the Law of Consumer Protection and Fair Trading*, 6th Ed, (London: Butterworths, 2000), p 140.

³ Cooke J and D Oughton, op cit p 510.

⁴ Lawson R, *Exclusion Clauses and Unfair Contract Terms*, 7th Ed (London: Sweet & Maxwell, 2003), p 201; Bone S, L Rutherford and S Wilson, op cit p 19.

⁵ Collins B, ‘Unfair Terms in Consumer Contracts Regulations 1994’, <http://webjcli.ncl.ac.uk/articles3/collins3.html>>; Koffman L and E Macdonald, op cit p 274; Upton M, ‘European unfair contract terms law’, (1995) SLT p 295.

the consumer was able to influence its substance? If yes, what sort or degree of amendment could meet this requirement?

In the writer's opinion, the Regulation does not require a specific type or degree of amendment to be made to the term and, moreover, such an amendment is not, sometimes, required at all. What is intended by this condition is that the consumer must be a partner in producing the term in question, the issue which is a matter of evidence for the court.

Consequently, a term will be outside the Regulations as individually negotiated even if it was not changed so long as the draft was presented to the consumer to take action which he then declined to do. In contrast, if the consumer and the seller or supplier did argue over a term but no modification was achieved, it would be considered one which has not been individually negotiated. Furthermore, even if the consumer succeeds in reformulating the term, he may be considered as incapable of influencing its substance as long as it still achieves the same effect as was intended by the business.¹

Another difficulty on the consumer's ability to influence the substance of the term may arise if the seller or supplier offers alternative terms from a pool of standard terms. According to Lockett and Egan², there are two possibilities in this case. On the one hand, it could be said that although such terms are pre-drafted, they have been individually negotiated by the consumer who was then able to influence their substance and to decide whether or not to include a specific term of them. Therefore, there is no room for the Regulations to be applied. On the other hand, it could be said that since they are all pre-drafted terms they fall within the sphere of the Regulations.

Contrary to Brian St Collins, who seems to be of the first opinion³, the writer would take the line that offering alternative pre-formulated terms by the seller or supplier does not change the fact that the term that is chosen to be included remains a standard term. Even after the negotiations, the consumer could not influence its substance since he could not change any aspect of its contents. Here, even if it may be true that the contract as a whole is no longer a standard one, this is not sufficient

¹ See, Lawson R, *Exclusion Clauses and Unfair Contract Terms*, 7th Ed (London: Sweet & Maxwell, 2003), pp 201, 202.

² Lockett N and M Egan, *op cit* p 22.

³ Collins B, 'Unfair Terms in Consumer Contracts Regulations 1994',
'<http://webjcli.ncl.ac.uk/articles3/collins3.html>>

simply because the Regulations stress the need for every single term in the contract to be individually negotiated.

2.2.2.2. The burden of proof on individual negotiation

According to Reg 5(4), the burden of proof on whether or not a term was individually negotiated, is on the seller or supplier who wants to rely on that term. In other words, a consumer is required only to assert that the term has not been individually negotiated, while a seller or supplier is required to disprove that assertion.

Although this provision reflects its origin in the Directive¹, it contradicts the general legal provisions in most Member States, including the UK, where a party who makes an assertion is required to prove it². Also, it contradicts the general provision in the JCC, as laid down by S 77, which states that it is the claimant's responsibility to prove his claim.

Unlike the opinion criticizing this provision as seemingly to be arbitrary and without justification³, the writer, as far as consumer protection is concerned, thinks that such a provision should be welcomed especially in connection to individual actions where it is necessary to make it easier for consumers to contest unfair terms. Therefore, given the absence of collective actions in Jordan, it is hoped that the Jordanian legislator will consider inserting a similar provision.

2.2.3. Core terms

Reg 6(2) provides that no assessment of fairness shall be made in relation to any term defining the main subject matter of the contract or concerning the adequacy of the price or remuneration, as against the goods or services supplied in exchange, so long as it is expressed in plain and intelligible language.

The first point to be made is that the attitudes towards the exclusion of the above two types of terms, which are often referred to as core terms, were not alike. In one view, this is a strange provision making non-core terms, which are of lesser importance, vulnerable to assessment while rendering core terms immune from the test⁴. Contrary to this, other commentators have stressed the necessity of such an

¹ art 3(2).

² Lockett N and M Egan, op cit p 22.

³ Upton M, op cit p 295.

⁴ Collins B, 'Unfair Terms in Consumer Contracts Regulations 1994',
'<http://webjcli.ncl.ac.uk/articles3/collins3.html>>

exclusion as a requirement of the free market economy protecting the freedom of the parties in contracting¹. The latter approach seems to be the real reason behind exempting core terms from the test².

Whereas the second approach is consistent with the situation under common law whereby the courts will not inquire into the adequacy of consideration, the first approach is in line with the situation under S 204 of the JCC where no exemption from the oppression test is offered to core terms. This brings us to the question of which of these attitudes is more attractive. Before answering this question, it is necessary to find out whether subjecting both core and non-core terms to the JCC's test of oppression is a genuine desire to provide wider protection to the weaker party (the consumer) or instead constitutes an unintended wide protection at the expense of the freedom of contract.

In answering this question, it is helpful to refer to the Preliminary Chapter³ of this Thesis where it was found that the entire protection provided by S 204 has come against one of the general principles on which the JCC is based, which is the freedom of contract. This implies that the Jordanian attitude contradicting this sacred principle cannot be a mere coincidence made without intention.

It might be argued, however, that the whole idea of core terms might be unknown under Jordanian law and this is why there was no exclusion of terms of this sort. Such an argument is certainly baseless since the JCC does recognise such a notion and the distinction between core and non-core terms is employed elsewhere in the JCC by virtue of S 100 providing that the contract cannot be declared concluded unless all core terms are agreed on by the parties⁴. Whereas, the parties can leave non-core terms to be agreed on thereafter, and if they fail to agree on them the court can interfere to determine these terms according to the law, the nature of the transaction and the custom⁵. This is, in the meantime, an example of how the general principle securing the freedom of contract reflects on the JCC, with the result that if this freedom is somewhat sacrificed this must be looked at as exceptional, otherwise the whole concept of the contract will be put at risk if provisions like that of S 204,

¹ Brandner H and P Ulmer, *op cit* p 656.

² Howells G and T Wilhelmsson, *EC Consumer Law*, (Aldershot: Dartmouth, 1997), p 94.

³ See *supra*, p 33 et seq.

⁴ Sub-section 1.

⁵ Sub-section 2.

allowing the court to rewrite the whole contract discretionally, are deployed within the JCC abundantly.

Having concluded that the approach prevailing under the Regulations is a genuine desire to secure the freedom of contract on the account of consumer protection, while that under the S 204 of the JCC is vice versa, it is time to answer the question of which of these approaches is more attractive. For the same reason for which the Jordanian legislator prohibits the court from interfering under S 100, mentioned above, unless all core terms are agreed on, which is the fear that interference in core terms means that the court has the authority to rebuild the contract jeopardising the notion of contract as a meeting of wills, the writer prefers the approach taken by the Regulations, provided that what constitutes a core term is considerably restricted.

Preferring the approach taken by the Regulations does not mean it is not problematic mainly because it is not easy to define “core terms”¹. Neither the Regulations nor the Directive contain definitions of “core terms” or “the main subject matter”. Even the guidance which may be inferred from Recital 19 to the Directive, which states that “...in insurance contracts, the terms which clearly define or circumscribe the insured risk and the insurer’s liability shall not be subject to [the assessment of fairness], since these restrictions are taken into account in calculating the premium paid by the consumer” seems to be useless. On the one hand, the Recital looks problematic since it opens the door for businesses to argue that any exception they include is “taken into account in calculating the [price] paid by the consumer”;² and, on the other hand, the insurance case mentioned in this Recital is, ultimately, either given as a mere example or applies exclusively to insurance contracts.

Having said this, and since all of the terms in the contract, in one form or another, define the good or service and relate to the adequacy of the price³, Reg 6(2) generates uncertainty which may motivate many businesses to include unfair terms in their contracts depending on the immunity provided by this Regulation. But, this seems a minor problem compared with the problem highly likely to happen if the courts adopt a broad interpretation in relation to core terms.

¹ See, Macdonald E and M Furmston, *Exemption Clauses and Unfair Terms*, (London: Butterworths, 1999), p 176 et seq.

² Brownsword R and G Howells, *op cit* p 251.

³ Bright S and C Bright, *op cit* p 670; *Director General of Fair trading v First National Bank Plc* [2001] UKHL 52, para 34.

Such a danger would have been realised if the court in *Director General of Fair Trading v First National Bank Plc*¹ (hereafter *the Director* case) had not stood firm in the face of the attempt made by the Bank to include the disputed term within the realm of “core terms”. The facts of this case show that the borrower was, under the contract, subject to increased payment in the event of his default under loans taken out with the Bank. Condition 8 of the contract allowed the Bank, in default of an instalment, to demand payment of the balance and interest outstanding. Under this condition, interest on the amount that became payable would be charged at the contractual rate until payment, after as well as before any judgement. The condition further provided that such an interest provision was to be independent of, and not to merge with, the judgement. As a consequence, the borrower found himself facing a continuing liability to the Bank relating to post-judgement contractual interest. The Director General of Fair Trading (hereafter the Director)², acting under the power given to him by the Regulations, sought an injunction against the use of that term in the Bank’s standard form loan agreement because of its unfairness. The Bank rested its defence on the basis that the term was not unfair, and that it was, in any event, a core term.

Fortunately³, the House of Lords⁴, the Court of Appeal⁵, and the High Court⁶, held that condition 8 was not a core term. Thus, by taking a decisive attitude against the wide interpretation of core terms, the Courts finished anxiety from a possible wide interpretation. Lord Bingham drew attention to such anxiety, stating that:

“The object of the Regulations and the Directive is to protect consumers against the inclusion of unfair and prejudicial terms in standard form contracts into which they enter, and that object would plainly be frustrated if reg 3(2) (b) [of the 1994 Regulations;

¹ *Director General of Fair trading v First National Bank Plc* [2001] UKHL 52.

² It is necessary to notice that as a consequence of S 2 of the Enterprise Act 2002, the Office of the Director General of Fair Trading was abolished and replaced with the OFT to which the functions of the Director General of Fair Trading, his property, rights and liability were transferred. Therefore, any reference afterward to the powers of the Director under the Regulations goes automatically to the powers of the OFT.

³ The line taken by the courts is of particular significance due to the fact that this case was the first to have come before the High Court, the Court of Appeal and the House of Lords on the Regulations. And it was the hope of some commentators (Collins B, ‘Unfair Terms in Consumer Contracts Regulations 1994’, ‘<http://webjcli.ncl.ac.uk/articles3/collins3.html>>’) and then it was welcomed when taken (Macdonald E, ‘Scope and fairness of the Unfair Terms in Consumer Contracts Regulations: *Director General of Fair Trading v First National Bank*’, (2002) 65 MLR p 773).

⁴ [2001] UKHL 52, paras 12, 34.

⁵ [2000] QB 672, para 25.

⁶ [2000] 1 All ER 240, paras 27, 28.

equivalent to Reg 6(2)(b) of the 1999 Regulations] were so broadly interpreted as to cover any terms other than those falling squarely within it”.¹

It is important to know how the House of Lords reached this decision, as this may provide some guidance on how to distinguish between core terms and non-core terms where the Regulations fail to do. The House of Lords distinguished between terms expressing the substance of the bargain and incidental terms surrounding them² or, in the words of Lord Steyn, subsidiary terms³. It was found that the term in question was incidental because it dealt with the consequences of default⁴.

The above approach distinguishing between terms which relate to the situation after and before default has been criticized because it will not be able to solve all categorisational problems. The criterion seems to be somewhat limited. Under this criterion, terms subjecting the main subject matter to variation will be treated as dealing with the situation before breach and then as core terms. Equally, penalty clauses sometimes do not appear as terms dealing with the situation after breach, but may rather be drafted as dealing with an option in performance. It would be better, therefore, if it is taken further to declare all terms allowing for variation from the initially stated performance as non-core terms.⁵

Such a criterion and the problems it generates recall to mind the general approach under common law⁶ which indicated in the context of UCTA whereby a distinction should be made between definitional terms (i.e. terms defining the party's obligations) and exclusion clauses, which is deemed problematic because even the clearest exclusion clauses might be seen as definitional terms specifying the scope of the party's obligations⁷. Nevertheless, some commentators have argued that such an approach is not exactly demanded by the Directive (and hence the Regulations)⁸. What is required in the context of the Regulations is a distinction between definitional terms and exclusion clauses based on the impact of the term upon the parties'

¹ [2001] UKHL 52, para 12. The same approach was taken by Lord Steyn ([2001] UKHL 52, para 34).

² Ibid, para 12.

³ Ibid, para 34.

⁴ Ibid, paras 12, 34, and 43.

⁵ See, Koffman L and E Macdonald, op cit p 278; Macdonald E, 'Scope and fairness of the Unfair Terms in Consumer Contracts Regulations: *Director General of Fair Trading v First National Bank*', (2002) 65 MLR p 766.

⁶ See, for example, *Kenyon Son & Craven Ltd v Baxter Hoare & Co. Ltd* [1971] 2 All ER 708.

⁷ Brownsword R and G Howells, op cit p 248, 249.

⁸ Macdonald E, 'Mapping the Unfair Contract Terms Act 1977 and the Directive on Unfair Terms in Consumer Contracts', (1994) JBL p 461.

perception of the contractual performance¹. Reference to the latter approach can be found in an OFT bulletin, where it was stated that:

“It would be difficult to claim that any term was a core term unless it was central to how consumers perceived the bargain. A supplier would surely find it hard to sustain the argument that a contract’s main subject matter was defined by a term which a consumer had been given no real chance to see and read before signing - in other words if that term had not been properly drawn to the consumer’s attention”.²

In a recent decision³, the court seemed to uphold the above approach⁴. An estate agent’s commission fee had not paid by the vendors at the time required in the contract. The fee was a standard commission rate of 3% or an early payment discounted rate of 1.50%. Under clauses 6 and 9 of the contract, the early payment discounted rate is only available if the full sum payable is received by the agent within ten working days of the completion date, and if the full sum is not received within this period the standard commission rate will be due and payable. In court, the claimant argued that the commission was the price for the services supplied and that it was a core term. The court found that “both parties contemplated an agreed operative price of 1.50% with a default provision of 3%”⁵ and neither of them “had any reason to suppose that the 3% figure would have any role, except as a fallback or default provision”⁶. Accordingly it was held that the 3% was not the price and hence not a core term.

Such a trend is reflected, on one way or another, in the New Legislation. To enjoy immunity against the “fair and reasonable” test, Clause 4(2)(3) of the Draft Bill provides that the definition of the main subject matter of the contract should be “(a) transparent; (b) substantially the same as the definition the consumer reasonably expected”, and the price should be “(a) transparent, (b) payable in circumstances

¹ Koffman L and E Macdonald, op cit p 278.

² OFT, Bulletin Issue No 2, Sep 1996, para 2.26.

³ *Bairstow Eves London Central Ltd v Smith and others and Darlingtons (a firm) (Pt 20 defendants)* [2004] EWHC 263.

⁴ See further, Koffman L and E Macdonald, op cit p 279.

⁵ [2004] EWHC 263, para 27.

⁶ Ibid, para 30.

substantially the same as those the consumer expected, and (c) calculated in a way substantially the same as the way the consumer reasonably expected”¹.

However, the reference that the above Clause makes to the issues of “transparency” and “reasonable expectation” will not be of any benefit in defining core terms, because they are, as put clearly above, mentioned as conditions to be satisfied in a core term, which is not itself identified, so as to be exempted from the test of “fairness and reasonableness”. In this way, they merely mirror the stipulation of the Regulations that the invulnerable core term must be plain and intelligible. And even if the Regulations or the New Legislation make it clear that the core term is that term which is plain/transparent or meets the expectation of the consumer as implicitly mentioned in the above bulletin, this would be a bizarre criterion generating odd results. For example, the trader would be allowed to enhance the benefits of immunity by drafting all the terms plainly; and that whether a term is a core term would be decided by the consumer depending upon whether or not he understood the term and expected its effects. Worse, the stipulations under both pieces of legislation that the core term must be plain and transparent, etc, in order to be immune from the test, would be meaningless or at least obscure. This is because it does not make sense that the term must be plain/transparent to be immune from the test while it is supposed to be so initially; otherwise it would not have been considered as a core term from the beginning.

Having said this, it was hoped that the New Legislation would overcome the problem of the distinction between core terms and non-core terms, which the existing legislation has failed to solve², by providing a clearer provision on what constitutes a core term. It is welcomed, however, that the new provision will have the effect of limiting the scope of the exemption of core terms. This is more than obvious where Clause 4(2)(3) of the Bill provides for many conditions to be satisfied in the core term so as to not be subject to the “fair and reasonable” test; and, moreover, that the term should be transparent and not only “plain and intelligible”³.

¹ See, also, The Law Commission and the Scottish Law Commission, Report on Unfair Terms in Contracts- (Law COM No 292, Scot Law COM No 199), Feb 2005, paras 3.55, 3.65 and 3.66.

² Almost all of the commentators referred to the Regulations failure in providing for an obvious provision as for core terms exemption; see, for example, Brownsword R and G Howells, op cit p 263.

³ See further, Koffman L and E Macdonald, op cit p 280.

2.3. Excluded contracts

The Regulations apply only to contracts between a consumer and a seller or supplier¹. It follows that business contracts with other businesses are not covered by the Regulations even when acting in private transactions; and neither are contracts concluded between consumers only.

However, the issue which is unclear here is whether or not the scope of Regulations is restricted to the sale of goods and supply of services contracts. In a first reading, it was suggested that agreements which are outside the sphere of supplying goods or services are not affected by the Regulations. For this reason, and in the context of financial securities, as the security is no more than evidence of indebtedness, the contract is excluded from the Regulations' scope. Conversely, the money covered by the security, which will constitute the service, is covered by the Regulations².

This may serve to explain the reason why the specific list of contracts excluded from the application of the 1994 Regulations was not replicated under the current Regulations. Schedule 1 to the former Regulations provided that:

“the provisions of these Regulations do not apply to-

- a) Any contract relating to employment.
- b) Any contract relating to succession rights.
- c) Any contract relating to rights under family law.
- d) Any contract relating to the incorporation and organisation of companies or partnership.”

However, it was suggested that the absence of these exclusions merely mirrors the fact that it is unnecessary to list these exclusions expressly as long as the Regulations are restricted to consumer contracts, and none of the above categories is a consumer contract³. Such a view seems plausible given that the appearance of the exclusions in the Directive mirrors the German AGB's provisions, from where they were lifted, where such exclusions are needed since German law is not limited to consumer

¹ reg 4 (1).

² Lawson R, *Exclusion Clauses and Unfair Contract Terms*, 7th Ed (London: Sweet & Maxwell, 2003), p 200.

³ Bright S, *op cit* pp 341, 342.

contracts¹. Accordingly, one may suggest that contracts mentioned in the above list are covered by the Regulations if they are concluded between a seller or a supplier and a consumer². Despite the fact that the latter requirement rarely materialises, it is still possible. In *Brigden v American Express Bank Ltd*³, the court found that the employee was acting as a consumer. However, relying on this case may not serve the latter view, since it was suggested that the employment contracts were excluded from the scope of the Regulations for reasons other than the impossibility of finding an employee dealing as a consumer. On this suggestion, the real reason for such an exclusion was to leave this category to be dealt with under employment legislation⁴. Even the New Legislation, which separates employment contracts from consumer contracts, seems to be doing so for the latter reason. The Report on Unfair Terms in Contracts, with which the Draft Bill of the New Legislation is enclosed, concentrates on the point that employment contracts are not consumer contracts, but meanwhile goes on to add that this is only for the purposes of the Draft Bill⁵. The Draft Bill goes a step further and puts it more clearly when providing that a consumer contract “means a contract (other than one of employment)...”⁶. If one is right, this exclusion implies that employment contracts could originally be consumer contracts.

A second reading convincingly argues that the Regulations should be interpreted as extending to other contracts where a consumer is a party. Commentators of this opinion⁷ employ the language of other versions of the Directive belonging to many Member States (notably France, Italy, Spain, and Germany) which do not use the restrictive terminology used in the English version (i.e. “seller” and “supplier”). By way of example, the French version of the Directive does not refer to a “seller or supplier” but to a “*professionnel*” which means someone in business or a profession.

¹ Ibid, p 342.

² Lawson R, *Exclusion Clauses and Unfair Contract Terms*, 7th Ed (London: Sweet & Maxwell, 2003), p 201.

³ [2000] IRLR 94. Similar line was taken under UCTA, (see *Chapman v Aberdeen Construction Group Plc* (1993) SLT 1205; *Peninsula Business Services Ltd v Sweeny* [2004] LRLR 49 (EAT)). Formerly, however, the Court of Appeal included a contract of employment under the written standard term of business and, on this basis, refused to treat the employee as a consumer (see, *Liberty Life Assurance Co Ltd v Sheikh* (the Times 25 June 1985)).

⁴ Bone S, L Rutherford and S Wilson, op cit p 7.

⁵ The Law Commission and the Scottish Law Commission, Report on Unfair Terms in Contracts- (Law COM No 292, Scot Law COM No 199), Feb 2005, para 6.9.

⁶ Clause 26(1).

⁷ Grubb A and Furmston M (Editors), op cit p 647; Beale H & Others (Editors), op cit pp 879, 880; Whittaker S, ‘Unfair contract terms, public services and the construction of a European conception of contract’, (2000) 116 LQR, pp 97, 98.

2.4. Areas of significant importance left with uncertainty

2.4.1. Land contracts

One of the major uncertainties as to the scope of the Regulations is contracts dealing with land. Some commentators¹ took the view that this uncertainty no longer exists because of the revision made to the Regulations in 1999. In the 1994 Regulations, the seller was defined as “a person who sells *goods* and who, in making a contract to which these Regulations apply, is acting for purposes relating to his business”; and the supplier as “a person who supplies *goods or services* and who, in making a contract to which these Regulations apply, is acting for purposes relating to his business”².

In the writer’s view, it seems that nothing has changed in relation to the real reason behind such an uncertainty. Although it is true that the definition of the seller and supplier in the 1999 Regulations does not include the phrases “goods” and “services”, reference to them is made throughout these Regulations³ and, more importantly, in the English text of the Directive⁴. Therefore, it can be assumed that the controversy over this issue which arose under the 1994 Regulations will continue, based on the same question of whether it is permissible to treat land as “goods” or “services”.

In response to this question, the argument has taken two directions. Firstly, land is neither a good nor a service, and then land contracts are excluded from the scope of the Regulations⁵. To support this view it was argued that although there is nothing in the Regulations assisting in determining whether or not contracts relating to transactions on land fall within the ambit of selling “goods” or supplying “services”, the English interpretation suggests that they do not. This is because, on the one hand, the word “goods” is restricted to movable products, and some statutes⁶ exclude land from being covered by this concept either expressly or indirectly by restricting “goods” to movables, while, on the other hand, it is not easy to consider such

¹ Cooke J and D Oughton, op cit p 509.

² reg 2(1).

³ E.g. reg 6(1), (2); sch 2 (l)(f), (k) and (l).

⁴ E.g. recitals 2, 5, 6, 7, 18 and 19; art 4(1), (2).

⁵ On this direction, see Bone S, L Rutherford and S Wilson, op cit p 11, where contracts concerning land were categorized within the impliedly excluded contracts. The DTI is of the same opinion, (See, DTI, Implementation of the EC Directive on Unfair Terms in Consumer Contracts 93/13/EEC, a Consultation Document, 1993, comment on art 1(1)).

⁶ See, Torts (interference with Goods) Act 1977, s. 14; Supply of Goods and Services Act 1982, s. 18(1); Theft Act 1968, s. 34(2)(b); and Sale of Goods Act 1979, s. 61(1).

contracts as supplying “services”¹. Even in the case of some contracts on land which contain an element of service, such as contracts of leases and mortgages, English courts took the line, for the purposes of UCTA², that the service element was a part of the creation of the estate. In *Havenridge v Boston Dyers*,³ the Court of Appeal held that insuring the premises by the landlord for the benefit of the tenant was not a supply of a service within the meaning of the Supply of Goods and Services Act 1982. A similar view was taken in *Electricity Supply Nominees v IAF Group*,⁴ in which the court, after declaring that the lease is a multiple contract consisting of agreements regarding paying the rent and other sums (such as service charges) and maintenance, decided that “all the covenants that are integral to the lease which creates the interest in the land ‘relate to’ the creation of that interest in land” and, therefore, none of these covenants were covered by UCTA.

In the other direction, it was suggested that regardless of the restrictive interpretation given to the words “goods” and “services” by the domestic law, such concepts should be interpreted widely so as to cover all consumer contracts⁵. The purposive interpretation which should prevail when interpreting the EC legislation⁶ requires more protection to be given to the consumer, whose interests will be harmed if land contracts are left outside the Regulations⁷.

This approach may be supported by analogy with the French text of the Directive, which does not use the word “goods” but rather uses the phrase “*biens*” denoting property generally rather than mere goods⁸. The judgment of the ECJ in the *CILFIT* case seems to be arguing for adopting the result produced by this analogy. In this case, the ECJ stated that “...it must be borne in mind that Community legislation is drafted in several languages and that the different language versions are all equally authentic. An interpretation of a provision of Community law thus involves a

¹ Bright S and C Bright, op cit pp 661, 662.

² UCTA expressly excludes land contracts from its coverage (see sch 1, para 1).

³ [1994] 49 EG 111.

⁴ [1993] 3 All ER 372. See further, Bright S and C Bright, op cit p 662.

⁵ The vast majority of commentators are of this opinion; e.g. Collins H, ‘Good faith in European contract law’, (1994) 14 OJLS, p 242; Brandner H and P Ulmer, op cit p 651; Bright S, op cit p 341; Grubb A and Furmston M (Editors), op cit p 646.

⁶ See, *Srl CILFIT and Larificio di Gavardo SpA v Ministry of Health* (C-283/81) [1982] ECR 3415, para 20.

⁷ This is the line taken in *the London Borough of Newham v Khatun and others* [2004] EWCA Civ 55, para 77.

⁸ See, Longshaw A and T Sewell, *the Unfair Terms in Consumer Contracts Regulations 1994*, (Surrey: the College of Law, 1997), p 27.

comparison of the different language versions”¹. The Court went on to emphasise that “legal concepts do not necessarily have the same meaning in Community law and in the law of the various Member States”².

If a lesson is to be learned from this ruling, it would be that the priority should be given to the meaning that the Directive intends to give to a particular phrase which can be found out through resorting to other texts of the Directive or even to a different Community legislation, rather than that given under local law.

An example of Community legislation that argues in favour of the second direction can be found in the Sixth VAT Directive, which gives the words “goods” and “services” a broad meaning³. Art 5(1) of this Directive defines “the supply of goods” as meaning “the transfer of the right to dispose of tangible property as owner”, and Member States have, under Art 5(3), the right to include as a tangible property:

- “(a) certain interests in immovable property;
- (b) rights in rem giving the holder thereof a right of user over immovable property;
- (c) shares or interests equivalent to shares giving the holder thereof *de jure* or *de facto* rights of ownership or possession over immovable property or part thereof.”

As for “supply of services”, Art 6(1) leaves no doubt that land contracts fall within the essence of this concept because it states that the latter concept includes any transaction which does not constitute a “supply of goods” as defined in Art 5.

In conclusion, the foregoing debate represents what appears to be a failure in establishing certainty in a very important field; a failure that might amount to a “sorry story”⁴. This is despite the fact that English courts favour the second direction, so as to be in the safe side if the wide interpretation is found to be the meaning intended to be given to the words “goods” and “services”; where otherwise it would mean that the UK had failed to fulfil its obligations to apply the Directive provisions properly⁵. In

¹ *Srl CILFIT and Larificio di Gavardo SpA v Ministry of Health* (C-283/81) [1982] ECR 3415, para 18.

² *Ibid*, para 19.

³ Sixth Council Directive of 17 May 1977 on the Harmonisation of the laws of the Member States Relating to Turnover Taxes-Common System of Value Added Tax: Uniform Basis of Assessment, Directive 77/388/EEC OJ L 145, 13 June 1977 p 1.

⁴ Bright S and C Bright, *op cit* p 672. For further reading on the uncertainty created by the existing Regulations with regard to land contracts, see Longshaw A and T Sewell, *op cit* pp 27,28; Beale H & Others (Editors), *op cit* pp 880-883.

⁵ Harrison R, *Good Faith in Sales*, (London: Sweet & Maxwell, 1997), p 706.

particular, the Court of Appeal has resolved the above debate in favour of this direction and hence the consumer¹.

It is wonderful, therefore, that the New Legislation makes it clear that land contracts are within its scope. The Report on Unfair Terms states that "...contracts for the transfer of an interest in land and for the creation or transfer of interests in securities should not be exempt from the new regime"². The Report goes on to stress this, providing that "...Clause 1³ is drafted without any limitation in respect of transactions for land"⁴.

2.4.2. Insurance contracts

The consensus of opinion is that insurance contracts are within the coverage of the Regulations⁵. In a field described as the "abyss of exploitation permitted by free markets"⁶ - not only because it falls beyond the coverage of UCTA⁷, but also because it allows businesses to enjoy a discretionary right to render the contract void relying on the doctrine of *uberrimae fidei* whereby the consumer is subject to extraordinary duties of disclosure⁸, along with the existence of the dominant small print carrying therein potential unfair surprise⁹ - policing unfair terms came as a welcome step towards reforming the law.¹⁰

However, the picture is not that bright. Under the pressure of the insurance lobby, which failed to exempt insurance contracts from being controlled by the

¹ *The London Borough of Newham v Khatun and others* [2004] EWCA Civ 55 paras 77-83. See, also, *Starmark Enterprises Ltd v CPL Distribution Ltd* [2001] EWCA Civ 1252, Arden LJ, para 70.

² The Law Commission and the Scottish Law Commission, Report on Unfair Terms in Contracts- (Law COM No 292, Scot Law COM No 199), Feb 2005, para 3.80, and see, also, para 3.47.

³ Clause 1 of the Draft Bill which provides for business liability in case of death or personal injury resulting from negligence not to be excluded by any means, and for any other liability to be subjected to the reasonable and fair test.

⁴ The Law Commission and the Scottish Law Commission, Report on Unfair Terms in Contracts- (Law COM No 292, Scot Law COM No 199), Feb 2005, p 30 n 57.

⁵ Beale H, Legislative Control of Fairness: the Directive on Unfair Terms in Consumer Contracts, in Beatson J (Editor), *Good Faith and Fault in Contract Law*, (Oxford: Oxford University Press, 1995), p 239; Longshaw A and T Sewell, op cit p 28; Bone S, L Rutherford and S Wilson, op cit p 11; Hedley S, op cit p 11; Zimmermann R and Whittaker S, *Good Faith in European Contract Law*, (Cambridge: Cambridge University Press, 2000), p 604; The Law Commission and the Scottish Law Commission, Report on Unfair Terms in Contracts- (Law COM No 292, Scot Law COM No 199), Feb 2005, para 3.78.

⁶ Collins H, 'Good faith in European contract law', (1994) 14 OJLS, p 242.

⁷ See, UCTA, sch 1, para 1(a).

⁸ See, for example, the judgement in *Woolcott v Sun Alliance and London Insurance Ltd* [1978] 1 Lloyd's Rep. 629.

⁹ Collins H, 'Good faith in European contract law', (1994) 14 OJLS, pp 242, 243.

¹⁰ Ibid, p 243; Collins B, 'Unfair Terms in Consumer Contracts Regulations 1994', <http://webjcli.ncl.ac.uk/articles3/collins3.html>

Regulations¹, core terms were exempted from being subject to the fairness test. In insurance contracts, these terms are, as the Preamble of the Directive states, those defining or circumscribing the insured risk and the insurer's liability². This seems to represent a loophole in the Regulations³ through which insurance contracts might be excluded from the Regulations by the back door, taking into consideration that the small print in these contracts defines the insured risk⁴.

A comparison with the position that insurance contracts occupy in Jordan shows that if any type of contract has attracted attention, as far as the issue of unfair terms is concerned, it will be insurance contracts. This is seen in this and later Chapters. Having regard to the fact that the insurance contract is treated by the courts as the obvious example of adhesion contract, together with the fact that there is no exemption for core terms, one may be confident that the fears of uncertainty appearing under English law do not exist in Jordan.

2.5. Parties to contract

The parties to a contract under the Regulations are a consumer and a seller or supplier. In order to recognise the ambit of the Regulations it is necessary to examine the concept of each party under the Regulations.

2.5.1. A consumer

Reg 3(1) identifies a consumer as a natural person who is acting for purposes which are outside his trade, business or profession. With a formal difference, Reg 2 of the 1994 Regulations provides that "consumer means a natural person who...is acting for purposes which are outside his business".

It is worrying that the concept of the consumer under the Regulations falls short of protecting legal persons and, thus, seems to be limited relative to the local legislation. As was established in *R & B Customs Brokers Co Ltd v United Dominions Trust*⁵, when a company engages in a transaction which is not a regular one for a

¹ Hedley S, op cit p 11.

² Recital 19.

³ Beale H, Legislative Control of Fairness: the Directive on Unfair Terms in Consumer Contracts, in Beatson J (Editor), *Good Faith and Fault in Contract Law*, (Oxford: Oxford University Press, 1995), p 241.

⁴ Collins H, 'Good faith in European contract law', (1994) 14 OJLS, p 243.

⁵ [1988] All ER 874.

particular business it is covered by UCTA¹. Under the Regulations, the wording “natural person” has excluded companies, clubs, and societies². This restriction to natural persons seems disappointing because small businesses may, when dealing with stronger or more experienced parties, need as much protection as individuals³. Perhaps, for this reason, the New Legislation extends its protection to cover small businesses, although this is afforded outside of the sphere of consumer contracts.

The boundaries of the wording “outside his trade, business or profession” need to be clarified as much as possible so as to limit marginal cases which may constitute a problem hindering the protection of a party who is a consumer on the assumption that he is not. To this effect, recourse to court decisions seems to be appropriate, because they show which readings are taken in practice. In *Standard Bank London v Apostolakis*⁴, the question which arose was whether or not the defendants, who were a couple of wealthy individuals (a civil engineer and a lawyer) using their funds for dealings in foreign exchange under an umbrella contract with the Bank, were consumers. The court found that entering into foreign exchange contracts was “certainly not part of a person’s trade as a civil engineer or a lawyer”. The court went on to hold that even if the criterion used by the ECJ in *Benincasa* (i.e. the criterion of private final consumer)⁵ were used, the foreign exchange contracts “were for the purpose of satisfying the needs of [the defendants], defined as an appropriate use of their income, and that that need was a need in terms of private consumption”, since “consumption cannot be taken as literally consumed so as to be destroyed but rather consumed in the sense that a consumer consumes, viz. he uses or enjoys the relevant product”.

In the writer’s opinion, in spite of referring to the criterion used in *Benincasa*, it could be said that the court did, in reality, try to distinguish between the defendants’ main professions or businesses as engineer and lawyer and their secondary business. That is, dealing in foreign exchange, having regard to the fact that the defendants had

¹ It is worth mentioning that the amendments made to UCTA by the Sale and Supply of Goods to Consumers Regulations 2002 (SI 2002/3045) affords more protection to the consumer where he is an individual than where he is not (see, reg 14 (2)).

² See Lawson R, *Exclusion Clauses and Unfair Contract Terms*, 7th Ed (London: Sweet & Maxwell, 2003), p 199; *Cape Snc v Idealservice Srl* (Joined Cases C-541/99 & C-542), para 16.

³ Beale H, A Hartkamp, H Kotz and D Tallon (General Editors), op cit p 527; Collins B, ‘Unfair Terms in Consumer Contracts Regulations 1994’, <http://webjcli.ncl.ac.uk/articles3/collins3.html>; Dickie J, op cit p 51.

⁴ *Standard Bank London Ltd v (1) Dimitrios Apostolakis (2) Styliani Apostolakis*, the High Court of Justice, NO. 1999 FOLIO NO.1259, Longmore J.

⁵ See below (in this sub-section).

been dealing with the Bank repeatedly, involving a huge amount of money, with the aim of making profit, means that they were traders in fact even though their experience in the field of foreign exchange and their bargaining position were weaker than those of their opponent. As far as consumer protection is concerned, such a broad approach would be helpful had the court made it clear that that was what it intended. What seems clear is that the court had stretched the criterion of “private final consumer” in order to treat the defendants as consumers.

Contrary to this wide reading, the Sheriff Court of Glasgow and Strathkelvin¹ took the line that the wordings “trade, profession” should not be interpreted narrowly, rejecting the claim of a professional footballer that he was a consumer when concluding a management agreement which appointed the claimants to act on his behalf in relation to the negotiation and/or management of any business in connection with his career and related activities as a professional football player². Having regard to the lines taken by the ECJ in *Di Pinto*³ and *Benincasa* the Court held that the defendant was not acting outside his trade or profession since the defendant’s trade or profession was playing football from which he earned his living⁴.

To complete the picture, it is necessary to have a look at European jurisprudence, especially given that it was relied on in the above two cases. Although the ECJ has not had the opportunity to consider the notion of the consumer under the Directive, it has considered it for the purposes of the Brussels Convention⁵ and European legislation other than the Directive, in which the same wording (i.e. outside his trade or profession) is employed. In this regard, the Court has taken an autonomous interpretation imposing a restrictive meaning as to this notion. In *Di pinto*⁶, the question before the Court was whether a trader, who concluded a contract for the advertisement of his business in order to sell it, could be deemed a consumer according to Art 2 of Directive 85/577/EEC 1985⁷. The court held that:

¹ Pursuant to Reg 3, The Regulations apply to Scotland.

² *Prostar Management Ltd v Twaddle* [2003] SLT (Sh.Ct) 11.

³ See below (in this sub-section).

⁴ *Ibid*, paras 3, 12-14.

⁵ Brussels Convention of 1968 on Jurisdiction and the Enforcement of Judgements in Civil and Commercial Matters, art 13.

⁶ (C-361/89) [1991] ECR I-1189, para 12.

⁷ Council Directive of 20 December 1985 to Protect the Consumer in Respect of Contracts Negotiated Away from Business Premises, Directive 85/577/EEC OJ L 372 31 December 1985 p 31.

“The criterion for the application of protection lies in the connection between the transactions which are the subject of the canvassing and the professional activity of the trader: the latter may claim that the directive is applicable only if the transaction in respect of which he is canvassed lies outside his trade or profession. Article 2, which is drafted in general terms, does not make it possible, with regard to acts performed in the context of such a trade or profession, to draw a distinction between normal acts and those which are exceptional in nature.”¹

Accordingly, the Court found that:

“Acts which are preparatory to the sale of a business, such as the conclusion of a contract for the publication of an advertisement in a periodical, are connected with the professional activity of the trader; although such acts may bring the running of the business to an end, they are managerial acts performed for the purpose of satisfying requirements *other than the family or personal requirements* of the trader.”²

The ECJ has repeated this view where a “consumer contract” was, for the purposes of Arts 13,14 of the Brussels Convention, interpreted as a contract concluded for “family or personal requirements”³. Accordingly, the concept of consumer referred only to a “private final consumer”⁴. This entails that the rules of the Convention “apply only to contracts concluded *outside and independently of any trade or professional activity or purpose*, whether present or future”,⁵ with the result that “only contracts concluded for the purpose of satisfying *an individual’s own needs in terms of private consumption* come under the provisions designed to protect the consumer as the party deemed to be the weaker party economically.”⁶

In conclusion, it has been suggested, depending on these rulings, that the ECJ, is likely to take a restrictive view in considering the concept of consumer for the purposes of the Directive⁷. In fact, this is highly likely to be true, but what is more

¹ (361/89) [1991] ECR I-1189, para 15.

² (361/89) [1991] ECR I-1189, para 16.

³ For further reading, see Beale H & Others (Editors), *op cit* p 886.

⁴ *Francesco Benincasa v Dentalkit Srl* (C-269/95) [1997], para 15; *Shearson Lehman Hutton Inc v TVB Treuhandgesellschaft für Vermögensverwaltung und Beteiligungen mbH* (C-89/91) [1993], para 22; *Societe Bertrand v Paul Ott* (150/77) [1978] ECR. 1431, paras 21, 22.

⁵ *Francesco Benincasa v Dentalkit Srl* [1997] (C-269/95), para 18.

⁶ *Ibid*, para 17.

⁷ Beale H & Others (Editors), *op cit* p 886. See, also, Hondius E, ‘EC Directive on Unfair Terms in Consumer Contracts: towards a European law of contract’, (1994) 7 JCL p 38.

important is that such a restrictive approach has already been taken by the courts in the UK. This is apparent from *Prostar Management Ltd v Twaddle*, where, as mentioned above, the player was not treated as a consumer even though the contract was about promoting his career, and it is not expected that he would have any experience in such a field.

Having arrived at this conclusion, and in the light of the exclusion of legal persons from the ambit of the Regulations, the result, of course, is not in favour of the protection which it was hoped would be granted to the consumer. Instead, this seems to be restricted to a large extent.

In the writer's view and after having regard to the rationale of protecting consumers, as explained in the Preliminary Chapter, the solution may lie in going beyond the minimum criterion set out in the Directive, and to allow for a wider concept of the consumer than "any natural person ...acting for purposes which are outside his trade, business or profession". Accordingly, legal persons should be afforded the protection as long as they need it as consumers. Furthermore, all contracts made for family or private consumption of whatsoever nature should be considered as being concluded, "outside his trade, profession or business". Finally, for other contracts which are made not for private or family purposes as illustrated by the ECJ, a distinction should be made between those main transactions which are the essence of the trader's work, and secondary transactions aiming at facilitating his work, i.e. those which relate to his work but are not part of it. For example, a businessman dealing in car repair should be treated as a consumer when buying a computer to save data relating to his work. So should a lawyer if he buys a suit to wear when going to court. This is because they are both in weak positions with no experience, just like any other person dealing outside his business. Conversely, the retailer dealing in computers should not receive the protection available to the consumer under the legislation when dealing with the producer or the main supplier. The same could be said with respect to the lawyer when dealing with his clients, who are consumers in this case while he is not. In this way, the footballer in *Prostar Management Ltd v Twaddle* and the trader in *Di pinto* would both be consumers.

The Jordanian legislator is recommended to pay attention to these points when defining the "consumer", should he produce a special Act or provisions to deal with consumer protection against unfair terms, given that the current provision (i.e. S 204 of the JCC) aiming at protecting adherent parties in contracts gives a wide protection

in connection with the specific point where it targets both legal and natural persons and draws no lines between adherent parties who deal outside their businesses, if any, and those who deal inside them as long as they are both adherent parties.

2.5.2. A seller or supplier

Reg 3(1) provides that “seller or supplier” means any natural or legal person who is acting for purposes relating to his trade, business or profession, whether publicly owned or privately owned.

As far as the width of the Regulations is concerned, a few points could be made in relation to the definition set out above. Initially, it seems that the definition adopted is broad enough to cover contracts to which public or local authorities and organisations are parties, even those which do not aim at making profit.

On the first issue, the Regulations, as with UCTA and the New Legislation which expressly provide that “business” includes the activities of any local or public authorities¹, apply to contracts concluded between a consumer and public or local authorities², such as those between pupils and publicly owned institutions of higher education, with which OFT has had many occasions to deal³. In *The London Borough of Newham v Khatun*⁴, the question arose whether the Regulations and the Directive applied to public authorities, and specifically whether the London Borough of Newham was a “seller or supplier” for the purposes of the Regulations. Both the Court of First Instance and the Court of Appeal made it clear that the Regulations apply to contracts concluded with public and local authorities⁵.

On the second issue, the Regulations follow the line previously taken⁶ and do not apply only to contracts concluded with profit-making organisations⁷. Interpreting the Directive purposively may uphold this view, since the consumer is not always able to recognise whether or not the seller or supplier with whom he is dealing is seeking a

¹ UCTA, s. 14; the Draft Bill, Clause 32 (2).

² Beale H & Others (Editors), op cit p 884; The Law Commission and the Scottish Law Commission, Report on Unfair Terms in Contracts- (Law COM No 292, Scot Law COM No 199), Feb 2005, para 3.32.

³ See, OFT, Bulletin Issue No 21, May 2003, pp 48-50; OFT, Bulletin Issue No 1, May 1996, pp 41, 42.

⁴ *R (on the application of Khatun and others) v London Borough of Newham and another* [2003] EWHC 2326; in the Court of Appeal, [2004] EWCA Civ 55.

⁵ On the first instance, see paras 67,68; on appeal, paras 88-93.

⁶ See, *Town Investment Ltd v department of the Environment* [1978] AC 359; *Rolls v Miller* [1883. R. 2413.] 25 Ch. D. 206, p 71, wherein it was held that it was not necessary for an organisation to make profits so as to be considered as a business.

⁷ For further reading, see Beale H & Others (Editors), op cit pp 884, 885.

profit. Therefore, the level of protection afforded should not to be affected by the fact that the latter is dealing, say, on a charity basis¹.

It could be said that this situation is comparable to that in Jordan. Firstly, contracts concluded with a local and public authority are covered by S 204 of the JCC, even those which take the form of administrative contracts². Secondly, there is nothing in the law to restrict adhesion contracts to those concluded with profit-making organisations. Hence, for example, the consumer who deals with either shops or stores belonging to the Civil Consumption Organisation run by the government, or welfare societies, neither of which aims at making profit, would benefit from the protection afforded by S 204.

Nonetheless, such a spacious ambit that Reg 3(1) generates might be restricted due to the phrases “seller” and “supplier”. This possibility would be avoided if different phrases were used, such as “business” which was used in some language versions of the Directive³. Such phrases suggest that the consumer is the recipient of the good or service. Often he is, but this does not prevent him from sometimes appearing to be the supplying party. The situation in which a woman guarantees her husband’s company to a bank may offer a good example in this connection. In favour of consumer protection, such phrases should not prevent a seller or supplier from being the recipient of goods or services for the purposes of the Regulations. Happily, such an approach is the one that seems to be adopted locally and continentally. The DTI’s guide on the 1994 Regulations suggested that a business which buys from a consumer, such as a second-hand car dealer, can be deemed a seller⁴. Similarly, the judgement of the ECJ in *Bayersiche Hypotheheken v Dietsinger*⁵ made it clear that, in the context of Directive 85/577/EEC⁶, the seller or supplier can be the person who receives goods or services. The judgement in this case showed that a guarantor (the supplier of the service in the contract of guarantee) who enters into a contract for a purpose unconnected with his, or the principal debtor’s, trade or profession shall be regarded as a consumer. Lastly, the European Commission has taken the view that

¹ Ibid, p 885.

² See *infra*, p 112.

³ Grubb A and Furmston M (Editors), *op cit* p 647. The New Legislation is aware of this problem where, instead of using “seller” or “supplier”, it uses “business” (Clause 26 (1)).

⁴ DTI, *The Unfair Terms in Consumer Contracts Regulations 1994 Guidance Notes*, July 1995, para 4.8. See, also, Harvey B and D Parry, *op cit* p 139.

⁵ *Bayersiche Hypotheheken- und Wechselbank AG v Edgar Dietzinger* (C-45/96) [1998] ECR I-1199.

⁶ Council Directive of 20 December 1985 to Protect the Consumer in Respect of Contracts Negotiated Away from Business Premises, Directive 85/577/EEC OJ L 372 31 December 1985 p 31.

“the Directive...covers... contracts such as contracts pertaining to guarantees for the benefit of a financial institution or even cases in which the consumers themselves are sellers (provided the buyer is acting in the course of business)”¹.

2.6. Choice of law clauses

Reg 9 states that the Regulations “shall apply notwithstanding any contract term which applies or purports to apply the law of a non-Member State, if the contract has a close connection with the territory of the Member States”. This gives effect to Art 6(2) of the Directive, which provides that necessary measures shall be taken by the Member States to ensure that the consumer does not lose the protection granted by the Directive by virtue of the choice of the law of a non-member country as the law applicable to the contract.

It appears that the Regulations allow the choice of the law of a Member State even if it is not the law of the UK. The reason behind such permission seems to be due to the effect of the Directive which ensures a minimum protection for the consumer throughout the European Economic Area². This means that the choice of law of a non-Member States is not allowed as long as the contract has a close connection with the territory of the Member States, and, hence, the traditional approach of private international law which respects party autonomy regarding choice of law clauses is sacrificed for the sake of consumer protection. If this were not the case, measures to achieve such protection might be fruitless if traders resorted to terms of this sort to avoid the application of the Regulations. This justification was made clear in UCTA, where S 27(2)(a) provides that the Act shall apply notwithstanding any contract term applying or purporting to apply the law of a country outside the UK where the term appears to have been imposed wholly or mainly *so as to enable the party who imposed it to evade the operation of the Act*.

It seems that what Reg 9 provides for is a familiar continental measure where the consumer is a party in contracts. Reg 9 is consistent with the spirit of Arts 3(3)³ and 5 of the Rome Convention on the Law Applicable to Contractual Obligations

¹ European Commission, Report on the Implementation of Council Directive 93/13/EEC of 5 April 1993 on Unfair Terms in Consumer Contracts, [COM (2000) 248 final] April 27, 2000, p 8 n.19.

² Beale H & Others (Editors), *op cit* p 929.

³ This Article provides: “The fact that the parties have chosen a foreign law...shall not, where all the other elements relevant to the situation at the time of the choice are connected with one country only, prejudice the application of rules of the law of that country which cannot be derogated from by contract...”.

1980 implemented in the UK by the Contacts (Applicable Law) Act 1990¹. Art 5 of the Convention states that, in regard to certain consumer contracts, “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”. By way of analogy with the protection afforded under the Directive, it has been argued that the latter produces more protection than that offered under Art 5 which has at least the difficulty relating to the concept of “habitual residence” which is problematic and not easy to deal with².

However, Reg 9 could be susceptible to vitriolic criticism where there is no definition of the phrase “close connection” which may generate difficulties in application. It has been suggested that guidance may be obtained from S 27(2)(b) of UCTA, which provides that the Act has effect notwithstanding any contract term applying or purporting to apply the law of some country outside the UK, where one of the parties who was habitually resident in the UK dealt as consumer, and the essential steps necessary for the making of the contract were taken there whether by him or by others on his behalf.³

This view remains no more than a presumption, since there is nothing in the Regulations which indicates or even implies that this is what is meant by this phrase. Furthermore, the Directive is concerned with the protection of the consumer against unfair terms throughout the Economic Area. Therefore, it seems illogical to submit its provisions to the interpretation of the UK’s UCTA, which would mean that the phrase is given a meaning which may differ from others adopted in the rest of Europe.

In truth, the latter objection could be rebutted since the same guidance is contained in a European law. Art 4 of Rome Convention states that the applicable law, in case of declaring the chosen law inoperative, is the law of the country with which the contract is most closely connected. In determining such a connection, factors such as the location of the parties’ business or residence, the place of the immovable property if the subject matter of the contract is a right in immovable property or a right to use immovable property, and the place where the contract was made or was to be performed can be examined.

¹ Collins B, ‘Unfair Terms in Consumer Contracts Regulations 1994’, <http://webjcli.ncl.ac.uk/articles3/collins3.html>; Brownsword R and G Howells, op cit pp 244, 245.

² Dean M, ‘Unfair contract terms: the European approach’, (1993) 56 MLR pp 582,583.

³ Lawson R, *Exclusion Clauses and Unfair Contract Terms*, 7th Ed (London: Sweet & Maxwell, 2003), pp 235, 236.

Furthermore, the notion of “close connection” as it appears in UCTA seems to be replicated in the New Legislation. Clause 18 of the Draft Bill provides that

“Where a term of a consumer contract applies (or appears to apply) the law of somewhere outside the United Kingdom, this Act has effect in relation to the contract if:

- (a) the consumer was living in the United Kingdom when the contract was made, and
- (b) all the steps which the consumer had to take for the conclusion of the contract were taken there by him or on his behalf”.

It can be inferred from this provision that the meaning given to such a notion under UCTA is the one intended by Reg 9, given the fact that the Law Commissions are aware that the New Legislation should appear as genuine, sincere implementation of the provisions of the Directive.

It should be mentioned, however, that the criterion for applying the New Legislation is not, as appears from the Clause quoted above, the close connection to “the territory of the Member States” but rather the close connection to “the territory of the UK”. The Commissions’ point of view was that a clause enforcing UK mandatory provisions in wider circumstances would give UK consumers more protection than a provision merely replicating the wording of Reg 9 implementing the Directive. That is because UK law gives consumers stronger protection than that afforded by the Directive, the level of protection which the consumer would not necessarily have under the law of another Member State. This begs the question of what if the law of other Member State puts the consumer in a better situation than that under UK law. The Commissions took the view that even if the law of the other Member State provides more protection, it will still benefit the consumer to be able to rely on UK law. This is because, as stated in a quotation from Whittaker’s report for the DTI on the consolidation of unfair terms legislation, although the law of other Member States may be as protective as, or even more protective than, UK law, it will be difficult and very expensive for a UK consumer to establish this¹. This is in addition to the fact that, in the circumstances stated in Clause 18(1), UK consumers justifiably expect their own “home” law to apply².

¹ The Law Commission and the Scottish Law Commission, Report on Unfair Terms in Contracts- (Law COM No 292, Scot Law COM No 199), Feb 2005, para 7.15.

² Ibid, para 7.18.

In other cases where the contract has a close connection with the territory of Member States other than the UK, the New Legislation provides for the laws of other Member States to be applied as long as they are applicable by virtue of existing rules of private international law and the consumer is afforded the protection contemplated by the Directive¹. The reasoning behind this provision is the contemplation that it would be inappropriate to apply UK law to contracts substantially connected to another Member State, especially when, by virtue of the rules of private international law, “that State’s own Directive-compliant regime” would normally apply to these contracts providing consumers with the required protection².

All this brings us to the point of whether the Jordanian consumer can benefit from a comparable provision under Jordanian law. At the outset, it can be confirmed that there is no direct provision making S 204 immune from a term denying the application of the Jordanian law. Nor does the consumer benefit from the general rule provided by S 20 of the JCC, which reads “the law applicable on contractual obligations shall be that which belongs to the state of the common domicile of the contracting parties, and in case they are not from the same domicile it shall be that which belongs to the state in which the contract was concluded, *unless, in both cases, there is an agreement to the contrary*”. It follows that Jordanian law subjects the law applicable to contracts to the choice of the parties, regardless of whether or not the contract is of an adhesive or consumer nature.

Nevertheless, as discussed below, S 204 bans any term excluding its application. If a wide reading is taken, such a provision will cover not only terms which state that S 204 is not applicable to the contract in question, but also all terms which have the same effect, including terms providing for the application of the law of another state. For the sake of certainty, however, it is hoped that the Jordanian legislator will pay attention to this case in making it clear, through an Act generated in order to protect consumers against unfair terms or a provision to be added to S 204 or S 20, that in contracts to which the consumer or adherent is party a term included to evade the application of the Jordanian law will be ineffective provided that this party is domiciled in Jordan or the contract was made in Jordan.

¹ The Draft Bill, Clause 18 (2), (3).

² The Law Commission and the Scottish Law Commission, Report on Unfair Terms in Contracts- (Law COM No 292, Scot Law COM No 199), Feb 2005, para 7.20.

3. Scope of the theory of contracts of adhesion as represented by S 204 of the JCC

3.1. Introduction

In the Preliminary Chapter, opening issues on the notion of adhesion contracts were addressed, such as its origin, the legal nature of contracts of this sort and their relation to Islamic law. The scope of this notion must now be examined so as to delineate the boundaries of the protection that Jordanian law provides under S 204 of the JCC.

S 204 provides that if a contract of adhesion¹ includes oppressive terms, the court may intervene to amend these terms or even to free the adherent from them, and every agreement to the contrary shall be void.

The formulation of the above Section stipulates that the court can intervene to protect the adherent party if two cumulative conditions are met: that the contract under consideration is entered into by adhesion and that it contains an oppressive term. What constitutes a contract of adhesion will be addressed below, while what amounts to an oppressive term will be the subject of the second part of the following Chapter.

3.2. Defining the “contract of adhesion”

Consistent with the general principle that it is not the task of the legislator to set definitions, the JCC deliberately² does not include a definition of the “contract of adhesion”. However, S 104 of the JCC, set to describe the form of acceptance in contracts of adhesion, does successfully touch the essence of the notion when providing that the acceptance in such contracts is no more than a submission to the offeror’s non-negotiable, pre-formulated terms.

From the above, it seems that the legislator stipulates merely two conditions to declare a specific contract adhesive, concluded between unequal parties and, accordingly, that the weaker party deserves to be protected. Those conditions are the pre-formulation and the absence of negotiation. The question here is whether or not this conclusion is premature ignoring other conditions which need to be satisfied before the protection becomes available. In other words, does the provision of S 104

¹ The Arabic translation of the term “adhesion” is, as suggested for the first time by the learned Egyptian jurist *Assanhory*, “*Ithaan*”. This mirrors precisely in English the term “submission”. Therefore, it may express more accurately the reality of these contracts in which, as will be seen, the weaker party *submits* to the will of the stronger party.

² The Explanatory Memorandum of the JCC, op cit p 114.

set out all the conditions the law requires in the contract for it to be regarded as a contract of adhesion, or are these but the tip of an iceberg? From the point of view of consumer protection, setting standardization as a sole touchstone to adjudicate the adhesive nature of the contract is the best the consumer ever expects, and therefore one would hope that this is what the legislator intends. However, answering this question needs further investigation and analysis.

At the juristic level, the commentators in the civil law world have, almost consensually¹, alluded to three conditions as pillars of the contract of adhesion². Those pillars are:

Firstly, as laid down in S 104, the contract must be standard, which means that the offer concerning one type of good or service must include typical non-negotiable terms for a long period. In other words, the people to whom the offer is directed must be treated equally. However, such a qualification (standardization) would not necessarily be injured if some contractual terms were subject to negotiation, as long as the negotiation was limited³. This may give some credence to the opinion that contracts of adhesion are not always entered into in the absence of personal considerations where, for instance, in contracts concluded between banks and borrowers, where their adhesive nature is never in doubt, personal considerations (the confidence and trust the bank requires in the borrower) play a significant role in concluding the contract⁴.

According to some writers, since the attention should be given to the issue of coercion and not to standardization, which is a mere indication of the existence of coercion, this element is neither inclusive nor exclusive. This entails that, on the one hand, not all standard contracts are adhesive; while on the other hand although the

¹ In their book, *Assarhan and Khatir* added a fourth pillar which is that the majority of the terms included in the contract are in favour of the offeror who is the strong party, (see, *Assarhan A and Khatir N, the Sources of Obligations in the Jordanian Civil Code*, (Amman: *Dar Ul-thaqafah*, 2000), p 73 (in Arabic)).

² Among them: *Pichon; Fortier; Berlioz* (see, *Imran A*, op cit p 28, n 273); *Assanhory A, the Sources of the Right Under the Islamic Law: a Comparative Study with the Western Jurisprudence*, Part 1 (Cairo: *Dar Unnahdah Alarabiah*, 1967), pp 78,79 (in Arabic); *Al-Badawi M, the General Theory on Obligation*, part 1, (Cairo: the Open University Publications, 1991), p 59 (in Arabic); *Sewar M*, the Judge's Authority to Amend the Contract, a lecture delivered in the Jordanian Bar Association and published in the *JBAJ*, 1992, Vol 1, p 111 (in Arabic).

³ CCR 39/1999 *JBAJ* 1999 p 2457; see, also, *Berlioz G*, op cit p 27, cited in *Lashob M*, op cit p 19, where he defined the contract of adhesion as the contract whose content has been determined either entirely or partially in a general, abstract way prior to the contracting process.

⁴ *Berlioz G*, op cit p 48, cited in *Lashob M*, op cit p 144.

predominance of standardization enhances the proportion of adhesion contracts, such contracts are not restricted to standard forms¹.

From a traditional contract of adhesion theory's (that requires the three pillars under discussion to be met in the contract to be considered as adhesive) point of view, the writer agrees with the above opinion in that the standardization element is neither exclusive nor inclusive. And, the non-exclusive nature of the standardization element may provide some interpretation to the fact that repetition is not a necessary element in the contract of adhesion while it is essential in the standardization notion. Only this qualification can justify why a weaker party who adheres to an orphan contractual text concluded for the first and last time might be considered as a party to an adhesion contract².

But, relying on the existence of coercion to prevent unfair terms in either standard or non-standard contracts may lead to doubtful results. If the phrase "coercion" was set to mean "adhesion" or "submission", it will be merely a matter of a difference in expression but the question would still remain when the state of "coercion" or "submission" itself could be said to exist. Whereas, if the intention was to give "coercion" the meaning of "duress", the picture, at the consumer protection level, would be worse since the notion of duress requires more extreme conditions to be satisfied and it seems to be restricted to procedural unfairness, as is the case in Jordanian law. However, resort to the notion of "duress" is less likely to be expected simply because it is useless for the purposes of consumer protection where it seeks to prevent contracts concluded by force. These were never tolerated even before the notion of adhesion contracts was generated; while the issue at stake in relation to the latter notion is the unfairness of the contract in a broader meaning (unfairness in procedures and substance). This issue falls beyond the requirement of force as known under notion of duress.

Secondly, enterprises or businesses dealing in the goods or services which are the subject matters of the adhesion contract must be utilities or suppliers exercising monopoly powers, whether legally or in practice (to borrow Kessler's phrases "artificially or naturally"³). The result in both cases is the absence of rival sellers or

¹ Slawson W, op cit pp 549, 550.

² See, *Lashob M*, op cit p 62.

³ Kessler F, op cit p 632.

suppliers with whom the offeree can contract even if he wants to, or the competition over the supply of the good or service in question is so restricted. It can be deemed so, even in the existence of unlimited competition, the case in which all or the majority of competitors use the same contractual terms. This situation may arise due to a tacit agreement among them or because they are obliged to use terms embodied in a contract produced by a professional or trade association¹. In any case, what is important here is that the consumer is precluded from the benefit of the competitive market represented by the ability to shop around for better terms.

Thirdly and finally, the subject matter of the contract must be goods or services which are essential to the consumers. This pillar will be returned to later in this section.

However, a few jurists² in Egypt and Jordan believe that the narrow traditional notion of contracts of adhesion based on the above three pillars has been superseded by a wider notion based on the idea of pre-formulation and the absence of negotiation, and free from the requirements of monopoly and the necessity of the subject matter of the contract.

This approach is addressed again below when discussing the issue of insurance contracts. It is commensurate with the notion of the contract of adhesion as understood by some common law jurists where no serious attention is paid to the structure of the market in which the contract at issue is made, but rather the keystone is the standard nature of the contract congruent with the absence of negotiation. A good representative of such jurists³ is Rakoff who limited contracts of adhesion to a

¹ An example of such agreements in Jordan could be found in the insurance contracts context where the possibility of producing such an agreement was opened by virtue of the Jordanian Insurance Companies Association Regulations No 30/1989 giving effect to S 41 of Supervising Insurance Businesses Act No 30/1984 (as amended by Act No 24/1987 of the same name), which repeated in S 86 of the superseding Act, Regulating Insurance Businesses Act No 33/1999 (as amended by Act No 67/2002 of the same name). S 4(4) of the Regulations provides that one of the aims of establishing the said Association is to unify insurance contracts.

² See, Mansoor M, *the Insurance Provisions*, (Cairo: *Dar Al-Jame'ah Al-Jadeedah*), p 116 (in Arabic); Haddad H, 'The responsibility of the insurer in vehicles' accident insurance', (1979) 4 JBAJ, pp 136, 137 (in Arabic).

³ See, among them, Macneil where the pre-formulated contracts countervail the contract of adhesion (Macneil I, 'Bureaucracy and contracts of adhesion', (1984) 22 OHLJ p 5); Slawson who is of the opinion that contracts of adhesion commonly occur even in non-monopolistic situations (Slawson W, op cit p 553); Ehrenzweig, *Adhesion Contracts in the Conflict of Laws*, 53 Colum. L. Rev. 1953 p 1075; Adams J and R Brownsword, *Key Issues in Contract*, (London: Butterworths, 1995), pp 55, 63; Koffman L and E Macdonald, op cit p 167.

“model” based on several characteristics, none of which refer to monopolisation or the necessity of the supplied goods or services. These characteristics are as follows:

- “(1) The document whose legal validity is at issue is a printed form that contains many terms and clearly purports to be a contract.
- (2) The form has been drafted by, or on behalf of, one party to the transaction.
- (3) The drafting party participates in numerous transactions of the type represented by the form and enters into these transactions as a matter of routine.
- (4) The form is presented to the adhering party with the representation that, except perhaps for a few identified items (such as the price terms), the drafting party will enter into the transaction only on the terms contained in the document. This representation may be explicit or may be implicit in the situation, but it is understood by the adherent.
- (5) After the parties have dickered over whatever terms are open to bargaining, the document is signed by the adherent.
- (6) The adhering party enters into few transactions of the type represented by the form – few, at least, in comparison with the drafting party.
- (7) The principal obligation of the adhering party in the transaction considered as a whole is the payment of money”.¹

However, Rakoff did admit that, in the context of the common law system, “the most famous academic and judicial treatment of the subject assumed a close connection between the use of contracts of adhesion and the exercise of monopoly power”². As has been already mentioned, this amounts to the situation in the civil law world at the academic level, especially where some writers see that the monopoly is the essence of the notion of adhesion. Such power is seen as the reason behind the standardization of contracts where the monopolistic supplier finds himself in a strong position with no, or limited, competition, enabling him to impose his terms on the weaker party³.

Eventually, the attitude at the juristic level can be described as both somewhat gloomy because it is not easy to decide, depending on it, on what ground S 104 is based, and disappointing since the dominant juristic trend still focuses on the three traditional pillars. This works against a wide and clear scope of “adhesion contract”, which is required as far as consumer protection is concerned. However, a final

¹ Rakoff T, op cit p 1177.

² Ibid, p 1178.

³ Saleem E, op cit p 159.

conclusion on this cannot be made before discussing the issue of insurance contracts in the next section.

Accordingly, it seems that the attitude at the juristic level is at odds with the situation at the legislative level represented by S 104. Whereas the contract of adhesion is, according to many commentators, inevitably linked with monopolisation and the nature of the goods or services to be provided as well as standardization, S 104 implies that it is enough to declare the contract adhesive whenever it is presented as a standard contract coupled with the absence of negotiation.

It might be said that it should be easy to determine the dispute in favour of S 104, because legislation is the first primary source of law in Jordan while the views of jurists are merely ancillary sources. However, the answer is not so simple, for two reasons. Firstly, there is no strong indication that just because the other conditions are not mentioned in S 104, this means that they are of no relevance. Secondly, although it is not binding, the Explanatory Memorandum of the JCC commenting on S 104 backs the attitude of the jurists when repeating the three pillars linking the contract of adhesion with the practice of monopoly and the necessity of the goods or services¹.

Yet, the idea that standardization is the only condition required by the law to declare a contract adhesive might be sustained by the fact that reliance on the theory of contracts of adhesion based on the above three pillars as a protective device against unfair contract terms is declining in France in favour of the protection based on the distinction between *contrats négociés* [sic] and *contrats non négociés* [sic] (negotiable and non-negotiable contracts)². This means that the French law, as the spiritual father of the theory, no longer concentrates on the monopolistic nature of the utility as a key element in operating the protective system acting against unfair terms. Such a development could explain why the so-called “pre-formulated standard contract” in the English version of the Directive (Art 3(2)) is referred to as “*contrat d’adhésion*” in the French version³. This development might be seen as a departure from the entire notion of adhesion contracts, or a mere modification in the notion basing it on the single condition of standardization. Whilst, the provision of S 104 can be justified on the latter assumption, there is no room to base it on the former. This is because both Ss 104 and 204 indicate explicitly that their provisions apply to adhesive contracts

¹ See The Explanatory Memorandum of the JCC, op cit p 113.

² See, Assarhan A and Khatir N, op cit p 72, n (1).

³ See, Hondius E, ‘EC Directive on Unfair Terms in Consumer Contracts: towards a European law of contract’, (1994) 7 JCL pp 37, 38.

and not to any other contract. Therefore, the discussion will be restricted to the possibility that a development has taken place in the notion of adhesion contracts itself.

The attitude at the judicial level seems to be not upholding this or at the best, as with the situation at the legislative and juristic levels, uncertain. In the absence of Jordanian case-law on the issue at stake, it is helpful to have recourse to rulings taken by the Egyptian courts, given that S 204 of the JCC is a copy of S 149 of the Egyptian Civil Code¹. In considering the conditions that must exist in a contract so as to be deemed a “contract of adhesion”, the Egyptian Court of Cassation has left no doubt about the necessity of the existence of the three traditional pillars², demonstrating that in absence of any of them, “adhesive” is not the correct description of the contract in question.³

In the light of this and the predominant attitude at the academic level, one might conclude that, if the question of what conditions a contract of adhesion must satisfy goes to Jordanian Court of Cassation, it is highly likely that the traditional restricted approach, based on the exercise of monopoly power and the necessity of goods or services, will be upheld. However, it should be repeated that the lack of judicial rulings in this connection leaves the whole issue deeply uncertain.

On the assumption that the above dominant attitude proves to be correct, a more limited protection might be expected if a restrictive approach is also taken with relation to the necessity of the subject matter of the contract. The degree of necessity required is not clear with the consequence that it may constitute a point of undesirable uncertainty. Although the Jordanian Court of Cassation has not had the opportunity to express its opinion on this issue apparently because, as already mentioned, it has never been faced with the question of what constitutes a contract of adhesion, it seems that the approach taken implicitly by the Court is wide enough to encompass a range of contracts. This is fairly obvious from the series of decisions taken by the court over twenty seven years since the enactment of the JCC, in which the court has repeatedly emphasized the adhesive nature of insurance contracts⁴. The importance of the example of insurance contracts stems from the fact that it is not only the necessity of

¹ Hussain N, op cit p d.

² Egyptian Civil Cassation (hereafter ECC) 208/1954, cited in *Shulah S, the Court of Cassation's Judgments on Insurance*, (Alexandria: *Mansha'at Almarif*, 1997), pp 128,129 (in Arabic); ECC 134/1969, cited in *Saleem E*, op cit p 159; ECC 80/1974, cited in *Morqus S*, op cit p 183.

³ ECC 208/1954; ECC 230/1958, cited in *Shulah S*, op cit pp 129, 128 respectively.

⁴ See *infra*, p 110, n 5.

the insurance as a subject matter of the insurance contract which is disputed but also the validity of the contract itself. According to the *Shari'a*, on which the JCC is based, this is in doubt¹ regardless of the fact that JCC took the dominant opinion in the Islamic jurisprudence which is apt to validate insurance agreements.

Even so, it could be said that the Court of Cassation has not set a general criterion as to what could be considered as necessary goods or services. For this reason, providing some enlightenment on this issue requires resorting to judgments taken pursuant to a comparable law system. A look, once again, at the decisions of the Egyptian Court of Cassation turns the optimistic picture painted above upside-down. The Court has seemingly taken a narrow view of the concept of “necessity”, stipulating that essential goods or services are those which people need desperately, or cannot look after their interests without, to the extent that they are coerced to enter into contracts to reserve them even if the terms of these contracts are excessively burdensome². It is no surprise, therefore, that the Court quashed the decision given at the first instance considering private vehicles as necessary goods³. If the same approach is taken in Jordan, it will have an unfortunate impact on consumer protection, severely restricting the number of consumer contracts covered by the notion of “contract of adhesion”.

3.3. The position of insurance contracts

Addressing the issue of whether or not insurance contracts fall within the realm of contracts of adhesion is important because it is relevant to the width/narrowness of the whole theory of adhesion contracts, which is the main aim of this section. Also, finding that the insurance contract is a contract of adhesion would extend the protection afforded to the consumer against unfair terms included in insurance contracts by subjecting terms falling outside the list of specifically outlawed terms addressed in the next Chapter⁴, to the test of oppression. Furthermore, once it is clarified that insurance contracts are of adhesive nature, this list would be an indication as to the whole test of oppression, providing a considerable enlightenment concerning the fairness under the JCC.

¹ On the debate over the validity of insurance contracts in Islam, see *Al-Khafeef A*, ‘The insurance Contract’, (1965) AJ, p 10 et seq (in Arabic); *Al-Attar A*, ‘The position of the commercial insurance under the Islamic law’, (1976) JGCM, p 260 et seq (in Arabic).

² ECC 80/1974, cited in *Saleem E*, op cit p 159.

³ ECC 396/1974, cited in *Shulah S*, op cit p 129.

⁴ See *infra*, p 189 et seq.

Whether or not insurance contracts are adhesion contracts has been the subject of extensive debate. The overwhelming majority of opinion on the issue suggests that insurance contracts are contracts of adhesion¹. Some jurists who support this opinion have not explained clearly the ground upon which they took this route, except by reference to the inequality of bargaining positions allowing the drafting party not to negotiate contractual terms². Others³ rest clearly on the three traditional pillars which do, in their opinion, exist in the insurance contract in that: the insured person has as a rule no say in the formulation of the contract nor is he able to negotiate its details; the insurers are at least in practice monopolistic powers always keen on generating uniform contracts, and sometimes they being obliged to; and the service that insurers provide is necessary to the public, because it is no longer acceptable to consider, say, fire insurance, accident insurance, or employer's liability insurance, as sorts of accessories notably in the eyes of big or even small firms as part of profit and loss computing process.

Under a second opinion, the insurance contract is not an adhesive contract for the following reasons:

- 1- The insurers are not monopolies since there is open competition between insurance companies in the marketplace. The contention that the insurance industry operates in a monopolistic environment could be true in socialist or communist countries, but not in free-market states such as Jordan and Britain. In countries like the latter, the relationship between the insurer and the insured person is based on a neck and neck basis, allowing for the insured to negotiate the contract freely even if it is pre-formulated. This is because most of its terms are modifiable especially where a considerable number of the people dealing with

¹ This is the situation not only in Jordan and Egypt following the French line but also in other codified systems such as the Italian law (see, Bossi A, 'Unfair contract terms under Italian law', (1995) 6 ICCLR, p 27); and beyond that, in the common law (see, Patterson, 'The delivery of a life-insurance policy', 1919 33 Harv. L. Rev. pp 198, 222, where the word adhesion was mentioned for the first time; Blyth T, 'Regulation of reinsurance in the United Kingdom: arbitrage and architecture', (2002) 4 JIFM p 185; *Pilkington UK Ltd v CGU Insurance PLC* [2004] EWCA CIV 23, Potter L.J.

² *Al-Ateer A*, op cit pp 92 et seq; *Assanhory A*, *Al-Waseet in the Civil Law*, Part 7, (Beirut: *Dar Ihia' Atturath Al-Arabi*, 1973), pp 1141 et seq (in Arabic).

³ See *Al-Badrawi A*, *The insurance*, (Cairo: *Dar Al-Kitab Al-Arabi*, 1963) p 116 (in Arabic); *Faraj T*, *The insurance under the Lebanese law*, (Beirut: *Addar Al-Jame'yeh*, 1986), pp 322, 323 (in Arabic); *Al-Zu'bi M*, *the Insurance Contract: a Comparative Study Between the Islamic and non-Islamic Laws*, a PhD Thesis, Cairo University, Cairo, 1982, p 149 (in Arabic); *Saleem E*, op cit pp 164, 165.

insurers are well-educated and sometimes expert, because of which they are able to bargain effectively.¹

Interestingly, this point has received the support of some jurists who argue that insurance contracts are adhesive, acknowledging that if the insured person is a big firm in a strong position, such as an oil company, the contract will not be adhesive insofar as the insured is able to impose some conditions on the insurer.²

2- Even if it is submitted that the insurance companies are in a monopolistic situation, the insured might still find shelter in the direct legal censorship offered by the law, which sometimes intervenes to regulate the conditions of insurance contracts concerning termination and the instalments to be paid by the insured person³. Even those who are of the opinion that insurance contracts are adhesive exclude the situation where the legislator intervenes to regulate a specific contract. For this reason, some have suggested that the compulsory insurance imposed by S 6 of Road Traffic Act No 47/2001 on the vehicle owners, aiming at insuring third parties, who are not responsible for the accident, and their cars or belongings, is not a contract of adhesion⁴ taking into consideration that the legislator's intervention extends to regulate the contract conditions and allocating the instalments to be paid by the insured as well as the remuneration the third party (the beneficiary) deserves⁵.

3- As a subject matter of the contract, the insurance is not an essential service to the degree people cannot live conveniently without it, and therefore it cannot be compared with food, electricity, gas, and transportation.⁶

If one is of the opinion that insurance contracts are of adhesive nature, one can rebut the above argument by relying on the following points:

¹ Abd Ullah S, *the Risk and the Insurance*, (Cairo: Dar Unnahdah Al-Arabiah, 1967), p 70 (in Arabic).

² Al-Ateer A, op cit p 94.

³ Of this opinion is *De feil* (see Al-Zu'bi M, op cit p 149).

⁴ Al-Ateer A, op cit p 94.

⁵ Ss 7 and 10 of the Obligatory Insurance Against Civil Liability Arising from the Use of Vehicles Regulations No 32/2001 provide that insurance instalments to be paid by the insured person to the company and the rules of estimating the remuneration to be paid to the third party once the accident happens are to be allocated pursuant to instructions issued by the Cabinet.

⁶ See, Abu Qurah K, 'Is the insurance contract among the contracts of adhesion?', (1992) 34 AIJ, p 5.

Firstly, we have already reached the point that the existence of many suppliers does not mean necessarily that there is competition in the market, since there might be a tacit agreement between those suppliers on the terms to be presented to the public.¹

Secondly, it is apparent that the jurists of the above opinion relied on the nature of the free market to protect the insured against the insurer. But this has nothing to do with the fact that the insured is still a weaker party suffering from an inequality of bargaining position represented by lack of choice and experience. This cannot be changed if a limited number of insured persons have equal positions to those of the insurers in terms of experience or financial power.

Thirdly, the argument that the insured is well-protected by the law, with the result that he is no longer a weaker party in the contract, is a double-edged sword since it can be employed by the opponents of the non-adhesive nature of insurance contracts. It could be contended that the legislator need not intervene to protect the insured party if the latter were not in need for such protection due to the adhesive nature of the contract to which he is party.

Fourthly, as for the compulsory insurance which is set as an example in the second reason put forward by the proponents of the non-adhesive nature of insurance contracts, the writer thinks that this could amount to a bizarre point to be made. Leaving aside the fact that *Haddad*, who, as will be seen below, denied that insurance contracts are of adhesive nature in the light of the three pillars, sees that compulsory insurance contracts is an exception since their subject matter is necessary by virtue of the law², the writer believes that considering the compulsory insurance as non-adhesive contract just because the legislator regulates its provisions would have a destructive effect on the whole idea of adhesion contracts. This is because almost all contracts whose adhesive nature has never been in doubt; such as contracts on electricity, water, gas and transportation, have been regulated by the legislator in

¹ See *supra*, p 102.

² See *Haddad H*, Adhesion and the insurance contract, a paper presented at the Judiciary and the Insurance Conference held in Amman between 28-30/Oug/ 2002, and could be found at 'http://www.lac.com.jo/resear26_1.htm' (in Arabic).

favour of the weaker party¹, and, then, according to this opinion, could be considered as non-adhesive. The question would be which contracts are adhesive, if these were not!

A third opinion has been taken by *Haddad*² who adopted the same argument said by the proponents of the non-adhesive nature of insurance contracts but arrived at a different result. After acknowledging that insurance contracts cannot be adhesive if the three pillars are pre-conditions, *Haddad* took the view that the fact that the insurance contract is adhesive is an example of the development that happened on the theory of adhesion contracts. The final version of the theory, as already discussed³, does not pay attention to the three traditional pillars, and instead the only condition to be met is that the weaker party has no role to play in drafting the contract nor is he able to negotiate its provisions after drafting.

Although one cannot conceal one's sympathy towards the latter opinion, which appears to be simple and closer to being able to satisfy the contemporary consumer's need for protection, the attitude in Jordanian is covered with uncertainty. The JCC is not helpful in arguing in favour of this opinion although it is not against it. The Explanatory Memorandum stresses the adhesive nature of the insurance contract⁴, but does not explain on what basis it takes this approach. As such, there is no choice but to refer to the general conditions (the three traditional pillars) to which the Memorandum alludes in the course of defining the contract of adhesion, with the result that only the traditional theory can, from a legislative perspective, provide a ground for considering insurance contracts as of adhesive nature.

On the other hand, surveying the decisions taken so far by the Court of Cassation concerning insurance contracts shows that the court, which is constantly of the opinion that these contracts are adhesive⁵, has never based its decisions on the three pillars, but rather refers repeatedly to the issues of pre-formulation and lack of negotiation. Does this support *Haddad's* point of view? This question is difficult to

¹ See, for example, the General Electricity Act No 64/2002; the General Passengers Transportation Act No 48/2001.

² *Haddad* H, 'The responsibility of the insurer in vehicles' accident insurance', (1979) 4 JBAJ, pp 136,137(in Arabic), repeated in *Haddad* H, Adhesion and the insurance contract, a paper presented at the Judiciary and the Insurance Conference held in Amman between 28-30/Oug/2002, and could be found at 'http://www.lac.com.jo/resear26_1.htm' (in Arabic).

³ See *supra*, p 104 et seq.

⁴ The Explanatory Memorandum of the JCC, op cit p 113.

⁵ See, by way of example, CCRs: 2541/1999 JJ 2000, p 93; 531/1998 JBAJ 1998, p 2625; 1611/2002 ACC; 2596/2001 ACC; 157/2002 ACC.

answer because it could be argued that the question of the necessity of the three pillars has never been openly directed to the Court of Cassation. Being so, along with the open contradiction with the Explanatory Memorandum, which occurs once it is said that the Court adopted the pre-reformulation and absence negotiation as a sole requirement to be met in adhesion contracts, it is by no means easy to promote, without reservation, the contention that insurance contracts are adhesive.

The conclusion would be that insurance contracts are obviously adhesion contracts under the JCC, but it is uncertain whether they are so on the grounds of the traditional theory of adhesion contracts based on the three pillars or the new version of the theory based on mere standardization. Having concluded this, the consequence would be that the case of insurance contracts does not help in finding an answer to the question of whether the theory of adhesion contracts under Jordanian law is based on a single pillar or three pillars. In other words, the same uncertainty which appeared in the previous section is replicated here.

3.4. Private & administrative contracts

It is important, as far as the scope of the notion of adhesion contracts is concerned, to answer the question of whether it is restricted to private contracts (civil & commercial contracts) or goes beyond that to encompass administrative contracts. Answering this question entails, firstly, having a look at the characteristics that distinguish administrative contracts from private contracts.

Although the courts and public law jurists have divided on the criteria by which administrative contracts can be identified, there are, as a whole, two criteria for defining them:

First, the legislative criterion according to which if legislation provides that the administrative courts are competent to determine a dispute raised by reason of a specific contract, this contract would be deemed an administrative one.

In Jordan, a distinction based on this criterion is not to be found because the sole, first instance and ultimate administrative court, which is the High Court of Justice, is not competent to review contracts whatsoever, simply because its competence is confined to revising specific types of administrative decisions¹.

¹ The High Court of Justice Act No 12/1992, s. 9.

However, the most famous administrative contracts of this type, as provided by comparative laws in France and Egypt, are the contracts of public actions and the public supply.

Second, the judicial criterion is based on the definition given to the administrative contract by the administrative courts, and especially by the first court that appeared in the administrative judiciary world, the French *Conseil D'Etat* (Council of the State). This suggested that the administrative contract is a contract concluded by a public legal person in order to operate a public utility under the public law provisions allowing for the inclusion of abnormal conditions not tolerated under the private law, such as the administration's right to terminate the contract without reasonable notice or bearing consequential responsibility.¹

In the light of this definition, there is no place for restricting the scope of the contract of adhesion to private contracts. Rather, it seems that the need for protecting the weaker party to the administrative contract is greater where the strength of the administration does not only appear as a natural, abstract strong position that the strong party to a private contract has (in terms of wealth and experience) but also as a tangible authority which is in the nature of the administrative contract itself. The administration in such contracts is armed with extraordinary legal rights allowing it to terminate, alter the contract without notifying the other party or cure the loss he incurs as a result.

From the point of view of consumer protection, that the concept of adhesion contracts does cover administrative contracts seems to be of very limited impact, if any, since it is not imagined that the notion of consumer, however widened, can be applied to a party to an administrative contract.

This does not mean that it is impossible to find contracts concluded between a consumer and the administration. The administration concludes contracts with consumers but they are not of an administrative nature. The administration does not contract only with administrative contracts but runs its, and the people's, affairs via both administrative and private contracts. So, consumers are not parties to administrative contracts when dealing with public utilities operated by the government or under its supervision, such as public and private universities or

¹ *Al-Tammawi S, the General Basis of the Administrative Contracts*, (Cairo: Darul Fikr Al-Arabi, 1975), p 50. See, also, ACR 181/97 ACC.

hospitals. Transactions of this sort are private contracts irrespective of the fact that one of the parties is a public legal person, because all such transactions will not meet the criterion set out above.

3.5. Written & oral terms

Consumer protection under S 204 will be affected positively or negatively depending on whether the notion of adhesion contracts is confined to written contracts or goes beyond that to include oral agreements. Similar to what appeared under the Regulations, both judicial and academic levels agree that even if it is stipulated that the adhesion contract must be standard, this does not mean that it must be produced in writing. Even if the majority of adhesion contracts are written, they could, however, be oral, depending on the type of the contract they represent.

In a few cases, the law provides that specific types of contracts are void unless they fulfil the formality the law requires, which is either to be concluded in writing¹ or to be registered which, in practice, entails that the contract must be in writing². The law, in few cases also, provides that the proof of specific contracts must be through writing exclusively albeit their conclusion is not subject to the formality³. However, it is apparent that the requirement that the contract must be in writing, in these cases, has nothing to do with its characteristic as a contract of adhesion, but rather depends on whether or not the law requires that a particular contract must satisfy specific formalities or be in writing, which happens irrespective of whether it is a contract of adhesion⁴. Such an approach seems to be compatible with what has been explained above that the contract of adhesion is not tied to standard contracts, though being tied to the latter form does not, also, prevent it from being concluded orally.

¹ On cases of this sort, see S 584(1) of the JCC stating that the partnership contract should be in writing.

² The most famous examples of these contracts are contracts on land and vehicles.

³ In CCR 121/1995, the Court of Cassation held that the insurance contract is a contract of consent (i.e. not formal) and thus the mere verbal offer and consent are enough for the purpose of entering the contract. Even so, the averment of the contract should be in writing (JBAJ, 1996 p 1787). See in the same meaning, CCR 321/1990 JBAJ 1991, p 1866.

⁴ *Imran A*, op cit p 27; *Lashob M*, op cit p 71 et seq.

3.6. Could the scope of protection under S 204 be wider than that of the Regulations?

If an early conclusion is to be made here, it would be that the scope of S 204 of the JCC concerning the notion of adhesion contracts is far more restricted than that of the Regulations. However, the protection under the JCC seems to be wider than that under the Regulations in three respects. Leaving aside the fact that the notion of “contracts of adhesion” is wider in that it is not restricted to consumer contracts but covers all adhesion contracts, no matter whether the adherent is a consumer or not¹- which is not important here, since consumer protection is the subject of this study and it is renowned that a considerable proportion of adherents are, in fact, consumers - the protection offered by the JCC is wider since:

Firstly, it includes all weaker parties irrespective of whether they are natural or legal persons. Even if it is recognised that the majority of consumers are natural persons and that the majority of consumers who are in pressing need of protection are natural persons, the JCC’s blanket protection is still of significance due to the fact that legal persons may, in many instances, find themselves in weaker, not better, contractual positions than those of natural persons.

Secondly, although it is true that standardization coupled with hostility to negotiation is a solid characteristic of the notion of the contract of adhesion, it should be borne in mind that not all terms of the contract of adhesion are of this sort. On this basis, it is not uncommon to find some terms in insurance contracts, for example, are left to be negotiated individually with the consumer (the insured). In this case the scrutiny of oppression under the JCC covers all the terms in the contract regardless of whether or not they have been negotiated. Some may argue that, even under the Regulations, the fact that a specific term or certain aspect of a pre-formulated standard contract has been negotiated will not exclude the rest of the contract from the test of fairness². This is definitely true but does not mean that the JCC and the Regulations offer an identical protection, in relation to this part, where the former subjects all the terms of the contract of adhesion, including those which are negotiated, to the test of oppression.

¹ See, Rakoff T, op cit p 1178 n 14.

² reg 5(3).

Thirdly, it has been suggested that some contracts, such as those relating to electricity, water and post are excluded from the coverage of the Regulations because they are, without justification, considered as of a non-contractual nature; i.e. they are relationships created by public law, and the Regulations do not apply to non-contractual relations¹. This is not the case under the notion of contract of adhesion, but rather these contracts are at the heart of such notion.

However, the writer's view is that the existence of such a shortcoming might be under suspicion at least in practice. Sch 1 to the Regulations lists the Director General of Electricity Supply for Northern Ireland and the Director General of Water Services among the qualifying bodies, and there would be no point in listing them if these sectors are excluded from the Regulations. More importantly, there is evidence from the OFT's bulletins that these sectors or, at least, water and postal services are covered by the Regulations. Bulletin 13, for example, shows that agreements for the supply of water² and postal services³ were investigated and amended by the enforcing bodies, which means that the latter understood that they are within the coverage of the Regulations.

In Jordan, such contracts are, as said before, covered by the idea of adhesion contracts. However, it may be true to say that the most important terms they contain, like those concerning the price will escape the application of S 204 of the JCC by the back door because they are imposed by, or reflect, statutory or regulatory provisions of the law regulating the supply of the goods or services which constitute the subject matter of these contracts. As mentioned earlier in this Chapter,⁴ there is no express provision in Jordan like that under the Regulations excluding terms of the latter kind from the application of S 204. However, it is expected that the same result would be achieved if a term reflecting a statutory or regulatory provision was brought before the court. One would think that the legal logic is that the court would have no choice but to declare the fairness of such a term because the legislator does not impose an oppressive term.

¹ See, Nebbia P, *Unfair Terms in Consumer Contracts: English and Italian Law on Unfair Terms in the Light of Directive 93/13*, a PhD Thesis, University of Southampton, 2003 p 114. See further, Whittaker S, *op cit* pp 96, 97.

² OFT, Bulletin Issue No 13, April 2001, p 26.

³ *Ibid*, p 23.

⁴ See *supra*, p 70 et seq.

Last, but not least, core terms, which are immune from the test under the Regulations, are not afforded such a privilege under the JCC which, in this relation, treats all terms equally. This advantage should not be underestimated, taking into consideration that core terms are the most important terms in the contract and, one can venture to say, the terms in which unfair provisions are often included.

4. Conclusion

Both English and Jordanian laws on unfair terms have many loopholes and leave many points deeply uncertain. This, sometimes, allows for the protection, which is the aim behind enacting the legislation, to be missed by the back door. Nevertheless, the situation in Jordan seems to be much more problematic.

Some of the provisions of the English Regulations need to be verified so as to provide the level of protection that matches the desires of consumers. The relationship between the Regulations and UCTA constitutes the main source of confusion and complexity that consumer protection suffers from. Additionally, some types of contracts, such as land and insurance contracts, have with no obvious reason been left under the mercy of the courts' interpretation as to whether or not to grant the weaker parties to them the protection provided by the Regulations. However, the New Legislation may mitigate some criticism directed to the English legislation, since it seems to be aware of many of these problems. Major issues like the overlap between UCTA and the Regulations and the problem of land contracts will be resolved once the New Legislation has been enacted.

In Jordan, legislative and judicial attitudes still revolve around the three pillars of the adhesion contract as imposed by the traditional theory (that the contract is pre-formulated and non-negotiated; that its subject matter is essential to the consumer; that the seller or supplier is a monopolistic power). Therefore, it is quite hard to say that consumer protection is sufficient. The prevailing opinion, as described in this Chapter, is that the three pillars must meet in the contract to be considered a contract of adhesion. As such, the scope of the protection afforded seems to be, considerably, narrower than that of the Regulations, which, require only that the contract be non-negotiated in order to operate the system of protection against unfair terms. On this ground, it is clear that the JCC immunizes many contracts from the test of oppression, the situation which seems to be against the requirements of consumer protection.

The solution to such a shortage in protection would be to extend its scope to cover all contracts regardless of their subject matter and the structure of the market in which the contract is made. Such a step could be taken by the legislative authority by adding an express Section to the JCC defining adhesion contracts as those contracts which have not been negotiated. Alternatively, the legislative authority could include such a provision in a freestanding Act to protect the consumer against unfair terms in addition to the general provision enshrined in S 204 of the JCC.

Assuming that the legislative authority is not in a mood to trigger such a development, it is the responsibility of the judges, who are in touch with the daily ongoing problems generated by unfair contract terms, to take this step through adopting the wide reading of adhesion contracts based on the sole requirement of pre-formulation associated with the absence of negotiation. This invitation is directed particularly to the Court of Cassation given the moral power that it has, as an ultimate court in the judiciary, over the inferior courts.

Chapter Two

The test of fairness/oppression

1. Introduction

The purpose of this Chapter is to examine the English test of fairness and the Jordanian test of oppression. An ideal level of consumer protection against unfair terms requires not only the existence of such a test but also that it is effective. And the effectiveness of the test entails that its elements are set out in a clear, comprehensible, and accessible way, and that every single phrase and wording used is accurate.

As a part of the test, the English Regulations and the Jordanian JCC provide lists of potentially unfair terms (as for England) and oppressive terms (as for Jordan), albeit the latter is restricted to the specific sector of insurance contracts. As far as these lists are concerned, the concentration will be on three issues; firstly, the aim behind including a term within the list and whether it reflects the general concerns of the test; secondly, and relating to the first, the indications that the list provides on the interpretation of the test, the issue which is very important to the Jordanian case mainly; and thirdly, with regard to the English list only, whether a term categorised within the list is a mere replication of that dealt with under common law or other legislation, notably UCTA, which has, as will be seen, a particular effect on the efficiency of the test as a whole.

The practical impact of the test as appears from the OFT's reports and court rulings, however few, will be given attention, since it is not the frozen pieces of legislation which are important but rather their practical impact.

2. The Regulations' test of fairness

2.1. Rules determining fairness

According to Reg 5(1), any contractual term not individually negotiated shall be regarded as unfair if it causes a significant imbalance in the parties' rights and obligations arising under the contract to the detriment of the consumer, and if it is contrary to the requirement of good faith. The Regulation goes on, in Para 2, to provide that a term shall always be regarded as not having been individually negotiated if it has been drafted in advance, provided that the consumer has not been

able to influence its substance. The provision provided by the latter Paragraph was treated in the previous Chapter. In this Chapter the requirements of good faith and balance are addressed.

2.1.1. The requirement of good faith

2.1.1.1. Background: good faith under common law and the advent of the Directive

Despite the very early invitation to adopt a doctrine of good faith in English law¹, and the existence of some exceptions in certain areas such as the law of insurance where the governing principle is good faith, a general principle of good faith was until very recently unfamiliar to English contract law². Instead, English law has been familiar with this concept in the sense of honesty in fact or a clear conscience, but refused to adopt explicitly an overriding requirement of good faith³. This had the effect of motivating commentators to see the notion of good faith as something mysterious and exciting to an English lawyer⁴, and, moreover, problematic⁵. For these reasons, the Law Commissions recommended that the New Legislation should not include any express reference to “good faith”⁶. Whether or not others⁷ agree with those who argue

¹ See, Powell R, ‘Good faith in contracts’, (1956) 9 CLP p 16 et seq; Brownsword R, ‘Good faith in contracts’ revisited’, (1996) 49 CLP p 111.

² Collins B, ‘Unfair Terms in Consumer Contracts Regulations 1994’, <http://webjcli.ncl.ac.uk/articles3/collins3.html>>; Brownsword R, ‘Positive, negative, neutral: the reception of good faith in English contract law’ in Brownsword R, N Hird and G Howells, *Good Faith in Contract-Concept and Context*, (Aldershot: Dartmouth Publishing Ltd, 1999), p 14; Weatherill S, op cit p 322.

³ Brownsword R, ‘Positive, negative, neutral: the reception of good faith in English contract law’ in Brownsword R, N Hird and G Howells, *Good Faith in Contract-Concept and Context*, (Aldershot: Dartmouth Publishing Ltd, 1999), p13; Adams J and R Brownsword, *Understanding Contract Law*, 3rd Ed (London: Sweet & Maxwell, 2000), p116. See, also, Mckendrick E, op cit p 368.

⁴ Collins H, ‘Good faith in European contract law’, (1994) 14 OJLS, p 249. The same suggestion was repeated in *Zealand & Zealand v Laing Homes Limited* (2000) T.C.L.R, Sweet & Maxwell Ltd p 727.

⁵ Gonzalez A, ‘eBay law: the legal implications of the C2C electronic commerce model’, (2003) 19 CLSR p 472; Weatherill S, op cit p 316; Hodgkinson T, ‘Enforcing consumer rights in the 21st century’, (1999) 22 CLT, p 71.

⁶ See, the Law Commission and the Scottish Law Commission, Report on Unfair Terms in Contracts- (Law COM No 292, Scot Law COM No 199), Feb 2005, paras 3.86 - 3.91.

⁷ Considerable objections against removing reference to good faith have been made, suggesting that this constitutes a retrograde step (see, the Law Commission and the Scottish Law Commission, Report on Unfair Terms in Contracts- (Law COM No 292, Scot Law COM No 199), Feb 2005, p 39, para 3.88). Such a step would also contradict the attitudes of many commentators who welcomed, and expressed their satisfaction with, the requirement of good faith (see, for example. Steyn J, ‘Contract law: fulfilling the reasonable expectations of honest men’, (1997) 113 LQR, p 439; Collins H, ‘Good faith in European contract law’, (1994) 14 OJLS, p 254; Howells G, ‘Good faith in consumer contracting’ in Brownsword R, N Hird and G Howells, *Good Faith in Contract-Concept and Context*, (Aldershot: Dartmouth Publishing Ltd, 1999), p 92).

that the concept of good faith is mysterious and problematic, one of them has acknowledged, at least, that English law has no comprehensive principle of good faith like that existing in different forms in many European legal systems¹. To some extent, this explains why the principle of good faith in contract has neither generally been a topic addressed by academics nor a matter pleaded or addressed in litigation².

Under common law, two main approaches have been taken to justify the absence of this principle from English contract law, which are briefly:³

- a) The pragmatic approach: this approach was expressed by Bingham LJ in *Interfoto Picture Library Ltd v Stiletto Visual Programmes Ltd*⁴ where he suggested that English law has not committed itself to an overriding principle of good faith but, instead, has developed piecemeal solutions in response to problems of fairness. The tenor of this approach is that English law has a patchwork of provisions (such as doctrines of economic duress, misrepresentation, mistake and frustration)⁵ equal to, and has the same effects of, the doctrine of good faith. Therefore, the absence of an explicit principle of good faith did not prevent English law from challenging the problem of unfairness, which can manage nicely without it.
- b) The repugnancy approach: this orthodox approach emphasized that requiring contracting parties to behave in good faith is against the nature of negotiation requiring that each party should feel free to seek his own interests and nothing else. In *Walford v Miles*⁶, Lord Ackner held that:

The concept of a duty to carry on negotiation in good faith is inherently repugnant to the adversarial position of the parties when involved in negotiations. Each party to the

¹ Howells G, 'Good faith in consumer contracting' in Brownsword R, N Hird and G Howells, *Good Faith in Contract-Concept and Context*, (Aldershot: Dartmouth Publishing Ltd, 1999), p 92.

² Brownsword R, *Contract Law: Themes for the Twenty – First Century*, (Butterworths: London, 2000), p 98.

³ For further reading, see: Adams J and R Brownsword, *Key Issues in Contract*, (London: Butterworths, 1995), p 198 et seq; Brownsword R, 'Two concepts of good faith', (1994) 7 JCL, p 197; Teubner G, 'Legal irritants: good faith in British law or how unifying law ends up in new divergences', (1998) 61 MLR, p 11.

⁴ [1989] QB 433.

⁵ Brownsword R, 'Positive, negative, neutral: the reception of good faith in English contract law' in Brownsword R, N Hird and G Howells, *Good Faith in Contract-Concept and Context*, (Aldershot: Dartmouth Publishing Ltd, 1999), p 22.

⁶ [1992] 2 AC128.

negotiation is entitled to pursue his (or her) own interest, so long as he avoids making misrepresentations... A duty to negotiate in good faith is as unworkable in practice as it is inherently inconsistent with the position of a negotiating party.

With the implementation of the Directive, good faith is no longer an alien concept to English lawyers, regardless of its limited application to consumer contracts¹. However, the EC Directive on Unfair Terms in Consumer Contracts is not the sole factor in achieving this result, albeit it is the cornerstone in the newborn principle and still provokes substantial argument². Rather, this development could also be attributed to several other factors:

First of all and at the continental level, besides the Directive on Unfair Terms in Consumer Contracts, the European Community had formerly adopted the Directive on Commercial Agents³, implemented in the UK by the Commercial Agents (Council Directive) Regulations 1993⁴, which obliges a principal and agent to act dutifully and in good faith as for one another's interest⁵.

Secondly, it could be said that the development in common law itself during the 1980s and thenceforth prepared the ground for incorporating such a continental concept into English law. This began with the judgements of Steyn J in *Banque Keyser Ulmann S.A v Skandia Insurance Co Ltd*⁶ and Bingham LJ in *Interfoto Picture Library Ltd v Stiletto Visual Programmes Ltd*,⁷ where the courts showed an interest in good faith.

Thirdly, the role of the developed model contract for international trade, which will surely lay down the principle of good faith, cannot be ignored as a motive towards the

¹ Brownsword R, 'Good faith in contracts' revisited', (1996) 49 CLP p 118.

² Brownsword R, N Hird and G Howells, *Good Faith in Contract-Concept and Context*, (Aldershot: Dartmouth Publishing Ltd, 1999), p 2.

³ Council Directive of 18 December 1986 on the Coordination of the Laws of the Member States Relating to Self-Employed Commercial Agents, Directive 86/653/EEC OJ L382 31 December 1986 p 0017.

⁴ SI 1993/3053, coming into force in January 1, 1994. Some amendment as to these Regulations was made under the Commercial Agents (Council Directive) (Amendment) Regulations 1998/2868.

⁵ arts 3(1), 4(1).

⁶ *Banque Keyser Ulmann S.A v Skandia Insurance Co Ltd* [1987] 1 Lloyd's Rep. 69. On the Court of Appeal, *La Banque Financiere de la Cite SA v Westgate Insurance Co Ltd* [1990] qb 665. On the House of Lords, *Banque Financiere de la Cite SA v Westgate Insurance Co Ltd* [1991] 2 AC 249.

⁷ [1989] QB 433; see *infra*, p 129 et seq.

explicit adoption of a general principle of good faith, especially when combined with the fact that common law world across the Commonwealth is gradually tending to accept the concept of good faith¹. This is clear, with regard to England at least, from the above two points.

However, this is not to suggest that the old debate between those who support the idea of adopting an overriding principle of good faith in English contract law and those who oppose it has come to an end. The arrival of the Directive on Unfair Terms has not finished this argument for at least two reasons. The first is the Directive's ambit which is restricted to deal with mere consumer contracts. This means that the Directive did no more than introduce English law to the concept of good faith as a contracting principle, and this is only a limited progress of one step towards providing English law with a legal regime that satisfies contractors' legitimate expectations in dealing with them in good faith². Secondly, even if English law has adopted a general requirement of good faith, this does not guarantee that the debate over the necessity of such a step will not continue. The writer thinks that spacious principles like "good faith" and "substantive fairness" will always be controversial. Therefore, a similar controversy to that generated over whether or not the law should intervene to cure substantive unfairness was agitated and can be expected to continue with regard to good faith, especially since it arguably constitutes an element in substantive fairness.

For those who oppose the idea of good faith, adopting such a principle: would threaten to import uncertain discretion into English law as this idea is surrounded by ambiguity; calls for difficult inquiries into contracting parties' reasons in particular cases; would be an inappropriate criterion if the contracting contexts varied greatly because it fails to recognise that they are not all the same; and impinges on the autonomy of the parties since it regulates matters of substance in a broad sense.³

¹ Adams J and R Brownsword, *Understanding Contract Law*, 3rd Ed (London: Sweet & Maxwell, 2000), p106; Steyn J, 'Contract law: fulfilling the reasonable expectations of honest men', (1997) 113 LQR, p 438.

² Howells G, 'Good faith in consumer contracting' in Brownsword R, N Hird and G Howells, *Good Faith in Contract-Concept and Context*, (Aldershot: Dartmouth Publishing Ltd, 1999), pp 93, 114.

³ Brownsword R, 'Positive, negative, neutral: the reception of good faith in English contract law' in Brownsword R, N Hird and G Howells, *Good Faith in Contract-Concept and Context*, (Aldershot: Dartmouth Publishing Ltd, 1999), p 21; Brownsword R, *Contract Law: Themes for the Twenty – First Century*, (Butterworths: London, 2000), p 100 et seq; Waddams S, 'Good faith, unconscionability and reasonable expectations', (1995) 9 JCL, pp 58 et seq.

According to those who favour the principle, applying a general requirement of good faith to English contract law would generate an improved contractual regime, and contribute to producing an improved business environment¹. Moreover, an explicit doctrine of good faith has the effect of treating problems of bad faith in a clean and direct fashion; would enable judges at all levels to challenge effectively problems of unfair dealing; directs the law to serve in protecting reasonable expectations which vary from one context to another; and would create a culture of trust and cooperation encouraging the autonomy of the parties². Moreover, unless it adopts an explicit concept of good faith, English law suffers from a lack of rationality and prevents itself from developing a coherent jurisprudence of good faith and bad faith³.

For the writer, the latter opinion seems to be reasonable, and it can be added that the discretionary authority is not something to be afraid of especially where it is more compatible with the role that the courts have under common law than that of the courts in the civil law system. With regard to protection against unfair terms specifically, flexibility is required. It is difficult to see how courts could deal with substantive unfairness, which consumer protection against unfair terms is mainly about, without some flexibility.

2.1.1.2. That good faith is generated by the Directive, what does this entail?

After all, although its inclusion within the Directive is restricted to consumer contracts not subject to negotiation, the Directive has placed the principle of good faith on the agenda for English lawyers. This is irrespective of the fact that such inclusion has not been immune from criticism, where it was contended that it was at best a complex irrelevancy and at worst could constitute an obstacle in front of eliminating potentially unfair terms⁴.

¹ Brownsword R, N Hird and G Howells, *Good Faith in Contract-Concept and Context*, (Aldershot: Dartmouth Publishing Ltd, 1999), p5; Adams J and R Brownsword, *Key Issues in Contract*, (London: Butterworths, 1995), p 243, 244.

² Brownsword R, 'Positive, negative, neutral: the reception of good faith in English contract law' in Brownsword R, N Hird and G Howells, *Good Faith in Contract-Concept and Context*, (Aldershot: Dartmouth Publishing Ltd, 1999), pp 32, 39; Arrighetti A, R Bachman and S Deakin, 'contract law, social norms and inter-firm cooperation', (1997) 21 CJE p 171; Burchell B and F Wilkinson, 'Trust, business relationships and the contractual environment', (1997) 21 CJE p 217.

³ Adams J and R Brownsword, *Key Issues in Contract*, (London: Butterworths, 1995) p 202.

⁴ Howells G, 'Good faith in consumer contracting' in Brownsword R, N Hird and G Howells, *Good Faith in Contract-Concept and Context*, (Aldershot: Dartmouth Publishing Ltd, 1999), p 95.

The fact that the principle of good faith is a continental creature should be taken into consideration whenever an interpretation of this concept is required, not only because of its European background but also because the benefits of the internal market's goals of integration may be undermined if each Member State prefers to rely on its own concept of good faith. This would be an unhealthy situation, legally speaking, as far as European law is concerned, and might badly affect the interests of English consumers when dealing with European traders outside the UK. It is necessary to bear in mind here that the concept of "good faith" under the Directive does not have the same meaning in the different legal systems of Member States, including England¹ and therefore cannot be transposed from one legal system to another without difficulty². Therefore, any attempt to rely on a national definition of good faith would fail³. On this ground, the writer suggests that seeking European standards of such a principle, and hence of fairness, is inevitable. Moreover, this should remain a holy goal to be achieved in the process of the integration of the European market and maintaining the law compatible with itself as well as improving consumer protection.

Whether the English application of the Directive has succeeded in this task is the question that the study tries to answer. First it is necessary to explore what "good faith" means for the purposes of the Regulations, in the light of the guidance provided in this context in the Regulations themselves and the judgements of the courts.

2.1.1.3. Guidance to good faith provided by the Directive and the Regulations

The Directive and the Regulations do not include a definition of good faith, and this may be due to the open-ended nature of this concept. Or, it might be thought that it is better to free some space to the discretion of the courts at the local and continental levels when defining such a concept in the light of the guidance provided by the Directive and the Regulations. This might be what is referred to in Recital 15 to the Directive, which reads "it is necessary to fix in a *general way* the criteria for assessing the unfair character of contract terms". As will be seen, this shortcoming, the writer would like to say, has generated difficulties and uncertainty, at least in England where the lack of an explicit definition has encouraged the courts to resort to a local

¹ On this diversity, see Zimmermann R and Whittaker S, op cit.

² Brownsword R, N Hird and G Howells, *Good Faith in Contract-Concept and Context*, (Aldershot: Dartmouth Publishing Ltd, 1999), p1.

³ Lockett N and M Egan, op cit p 22.

definition for such a continental concept. For this reason, it may be in the interest of the correct interpretation, and then application, of the law to define this concept given its controversial nature, as clear from the previous section.

The only guidance in the Directive and the Regulations on the meaning of good faith is that provided by the preamble of the Directive in Recital 16, which states that the “overall evaluation of the different interests involved” constitutes the requirement of good faith, and that “the requirement of good faith may be satisfied by the seller or supplier where he deals fairly and equitably with the other party whose legitimate interests he has to take into account”.

Each one of the sentences quoted above represents a criterion on the definition of good faith. Whereas the writer’s opinion is that the first criterion seems to be a mere instruction as to how the assessment of good faith and fairness, in general, should be undertaken; the second criterion seems to be constructive. However, it is not clear what is the aim behind inserting the word “may” employed in the latter criterion. Such a word may render this criterion of less importance because it might be assumed, accordingly, that this criterion is provided by way of example and, hence, is not conclusive. Anyhow, the word “may” has the effect of putting the only criterion set by the Directive under suspicion simply because the other face of “may” is “may not”.

Nonetheless, if this analysis is correct as regards the first element of this criterion (i.e. dealing fairly and equitably), it is not the case in relation to the second element which is the requirement that the trader shall take the consumer’s interest into account. This is because it is obvious from the formulation of the element (“whose legitimate interests he has to take into account”) that “may” relates only to the first element. The writer thinks that, as long as the second element is beyond suspicion it does not matter whether the first element is surrounded with such suspicion as a result of inserting the word “may”. It is obvious that the first element is an open criterion subject to various readings, and, in the writer’s view, a mere redundancy since the test under the Regulations is all about fairness. Or, it seems that it is not an independent element, because it cannot be imagined that the trader takes the consumer’s interests into account but, at the same time, does not treat him fairly. Therefore, such an element adds little in explaining what satisfies the requirement of good faith. On the contrary, the second element is a valuable enlightenment, albeit spacious.

Besides these criteria, Recital 16 provides for some factors to be taken into account in making an assessment of good faith. These factors were mentioned in Sch 2 to the 1994 Regulations as follows:

- “(a) The strength of the bargaining position 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...
- (d) The extent to which the seller or supplier has dealt fairly and equitably with the consumer.”

It has been noted that the abusive element of these factors might be due either to unfair surprise or monopoly power¹. The first three factors are familiar tools of English law under Sch 2 to UCTA in relation to the test of reasonableness, alluded to in the Preliminary Chapter of this Thesis. This fact has motivated some commentators to argue that their inclusion in the Regulations was not a coincidence, but rather aiming at placating the fears of English lawyers who were anxious about the use of the unfamiliar concept of good faith². For others, this inclusion came as a reflection to the Directive’s inattention to any guidance as to how the requirement of good faith can be assessed³. In the writer’s opinion, the inclusion of such factors in the 1994 Regulations reflects Recital 16 to the Directive, but it is still possible that their inclusion in the Directive initially resulted from an English endeavour pushing towards incorporating guidance familiar to English lawyers.

These factors, together with Recital 16’s extra qualification obliging the seller or supplier to take the consumer’s interests into account, would give a positive answer to the question raised by some commentators⁴ of whether the requirement of good faith goes beyond the mere negative duty requiring the seller or supplier not to mislead or

¹ Howells G, *Consumer Contract Legislation: Understanding the New Law*, (London: Blackstone, Press Limited, 1995), p 43.

² Ervine W, op cit p 255; see, also, Beale H & Others (Editors), op cit p 902.

³ Kemp R, C Coulter and H Suddards, ‘Suppliers beware: implementation of the Unfair Contract Terms Directive in Europe’, (1995) 11 CLSR p 195.

⁴ Brownsword R, G Howells and T Wilhelmsson, ‘The EC Unfair Contract Terms Directive and welfarism’, in Brownsword R, G Howells and T Wilhelmsson (Editors), *Welfarism in Contract Law*, (Aldershot: Dartmouth, 1994), p 279.

actively conceal the consumer, to impose a positive duty of disclosure and taking the consumer's interest into account¹.

However, the judgement in the *Director* case² might frustrate this conclusion. In that case, the consumers had discovered that they still owed considerable sums to the Bank although they had complied with a court ordered repayment schedule based on what they could pay. The House of Lords took the view that the Bank was not responsible for the lack of information (i.e. disclosure), the problem which did not lie in the disputed term but rather was due to the legislation itself, and therefore the term was not unfair. This approach has created uncertainty as to the efficacy of the Regulations in dealing with informational problems which do not merely relate to the intelligibility and accessibility of the terms as a piece of English³. Likewise, in *Broadwater Manor School v Davis*⁴, the parents were required under the contract to give a term's notice to the school when cancelling their acceptance of the place for their daughter. However, their cancellation was too late from the school's point of view. The court held that the school's failure to notify the parents of the school's terms was not so serious as to amount to a failure to act in good faith, even though the court observed that the language and style of the term's written notice offended the spirit and purpose of the Directive in that it was not defined in the contract sufficiently for lay people inexperienced in private schooling. Not only that, but the requirements for giving notice in relation to timing, content and the consequences of a failure to comply were not sufficiently drawn to the parents' attention.

No doubt, such a narrow approach will not serve in protecting consumers against failures in disclosure. However, the commentary on these rulings would be, firstly, that the above judgments do not yet amount to a trend on the issue because the courts in England have not had the opportunity to shape such a trend, given the very limited number of cases relating to the Regulations which have reached the courts. Secondly, the judgment in the *Director* case cannot be built upon with respect to good faith since the House of Lords was, as will be seen, criticised heavily for not going to

¹ See further, DTI, Review of the Eighth EU Consumer *Acquis* Minimum Harmonisation Directives and their Implementation in the UK and Analysis of the Scope for Simplification, <<http://www.dti.gov.uk/files/file27199.pdf>> para 26.

² [2001] UKHL 52. Further details on this case can be found at pp 78 et seq and 217 et seq of this Thesis.

³ See further, Macdonald E, 'Scope and fairness of the Unfair Terms in Consumer Contracts Regulations: *Director General of Fair Trading v First National Bank*', (2002) 65 MLR p 763.

⁴ (Worthing county court) [1999] C.L.Y. 1801.

the ECJ to seek a preliminary ruling on the issue of good faith. Therefore, only the future will tell if the courts will insist on not seeking an ECJ ruling on this issue, and, if the House of Lords does decide to seek such a preliminary ruling, whether or not the approach that will be taken by the ECJ will be as narrow as the above mentioned approach.

Regrettably, although it was suggested that it is probably impossible to achieve greater precision in providing such a flexible concept than the 1994 Regulations did¹, the four above factors were not reproduced in the 1999 Regulations. This raises the question of whether or not they can still be employed in assessing good faith. It seems that they remain relevant. The omission of these factors, which was described as a mere disadvantage of the copy out technique adopted in producing the 1999 Regulations,² will change nothing in practice, since Recital 16 to the Directive provides them³, and, as it appeared in *Lister v Forth Dry Dock & Engineering Co Ltd*⁴, it is permissible to resort to the Recitals so as to interpret the Regulations, the vision which was upheld in the *Director* case⁵.

A further final question to be answered here concerns whether there is an indication in the Directive or the Regulations as to the stage in which good faith is required. Generally speaking, good faith can play a role at each step of the contracting process until the contract is fully performed; in other words, at the formation, performance and enforcement stages. In Jordan, for example, S 202(1) of the JCC provides that the contract shall be performed according to what has been agreed on and in a manner consistent with the requirement of good faith. Further, S 239(2) of the JCC, addressing the interpretation of the contract, requires that good faith must exist in every phase of the contracting process.

As seen later in this Chapter, the Regulations refer to the circumstances attending the conclusion of the contract to be taken into consideration when assessing the fairness of the contract. For this reason and, perhaps, because of some other similar signals contained in the Directive or the Regulations, such as factor (b) mentioned above which refers to whether the consumer had been induced to agree to

¹ Treitel G, op cit p 273.

² Ervine W, op cit p 255.

³ Macdonald E, 'Scope and fairness of the Unfair Terms in Consumer Contracts Regulations: *Director General of Fair Trading v First National Bank*', (2002) 65 MLR p 769.

⁴ *Litster and others v Forth Dry Dock & Engineering Co. Ltd (in receivership) and another* [1990] 1AC 546, Lord Oliver of Aylmerton.

⁵ [2001] UKHL 52, para 17.

the term in question, which happens only at the stage of negotiation, it has been suggested that there is a reasonable assumption that the requirement of good faith in the Directive, and hence the Regulations, refers to good faith in negotiation imposing the duty of disclosure of terms and preserving some element of choice which assume that standard form contracts should not be offered on a take it or leave it basis.¹

The writer's opinion is that, for the benefit of the consumer at least and as it is presumably in principle, good faith should cover the whole contracting process since the contracting party might act in good faith during negotiation but not in later stages. This opinion arguing for a wide approach is upheld by the origins of the whole notion of good faith. Both the German and the French laws on which the requirement of good faith in the Directive is based demand that good faith must be satisfied in performance also².

2.1.1.4. Guidance to good faith provided by the courts: the *Director* case

The decision made by the House of Lords in the *Director* case seems to be the key ruling in shaping the English courts' approach as to what satisfies the Directive's requirement of good faith. Instead of taking advantage of the unique opportunity raised in the case to give a definition to the concept of good faith compatible with the continental character of the Regulations, the House of Lords resorted³ to the judgement given by Bingham LJ in *Interfoto Picture Library Ltd v Stiletto Visual Program Ltd*⁴. The dispute in this case was about a clause penalising the defendant in the case of a delay in returning the borrowed items in a contract for the loan of photographic transparencies. Bingham LJ observed, in this case, that good faith does not "simply mean that the parties should not deceive each other". But rather:

"Its effect is perhaps most aptly conveyed by such metaphorical colloquialisms as 'playing fair', 'coming clean' or 'putting one's cards face upwards on the table.' It is in essence a principle of fair and open dealing... It might [he thought] be held on the facts of

¹ Brownsword R, G Howells and T Wilhelmsson, 'Between market and welfare: some reflections on Article 3 of the EC Directive on Unfair Terms in Consumer Contracts' in C Willett (Editor), *Aspects of Fairness in Contract*, (London: Blackstone Press Limited, 1996), p 40; Howells G, 'Data protection, confidentiality, unfair contract terms, consumer protection and credit reference agencies', (1995) JBL p 352.

² Beale H, Legislative Control of Fairness: the Directive on Unfair Terms in Consumer Contracts, in Beatson J (Editor), *Good Faith and Fault in Contract Law*, (Oxford: Oxford University Press, 1995), p 244.

³ [2001] UKHL 52, para 36.

⁴ [1989] QB 433.

this case that the plaintiffs were under a duty in all fairness to draw the defendants' attention specifically to the high price payable if the transparencies were not returned in time and, when the 14 days [the date set for return], had expired to point out to the defendants the high cost of continued failure to return them ”.

In the *Director* case, the Court had to explain what was intended by the principle of “fair and open dealing” mentioned above. Lord Bingham, who embarked once again on this task, defined openness as requiring that the terms should be expressed fully, clearly and legibly without concealed pitfalls or traps; that appropriate prominence should be given to terms which might operate to the detriment of the consumer. In turn, fair dealing requires that:

“A supplier should not, whether deliberately or unconsciously, take advantage of the consumer's necessity, indigence, lack of experience, unfamiliarity with the subject matter of the contract, weak bargaining position or any other factor listed in or analogous to those listed in Sch 2 to the Regulations.”¹

Whereas Lord Steyn took the same line as that taken by Lord Bingham when saying that good faith imports the notion of open and fair dealing², Lord Millett, for his part, focussed on an overall approach, pointing out a set of factors which should be taken into account in assessing a disputed term. His Lordship said:

“There can be no one single test of fairness. It is obviously useful to assess the impact of an impugned term on the parties' rights and obligations by comparing the effect of the contract with the term and the effect it would have without it. But the inquiry cannot stop there. It may also be necessary to consider the effect of the inclusion of the term on the substance or core of the transaction; whether if it were drawn to his attention the consumer would be likely to be surprised by it; whether the term is a standard term, not merely in similar non-negotiable consumer contracts, but in commercial contracts freely negotiated between parties acting on level terms and at arms' length; and whether, in such cases, the party adversely affected by the inclusion of the term or his lawyer might reasonably be expected to object to its inclusion and press for its deletion.”³

¹ [2001] UKHL 52, para 17.

² Ibid, para 36.

³ Ibid, para 54.

On this ground, his Lordship concluded in relation to the particular term in question¹ that the Bank did not act in bad faith, since it had not taken advantage of the borrower's weakness of bargaining power or lack of professional advice to include that term which would otherwise be omitted². Indeed, the Court as a whole reached the same result: the Bank satisfied the requirement of good faith as the panel envisaged it.

Some remarks can be made on the decision taken in the *Director* case as to good faith. Although the House of Lords continuously referred to the Regulations as a reference with respect to this issue, its decision rested, apparently, on the English understanding of good faith as appearing in *Interfoto Picture Library Ltd v Stiletto Visual Program Ltd*. This English understanding of good faith seems to be based on an almost subjective criterion based on the intention of the trader (the Bank in the *Director* case) as to whether he aimed at taking unfair advantage of the consumer or abusing his position. Conversely, the Directive's approach tilts to adopt an objective criterion grounding on whether or not the trader has dealt with the consumer fairly and equitably by taking the latter's interests into account. In fact, there is no evidence in the *Director* case that the House of Lords applied this criterion (that the trader should take the consumer's interests into consideration), although it was an anchor point on which the Court of Appeal had relied in finding that the term in question was unfair³. Thus, the question remains whether this term would survive had the House of Lords paid attention to this criterion. The same question arises had the House of Lords asked for a preliminary ruling from the ECJ on the issue of good faith.

Taken together these remarks show the need for a European concept of good faith compatible with the Regulations as an implementation of a piece of European legislation. How to achieve such a European understanding of good faith is the subject of the following section.

2.1.1.5. Towards a continental concept of good faith

The gist behind including the requirement of good faith in the Directive is to promote a particular vision of consumer protection based on achieving a successful market in

¹ On this term, see *supra*, p 78.

² [2001] UKHL 52, para 57.

³ See, [2000] QB 672, Gibson LJ, para 35.

goods and services based on bonds of solidarity¹. Further, the correct application of any legislation requires that its interpretation should reflect the legislator's will (i.e. that the meaning given to a provision should be that which the legislator intended). Therefore, it is crucial, as pointed out before, that an autonomous or neutral interpretation of good faith should be adopted throughout the Member States. This means that the notion of good faith should be determined beyond the effect of any national legal system, unless the Directive itself intends that the European good faith employs a national concept.

The question remains, however, by which means a European concept of good faith can be achieved in English contract law in relation to unfair terms. In response to this question, three routes have been suggested. These reflect, generally speaking, the judgement held in the *Director* case. For some commentators, if the court of a Member State (England in our case) avoids resorting to the domestic laws of the Member States (mainly English law in our case), this is likely to achieve the desired result of establishing a general concept of good faith in European contract law². Instead, the court should look at the jurisprudence of relevant European laws, such as the German Act on Standard Contract Terms of 1976, on which the requirement of good faith in the Directive is based, and the Law of Obligations in the German Civil Code³. This approach has received support from all the judgments held in all stages of the *Director* case, where both Evans-Lombe J at first instance⁴ and Gibson LJ in the Court of Appeal⁵ had laid stress on the need to interpret the concept of good faith in the light of its civilian origins. However, did these courts and the House of Lords, specifically, apply this call in practice by referring to the relevant European law when determining the issue of good faith? The answer would be no, and the previous section sheds some light on this.

The second route argues in favour of seeking guidance as to good faith from the ECJ in order to stabilize a permanent principle of good faith once and for all. As

¹ Collins H, 'Good faith in European contract law', (1994) 14 OJLS, p 254. This should tie in with the general purpose of the Directive that art 1 summarizes in approximating the laws, regulations and administrative provisions of the Member States relating to unfair terms in consumer contracts.

² Beale H & Others (Editors), op cit pp 902, 903.

³ Collins B, 'Unfair Terms in Consumer Contracts Regulations 1994', <http://webjcli.ncl.ac.uk/articles3/collins3.html>>. See, also, Beale H, Legislative Control of Fairness: the Directive on Unfair Terms in Consumer Contracts, in Beatson J (Editor), *Good Faith and Fault in Contract Law*, (Oxford: Oxford University Press, 1995), p 243.

⁴ [2000] 1 All ER 240, para 35.

⁵ [2000] QB 672, para 27.

already alluded to, the *Director* case was deemed a missed opportunity to achieve this aim, for which the House of Lords has been criticized¹. The criticism was directed to Lord Bingham because he abstained from referring the case to the ECJ while at the same time declaring that “Member States have no common concept of good faith”. Supporters of this route suggest that the House of Lords should have operated the provisions of the EEC Treaty which provide that national courts may ask a preliminary decision relating to the interpretation of acts of the community from the ECJ, and state the duty of the final instance courts to refer to the ECJ.

From Lord Bingham’s point of view, there was no reason to refer the case to the ECJ since the language used in expressing the test was clear and not reasonably capable of differing interpretation². It seems that his Lordship relied on the provisions of the Treaty mentioned above under which, as the ECJ had the occasion to explain³, there is no need to refer to the ECJ where the correct application of the Community law is obvious enough to the extent that there is no room for reasonable doubt in relation to the interpretation.

However, for the same above reason that might have motivated Lord Bingham not to refer the issue to the ECJ, it could be argued that the House of Lords was not attentive to the possibility that many other courts throughout the Community, including the ECJ itself, might not agree with the approach adopted locally⁴. This is reinforced by the fact that the Directive was drafted in eleven languages, from which it certainly follows that the term in question may have different meanings in EC law and other national laws⁵.

Another commentator has argued that the reason behind not referring the case to the ECJ was by no means the clarity of the legislation. In truth, that the House of Lords reversed the decision of the Court of Appeal reversing the decision of the High Court which refused to grant the injunction requested against the impugned term

¹ Dean M, ‘Defining unfair terms in consumer contracts - crystal ball gazing? *Director General of Fair Trading v First National Bank plc*’, 65 MLR 2002 p 773 et seq; Nebbia P, ‘Comment on the case of *Director General of Fair Trading v First National Bank*, House of Lords, [2001] 3 WLR 1297’, (2003) 40 CMLR, p 987.

² [2001] UKHL 52, paras 17, 25.

³ *Srl CILFIT and Lanificio di Gavardo SpA v Ministry of Health* (C- 283/81) [1982] ECR 5318.

⁴ M Dean, ‘Defining unfair terms in consumer contracts - crystal ball gazing? *Director General of Fair Trading v First National Bank plc*’, 65 MLR 2002 p 780.

⁵ *Ibid*, p 780.

eloquently demonstrates that the question in the case was far from clear¹. This leads to the question of what is the real reason for the House of Lords' attitude in not referring the case to the ECJ. This commentator explained that the decision taken in the *Director* case "can be read as an attempt by a common law court to maintain the role of defining fundamental contract law doctrines against the creeping Europeanisation of core principles and notions"². If this contention proves to be true, such a trend goes against the correct implementation of the law and may threaten the protection that the consumer is promised. Meanwhile, it has the effect of proving the writer's point of view that the House of Lords did not indeed apply a European good faith.

In addition to the above two routes, there is a third route in favour of which some argument has been made³. It is argued here that the vast majority of consumers' disputes rarely reach the courts and, if they do, are heard in the lower courts. It is highly likely that the judges of the latter courts prefer to resort to their traditional contract law sanctifying the freedom of contract, and find it difficult to deal with the ethical debate raised by the principle of good faith. Therefore, it is recommended that the jurisdiction of consumer disputes be transferred to new bodies which are likely to be more receptive to new approaches. It is true that if all cases concerning good faith reach the ECJ there will be no room for arguing for such an approach where authoritative guidance is available, but, as already indicated, there is no guarantee that this will happen regularly⁴.

All the above routes seem to be constructive. However, the third route seems problematic, irrespective of the fact that it is, in principle, in line with the invitation to considering the creation of a special court or tribunal to deal with disputes over unfair terms in contracts, which the writer makes in Chapter Three of this Thesis. This is because, *inter alia*, it is not clear how and why the understanding of these new English bodies towards the issue of good faith would differ from that of the current competent courts, given that the panels of these bodies and those of the courts have the same mentality or background.

¹ Nebbia P, 'Comment on the case of *Director General of Fair Trading v First National Bank*, House of Lords, [2001] 3 WLR 1297', (2003) 40 CMLR, p 987.

² Ibid, p 993.

³ See, Howells G, 'Good faith in consumer contracting' in Brownsword R, N Hird and G Howells, *Good Faith in Contract-Concept and Context*, (Aldershot: Dartmouth Publishing Ltd, 1999), pp 99, 102 and 103.

⁴ See on this, Weatherill S, *op cit* p 327.

2.1.2. The requirement of balance

As already indicated, Reg 5(1) requires that, besides the lack of good faith, a non-negotiated term must cause a significant imbalance in the parties' rights and obligations arising under the contract to the detriment of the consumer before it can be regarded as unfair.

The first element that must be met here is that the imbalance must be significant. This element seems necessary to immunize minimal and moderate imbalance from being subject to the test of fairness, since it is generally accepted that a large number of contracts contain an imbalance between the parties in one form or another. However, it has been seen as a source of uncertainty because the Directive, and the Regulations drawn from it, introduce no criterion or guidance to distinguish between cases where imbalance is considered significant and others where it is not.¹

However, guidance as to the level of significance requested by the Regulations so as to decide that a term under scrutiny is unfair might flow through two streams. First, this element corresponds with one required under S 3(2)(b) of UCTA which provides that the performance must be "substantially" different from that which was reasonably expected. Hence, recourse to the interpretation given to "substantially" may help in drawing the boundaries of "significance" provided by the Regulations.

The second stream which may provide some assistance on the meaning of the wording "significant" is the OFT's publications. In its guidance, the OFT has pointed out that the requirement of significant imbalance exists when a contract "contains a term making consumers carry risks that the supplier is better able to bear". The guidance explains that the supplier is the stronger party to bear a risk, "if it is within his control, or he can insure against it more cheaply than the consumer, and especially if it is a risk of which the consumer cannot be expected to be aware"². This guidance seems worthy of considerable respect given the attention accorded to it by the House of Lords in the *Director case*. In this case, Lord Bingham alluded to a close criterion under which a term contains significant imbalance if a term "is so weighted in favour of the supplier as to tilt the parties' rights and obligations under the contract significantly in his favour" and that this happens when that term grants the supplier "a

¹ See, Dean M, 'Unfair contract terms: the European approach', (1993) 56 MLR p 585; Taylor M and A Naidoo, op cit para 7; Collins B, 'Unfair Terms in Consumer Contracts Regulations 1994', <http://webjcli.ncl.ac.uk/articles3/collins3.html>>; Koffman L and E Macdonald, op cit p 283.

² OFT, Unfair Contract Terms Guidance, Feb 2001, para 18.2.1, cited in Taylor M and A Naidoo, op cit para 7.

beneficial option or discretion or power, or by the imposing on the consumer of a disadvantageous burden or risk or duty”.¹

Whereas the latter approach can be beneficial in providing some enlightenment on the meaning of “significant imbalance”, the resort to UCTA is an attempt to interpret the Regulations, which are a European product, by referring to local legislation. As indicated elsewhere, such a technique is risky because no one can guarantee that the meaning the local legislation (UCTA in our case) gives to a term is typical to what the Community legislator intends for a similar or close term. Unless the latter makes it clear that this is his intention, such a technique should be avoided.

The second element is that the imbalance must result from the disputed term itself. This may raise to the surface the possibility that a contract contains many unbalanced terms which together render the whole contract to lean in favour of the trader roughly, but because the imbalance resulting from each individual term is not significant, these terms will not be considered as unfair. Doubtless, such a situation could constitute a fatal defect in the Regulations.²

Nonetheless, this does not mean that other terms of the contract will not be relevant when assessing the fairness of the term in question. It is well established under the Regulations that in deciding whether a term causes significant imbalance, the term must be scrutinized in the context of the whole obligations undertaken by the parties³. This means that the disputed term will not be declared unfair so long as there is another term in the contract counterbalancing it in favour of the consumer⁴. The counterbalancing term must be, in the words of the OFT, “first...potentially detrimental to the supplier as the term in question is to the consumer, and secondly...obviously linked to it, so that the two, on a common sense view, tend to

¹ [2001] UKHL 52, para 17. See Taylor M and A Naidoo, op cit para 7.

² Lawson R, *Exclusion Clauses and Unfair Contract Terms*, 7th Ed (London: Sweet & Maxwell, 2003), p 207. It may be that a court would recoil from such an apparent injustice and employ techniques of interpretation akin to those used in the incorporation cases.

³ See *infra*, p 143 et seq. See, also, Macmillan C, ‘Evolution or revolution? Unfair terms in consumer contracts’, (2002) CLJ p 23; Macdonald E, ‘The emperor’s old clauses: unincorporated clauses, misleading terms and the Unfair Terms in Consumer Contracts Regulations’, (1999) 58 CLJ pp 417,418. This approach was adopted continentally as well as locally (see Macdonald E, ‘Comment on the case of *Freiburger Kommunalbauten Gmb H Baugesellschaft & Co KG v Hofstetter* (C- 237/ 02) [2004] 2 C.M.L.R. 13 (ECJ Chamber))’, (2005) 121 LQR 38; *Director General of fair trading v First National Bank Plc* [2001] UKHL 52, para 17.

⁴ Grant D, ‘The unfair terms in consumer contracts Regulations and the IATA general conditions of carriage- a United Kingdom consumer’s perspective’, (1998) JBL p 133.

cancel each other out”¹. Such terms counterbalancing one another may be found in *Freiburger Kommunalbauten Gmb H Baugesellschaft &Co KG v Hofstetter*², where the referred question of whether obliging the purchaser of a parking space to pay the price before the performance of the contract is unfair required necessarily considering to what extent the guarantee provided by a credit institution on behalf of the seller, which secured any monetary claims that the purchaser may have in the case of non-performance or defective performance, counterbalanced such a term³.

The final element is that the imbalance must be to the detriment of the consumer with the result that if a term causes an inoffensive imbalance as to the consumer, it will not be considered unfair. It could be correct to say that this element is of less importance, and just a reminder of the main goal behind producing the Directive and then the Regulations, which is consumer protection.

2.1.3. The relationship between the requirements of good faith and balance

Despite clear wording, doubts are raised in the literature on whether “good faith” and “significant imbalance” mentioned in Reg 5(1) were both required before declaring the unfairness of a term, or whether they were alternative requirements, or whether significant imbalance was the only necessary requirement⁴. This recalls a debate over the issue of procedural and substantive fairness and whether any of the requirements of good faith and balance represents any of these sorts of fairness. The debate over these issues can be crystallized in the following four readings:

The first reading is that the two requirements are separate, cumulative and equal; while the requirement of good faith represents procedural fairness, the other represents substantive fairness⁵. On this view, both requirements must be satisfied to

¹ Edwards P, ‘The challenge of the Regulations’, OFT, Bulletin Issue No 4, Dec 1997, pp 22, 23; Grant D, op cit p 134.

² *Freiburger Kommunalbauten GmbH Baugesellschaft &Co. KG v Ludger Hofstetter et Ulrike Hofstetter* (C-237/ 02) [2004].

³ The ECJ provided no answer on this primary question because it took the view that “it is primarily for the national court to decide whether a clause which is subject of proceeding before it is to be treated as being unfair”, and this is why the writer used the word “may” when giving this example.

⁴ See, for example, Mitchell C, ‘Comment on the case of *Director General of Fair Trading v First National Bank Plc* [2000] 2 W.L.R. 1353 (CA)’, (2000) 116 LQR 557.

⁵ See, Brownsword R, G Howells and T Wilhelmsson, ‘Between market and welfare: some reflections on Article 3 of the EC Directive on Unfair Terms in Consumer Contracts’ in C Willett (Editor), *Aspects of Fairness in Contract*, (London: Blackstone Press Limited, 1996), p 31. See, also, Collins H, ‘Good faith in European contract law’, (1994) 14 OJLS, p 249 where he pointed out that “the test... of

declare the unfairness of a term. That is to say, a term must be unfair procedurally because the process by which the contract was made was devoid of good faith, and, at the same time, it must be unfair substantively due to a significant imbalance resulting from the inclusion of the term.

This approach might find some support from Lord Bingham's judgement in the *Director* case, where his lordship said: "the requirement of significant imbalance is met 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... The requirement of good faith in this context is one of fair and open dealing"¹.

However, whereas this supports the idea that there are two separate requirements, it might not support the idea of distinguishing between procedural and substantial unfairness especially since such a distinction was rejected in the same ruling. For his part, Lord Steyn acknowledged the existence of two separate requirements, albeit with a large area of overlap. However, he refused any attempt to give a mere procedural reading to the requirement of good faith.²

The second reading is that a term might be found unfair due to either substantive or procedural matters. Interestingly, this indicates that the test of unfairness can stand on a sole procedural leg. On this basis, even if a term is found to be fair in substance, it is enough to declare its unfairness due to defects in procedures. By way of example, element (i) of the Regulations' grey list, which will be discussed later in this Chapter, puts certain types of terms under suspicion because the consumer had no real opportunity of becoming acquainted with before the conclusion of the contract, an issue referring merely to procedures³. It is clear that this approach neither matches the requirement of balance with the substantive unfairness nor the requirement of good

significant imbalance of the obligations obviously directs attention to the substantive unfairness of the contract".

¹ [2001] UKHL 52, para 17.

² Ibid, paras 36, 37. On the criticism of this approach, see, also, Collins H, 'Good faith in European contract law', (1994) 14 OJLS, p 250. Lord Steyn's judgement seems to be compatible with the suggestion already proposed by Macdonald where she argued that good faith "may involve consideration of procedural matters, such as the availability and intelligibility of the clause to the consumers, but it may also go beyond that and involve substantive issues", see Macdonald E, 'Y2K and contractual exemption clauses', <http://www.law.warwick.ac.uk/jilt/99-2/macdonald.html> p 21. Also, the Directive 2005/29/EC on Unfair Commercial Practices evidences that general duty of good faith does not necessarily produce procedural fairness, (See, OFT, Implementing the EU Directive on Unfair Commercial Practices and Amending Existing Consumer Legislation, a Consultation Response, March 2006, <http://www.offt.gov.uk/NR/rdonlyres/CA6F0469-4A1F-4C53-A844-CD5894B59672/0/oft839.pdf> >

³ Unfair Terms in Contracts: a Joint Consultation Paper, op cit pp 47, 48.

faith with procedural unfairness, as the first approach does, and this explains why it reached this conclusion.

It might, however, be bizarre that a term causes significant imbalance to the detriment of the consumer although it is fair in substance. It has been suggested that this could be illustrated by the fact that the significant imbalance arises where the consumer does not know what his rights and obligations under the contract are and therefore is unable to safeguard his interests, or where he does not have the choice to reject entering into the contract.¹

The third reading is that the test of fairness depends on a single criterion whereby a term is unfair if it causes significant imbalance to the detriment of the consumer, and this is sufficient in itself. According to an approach, which the writer would like to call the kind approach, this is the essence of good faith². Here, the requirement of good faith is not an independent requirement, but represents the test of fairness as a whole. To some extent, this approach is similar to that under which good faith has a double aspect one is procedural in the sense of taking the consumer's interests into account which would be satisfied if the seller took steps to draw the consumer's attention to terms which could otherwise be unfair due to surprise; and the other is substantive in that there should be no significant imbalance to the detriment of the consumer.³

The tough approach, in the writer's terms also, rests this single-criterion test of fairness on the suggestion that the requirement of good faith in the Directive is of no genuine value and merely a bow in the direction of the origins of good faith in German law⁴. From this perspective, the fairness test consists only of whether a term creates significant imbalance to the detriment of the consumer.

Some support for this reading stems from the fact that the French law implementing the Directive has no requirement of good faith simply because it does

¹ Ibid, p 47. See, also Macdonald E, 'The emperor's old clauses: unincorporated clauses, misleading terms and the Unfair Terms in Consumer Contracts Regulations', (1999) 58 CLJ p 413.

² Brownsword R, G Howells and T Wilhelmsson, 'Between market and welfare: some reflections on Article 3 of the EC Directive on Unfair Terms in Consumer Contracts' in C Willett (Editor), *Aspects of Fairness in Contract*, (London: Blackstone Press Limited, 1996), pp 31,44 respectively.

³ Beale H, Legislative Control of Fairness: the Directive on Unfair Terms in Consumer Contracts, in Beatson J (Editor), *Good Faith and Fault in Contract Law*, (Oxford: Oxford University Press, 1995), p 245.

⁴ Beale H & Others (Editors), op cit pp 900, 901; Tenreiro M, op cit pp 276-279. See further, Hodgkinson T, op cit P 71.

not make sense to declare that a supplier behaves in good faith where he seeks to enjoy the disproportionate advantages set out in the contract. But, this omission could rightly be justified by the fact that the French law already contains a general requirement of good faith covering cases where the seller or supplier tries to enjoy a disproportionate advantage to the detriment of the consumer.¹

Moreover, this reading might conflict with Recital 16 to the Directive which takes the requirement of good faith seriously as an active element materializing where the seller or supplier deals fairly and equitably with the consumer and takes his legitimate interests into account. Similarly, the OFT gives good faith an independent role to play in the test of fairness. The OFT expected that good faith will often “turn on whether the trader’s marketing practices, documentation, and administrative procedures enable consumers to know exactly what they are doing, and to pull back from commitment at any point until the whole picture is clear to them”.²

The fourth reading is that significant imbalance has to do with substantive fairness, which has the predominant role in assessing the fairness of terms. Under this approach a term is contrary to the requirement of good faith and hence unfair as long as there is significant imbalance to the detriment of the consumer, irrespective of whether there are defective procedures. This reading, however, allows for procedures to play a conditional role in the assessment even if there is no such imbalance, provided that the disputed term has the potential to be imbalanced like the situation where the consumer is not aware of the term³.

Far from the differentiation between substantial and procedural fairness, and what requirement each of them represents, where the debate over these issues seems to be fruitless and does not serve any purpose as far as Reg 5(1) is concerned, the writer thinks that the first reading is the correct one. Both good faith and the balance are required as independent, cumulative requirements, and this is for two reasons. Firstly, it cannot be said that only one of these requirements, or that the significant imbalance alone, needs to be met. According to the general rules of law, the legislator does not include trite or meaningless words within the legislation. Viz., the principle is that

¹ Beale H & Others (Editors), op cit p 900.

² Edwards P, op cit p 23.

³ Bright S, op cit p 348.

there is nothing redundant in the legislation; behind every phrase there must be an intention and, therefore, it should be taken seriously. Secondly, it is not acceptable, legally speaking, that the test of fairness can be based on a single requirement. A violation of good faith which does not affect the consumer's interests where it does not generate significant imbalance to his detriment cannot form a reason for intervention in the consumer's favour. This is because the remedy under the private law (the civil liability) requires a sort of damage, which is the significant imbalance in the context of unfair terms. Moreover, it is not in the consumer's interest to delete or amend a term if it is not burdensome to him. Equally, a criterion based on the significant imbalance not tied with the violation of an ethical standard such as good faith or any other violation of the law (such as duress, misrepresentation) would go too far in infringing the freedom of contract. There is thus a real danger that this may demolish the contract institution itself, given the fact that the majority of transactions nowadays are consumer contracts.

2.2. Burden of proof

The Regulations do not specify which party will carry the burden of proof of the fairness/unfairness of a term. The common rules applying in such situation oblige the party who disputes a term to show its unfairness. This contrasts with S 11(5) of UCTA where the party who claims that a contract term or notice satisfies the requirement of reasonableness is required to show that it does. From the consumer's perspective, the provision of UCTA is better. Therefore, it is welcome that the New Legislation puts the burden of proof of the fairness of a term on the business (seller or supplier) trying to rely on it, except with regard to general enforcement undertaken by the OFT or a qualifying body¹. The reason behind the approach taken by the New Legislation is clear enough: the unfairness alleged in a general enforcement undertaken by the OFT or the qualifying bodies should be proved by these bodies because they have the ability to do so, while unfairness alleged in an individual enforcement made by the consumer himself, or even through his lawyer, is, *prima facie* true unless refuted by the seller or supplier because the latter has many more resources than the consumer and therefore, has to prove the fairness of that term.

¹ The Draft Bill, Clause 16.

The line taken by the New Legislation seems to be ideal and carries a lesson to be learned by the Jordanian legislator. The situation under Jordanian law on the point of proving the fairness/oppression of a term is similar to that under the Regulations: the burden of proof of the oppression of a term lies on the consumer. This is due to a general rule enshrined in S 77 of the JCC providing that “the burden of proof of a claim is on the claimant”. This provision is better to be reconsidered as regards consumers’ disputes, one believes.

2.3. Factors to be taken into consideration in assessing the fairness

Reflecting Art 4 of the Directive, Reg 6(1) tries to reduce the uncertainty which might be produced by the rules determining the fairness of a term, as treated above, by providing that in assessing whether that term is unfair, consideration must be given to the nature of the goods or services for which the contract was concluded, all circumstances attending the conclusion of the contract and all the terms included in the contract itself or in a secondary contract.

This Regulation provides, also, that this provision is without prejudice to Reg 12 treating the test of fairness at the general level. Thus, it should be borne in mind that Reg 6(1) is drafted to deal with the test of fairness at the individual level, where the allegation against the unfair term is undertaken by an individual consumer rather than by the OFT or one of the qualifying bodies seeking to preclude the continuing use of that term vis-à-vis all consumers¹. This is mainly because some of the factors contained in this Regulation, as mentioned above, cannot be operated at the general level. For example, it is impossible to ban the use of a category of terms generally and for the future on the bases of the circumstances attending the conclusion of the contract because this factor can be used only in every particular case.

2.3.1. The nature of the goods or services for which the contract was concluded

The nature of goods or services could, in certain types of cases, argue for the fairness of a term, while there is no doubt that it is unfair in other contexts. An example of this would be a term, in a sale of goods contract which is considered unfair if the good is new but which might be fair if the good is second hand.

¹ See, Koffman L and E Macdonald, op cit p 282; Hodgkinson T, op cit p 73.

2.3.2. All circumstances attending the conclusion of the contract

The assessment of fairness must be made taking into consideration the circumstances existing at the time of contract's conclusion, such as whether the consumer had, at that time, examined the good or not. Thus, subsequent events will not be taken into account if they were unforeseen at the time the contract was concluded¹. All this means, necessarily, that no attention should be given as to whether the performance of the contract is detrimental to the consumer; the approach which prevailed under the first version of the Directive² and which evoked criticism because it clashed with the Directive's reference to the time of conclusion as being crucial for assessing the fairness of a term³.

Guidance on the application of this factor is to be found in a commentary suggesting that, when investigating circumstances surrounding the conclusion of the contract, two particular elements seem to be of relevance. Firstly, pressure put by the seller or supplier on the consumer to enter the contract or to do so in haste, even if this pressure does not amount to a form of duress or undue influence. Secondly and linked to the first, whether the consumer had an opportunity to consider and then to decide upon the disputed term.⁴

However, the application of this factor in practice shows that the *Director* case has experienced a significant violation to it. One of the arrows pointed to the decision given in that case is that the House of Lords, when reasoning that the term in question was not unfair since the Bank tried to prevent the element of surprise, referred to "a standard form letter"⁵ sent by the Bank after judgement alerting the borrower to the continuing interest, a matter which clearly happened after the contract's conclusion.⁶

2.3.3. All other terms of the contract

Courts are required, when assessing the fairness of a term, to take into consideration other terms of the contract. Many examples can be found in the OFT reports showing that the fairness of a particular term in a contract may be affected by the existence of

¹ Oughton D and J Lowry, op cit p 404.

² Brownsword R, G Howells and T Wilhelmsson, 'The EC Unfair Contract Terms Directive and welfarism', in Brownsword R, G Howells and T Wilhelmsson (Editors), *Welfarism in Contract Law*, (Aldershot: Dartmouth, 1994), pp 281, 282.

³ Brandner H and P Ulmer, op cit p 658.

⁴ Beale H & Others (Editors), op cit p 906.

⁵ [2001] UKHL 52, para 24.

⁶ Nebbia P, 'Comment on the case of *Director General of Fair Trading v First National Bank*, House of Lords, [2001] 3 WLR 1297', (2003) 40 CMLR, p 986.

other terms in the same contract. For example, a term giving a seller the right to increase prices was deemed fair because the consumer was also given the right to get out of the contract without penalty¹. Again, a term providing the consumer with a cooling-off period during which he would be able to cancel the contract without penalty may help in finding another term fair which otherwise would not be deemed so².

Conversely, some terms are affected by the absence of a particular term, and therefore have been declared unfair. For example, a term in a contract of membership of a fitness club was considered unfair since it allowed the business to assign the contract to another party without the permission of the consumer, whereas the latter was not allowed to transfer the benefit of the contract.³

2.3.4. Terms of any contract on which the disputed contract is dependent

The Regulations refer to the importance of the terms of secondary contracts on which the contract is dependent in assessing the fairness of a term it includes. This does not, however, mean that the secondary contract loses its importance entirely if the contract does not depend on it, because its terms could be deemed part of the circumstances which attended the primary contract's conclusion.⁴

Although the Regulations seem to allow the secondary contract to not necessarily be between the same parties as the primary contract, it should be obvious that such terms must have a specific relevance to the disputed term. Therefore, a term which demands an advance payment may be considered unfair irrespective of the fact that there is another term offering a degree of liability greater than that imposed by the law.⁵

It has been suggested that both primary and secondary contracts should be concluded simultaneously, or that the secondary contract should be made before the primary contract. This is due to the Regulations' injunction that attention shall be paid, in assessing the fairness of a term, to the circumstances "at the time of the conclusion of the contract"⁶. Accordingly, a term which was added to the primary

¹ OFT, Bulletin Issue No 1, May 1996, p 6.

² OFT, Bulletin Issue No 2, Sep 1996, p 12.

³ OFT, Bulletin Issue No 4, Dec 1997, p 40.

⁴ Oughton D and J Lowry, op cit p 404.

⁵ Lawson R, *Exclusion Clauses and Unfair Contract Terms*, 7th Ed (London: Sweet & Maxwell, 2003), p 205.

⁶ reg 6(1).

contract or to the secondary contract after the conclusion of the primary contract would not be taken into consideration in assessing the disputed term. On this basis, and since the secondary contract in many cases is concluded after the conclusion of the primary contract, a question of critical importance is whether or not the secondary contract will be taken into consideration at all in assessing the fairness in such cases.¹

In the writer's view, the secondary contract made after the conclusion of the primary contract can be taken into consideration when assessing the fairness of a term in the latter as long as it is made between the same parties as in the primary contract. This similarly applies to terms added to the primary or secondary contracts made between the same parties as in the primary contract. A term included in, or added to, the described secondary contract or a term added to a primary contract must be looked at as an amendments to the primary contract insofar as they affect the latter's provision. Here, there would be no violation to the stipulation that the fairness must be assessed at the time of contract's conclusion, because the time of making such amendments will be, simultaneously, the time of the conclusion of the contract as amended; i.e. it merges with the time of conclusion of the primary contract, and therefore it cannot be considered as being made after the latter's conclusion.

2.3.5. Using core terms in assessing other terms

As indicated above, if a core term is drafted in plain and intelligible language, it will not be subject to the test of fairness. However, it can be taken into account when assessing other terms of the contract. Reg 6(1) provides that regard shall be paid when assessing the fairness of a term to many respects, *inter alia* "all the other terms of the contract". By way of example, a lower price, which is a core term, can justify exclusions or limitations of liability.

2.4. The requirement of plainness and intelligibility

The Regulations require that all terms of the contract, including core terms, must be written in plain and intelligible language. Reg 7(1), reflecting Art 5 of the Directive, provides that a seller or supplier shall ensure that any written term of a contract is expressed in plain and intelligible language.

¹ Ibid, p 206.

It was suggested that this provision would cause some inconvenience in English law¹. However, it seems of great importance in practice, since the suggestions made in *Stage Line Ltd v Tyne Shiprepair*², under which putting a clause in a very difficult language or very small print was deemed against its reasonableness, have not been applied in any case³.

However, the language of the Directive, and hence that of the Regulations, seems to be unintelligible as to this requirement, since it failed to mention from whose perspective this requirement is to be assessed; the term may be plain to the lawyer or the trader but not to the ordinary consumer⁴. However, in the OFT's bulletins it is indicated that terms must be understood by the ordinary consumer who is acting without legal advice, and it follows that, unless explained in a language the consumer can understand, phrases deemed as lawyers language such as "*force majeure*", "consequential loss", and "time being of the essence of the contract" shall be avoided⁵.

It seems that the criterion taken by the OFT is an objective one based on the test of "the ordinary consumer". It might be suggested that it is better to adopt a personal criterion corresponding to the consumer's status and his level of education, including his legal background. This will allow for a consumer who is a lawyer, for instance, not to receive the same treatment that other consumers receive. However, it is pretty clear that no subjective criterion could work in a pre-emptive regime such as that adopted by the Regulations aiming at not pursuing terms on an individual basis.

What could increase the ambiguity of this requirement is that the language used in Reg 7(1), unlike that used in relation to Reg 6(2), implies that the term required to be plain and intelligible shall be a written term. This has the effect of restricting the requirement of intelligibility to written terms. Such a situation would ignore the fact that oral contracts are covered by the Regulations.

Regardless of the problem of how to prove plainness which could appear in oral contracts, and relying on the purposive interpretation of the Directive aiming at

¹ De Moor A, 'Common and civil law conceptions of contract and a European law of contract: the case of the Directive on Unfair Terms in Consumer contracts', (1995) 3 E. Rev. of Private Law, p 262.

² *Stage Line Ltd v Tyne Shiprepair Group Ltd and Others (the "Zinnia")* [1984] 2 Lloyd's Rep 211.

³ Furmston M, *Cheshire, Fifoot and Furmston's Law of Contract*, 14th Ed, (London: Butterworths, 2001), p 218.

⁴ Harvey B and D Parry, op cit p 141; Collins H, 'Good faith in European contract law', (1994) 14 OJLS, p 248.

⁵ OFT, Bulletin Issue No 3, March 1997, p 20. See also, Oughton D and J Lowry, op cit p 403.

offering full protection to consumers against unfair terms whether written or oral, it seems strange to restrict the requirement of plainness and intelligibility to written contracts. A purposive interpretation entails that such a restriction should not be taken seriously but rather regarded as an inaccurate formulation.

Arriving at the result that the requirement of plainness and intelligibility includes oral terms begs the question of whether the vendor can allege that a vague written term was explained orally. The writer believes that even if the vendor is able to prove such an allegation, it is unlikely that the courts will accept such an oral explanation. The assumption that oral terms are targeted by the requirement of plainness comes as a consequence of a purposive interpretation, due to the fact that this result favours the consumer. A purposive interpretation can be employed to conclude that the vendor cannot explain a written term orally because this harms the consumer's interests. In other words, as far as plainness is concerned, an oral explanation of a term can never be like a written explanation. Furthermore, the vendor should not benefit from the carelessness he showed in not writing the term plainly.

2.4.1. Consequences of failure to comply with the requirement of plainness and intelligibility

The fact that a particular term in a contract is not plain or intelligible means, except in public actions, that it will be subject to the rule provided in Reg 7(2) whereby the interpretation which is most favourable to the consumer shall prevail. The absence of plainness and intelligibility from a core term not only renders it vulnerable to the foregoing provision but also subjects it to Reg 6(2) which removes its immunity against the test of fairness.

It has been argued that the impact of Reg 7(2) simply reflects the existing rule in common law of *contra proferentem* interpretation of exemption clauses¹. According to this rule, and as already discussed in the Preliminary Chapter, the court adopts the meaning which is favourable to the party who did not participate in writing the vague

¹ Collins B, 'Unfair Terms in Consumer Contracts Regulations 1994',
'<http://webjcli.ncl.ac.uk/articles3/collins3.html>>

clause¹. If this is the case, the value of the requirement of plainness and intelligibility may be doubted because there is no real sanction in response to their absence².

However, although this is not expressly mentioned in the Regulations, it has been suggested that not to express a term plainly and intelligibly may constitute an important factor in the overall assessment of the fairness of this term, because using unintelligible language inhibits the consumer from a genuine opportunity to become acquainted with the effects of the relevant term.³

A contrary reading suggests that the sanction generated by Reg 7(2), under which the interpretation most favourable to the consumer shall prevail, stands alone as an independent rule detached from the fairness test; otherwise Reg 7(2) is otiose.⁴

The first reading, which suggests that the absence of plainness may constitute a factor in the test of fairness, might be reinforced by the New Legislation which, besides replicating the same provision of Reg 7(2)⁵, refers to the use of plain and intelligible language as a vital aspect of fairness. Clause 14(1) of the Draft Bill provides that whether or not a term is “fair and reasonable” is to be assessed according to the extent to which the term is transparent, the substance and effect of the term, and all the circumstances existing at the time of the contract’s conclusion. Under Para 3 of the same Clause, transparent means not only plain and intelligible but also presented clearly and readily available to any person likely to be affected by the term in question.

The writer would suggest that this cannot constitute decisive evidence that this is what is intended under the Regulations, because they are separate pieces of legislation. As a consequence, the attitude under the Regulations cannot be gauged by the provisions of the New Legislation, especially given the origin of the Regulations as a direct implementation of a European legislation. This differs from that of the New Legislation which is, albeit implementing the Directive too, produced to reflect mainly the English vision and concerns. Therefore, the writer’s reading would be similar to the second reading. This is because it seems to be closer to the language of

¹ See *supra*, p 47 et seq. A similar provision could be found in Jordan, where S 240(2) of the JCC provides that the interpretation of ambiguous terms in adhesion contracts shall not be allowed to harm the adhering party’s interests.

² Downes T, *Textbook on Contract*, 5th Ed, (London: Blackstone Press Limited, 1997), p 210.

³ Beale H & Others (Editors), p 928; Collins B, ‘Unfair Terms in Consumer Contracts Regulations 1994’, ‘<http://webjcli.ncl.ac.uk/articles3/collins3.html>’>

⁴ Upton M, *op cit* p 297.

⁵ The Draft Bill, Clause 8.

the Regulations except as regards core terms, where it could be argued that when rendering them subject to the fairness test the legislator might aim at sending a signal: the vagueness of a core term is a factor to be taken into consideration in assessing its fairness.

2.5. The effect of an unfair term on the consumer and the continuation of the contract¹

As a consequence of the requirement of the Directive which obliges Member States to provide in their national laws that terms which are unfair shall not be binding on the consumer², Reg 8(1) provides that an unfair term in a contract concluded between a seller or supplier and a consumer shall not be binding on the latter. Meanwhile, the contract, according to Reg 8(2), “shall continue to bind the parties if it is capable of continuing in existence without the unfair term”.

It appears obvious that Reg 8 does not give the court the power to rewrite the contract. This raises the point that the Directive, and hence the Regulations, does not follow the steps of many European laws, and particularly the Nordic laws, which have adopted a radical approach whereby courts have a generalized power to adjust unfair terms and to take into consideration the changed circumstances of the parties post formation in choosing which approach to take.³

The first point to be made in relation to the formula of Reg 8 is that the phrase “not binding” was selected carefully so as to be neutral and far from different classifications within legal tradition of classifying terms such as void, voidable and considered as non-existent; terms that even in English law have not, in many cases, been given the same meaning⁴. However this wording has not been left to be neutral as was intended. The early consultation documents issued by the DTI on the

¹ This Section is devoted to addressing Reg 8. Thus, the most important consequence that may result from a non-compliance with the requirement of fairness, which is the preventive measures likely to be taken by the OFT and the qualifying bodies against the continued use of the unfair term, will not be treated here; rather it will be the subject of the next Chapter.

² See art 6(1). See, also, recital 21 to the Directive.

³ Wilhelmsson T, ‘Control of unfair contract terms and social values: EC and Nordic approaches’, (1993) 16 JCP p 437. The approach taken by Nordic laws in relation to adjusting the unfair terms for the benefit of the weak party seems, to some extent, similar to the approach taken by Jordanian law under S 204 of the JCC (the contract of adhesion theory which is the subject matter of this Thesis as far as Jordanian law is concerned). On the other hand, changing the provisions of the contract according to subsequent conditions seems similar to that approach taken under S 205 of the JCC concerning abnormal incidents.

⁴ Tenreiro M, op cit p 280 et seq; Bright S, op cit p 350.

implementation of the Directive interpreted it as meaning voidable¹. Likewise, it was suggested that it has the effect of making the contract “voidable at the consumer’s option”². Against this, in *Kindlance Limited v Murphy*, Master Ellison took the same line that appeared in the first proposal of the Directive³ holding that a provision contravening the Regulations is void⁴.

Irrespective of the description given to this wording, attention should be paid to certain legal rules generated by the wording “not be binding on the consumer”, which, if applied, will give room for claiming that the consumer is not genuinely bound by the term. *Tenreiro*, who had the privilege to participate in producing the Directive, pointed out that these rules include: that the court shall declare the unfairness of a term and refuse to enforce it *ex officio* without any need for special demand from the consumer; that the consumer can refuse to carry out his obligations under the unfair term even if it has not yet been declared as unfair by the court; that the consumer has the right to invoke the unfairness of that term at any stage from the conclusion of the contract onwards; that the consumer cannot give up his right to invoke the unfairness of a term; and that the effects of finding a term to be unfair shall refer to the beginning of the performance of the contract by its parties.⁵

The application of some of these rules on the ground might pose difficulties. For example, it could be that the consumer’s practice of his right to refuse operating the term appearing to him to be unfair might cost him too much if it is proved later that he was wrong (i.e. that the term is not unfair). In such a case, the consumer might find himself responsible for compensating the trader for damage caused to him or he might be obliged to pay extra interest. Therefore, the consumer would not be expected to find the courage to attempt to benefit from such a right, unless he is very sure that the term is unfair or that he would not suffer very much should the term turn out to be fair in the eyes of the court.

The second point is that Reg 8(1) does not go beyond the Directive’s minimum requirement provided in Art 8 to take advantage of its provision allowing Member States to adopt or retain the most stringent provisions to ensure a high degree of

¹ Ibid, p 350.

² Upton M op cit p 296; a very close approach was suggested by another commentator. (See, Mosawi A and B Cooper, ‘How fair art thou? Setting the provisions of the EU Directive on Unfair Terms in Consumer Contracts in its legal context’, (1995) 92 LSGG p 20, available in West Law.

³ Tenreiro M, op cit p 280.

⁴ *Kindlance limited v Murphy*, Chancery Division, (1997) No 625 (Transcript) p 15.

⁵ Tenreiro M, op cit p 282.

protection for consumers. Brian St.J Collins¹ has suggested that this is unfortunate and a factor of weakness, since the sanction adopted is not likely to be effective. This view relies on the fact that the same provision was introduced under Ss 2(2) and 3(2) of UCTA and so far there is no evidence that the use of ineffective terms under UCTA has become uncommon. Therefore, he suggested that more effective sanctions exist within the laws of Member States and the Regulations could have adopted one of these. For example, Arts 5 and 6 of Luxembourg's Consumer Protection Act 1983 provide that any consumer or supplier's organisation represented on the Prices Board may request a court to declare the disputed term null and void and the seller or supplier who uses a term which has already been declared void against him is subject to a substantial fine. Alternatively, Arts 8 and 9 of Portuguese Decree Law 1985 and Art 10 of the Spanish General Law on Consumer Protection 1984 provide that if certain unfair terms were used in a contract, the entire contract is declared null and void.

Brian St.J Collins went on to suggest that greater protection would have been afforded to the consumer if the Regulations stated that the unfair term would be void and the consumer would be given the choice to decide whether or not to continue with a contract containing a void term.²

In analysing the above approach, it seems that there are three sanctions/solutions, and Brian St.J Collins thought that the legislator should have considered adopting one of them. These are that the trader who uses an outlawed term should be fined; or, that an unfair term must be void in itself and the contract will continue at the choice of the consumer; or, that a term which has previously been declared void against a particular trader must render a later contract to which he is party null should he use this term again.

The writer's opinion is that the first two of these sanctions, as rearranged in the latter analysis, seem worthy of consideration. However, the use of fines as a sanction in the face of unfair terms might be more suitably deployed with respect to public enforcement, as discussed further in the next Chapter. As for the second solution, it seems that the consumer would have no interest in quitting the contract as long as the unfair term is declared void and set aside. Thus, it is expected that if the consumer is

¹ Collins B, 'Unfair Terms in Consumer Contracts Regulations 1994', <http://webjcli.ncl.ac.uk/articles3/collins3.html>>

² Ibid.

given the opportunity to decide the contract's fate in this case, he will choose to continue with it.

The final solution represents no solution at all. Declaring the whole contract void because it includes an unfair term without taking into account the opinion of the consumer is highly likely to hurt his interests rather than benefiting him. This is because continuing with the contract without the unfair term could be, as explained previously, in his favour.

Other commentators have criticised Reg 8 because it does not make clear what is the effect of declaring a contract incapable of continuing without the disputed term on any related contract. For example, it is doubted that a loan agreement can continue if it has been decided that a guarantee on which it depends cannot continue.¹

In the writer's view, the effect of rendering a contract void on a related contract depends on whether the void contract is the main contract (the loan contract in the above example) or the ancillary contract (the guarantee contract). If the main contract is void it is reasonable to suggest that the ancillary contract is automatically void, and there is, by the way, an interesting rule in the JCC to this effect stating that "the accessory shall be considered as such and shall not be treated separately"² and, accordingly, "if the principal is void, the accessory shall be void also"³. It is expected that the same result would be reached if the issue goes to the English courts. On the other hand, if the ancillary contract is void this does not mean that the main contract is also void, although it would present a problem to which there is no single solution. Here, each case should be considered separately. And, this would mainly depend on the presence of a term within the main contract anticipating the situation where a term may be void and regulating its effects. Accordingly, the solution for the above example, in the absence of any previous arrangement within the loan contract and given that the latter contract is valid and will continue, might lie in providing another guarantor.

The effect of an unfair term on the whole contract under the Regulations seems to be similar to the consequence under Jordanian law. S 204 of the JCC authorizes the court to alter or remove, as appropriate, any harsh term in an adhesion contract. But it does not state what happens to the contract afterwards. It can be inferred from the

¹ Longshaw A and T Sewell, *op cit* p 40.

² s. 228.

³ s. 229.

language of the Section that the contract will continue; otherwise the legislator would not use the terms “remove” and “alter”. It seems that the legislator assumes that the general rule dealing with invalid terms provided in S 164(2) of the JCC will be applied in such a case. Under this Section, it is up to the parties to the contract to agree on any term unless it is prohibited by the law, public policy or morals. In these cases, the term will be null and the contract will continue except where the invalid term is the main purpose of contracting, in which case the whole contract is void. This seems to apply exactly to the case of unfair terms under S 204: when a term is declared unfair by the court the contract will continue without this term unless it is the main purpose of contracting, in which case the whole contract is void.

2.6. The indicative list

2.6.1. Introduction

Both the 1999 Regulations and the revoked 1994 Regulations include an indicative and non-exhaustive¹ list of terms which may be regarded as unfair². This list, the so-called “grey list” as opposed to “black list”, was lifted from the Annex to the Directive.

The fact that the Directive adopted the route of a grey list (i.e. not a black list) may reinforce the freedom of contract which would otherwise be violated by the fact that any term contained in a black list is unenforceable whether included freely or not. However, being a grey list was not the case in the earlier draft of the Directive. The draft Directive contained a black list of terms which would be prohibited. This proposal provoked strong objections from the UK and several other Member States³ because, among other reasons, it would require extensive amendments in the legislation of these countries⁴. Moreover, according to the European Parliament’s Commission for Consumer Affairs, it would be impossible for the Member States to agree on the composition of the black list⁵.

¹ As a result of this nature, the OFT has identified other types of terms not falling within this list to be, according to the OFT, questionable in the light of the general test of fairness (See, OFT, Bulletin Issue No 3, March 1997, p 18).

² In the 1999 Regulations, reg 5(5), sch 2. In the 1994 Regulations, reg 4(4), sch 3.

³ The black list was criticized by the House of Lords select committee on the European Communities (see, Duffy P, ‘Unfair contract terms and the draft E.C. Directive’, (1993) JBL p 70).

⁴ Lockett N and M Egan, op cit p 33.

⁵ Hondius E, ‘EC Directive on Unfair Terms in Consumer Contracts: towards a European law of contract’, (1994) 7 JCL p 40.

By relying on the minimal nature of the Directive, the UK was free to adopt the black list model or to employ a grey list as adopted in the Directive. Recital 17 to the Directive concerning the grey list refers to this by stating that “...because of the cause of the minimal character of the Directive, the scope of these terms may be the subject of amplification or more restrictive editing by the Member States in their national laws”.

In this section (the indicative list), the writer will compare the list with Jordanian law to determine its attitude towards the terms included in the list. However, this does not include how the test of oppression would affect these terms, and consequently, any conclusion that a specific term is not prohibited under Jordanian law has no implications for subsequent findings under the test of oppression.

Before addressing the list term by term, it is necessary to discuss the value of the list itself and whether or not its existence has shifted the burden of proof as to the fairness of the terms it includes to the trader, compared with the general rule, already treated¹, which places the burden of proof on the consumer.

2.6.2. The indicative list: the value and the burden of proof

Contrary to the word “non-exhaustive” which seems to be clear, indicating that other terms not included in the list may be unfair², the word “indicative” causes controversy stemming from variant descriptions given to the terms the list includes. Some commentators took the view that the list includes terms which will be typically found to be unfair even though they will not automatically be considered unfair because their incorporation in a particular contract may be justified by circumstances attending the conclusion of that contract³. Others suggested that the list contains terms that would rarely satisfy the test of fairness, and which are therefore effectively void⁴.

¹ See *supra*, p 141.

² The OFT has stressed that the exclusion from the list cannot form any sort of white list. Any standard term is unfair whether or not it appears in the list if it fails the test of fairness as set out in the Regulations (See, OFT, Bulletin Issue No 5, Oct 1998, p 10).

³ Brownsword R, G Howells and T Wilhelmsson, ‘The EC Unfair Contract Terms Directive and welfarism’, in Brownsword R, G Howells and T Wilhelmsson (Editors), *Welfarism in Contract Law*, (Aldershot: Dartmouth, 1994), p 283. The same line was taken in *Zealand v Laing Homes Limited* (2000) T.C.L.R. Sweet & Maxwell Ltd p 728, where Harvey J refused the idea that the list creates rebuttable presumptions, but rather is a merely guideline.

⁴ Dean M, ‘Unfair contract terms: the European approach’, (1993) 56 MLR p 587.

For the OFT, the list “is the most authoritative guide to what unfairness entails. It is not a ‘black list’, but the exact shade of grey involved is debatable”¹. The OFT went on to suggest that “if a term appears in the list, it is under substantial suspicion, but that correspondence with an item in the list cannot of itself determine the issue of unfairness”².

Based on the above, the value of such a grey list has been questioned. Some commentators have taken the view that the list is of little significance, adding little to English law because it is merely indicative³. For others, the list does have some value. According to this view, the list is useful for those drafting contracts, for consumers and for any party challenging a particular term, as it makes it easier for them to point to a term similar to that being drafted or under consideration⁴. Also, the list is useful to the seller or supplier in being aware of terms which are more likely to be unfair⁵.

More importantly, it has been suggested that the grey list has added a novel effect to English law through rendering the terms listed as *prima facie* unfair and hence reversing the burden of proof by putting the onus on a seller or supplier to show the fairness of a disputed term if it is similar to one contained in the list⁶. Although this contradicts the view taken by many commentators that the grey list has changed nothing in relation to the burden of proof⁷, if this approach is accepted by the courts and the OFT, it may be regarded as an important achievement since the burden of proof under the Regulations’ general test is, as already indicated, on the consumer.

However, an alternative suggestion is that although nothing in the Regulations provides expressly that the burden of proof as to the fairness of a particular term is placed on the party seeking to rely on that term where it, or a similar term, is contained in the list, this is likely to be the effect in practice.⁸

¹ Edwards P, op cit p 22.

² Ibid.

³ Cooke J and D Oughton, op cit p 513; Grubb A and Furmston M (Editors), op cit p 667.

⁴ Beale H & Others (Editors), op cit p 915; Lawson R, *Exclusion Clauses and Unfair Contract Terms*, 7th Ed (London: Sweet & Maxwell, 2003), p 207.

⁵ Hondius E, ‘EC Directive on Unfair Terms in Consumer Contracts: towards a European law of contract’, (1994) 7 JCL p 40.

⁶ See, Longshaw A and T Sewell, op cit p 49; Bone S, L Rutherford and S Wilson, op cit pp 33, 41; Treitel G, op cit p 274; Mosawi A and B Cooper, op cit.

⁷ Cooke J and D Oughton, op cit p 513; Lawson R, *Exclusion Clauses and Unfair Contract Terms*, 7th Ed (London: Sweet & Maxwell, 2003), p 207; Grubb A and Furmston M (Editors), op cit p 667; Grant D, op cit p 134; Beale H, Legislative Control of Fairness: the Directive on Unfair Terms in Consumer Contracts, in Beatson J (Editor), *Good Faith and Fault in Contract Law*, (Oxford: Oxford University Press, 1995), p 246.

⁸ Howells G, *Consumer Contract Legislation: Understanding the New Law*, (London: Blackstone, Press Limited, 1995), p 45.

The writer would support the opinion that the list is indicative in the sense that the terms it contains might be unfair, and it is for the consumer or the OFT to prove this as with terms outside the list. The benefits of the list, accordingly, go no further than the following: helping the courts and the OFT to recognise the legislator's understanding of the fairness under the Regulations; enhancing the certainty of the Regulations; allowing consumers and their lawyers to perceive the limits of their/their clients' rights; and alerting the trade sector to terms which are likely to be deemed unfair.

Taking this into account, the terms contained in the list can be considered. They are categorized into ten groups as follows:

2.6.3. Categories of the list's terms

2.6.3.1. Exemption or limitation clauses

This covers terms which have the object or effect of:

- “(a)¹ excluding or limiting the legal liability of a seller or supplier in the event of the death of a consumer or personal injury to the latter resulting from an act or omission of that seller or supplier;
- (b) inappropriately excluding or limiting the legal rights of the consumer vis-à-vis the seller or supplier or another party in the event of total or partial non-performance or inadequate performance by the seller or supplier of any of the contractual obligations, including the option of offsetting a debt owed to the seller or supplier against any claim which the consumer may have against him;
- (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.”

The motive behind inserting this category within the grey list can be found in the words of the OFT, which state that:

¹ This letter corresponds to that given to this category in Sch 2 to the Regulations. This applies to all the letters appearing in front of other grey-listed categories quoted afterwards in this Chapter.

“Rights and duties under a contract cannot be considered evenly balanced unless both parties are equally bound by their obligations under the contract and the general law. Suspicion of unfairness falls on any term that undermines the value of such obligations by preventing or hindering the consumer from seeking redress from a supplier who has not complied with them”.¹

It can be understood from this commentary that a particular exclusion or limitation could be seen as fair unless it goes beyond what is deemed essential². For example, terms aiming at excluding liability for consequential loss might be considered as unfair. This is not only because they have the potential effect of misleading the consumer, who may understand a reference to a consequential loss as extending to all loss from the breach, but also because they cover matters other than unforeseeable loss, the exclusion of which is not subject to the OFT’s objection. In this way, they go beyond what is essential.³

Under UCTA, many terms within this category would be categorized as exemption clauses. This would make the Regulations of less importance than UCTA due to the fact that exemption clauses are part of UCTA’s black list under which a term will be automatically ineffective. Nonetheless, the Regulations may still be of significance because of the general level of protection provided to ensure that unfair terms will no longer be used in consumer contracts. This is sustained by the fact underlined by the OFT that, although S 2(1) of UCTA provides that terms excluding or restricting liability for death or personal injury resulting from negligence are automatically ineffective, these terms are still in use and need to be challenged⁴. Moreover, although element (a) is similar to S 2(1), it is not restricted to liability arising from negligence. Here, it seems that the Regulations require a higher standard of care to be satisfied by the seller or supplier, and thus more protection is expected to be afforded to the consumer.⁵

The notion of inappropriate exclusion which appears in element (b) would give the particular circumstances a significant role in determining whether or not “the legal

¹ OFT, Unfair Contract Terms Guidance, Feb 2001, p 3.

² Grubb A and Furmston M (Editors), op cit p 670.

³ OFT, Bulletin Issue No 3, March 1997, pp 8, 9; OFT, Unfair Contract Terms Guidance, Feb 2001, p 11. An example of a term of this sort is to be found in OFT, Bulletin Issue No 5, OCT 1998, p 28, (Eastern Natural Gas Ltd).

⁴ OFT, Bulletin Issue No 3, March 1997, p 8, para 1.2.

⁵ Lockett N and M Egan, op cit p 34.

rights of the consumer vis-à-vis the seller or supplier or another party” had been “inappropriately” excluded or limited, for instance when a lower price may justify the inclusion of the excluding term where such reduction would not be afforded otherwise¹. The good faith rule obliging the seller or supplier to take into account the consumer’s interests seems highly relevant here².

On the other hand, it has been suggested that this notion may have the effect of increasing litigation, since the parties will be eager to ascertain which terms fall within its ambit³. It may be more precise, in the writer’s view, to suggest that the use of the term “inappropriately” is highly likely to be a source of uncertainty. Nonetheless, element (b) provides an example of what would constitute a consumer’s legal rights limited inappropriately, stating that the seller or supplier should not be allowed to exclude or limit the consumer’s right to set off debts owed by the seller or supplier against any claim that the consumer may have towards him. However, this gives no real guidance in drawing the boundaries of the notion. It seems that this example merely draws attention to the fact that terms of this sort fall within element (b) of the grey list. Such emphasis was needed, one would think, either because they are so dangerous, or because they are elusive and then they might escape being scrutinized decisively. Therefore, the need to explain the notion of “inappropriate exclusion” remains necessary.

Another important term which is within the ambit of element (b) is that covering the seller’s breach in the case of *force majeure*. This is despite the fact that the attempt of the European Parliament to include a specific element regarding such a term in the Directive failed. Thus, any inclusion of a *force majeure* clause will be tested under element (b), although it is unlikely to be found inappropriate.⁴

An analogy in this connection with Jordanian law shows that a *force majeure* clause is not potentially fair, as under the Regulations, but rather definitely fair by virtue of an express provision of the law. S 205 of the JCC provides that if the performance of the contract becomes cumbersome to the contracting party due to a general abnormal incident threatening him with serious loss, the court may according to the circumstances and after balancing the interests of both parties reduce the cumbersome obligation to the reasonable extent, if so prescribed by equity.

¹ Bone S, L Rutherford and S Wilson, op cit p 43.

² Collins H, ‘Good faith in European contract law’, (1994) 14 OJLS, p 252.

³ Lockett N and M Egan, op cit p 35.

⁴ Ibid, pp 35, 36.

Furthermore, any agreement to a contrary effect is void. Indirectly, this implies that the seller has the right to exclude or limit his liability in the event of *force majeure* even if there is no term specified to this effect in the contract. The extent of the exclusion or limitation, however, is subject to judicial consideration.

Not only the trader may benefit from the fact that such a term is fair under the JCC and highly likely to be fair under the Regulations. Also the consumer himself may drive advantage from such a situation. The New Legislation drew attention to the possibility that the consumer may appear as a seller or supplier¹. For example, a consumer who found himself under an unsatisfied obligation generated by a contract for selling a second hand car to a business due to a *force majeure* could benefit from the above provision if its conditions were met.

Element (q) would particularly cover a term under which the consumer is required to take disputes exclusively to arbitration not covered by legal provisions, or has the effect of altering the rules of proof to the detriment of the consumer. The inclusion of such an element within the grey list could be understood if read in the light of the value concentrating on the citizens' rights of access to justice through the legal system².

With regard specifically to jurisdiction clauses, the ECJ held that a clause conferring jurisdiction on the place of the seller's business is unfair because it gives the seller easy access to the court and potentially imposes a burden in that respect on the consumer³. More importantly, if the dispute concerns a limited amount of money, such clauses may make it difficult for the consumer to enter appearance and cause him to forgo any remedy or defence⁴.

The same justification seems, to some extent, relevant in relation to arbitration clauses aiming at changing the normal system of litigation. The issue of costs besides the significant imbalance has been central to the test of whether the arbitration clause was fair. In the *Zealand* case, the claimant entered an agreement with the defendant to purchase a house which was still uncompleted at the time of the agreement. The

¹ The Draft Bill, Clause 6.

² Wilhelmsson T, 'Control of unfair contract terms and social values: EC and Nordic approaches', (1993) 16 JCP p 447.

³ *Oceano Grupo Editorial SA v Rocio Murciano Quintero* (C-240/98)[2000] ECR I-4941, paras 23, 24. Locally, the High Court took the opportunity in *Standard Bank London Ltd v Apostolakis* to uphold this approach (See, *Standard Bank London Ltd v Dinitrios Apostolakis, Styliani Apostolakis*, No. 1999 Folio 1259, QBD (COMM CT) (2001), paras 48-51). See, also, *infra*, p 175.

⁴ *Oceano Grupo Editorial SA v Rocio Murciano Quintero* (C-240/98) [2000] ECR I-4941, para 22.

construction of the house was the subject of a “Buildmark” guarantee issued under the auspices of the National House Builders Council, which contained an arbitration clause. The claimant pursued the defendant before the court in relation to defects in construction and other matters. The matters arising in relation to construction fell within the scope of the arbitration clause and, therefore, the defendant argued that the determination of these matters should be left to arbitration. The court held that the arbitration clause contravened the Regulations because it created a significant imbalance between the parties taking into account that the claimant, who had another dispute with the defendant, would have to take two sets of proceedings in respect of the same remedy and thus would find himself at a financial disadvantage¹. Again, in the *Picardi* case, a contract for the refurbishment of a house was concluded between a supplier (architect) and two consumers (the house owners). Either party could refer the dispute to adjudication, and the adjudicator was to be appointed by the parties. But, in the case of disagreement, the adjudicator would be nominated by the architect’s own professional body. After alluding to the significant imbalance between the parties created by the arbitration clause², the court declared such a clause to be unfair since the “procedure which the consumer is required to follow, and which will cause irrecoverable expenditure in either prosecuting or defending it, is something which may hinder the consumer’s right to take legal action... Costs in an adjudication can be very significant”³.

However, the provision of element (q) might be seen as of no significance as far as arbitration clauses are concerned, for two reasons. Firstly, under the Arbitration Act 1996, if the amount of the contract in dispute is less than £5000, the term of arbitration is automatically unfair⁴. It might be contended, consequently, that this Act provides for better protection than that provided under the Regulations. Secondly, when element (q) refers to “arbitration not covered by legal provisions”, this places a stipulation that might never be satisfied since it is difficult, if not impossible, to find a situation which will be covered by this provision⁵.

In response to the first reason, it could be said that a deeper look would show a different picture. The above contention referred to the point of weakness in the

¹ *Zealander & Zealander v Laing Homes Limited* (2000) T.C.L.R., Sweet & Maxwell Ltd.

² *Picardi (t/a Picardi Architects) v Cuniberti and another* [2002] EWHC 2923, para 128.

³ *Ibid*, paras 131, 133.

⁴ s. 91; see, also, Unfair Arbitration Agreements (Specified Amount) Order 1999, (SI 1999/2167) coming into force on 1 January 2000.

⁵ Bone S, L Rutherford and S Wilson, *op cit* p 47.

Regulations compared with the 1996 Act (that the terms they list are only potentially unfair), but does not take into account their advantage over the Act as far as consumer protection is concerned. Unlike the 1996 Act, the Regulations place no limit in relation to the amount of the contract in question and, of course, this will have the effect of completing the protection against unfair arbitration terms afforded by the 1996 Act. The fact that many disputes fall outside the coverage of the 1996 Act, such as those in the *Zealander* and *Picardi* cases referred to above, reinforces this view.

As for the second reason, an initial interpretation seems to uphold such a criticism. The court in the *Zealander* case acknowledged that the above stipulation would have the effect of rendering element (q) meaningless. But the court went on to uphold a construction under which this stipulation was inserted so as to take account of special statutory schemes designed to assist consumers in some European countries (notably, the Netherlands, Portugal and Spain). In countries other than the latter, such as the UK, the precise effect of element (q) is to render unfair any term granting arbitration exclusive jurisdiction¹. This reading seems to be convincing.

In Jordan, element (a) of this category is comparable to S 270 of the JCC which renders void every contractual term excluding liability arising under tort. This provision seems to be stronger than that generated by element (a) in two respects. Firstly, it provides for a blanket prohibition of such clauses, regardless of the kind of damage resulting from the act; rather than being limited to death and personal injury. Secondly, it goes beyond putting the clause under suspicion of unfairness, as in element (a) and instead renders it totally void. Therefore, the route taken under S 270 seems more successful; such dangerous clauses shall be treated without any sense of mercy.

Conversely, it seems that the Jordanian consumer is not sufficiently protected against terms covered by elements (b) and (q). There is no express provision in the law prohibiting such terms, neither are they caught by the notion of public policy. In relation to terms covered by element (b), as seen in the Preliminary Chapter, some terms are prohibited because they have the effect of totally or partially exempting the party from his duty to perform the contract, such as a term absolving the vendor from liability for the price of the property he sold if it is found to belong to a third party².

¹ *Zealander & Zealander v Laing Homes Limited* (2000) T.C.L.R., Sweet & Maxwell Ltd, p 729.

² See *supra*, p 44 et seq, Fig.1.

However, this cannot disguise the fact that such prohibition is insufficient because it covers only specific cases in specific contracts.

The Preliminary Chapter also revealed that some terms on jurisdiction are prohibited by virtue of public policy¹. However, those terms relate to the jurisdiction of value and not to the venue, which is usually subject to change in contracts. What is accepted in Jordan is that the jurisdiction of venue is not of public policy and therefore can be transferred by the parties unless the dispute in question is over an estate².

A close commentary can be made on arbitration clauses. The clauses of this sort which are referred to in the Preliminary Chapter as examples of terms prohibited under the banner of public policy are those concerning very particular cases, such as conferring the jurisdiction on a foreign arbitrator on the account of the Jordanian court or rendering the arbitral award taken by the local arbitrator to be the ultimate decision. Some of these cases go against express provisions of the law. Cases other than these would be legitimate in the absence of express prohibition, and this includes clauses in contracts to which the consumer is party.

Shifting the burden of proof to the other party of the contract, no matter who he is, also seems to be legitimate. According to the Court of Cassation, techniques of averment are not of the public policy, but rather are among the rights of the parties and they are left to them to agree on³. Although, this refers, in the Court's ruling (depending on the questions raised before the Court), to whether or not to present any evidence and which evidence to present, one would think that this implies that the parties can agree to change the burden of proof to be placed on one of them (the consumer in our case).

2.6.3.2. Unbalanced forfeiture clauses

This covers terms which have the object or effect of:

“(d) permitting the seller or supplier to retain sums paid by the consumer where the latter decides not to conclude or perform the contract, without providing for the consumer to receive compensation of an equivalent amount from the seller or supplier where the latter is the party cancelling the contract.”

¹ See *supra*, p 28 et seq.

² See, for example, CCRs: 197/1976 QCC; 105/1991 QCC; 821/1994 QCC.

³ See, for example, CCRs: 314/1968 QCC; 180/1975 QCC; 1141/1995 QCC.

It is clear enough that the Regulations do not intend to prohibit forfeiture clauses concerning the consumer's failure to enter or perform the contract. Rather, the issue of imbalance is targeted here. On this ground, such clauses are likely to be regarded as unfair only if the consumer does not receive equal treatment where the seller or supplier is the party who cancels the contract¹. So, a stipulation that the supplier can retain prepayments or deposits if the consumer cancels is not unfair unless the consumer cannot retain prepayments if the seller or supplier cancels.

In addition, the requirement of balance entails that the forfeited sum be proportionate to any loss that the seller or supplier suffers caused by the consumer's cancellation.²

Element (d) and the aim behind it as explained above seem to correspond to S 107(2) of the JCC which provides that "if the party who paid the deposit withdraws from the contract, he shall lose it, while if the receiver of it withdraws, he shall repay it together with an equivalent sum". There are, however, fears that such a provision is only a default rule and, hence, the parties can agree to the contrary. If this is true, one can be almost sure that traders will be keen to insert a term to such an effect, undermining the virtue of balance which S 107(2) achieves. Yet, it should be noted that the JCC normally makes it clear if a particular provision is a default rule by adding a wording drawing attention to this situation, such as "unless otherwise is agreed on". S 107(2) does not mention this, and this is a strong indication that this provision is an imperative rule.

This finding suggests that the Jordanian provision seems to be stronger than that of the Regulations, given that any term to its contrary is ineffective and not merely potentially unfair. However, the provision of the Regulations still has an advantage over S 107(2) because the latter is restricted to deposits. The phrase "deposit" refers, legally speaking, to a sum of money paid by the receiver party in the contract (the receiver of the good or service: the buyer, the tenant ... etc) so that the other party is assured that he is serious in completing the transaction. If he then proves this (i.e. by completing the transaction), the sum will be deemed a part of the price of the good or service. This would necessarily mean that other sums of money paid by a party for

¹ See, of the same opinion, Bone S, L Rutherford and S Wilson, *op cit* p 59; Longshaw A and T Sewell, *op cit* p 56.

² OFT, Bulletin Issue No 2, Sep 1996, p 26.

purposes other than this and not as a portion of the price of the good or service, such as administrative expenses, labour costs and insurance, do not fall within S 107(2). In the light of this, the provision of the Regulations appears to be more comprehensive since it is not confined to deposits but more broadly covers all “sums paid by the consumer”. This formula would cover the kind of payments left out by S 107(2).

2.6.3.3. Penalty clauses

This covers terms which have the object or effect of:

“(e) requiring any consumer who fails to fulfil his obligation to pay a disproportionately high sum in compensation.”

It is axiomatic that this element does not seek to prohibit the parties’ attempts to fix compensation in advance in the event of failure to satisfy the contractual obligations. This has been highlighted by the OFT, which states that “in principle, there may be no objection to a financial penalty for pulling out of the contract that applies equally to both parties”¹. Fixing compensation in advance save money and time, create certainty for the contractual parties who will be able to know the extent of their liability and the risks they run because of entering the contract. Therefore, the courts uphold agreements to this effect if they reflect a genuine intention to cure damage resulting from the breach, and do not merely aim at compelling the party to perform the contract².

By relying on the disproportionate nature of the compensation as a key element in deciding whether or not a term of this sort is fair, the Regulations take the same line adopted by common law under which the high level of a sum is the key point in distinguishing between a penalty and a valid liquidated damage clause³. It has been suggested that common law may be more helpful than the Regulations, where a term will not be potentially unfair as under the Regulations but will be ruled out by the courts⁴.

¹ OFT, Unfair Contract Terms Guidance, Feb 2001, p 19.

² Longshaw A and T Sewell, op cit pp 56, 57; *Philips Hong Kong Ltd v Attorney General of Hong Kong* (1993) 9, Const LJ 202.

³ Beale H & Others (Editors), op cit p 919; *Dunlop Pneumatic Tyre Co Ltd v New Garage and Motor Co Ltd* [1914-1915] All ER Rep 739.

⁴ Longshaw A and T Sewell, op cit p 57.

However, this element leads the Regulations to extend beyond common law, because the latter's control over penalty clauses is restricted to clauses under which a specified payment is to be made if the party is in breach of the contract. By way of illustration, the consumer's failure to return transparencies within fourteen days caused the penalty in *Interfoto v Stiletto*¹. This was not a breach of the contract although the charge was disproportionately high. Rather, such a charge appeared as a price for late return rather than a penalty for breach, and so common law did not declare the term as unfair on this ground. This motivated contractors to include clauses which have the same effect as penalty clauses even though do not look like them, such as clauses which require deposits² and clauses which provide for reduced payment on immediate performance and a higher standard rate on late payment³.

In contrast, by depending on the object or effect of a term instead of its form, the Regulations overcame this problematic restriction. In *Kindlance Limited v Murphy*⁴, for example, an interest acceleration clause in a mortgage contract was found to be unfair although it was not connected with a breach of the contract.

For this reason, the writer is not of the opinion that element (e) does not add something of value to the provisions of common law other than a legislative impetus⁵.

What has been said above is close in its result to the situation in Jordan. Pursuant to S 364(1) of the JCC, the contracting parties may limit in advance the amount that the breaching party is to pay in damages, either by a term in the contract itself or by a subsequent agreement. The Section goes on to provide that, notwithstanding this, the court may in all cases and on the application of either party amend that agreement to render the estimation equal to the real damage. Although the technique used in this Section is different from that used in the Regulations, the result would be comparable: pre-estimated compensation is permitted while a disproportionately high compensation hiding a penalty will be reduced to match the actual damage.

¹ [1989] QB 433.

² However, it is worth mentioning that the protection under the common law was not always insufficient in this regard. In *Workers Trust & Merchant Bank v Dojap Investments Ltd*, the court treated an unreasonable deposit as a penalty and held that it should be recovered (See *Workers Trust & Merchant Bank v Dojap Investments Ltd* [1993] 2 All ER 370).

³ See, Koffman L and E Macdonald, op cit p 297; Bone S, L Rutherford and S Wilson, op cit p 59.

⁴ *Kindlance limited v Murphy*, Chancery Division, (1997) No 625 (Transcript).

⁵ See, Bone S, L Rutherford and S Wilson, op cit p 59.

Also, the fact that it is for the consumer, under the Regulations, to prove that a term covered by element (e) is unfair has its counterpart in Jordan. The Court of Cassation has repeatedly pointed to that it is for the party in breach to prove that no damage has been caused to the other party as a result of the breach of the contract, or that the pre-estimated compensation is higher than the real damage¹.

The question remains, however, as to whether or not the JCC covers terms that have the effect or object of penalty clauses, such as in the examples given above. Unlike the Regulations, S 346(1) may not help in answering this question since it was not formulated in a style aimed at avoiding penalty clauses, but rather deals with their effects if the intention behind their inclusion was to punish the breaching party or to compel him to fulfil his obligation under the contract. Accordingly, this Section cannot be expected to distinguish between a term which is a penalty clause or has the same effect and one which genuinely allocates compensation resulting from a breach. However, the door is open for the courts to take the approach that if the term is not a penalty clause but has that effect or object, it will fall within S 346(1) and will be treated accordingly. Unfortunately, there is no evidence from court reports that this has been done.

2.6.3.4. Terms dealing with contract duration

This covers terms which have the object or effect of:

- “(f) authorising the seller or supplier to dissolve the contract on a discretionary basis where the same facility is not granted to the consumer, or permitting the seller or supplier to retain the sums paid for services not yet supplied by him where it is the seller or supplier himself who dissolves the contract;
- (g) enabling the seller or supplier to terminate a contract of indeterminate duration without reasonable notice except where there are serious grounds for doing so;
- (h) automatically extending a contract of fixed duration where the consumer does not indicate otherwise, when the deadline fixed for the consumer to express his desire not to extend the contract is unreasonably early.”

It is clear from the language of element (f) that it is the absence of balance which puts terms covered by this element under suspicion, where the seller or supplier is entitled

¹ See, CCRs: 391/1987 JBAJ 1990 p 234; 2141/1999 JBAJ 2001 p 2206; 3326/2000 ACC; 641/2003 ACC.

to cancel the contract and possibly retain pre-payment while the consumer cannot¹. The Regulations treat such terms as, in principle, valid. This goes against the argument that such terms would be void because they permit the seller or supplier to dissolve the contract without any prejudicial consequences, with the result that the seller or supplier offers no contractual performance at all. The line taken by the Regulations is compatible with the consumer's interest which requires the whole contract not to be rendered void but, instead, that it shall continue without the unfair term².

Likewise, element (g) does not seek to prohibit terms allowing one or other party to terminate a contract of indeterminate duration. These terms are, in principle, valid. Rather, it seeks to prohibit them only if there is no reasonable notice, unless there are serious grounds for this being the case.

The efficiency of this element might be weakened by the wording it employs, since there is no guidance as to what constitutes "reasonable notice" and "serious grounds". Yet it has been argued that recourse to the rules relating to the concept of "reasonable notice", which are highly developed under common law (notably, rules concerning the incorporation of exclusion clauses in contracts, as dealt with in the Preliminary Chapter³), could be helpful in this context⁴.

Uncertainty might, also, arise from the restriction made on this element according to Para (2)(a) of Sch 2, which provides that this element is:

"Without hindrance to terms by which a supplier of financial services reserves the right to terminate unilaterally a contract of indeterminate duration without notice where there is a valid reason, provided that the supplier is required to inform the other contracting party or parties thereof immediately".

Such a restriction can be tolerated as a commercial necessity given the fact that financial markets are ordinarily subject to massive price fluctuations with the result

¹ Longshaw A and T Sewell, *op cit* p 60; Simmonds J, 'Bankers' documents and the Unfair Terms in Consumer Contracts Regulations 1999', (2002) 7 JIBL p 211. See, also, OFT, Bulletin 3, March 1997, p 26.

² Beale H & Others (Editors), *op cit* pp 919, 920.

³ See *supra*, p 46 et seq.

⁴ Collins B, 'Unfair Terms in Consumer Contracts Regulations 1994', <http://webjcli.ncl.ac.uk/articles3/collins3.html>>

that the application of element (g) would be unworkable in such a market¹. However, it would be preferable to avoid this restricting Paragraph having such ambiguity. It is not clear at all what constitutes a “valid reason” and what is the difference between a “valid reason” in this Paragraph and the “serious grounds” mentioned in element (g).²

As for element (h), it has been suggested that its existence within the list is a reflection of the freedom value, stressing that the freedom of the weaker party in the contract should not be restricted either for an unreasonable period of time or in some essential respect³. This element might have great value given that it was believed that the terms which it covers have never been controlled by common law or other general statutory provisions⁴. However, against this belief, it was argued that common law has dealt with these terms under the rule stating that the silence of the offeree, in the absence of exceptional circumstances, could not be regarded as acceptance⁵.

As with element (g), the wording employed in this element appears to be a source of uncertainty. It is not always easy to measure when the deadline, which is fixed for the consumer to announce his desire not to extend the contract, is “unreasonably early”. It has, however, been suggested that in endeavouring to ascertain what makes the deadline “unreasonably early”, an objective criterion can be deployed whereby attention should be given to the type of contract under consideration alongside the period during which most consumers would consider that they had enough experience under the contract to decide whether to renew the contract or not⁶.

In Jordan, only terms covered by the first limb of element (f) are dealt with expressly under the law. S 177 of the JCC puts a dangerous authority in the hands of traders. It provides that it is permissible for both contracting parties, or one of them, to stipulate that the contract could be dissolved at the option of the person who made the stipulation during the period of time the contractors agree on in the contract or for this to be agreed on thereafter. In the event of lack of agreement on this period, the court

¹ Lockett N and M Egan, op cit p 39. Similar comment can be made of elements (j) and (l), since both of them are, under sch 2(c), subject to the same restriction.

² Similar comment can be made of other elements in the list wherever these wordings are used (paras 1(j), (k); 2(a), (b)).

³ Wilhelmsson T, ‘Control of unfair contract terms and social values: EC and Nordic approaches’, (1993) 16 JCP p 447.

⁴ Bone S, L Rutherford and S Wilson, op cit p 51.

⁵ See, Collins B, ‘Unfair Terms in Consumer Contracts Regulations 1994’, <http://webjcli.ncl.ac.uk/articles3/collins3.html>>; *Felthouse v Bindley* (1862) 11 CBNS 869.

⁶ Longshaw A and T Sewell, op cit p 61.

will fix it according to custom. Although the consumer can benefit from such a provision to have a cooling off period before deciding to go ahead with the contract, it is expected that the trader who is the stronger party to the contract would take advantage of this provision to include a term to the effect of giving him such a right.

2.6.3.5. Conditional service provisions

This covers terms which have the object or effect of:

“(c) making an agreement binding on the consumer whereas provision of services by the seller or supplier is subject to a condition whose realisation depends on his own will alone.”

It could be argued that terms targeted by this element may render the whole contract void for uncertainty or want of consideration, since they confer on the seller or supplier the right to choose whether or not to perform the contract¹. On this basis, one may think that this element adds very little to English law, especially where the terms it deals with are also subject to the reasonableness test under UCTA². Consequently, it is unclear why this element was inserted within the Regulations’ list. However, this element, like all other elements, was copied from the Directive’s list. Even if there is no justification to include it within the English legislation, this might not be the case as regards the Directive, given the fact that prior to the Directive not all the Member States took the same approach in dealing with this category³. Accordingly, if the copy out technique had not been adopted by the English legislator, such an element might have had no place in the Regulations’ list.

Despite this, it might be not in the consumer’s interest to render the whole contract void, and neither do the provisions of UCTA provide for an ideal treatment given the absence of general enforcement.

In Jordan, it can be said that such a term is not only prohibited but would also render the whole contract void. Under the general rules in the JCC as provided in S 161, the subject matter of the contract must be defined beyond serious lack of

¹ De Moor A, op cit pp 257, 269 (n. 62); Beale H & Others (Editors), op cit p 918.

² s. 3(2)(b).

³ Beale H & Others (Editors), op cit p 918.

recognition, and if it is not ascertained as such, the contract shall be void. This provision applies to the above element, one would think.

Besides, although it is not expressly mentioned in the third chapter of the second book of the JCC concerning the conditions of the contract, the juristic opinion when commenting on this chapter is that the contracting party is not allowed to stipulate that whether or not to perform the contract will be determined according to his own will¹.

2.6.3.6. Terms binding consumers to hidden terms

This covers terms which have the object or effect of:

“(i) irrevocably binding the consumer to terms with which he had no real opportunity of becoming acquainted before the conclusion of the contract.”

Many factors combined to make this element one of the most important types of terms that the list contains. Firstly, this element has a very extensive impact because its effect goes beyond striking out only the terms it targets: if a term of this sort is found to be unfair, this means that the consumer will not be bound by contractual terms which he has not been made aware of, and then the contract as a whole might not be binding on him². Secondly, a concept may be raised by this provision which is very new to the laws in many Member States, obliging the seller or supplier to assess the ability of the consumer to understand contractual terms before entering into the contract³. Thirdly, terms falling within the scope of this element are not within the scope of UCTA simply because it is unlikely that they will be regarded as exemption clauses⁴. Fourthly, although the consumer can benefit from the common law rule of incorporation⁵, such a rule may fail to deal effectively with a considerable number of terms within the ambit of this element. For instance, in *L'Estrange v Graucob*,⁶ the terms of the contract could put the contracting party far from being acquainted, since they were presented in legible but regrettably small print. Despite this, they bound

¹ This is the opinion of Dr *Sa'doon Al-Ameri* as heard by the writer while he was reading for the Bachelor degree (1995).

² Beale H & Others (Editors), op cit p 921.

³ Lockett N and M Egan, op cit p 42.

⁴ Longshaw A and T Sewell, op cit p 62.

⁵ On this rule, see *supra*, p 46 et seq.

⁶ *L'Estrange v F Graucob, Ltd* [1934] All ER Rep 16. See further, Bone S, L Rutherford and S Wilson, op cit p 61.

her. Here, the Regulations seem to have a real impact as the OFT has stressed that “the message sent by the Regulations is clear enough. The use of small print and obscure language (so often found together) is futile - if not counter-productive - and should be jettisoned”.¹

It can be asked, however, when the trader will be able to say that the consumer has had a “real opportunity” to become acquainted with the relevant terms? Some guidance as to what the wording “real opportunity” means may be found in the OFT bulletin’s interpretation:

“Something more than the theoretical right to refer to a book held by the operator. [In the context of car parks tickets], while it is not practicable to put much information legibly on the back of a normal-sized ticket, it is by no means impossible to take reasonable steps - for example displaying posters in ticket offices - to alert consumers to, and summarize, significant provisions which they might not otherwise realise applied to them, and ignorance of which would cause them detriment”.²

Furthermore, other factors would be relevant to the issue of acquaintance. The most important of these is whether or not the consumer was granted a cooling off period allowing him to review the terms after the contract’s conclusion, and withdraw without penalty.³

Along with this, attention should be given to the length and complexity of the contract, on the one hand, and to what extent its terms are intelligible and understandable, on the other.⁴

There is no general provision in Jordan illustrating what impact that terms covered by element (i) have. Neither does the law make it clear whether the contractor will be obliged by terms which he has not had a real opportunity to read.

At the judicial level, the line taken by the Court of Cassation might be described as disappointing. The only case which dealt with this issue shows that the Court refused the allegation of a landlord, who entered into a contract made on his behalf

¹ OFT, Bulletin Issue No 4, Dec 1997, p 17.

² Ibid, p 10.

³ OFT, Bulletin Issue No 1, May 1996, p 30; OFT, Bulletin Issue No 2, Sep 1996, p 22. See, also, Collins B, ‘Unfair Terms in Consumer Contracts Regulations 1994’, <http://webjcli.ncl.ac.uk/articles3/collins3.html>>

⁴ Lockett N and M Egan, op cit p 41.

with the tenant, that he did not read the terms of the contract¹. However, given the fact that the landlord is the stronger party in the tenancy contract, it could be argued that the Court's attitude might be different if the party who had not read the contract was the weak party (i.e. the tenant, the adherent or the consumer). This might be upheld by the following:

Firstly, as seen later in this Chapter², some terms in insurance contracts will be prohibited due to lack of transparency or bad presentation.

Secondly, a look at the Egyptian Cassation Court's rulings regarding this issue reveals that the dominant rule has long been that the contracting party is obliged only by the terms which he knows or ought to know, even outside the realm of adhesion contracts³. This entails that any term which he had no opportunity to be acquainted with will not bind him.

2.6.3.7. "Seller's or supplier's discretion" clauses

This covers terms which have the object or effect of:

- “(j) enabling the seller or supplier to alter the terms of the contract unilaterally without a valid reason which is specified in the contract;
- (k) enabling the seller or supplier to alter unilaterally without a valid reason any characteristics of the product or service to be provided;
- (l) providing for the price of goods to be determined at the time of delivery or allowing a seller of goods or supplier of services to increase their price without in both cases giving the consumer the corresponding right to cancel the contract if the final price is too high in relation to the price agreed when the contract was concluded;
- (m) giving the seller or supplier the right to determine whether the goods or services supplied are in conformity with the contract, or giving him the exclusive right to interpret any term of the contract.”

The first three of these elements deal with terms allowing a seller or supplier to vary an aspect of the contract (its terms, subject matter or the price) against the interest of

¹ CCR 1544/1993 QCC.

² See *infra*, p 193 et seq.

³ Lashob M, op cit pp 164, 165.

the consumer, while element (m) deals with related terms giving a seller or supplier the right to determine whether the goods or services are in conformity with the contract, or the exclusive right to interpret any term of the contract. All these cases refer to discretionary rights.

It seems that there is a general condition that must be satisfied for the above elements to be judged as fair. This is that the rights they grant to the trader must be restricted to what is viewed as essential, and the “valid reason” stipulated in the first two elements is a reflection of this. This is reinforced by the OFT’s application of these provisions, which showed that it would be less likely to find terms covered by the above elements unfair if they did not go beyond what is essential¹. Nonetheless, this does not apply to terms merely providing that variation will be “reasonable” or will be made “reasonably”, since they are not better than those not containing such a wording.²

Elements (j) and (k) overlap with one another considerably, since the characteristic of the product or service to be provided is a term of the contract³. Also, both are required to satisfy the test of reasonableness under S 3(2)(b) of UCTA since they entitle a seller or supplier to “render a contractual performance substantially different from that which was reasonably expected from him”.

However, under element (k), “a valid reason” for alteration need not be mentioned in the contract as element (j) requires. This might beg the question of whether there is any wisdom to place such a heavy burden in element (j) upon the seller or supplier, who has to identify in advance potential reasons for alteration, and if it exists, then why does the same requirement not also apply to element (k)? It might be argued that this is due to the high level of danger that element (j) represents which does not exist in element (k).

That the valid reason is required to be mentioned in the contract, and that then the inclusion of a term covered by element (j) would be fair would render the restriction made on the element under Para 2(b) of Sch 2 a mere redundancy. This Paragraph provides that element (j) is without hindrance to terms allowing a supplier of financial services to alter the rate of interest payable by the consumer or due to the latter, or the amount of charges for other financial services, without notice so long as

¹ See, for example, OFT, Bulletin Issue No 5, Oct 1998, p 91.

² OFT, Unfair Contract Terms Guidance, Feb 2001, p 29.

³ See, Bone S, L Rutherford and S Wilson, op cit p 55.

there is a valid reason and where the supplier has informed the consumer thereof at the earliest opportunity. This case is in itself a valid reason, which according to element (j) would preclude the term from being found unfair. And, there is no fear, one would think, that element (j) would be misread, had Para 2(b) not been added, to have the effect of rendering terms targeted by this Paragraph unfair. This is because its provision is familiar to English courts where common law held, prior to the Directive, that terms of this sort are valid¹.

It might be contended, however, that the restricting Paragraph provides that the consumer will have the right to dissolve the contract immediately, which is not available under element (j). But, does this give the exclusion any extra value over the exclusion made under element (j)? The answer to such a question might be a tentatively affirmative, because giving the consumer the option to dissolve the contract seems to be of little importance. It would hardly be an attractive idea for the borrower (i.e. the consumer) to have to repay the loan in full².

The latter analysis might be applicable to the second limb of the Paragraph which provides that element (j) is without hindrance to terms allowing a seller or supplier to alter unilaterally the condition of a contract of indeterminate duration, as long as the consumer is informed with reasonable notice and he is free to dissolve the contract.

Element (l) contains two limbs, each covering a different situation. Whereas the first deals with a situation where the contracting parties do not agree a price which is left to be determined at the time of delivery, the second deals with the situation where a term entitles a seller or supplier to increase the price.

The drafting of this element should draw attention to two issues. Firstly, there is no reference to services in the first limb. This may be due to the fact that it is important to mention goods because it is unusual to defer setting their price, unlike with services³. Yet, this omission could be taken more seriously, and might be problematic if it was interpreted as constituting a restriction regarding the supply of services, the majority of which cannot be adequately priced prior to the time of supplying them because it is impossible to determine in advance the amount of work

¹ See, in this connection, *Lombard Tricity Finance Ltd v Paton* [1989] 1 All ER 918.

² See, Longshaw A and T Sewell, op cit pp 63, 64.

³ Bone S, L Rutherford and S Wilson, op cit p 55.

involved¹. Secondly, referring to the price being “too high in relation to the price agreed when the contract was concluded” in both limbs seems to be an error in drafting, because there is no agreed price in the situation covered by the first limb against which a comparison could be made². It has been suggested that, when facing such a term, the courts refer to a notional price based on the reasonable expectation of the consumer³. Alternatively, it would be possible to refer to, in Jordanian law’s expression, “the price of the market” at the time of the contract’s conclusion.

In many cases, the reason for increasing the price concerns the cost of the service escalating before or during the execution of the contract. So, it could be asked whether the term would be fair in such a case. The OFT made it clear that increasing the price in this case constitutes a bad bargain, since it places the risk of the contract on the consumer who would be less likely to be able to anticipate such increase than a seller or supplier⁴. However, as is evident from element (l), the term is less likely to be found unfair if another term permits the consumer to cancel the contract without prejudice⁵.

The final element in this category is element (m) which covers, *inter alia*, a term entitling the seller or supplier the exclusive right to interpret any term of the contract. Such a term could be used to oust the jurisdiction of the court, which is already void in English law.⁶

Not all of the above elements are treated under Jordanian law. Terms other than those covered by the first limb of element (l) and the second limb of element (m) could be subject to the rule of freedom of contract, allowing them to survive as long as they are generated by free will.

Conversely, terms covered by the first limb of element (l) are not only prohibited but may also render the whole contract void, since the price is a core term in the contract. Pursuant to S 105(1) of the JCC, the contract is void unless all core terms are agreed on by the contractors at the time of the contract’s conclusion or, according to S 479 of the JCC and in the context of sale of goods contracts, the parties set compact bases within the contract by which the price will be determined at the time of performance. Equally, what has been said above regarding the attitude of

¹ Lockett N and M Egan, op cit p 45.

² Bone S, L Rutherford and S Wilson, op cit p 55.

³ This is the suggestion of my supervisor Mr I Dawson, April 2006.

⁴ OFT, Bulletin Issue No 1, May 1996, p 44.

⁵ See, Ibid; OFT, Bulletin Issue No 2, Sep 1996, p 32.

⁶ Longshaw A and T Sewell, op cit pp 66, 67.

English law regarding terms covered by the second limb of element (m) might also be applicable in Jordan. The interpretation of a contractual term is the task of the courts, which are always careful not to allow the parties to oust their competence in this regard¹.

2.6.3.8. Entire agreement clauses

This covers terms which have the object or effect of:

“(n) limiting the seller’s or supplier’s obligation to respect commitments undertaken by his agents or making his commitments subject to compliance with a particular formality.”

Two separate situations are covered by this element. The first limb of the element deals with a term by which a seller or supplier can disown the actions of his employees or other agents (i.e. statements made by his representatives in pre-contractual negotiations) so that he can limit his liability and the consumer’s rights. In practice, such a term provides that the relationship between the parties is exclusively controlled by the written document, and that any external promises have no effect². This term, the so called “entire agreement clause”³, aims at ensuring that a court would conclude that the intention of the parties was that a written document should contain all the terms of the contract; otherwise it could take into consideration both oral and written terms.⁴

A hint of inducement can be inferred from the inclusion of such terms in a contract. The line taken by the OFT is that “entire agreement clauses” are generally unfair⁵ since:

“Consumers commonly and naturally rely on what is said to them when they are entering a contract. If they can be induced to part with money by claims and promises, and the seller can then simply disclaim responsibility on the basis of such legal technicality, the scope for bad faith is clear”⁶.

¹ See, for example, CCRs: 581/1991 QCC; 834/1997 QCC; 3213/2005 ACC.

² Bone S, L Rutherford and S Wilson, op cit p 45.

³ Beale H & Others (Editors), op cit p 923.

⁴ OFT, Bulletin Issue No 1, May 1996, p 15 et seq.

⁵ The OFT found that “virtually all” entire agreement clauses which it had seen were potentially unfair (See OFT, Bulletin Issue No 1, May 1996, pp 17, 19).

⁶ OFT, Unfair Contract Terms Guidance, Feb 2001, p 35. An example of this case could be found in Southern and Phillips Gas Ltd, OFT, Bulletin Issue No 4, Dec 1997, p 49.

But, it could be argued that terms should be deemed fair if the element of inducement or bad faith proved to be non-existent. Here, the OFT's disagrees because "even if such a term is not deliberately abused, it weakens the seller's incentive to take care in what he says, and to ensure that his employees and agents do so"¹.

Another point to be made, concerning the value of the inclusion of this part of element (n) within the grey list. The OFT's bulletins showed that terms covered by this element are one of the most commonly encountered classes of unfair terms². However, this does not mean that there was no attempt, prior to the Regulations, to prevent the inclusion of such terms. Before the Regulations, such terms generally failed in achieving their aims³. Their incorporation rarely succeeded in preventing a finding that there was a misrepresentation,⁴ or in preventing a pre-contractual statement from being a part of the contract⁵. The advantage of the Regulations, however, appears when the issue at stake is the misleading effect of the term rather than its actual effect (i.e. that the consumer has been prevented from relying on the statement because he thought that the "entire agreement clause" is effective). In this case, whereas common law seems to be ineffective, the pre-emptive powers available under the Regulations may make the difference. These powers would prohibit the term, if it is found unfair, from being used by all traders at present and in the future.⁶

The second limb of element (n) covers another form of "entire agreement clause" in which a seller or supplier attempts to get out of his contractual obligations by subjecting the consumer's rights to compliance to specific formalities⁷. An example of this could be found where a consumer wishing to benefit from a cooling-off period is obliged to fax the cancellation form to the supplier during working hours⁸.

¹ OFT, Unfair Contract Terms Guidance, Feb 2001, p 35.

² OFT, Bulletin Issue No 1, May 1996, p 9.

³ Macdonald E, 'The emperor's old clauses: unincorporated clauses, misleading terms and the Unfair Terms in Consumer Contracts Regulations', (1999) 58 CLJ p 428 et seq.

⁴ See, *Walker v Boyle* [1982] 1 All ER 634; *Thomas Witter v TBP Industries Ltd* [1996] 2 All ER 575; *Cooper and another v Tamms* [1988] 1 EGLR 257.

⁵ See, *Harling v Eddy* [1951] 2KB 739; *Couchman v Hill* [1947] KB 554; *J Evans & Son (Portsmouth) Ltd v Andera Merzario Ltd* [1976] 2 All ER 930; *Charlotte Thirty Ltd and Bison Ltd v Croker Ltd* (1990) 24 Con LR 46; *McGrath v Shah* (1989) 57 P & C.R. P 452.

⁶ Macdonald E, 'The emperor's old clauses: unincorporated clauses, misleading terms and the Unfair Terms in Consumer Contracts Regulations', (1999) 58 CLJ, p 433.

⁷ OFT, Bulletin Issue No 1, May 1996, p 17.

⁸ Longshaw A and T Sewell, op cit p 63.

The first form of “entire agreement clause”, which targets escaping the responsibility for acts or statements, might be subject in Jordan to the provisions dealing with deceit (Ss 143-150 of the JCC). S 143 defines deceit as using misleading means whether by word of mouth or deeds to make the other party consent to enter into a contract which he would not have entered into had such means not been used. According to S 145, a contract entered into by way of deception is voidable at the deceived party’s option.

As far as consumer protection is concerned, the positive effect for the deceived party of treating such cases under Jordanian law might be limited for the following reasons:

Firstly, as is clear from S 145 mentioned above, the deceived party will only have the choice to rescind the contract. This is, he is not given the choice to continue with the contract after avoiding the effect of deception or the provision of the contract which is generated by deception. In many cases, it is not in the consumer’s interest to annul the whole contract, just as it is not in his interest to continue with the contract as it is.

Secondly, according to S 145, the deceived party’s right to rescind the contract is not available unless he can prove that serious damage has been caused to him because of the deceptive act or statement. In this way, lesser degrees of damage cannot render the contract voidable. This counterparts the stipulation of the Regulations that the imbalance must be significant.

Thirdly, as noted above, element (n) mainly deals with a term by which a seller or supplier can disown the actions of his employees or other agents. This means that the Jordanian provisions would, also, have to target deception undertaken by a third party such as those mentioned above, in order to be able to call them “counterpart provisions”. In fact the Jordanian law does do this. Pursuant to S 148, the deceived party can rescind the contract if a third party undertook the deceptive act or statement. However, this applies only if the contracting party who benefited from the deception knew about the deception; and it is for the deceived party to prove this.

However, the trader might, under another provision, be responsible for compensating the deceived party for the damage incurred as a result of the act or statement of the trader’s employee, even if the latter did not know about that act or

statement. According to S 288 of the JCC, the court may, on the application of the injured person and if it finds it justifiable, hold liable for damage the person who has the power to supervise and direct the person inflicting such damage if the injurious act was committed by the latter while, or because of, performing the duties of his post.

2.6.3.9. Unilateral obligations clauses

This covers terms which have the object or effect of:

“(o) obliging the consumer to fulfil all his obligations where the seller or supplier does not perform his.”

One may venture to say that this element does not present a novel provision. Firstly, it clearly overlaps with elements (b), (c) and (f) of the list, all of which elements seek to find a balance between rights and obligations under the contract. Secondly, terms treated by this element allow the seller or supplier to render a performance substantially different from that reasonably expected or, in respect of the whole or any part of his obligation, to render no performance at all, and these terms are already within the scope of S 3(b) of UCTA.

However, a thorough look at elements (b), (c) and (f) reveals that they may fall short of covering all the cases covered by element (o). For example, a term in a contract for the provision of airtime by a mobile telephone service was found unfair by the OFT since it entitled the provider to suspend the network service from time to time without notice, meanwhile, the consumer remained liable for all charges due throughout the period of suspension unless the provider determines otherwise¹. This falls outside the ambit of the three above-mentioned elements, each of which deals with a specific case or cases, whereas element (o) provides blanket coverage.

On the other hand, although the element may be already subject to UCTA, its existence within the grey list still benefits the consumer due to the general level of enforcement available under the Regulations.

Under Jordanian law, similar protection seems to be achieved against terms covered by element (o). S 203 of the JCC provides that in contracts imposing mutual obligations on both parties, each of the two contracting parties may refrain from

¹ OFT, Bulletin Issue No 3, March 1997, p 77.

performing his obligation if the other party does not perform his. A similar provision can be found in S 378 of the JCC, which provides that whoever is bound to perform an obligation may refrain from doing so, as long as the creditor did not fulfil the obligation that has arisen because of the debtor's obligation and is connected with it. As such, terms covered by element (o) would be ineffective in Jordan by going against the express provisions of the law.

2.6.3.10. Assignment clauses

This covers terms which have the object or effect of:

“(p) giving the seller or supplier the possibility of transferring his rights and obligations under the contract, where this may serve to reduce the guarantees for the consumer, without the latter's agreement.”

It should be clear that this element does not seek an absolute prohibition of assignment clauses, but rather, as is obvious from its text, aims at protecting the consumer against such clauses only where the assignment occurs without his consent and the guarantees for him may be reduced by such an assignment.

Prior to the Regulations, which treat the assignment of both rights and obligations, control over terms of this kind seemed to be inadequate. Whilst it is extremely unlikely that these terms fall within the scope of UCTA, simply because they are not exemption clauses¹, common law provisions appeared to be inadequate because although there was prohibition over assignment in relation to obligations this was not extended to cover rights.²

Under Jordanian law, a stricter provision is adopted. According to the general provisions of subrogation covering cases of assignment, the consumer will be at the heart of the assignment process, which will not occur without his consent. S 996 of the JCC provides that the validity of a subrogation agreement depends on the consent of the subrogator, the subrogee and the beneficiary³, and any subrogation made exclusively between the subrogator and the subrogee shall be subject to the consent of the beneficiary⁴.

¹ Longshaw A and T Sewell, op cit p 69.

² Bone S, L Rutherford and S Wilson, op cit p 63.

³ Sub-section 1.

⁴ Sub-section 2.

It is very interesting to notice that the Court of Cassation has held that the provision of S 996 applies to the subrogation of rights and debts/obligations¹. The provisions of the Regulations and the JCC thus seem to be identical in this connection.

2.6.4. Closing remarks on the indicative list

After treating the elements listed in Sch 2 to the Regulations, six concluding remarks can be made concerning the list:

Firstly, many of the terms covered by the list are already the subject of prohibition or suspicion under either common law or UCTA or both. Some of these cases have been dealt with when discussing the list term by term. In particular, this applies to the following elements: element (b) which contains a provision similar to those provided by Ss 2(2) and 3(2) of UCTA under which the term is subject to the reasonableness test so long as it does not relate to the Sale of Goods Act 1979 where it will be automatically ineffective²; element (d) which treats terms might already be controlled by S 13(1) (b) of UCTA which provides that a term excluding or restricting any right or remedy in respect of the liability is prohibited by the Act³, and also fall within the coverage of the common law provisions dealing with penalties, as appeared in *Public Works Commissioners v Hills* ⁴; elements (f), (j) and (k) which cover terms already subject to the reasonableness test under S 3(2)(b) of UCTA; and element (m) which seems to fall within the control of UCTA (Ss 6,7,13 and 14).

It might be argued⁵ that this reduces the importance of including terms within the grey list which were already rendered null under UCTA or common law. Where both UCTA and the Regulations apply it may be in the consumer's interest to rely on the former since it is more attractive to the consumer in relation to the issue of proof.

However, it is worth remembering, as already indicated, that the Regulations have the advantage over both UCTA and the common law of the public, pre-emptive

¹ See, CCRs: 14/1990 QCC; 546/1993 QCC; 147/1996 QCC.

² s. 6(1), (2).

³ See, Collins B, 'Unfair Terms in Consumer Contracts Regulations 1994', <http://webjcli.ncl.ac.uk/articles3/collins3.html>>

⁴ [1904-1907] All ER Rep 919. See further, Bone S, L Rutherford and S Wilson, op cit p 59; Collins B, 'Unfair Terms in Consumer Contracts Regulations 1994', <http://webjcli.ncl.ac.uk/articles3/collins3.html>>

⁵ See, Lawson R, *Exclusion Clauses and Unfair Contract Terms*, 7th Ed (London: Sweet & Maxwell, 2003), p 208.

enforcement which they generate. On this ground, the inclusion of a term within the Regulations' list remains of great significance, even if it is also subject to control by UCTA or common law.

On the other hand, some of the elements included in the list came under legal control for the first time. This applies, for example, to elements (l) and (g) which deal with practices not falling within the provision of either common law or legislation preceding the Regulations. Therefore, the inclusion of these elements in the list seems more interesting.

Secondly, we have observed that some of the elements in the list overlap with each other to some extent. It might be argued that this is a defect in the list and might decrease the value of such elements. However, such a situation may be inevitable. It is impossible to generate a list of banned or potentially banned terms not one of whose terms is similar to, or overlaps with, another. Meanwhile, it is not clear why this constitutes a defect in the list or in the particular term itself. It might be argued that this would strengthen the protection through not allowing the targeted practice to escape from coverage.

Thirdly, the Regulations target not only the exact terms mentioned in the list, but also other terms which have the same "object or effect". By referring to such terms, the Regulations reflect the Directive in seeming to be unconcerned with the intention of the seller or supplier but rather with the outcome of the inclusion of a disputed term¹. This, as has been noticed with regard to penalty clauses², has the effect of enhancing the protection available to the consumer under the Regulations. It both widens the coverage of the list and deprives the trader from the benefit of any attempt made to escape the coverage of the Regulations through, for example, presenting the term in a form which differs from that in the list.

Fourthly, some of the list's terms are infected with uncertainty as a result of the phrases or wordings used in them, such as "valid reason"³, "serious grounds"⁴ and

¹ Longshaw A and T Sewell, op cit p 50.

² See *supra*, p 165.

³ See Sch 2, para 1 (j), (k); Sch 2, para 2 (a)(b).

⁴ See Sch 2, para 1 (g).

“unreasonably early”¹. But surely every piece of legislation is vulnerable to some degree of uncertainty. This can be tolerated as long as it does not exceed what is unavoidable. However, the uncertainty that the list carries might have contributed to the view taken by the Law Commissions that the list under the Regulations should not be replicated in the New Legislation, but rather should be reformulated to be more comprehensible to UK readers². As part of this reformulation, examples of potentially unfair terms should be added to the terms given in the list³. In this respect, reference was made to the ECJ’s decision taken in the *Commission v Sweden* case⁴ in which the Court held that the Directive’s Annex need not be directly included in national law implementing the Directive⁵.

Fifthly, it has been noted that the courts have not had a real opportunity to deal with the grey list. Otherwise, many important issues such as the value of the list, the burden of proof and the boundaries of the terms included in the list collectively and individually might be clarified.

This would encourage us to raise the question of how the Jordanian courts would deal with a similar list if it were introduced into Jordanian law. It is not easy to answer such a hypothetical question, especially where the suggested list is grey. This is because, unlike with a black list where the scope of judicial intervention is clear, the court would have discretionary authority in examining the terms included in a grey list. The only list provided by the JCC in relation to insurance contracts might indicate that the Jordanian legislator prefers the black list model. However, it might be true to say that a grey list would also be suitable in Jordanian law given the fact that the Jordanian test of oppression is wholly based on discretionary powers given to the courts, allowing them to eliminate, amend or even retain oppressive terms in accordance with the requirements of equity. But, there would be a similar problem to that which has appeared with regard to English law. As highlighted in the next section, there is almost nothing in Jordanian court reports which can show us how the

¹ See Sch 2, para 1 (h).

² The Law Commission and the Scottish Law Commission, Report on Unfair Terms in Contracts- (Law COM No 292, Scot Law COM No 199), Feb 2005, paras 3.109, 3.116, and 3.123.

³ Ibid, paras 3.109, 3.119; Appendix A, para 101.

⁴ *Commission of the European Communities v Kingdom of Sweden* (C- 478/99 [2002] ECR I-04147).

⁵ The Law Commission and the Scottish Law Commission, Report on Unfair Terms in Contracts- (Law COM No 292, Scot Law COM No 199), Feb 2005, para 3.108, n 119. Not to repeat the Directive’s list verbatim may have the effect of mitigating the criticism directed to the Regulations’ approach in this regard, (See, on this criticism, Upton M, op cit p 296.).

courts have applied these discretionary powers in practice. In any event, the writer thinks that a grey list in Jordanian law could play a role in alleviating the dreadful uncertainty surrounding the law at present.

Finally, some of the terms contained in the list have already been subject to Jordanian law. Some of these are banned under the JCC¹, others are permitted² and still others are permitted but their undesired effects rectified³. However, and as made clear earlier, these findings have nothing to do with the test of oppression which is treated in the following sections. Thus, those terms which are not expressly treated under Jordanian law, whether by being permitted or banned, might be found oppressive under the oppression test.

All of this indicates that satisfactory protection would be available to the Jordanian consumer against the dangerous terms indicated in the list if the notion of adhesion contracts were wide enough to encompass all consumer contracts. The fact is, however, that the ambit of this notion is, at worst, very narrow. It may be restricted to monopolistic contracts whose subject matter is necessary goods or services. Even at best it is covered with uncertainty as to whether or not it is really confined to such contracts. All this would render many oppressive terms untouched and keep them effective in consumer contracts either because the contract containing them is not an adhesive contract according to the first approach, or because the consumer does not, due to the uncertainty mentioned above, recognise that the contract is of adhesive nature, which is a pre-condition to operate the test of oppression.

3. The test of oppression⁴ under the JCC

3.1. Discovering the Jordanian understanding of oppression: is it an easy task?

Unlike the situation under the Regulations where the fairness test is exhaustively clarified, the JCC lays down no obvious, direct provision as to what renders a term oppressive. Consequently, there is no way to determine what the concept of oppression means for the purposes of S 204 except to have recourse to some proxy criteria outside of the provisions concerning adhesion contracts in Ss 104 and 204.

¹ See, for example, pp 161 et seq, 175.

² See, for example, p 161 et seq.

³ See, for example, p 165.

⁴ Albeit consistent, it is preferred to use the phrase “oppression” in the context of the JCC as a counterpart to the phrase “unfairness” used in the Regulations. This is because the phrase oppression has a special meaning under Jordanian law that could not be expressed accurately by any other phrase.

Only two possible meanings can be given to the phrase “oppression”, and no more. The first meaning is that given under French and Egyptian law concerning treatment of oppressive terms in contracts. The second meaning is Jordanian based on the Islamic theory of abuse of right.

3.1.1. A comparative understanding of oppression

The concept of “oppression” under Jordanian law might be similar to that adopted under French and Egyptian laws by reason of the fact that the theory of contract of adhesion developed in French law. Hence it is possible that the Jordanian legislator intended to transfer the provisions and concepts relating to oppressive terms from French law as a package.

The attitude under the French and Egyptian laws in connection with what can amount to an oppressive term revolves around the idea of excessive advantage that the professional takes at the expense of the weaker party (the consumer or non-professional).

At the juristic level, the oppressive terms are pre-formulated terms giving the proponent an excessive advantage to the detriment of the other party¹. Such terms can be, according to *Fudah*,² categorized into two types. Terms are *per se* oppressive where the oppressive nature is clear from the phrases and wordings included therein. Alternatively, terms are not *per se* oppressive; rather they appear to be oppressive only in practice. Perhaps such a distinction has been affected by the view taken by the Egyptian Court of Cassation, demonstrating that an oppressive term is one which contradicts the essence of the contract (i.e. *per se* oppressive)³.

Legislatively, the French understanding of the issue of oppression was manifested with the enacting of the Consumer Information Act 1978. Pursuant to S 35(1) of this Act, oppressive terms are those imposed by professionals on consumers or non-professionals by virtue of an abuse of economic power, and which give the professional an excessive advantage.⁴

¹ *Calais- Auloy* J, p 134, n 140, cited in *Al-Rifae'i A*, op cit p 212. A very close definition was taken by *Bricks* (see, *Bricks H*, *Les clauses abusive*, *Thèse, Paris*, 1982 p 9, cited, also, in *Al-Rifae'i A*, op cit p 212).

² See, *Al-Rifae'i A*, op cit p 213.

³ ECC 50/1960, cited in *Al-Rifae'i A*, op cit p 214.

⁴ *Saleh N*, *Consumer Protection under Jordanian Law*, (Amman: *Zahran Press*, 1991), p 38 (in Arabic); *Imran A*, op cit p 32.

This provision brings us to the question of what is meant by the abuse of economic power which creates the oppression. On one reading, the abuse of economic power meant by this Section involves taking advantage of the weak position the other party occupies. Accordingly, it is the so-called abuse of the position, close to coercion affecting the consent of that party, which is at stake¹. The professional who has experience and monetary power may exploit a consumer's desperate need for the good or service, leaving no room for the latter but to take it or to leave it without any genuine opportunity to bargain².

On another reading, S 35(1) refers to the traditional theory of abuse of right targeting exceeding the social teleology of using a personal right, which is well known under the general rules. However, envisaging oppression as an abuse of a personal right has been strongly criticised in France, because it was argued that it is incorrect to say that the unilateral drafting of a contract is the exercise of a personal right. Accordingly, it is not easy to find that the prohibition of oppression is a mere application of this theory³. Also, it has been argued that the theory, as expressed by its originator *Jusran* and his follower *Salleilles*, seems to be vague and very general and would allow judges to interpret such a spacious definition according to their personal views and even political backgrounds⁴.

The above controversy shows that the criterion of the abuse of economic power provided by S 35(1) seems to be unclear, especially where it has neither defined "economic power" nor hinted at the bases on which it rests or the level of oppression required. These issues are particularly important because abusive economic power is not always linked to the strength of the bargaining position the party has. For example, a huge firm seeking to maintain its excellent reputation may not include any oppressive term in its standard contracts; while a small trader may allow himself to enjoy an advantage over the consumer.⁵

The difficulties created by the economic criterion (the abuse of economic power) could be enhanced by the legal criterion (the excessive advantage the professional enjoys over the consumer). This must, pursuant to S 35(1), exist in a term

¹ *Ghestin J*, op cit p 685, cited in *Al-Rifae'i A*, op cit p 216.

² *Al-Rifae'i A*, op cit p 220.

³ *Ghestin J*, op cit p 693, cited in *Al-Rifae'i A*, op cit p 217.

⁴ *Ad-Duraini M*, 'The theory of abuse of right in the Islamic jurisprudence and the legal systems of Arab countries', (1985) 1 UDJ, p 92 (in Arabic).

⁵ *Godé P*, *protection des consommateurs*, *Rev. Trim. dr. civ.*, 1978, pp 744-746; *B Starck*, *droit civil: obligations 2- contrat*, 1989 p 270, both are cited in *Al-Rifae'i A*, op cit p 218.

in order to be qualified as oppressive; a criterion which is not free from uncertainty either. It could be argued that this criterion or condition is a natural corollary of the first criterion, and then there is no necessity to mention it separately¹. However, this additional requirement seems far from meaningless, not least because the abuse of economic power may not produce imbalance to the detriment of the consumer. And, if produced at all, not every imbalance will necessarily be excessive. Thus, as in the context of the English Regulations, where the requirement of significant imbalance counterparts this requirement, the question arises as to what degree of advantage would be considered as excessive.

Another problematic point is whether the imbalance caused by the advantage which the professional enjoys over the consumer is to be assessed in the light of the whole contract or only in relation to the term in question. It seems that the same tack taken under the Regulations is taken here also. This suggests that the assessment of a term should be made in the light of the whole contract in which it is included. If this approach proved to be the intended one, as it seems to be², this means that any term in the contract can alleviate the imbalance or demolish it totally in favour of the consumer, with the result the oppressive term might pass the test if the whole contract is balanced.

3.1.2. The pure Jordanian concept of oppression

The other possible meaning of the phrase “oppression” is that enshrined in S 66(2) of the JCC, derived from S 93 of the Journal, which provides that practicing a right is oppressive insofar as: there is an intention of aggression; the interest to be achieved from the act is unlawful or disproportionate to the damage that the act might cause to others; or it exceeds customs and usage.

S 66(2) applies the Islamic theory of abuse of right, which consists of two elements. The first is a subjective criterion focusing on the motive behind the act, which here is the intention to use a lawful act so as to hurt others or achieve an unlawful interest. It seems that the issue of good faith is central to this criterion, viz.; the act conducted in good faith will not fall within this criterion. The second criterion is objective relying on the contradiction between the act and the general rules of the law (the *Shari'a*) which are keen to foster the public good and avoid harmful

¹ *Al-Rifae'i A*, op cit pp 220, 221.

² *Bricks H*, op cit p 113, cited in *Al-Rifae'i A*, op cit p 222.

influences. This contradiction materialises where the outcome of the act is merely negative (harmful) or a mixture of negative and positive outcomes but the negative prevails, regardless of the fact that the act, say the term, itself is lawful.¹

This theory is comparable with the direction in French law taking the view that the abuse of economic power stipulated by S 35, as already mentioned, should be adjudicated in the light of the theory of abuse of right. As has been seen in the previous sub-section, the French theory suggests that the use of a right should not go against the social and economic aim for which it was created. This seems to be relevant to the Islamic theory, flowing, one could say, from the same spring.

3.1.3. Weighing up the Jordanian and French tests

There are many reasons to believe that the Jordanian test, based on the Islamic reading as set out in S 66(2), is meant to be applied when dealing with unfair terms under S 204. In the first place, it is true that Jordanian law has recognised the importance of the French theory of contracts of adhesion and the solution it provides in the fight against unfair contract terms. However, this does not mean that the legislation was intended to copy all the concepts related to this theory (oppression as an example), even if they existed prior to the theory itself, or to pick up all the French mechanisms put in operation so as to deal with the problem of adhesion contracts. Handicapped by S 3 of the JCC, interpreters of the law, mainly the courts, are not allowed to resort to French law even if they would like to. S 3 provides that the rules of the *Fiqh* (Islamic jurisprudence) shall be referred to in understanding the JCC's provision, its interpretation and meaning. This leaves no doubt that the Islamic jurisprudence, and not French law or any other jurisprudence, is the source of the interpretation where there is no specific provision to the contrary, given that the provision of S 66(2) is set within the general rules provided in the introductory chapter of the JCC so as to serve all the provisions thereafter whether in the JCC itself or any other Act.

Secondly, the phrase “oppression” (تعسف) has, under the JCC, a robust link with the phrase “right”. For this reason, it is logical to assume that the trader abuses a right when using an oppressive term. To explain this, it is necessary to refer to the concept

¹ See, *Ad-Duraini M*, op cit pp 89, 90. See also, CCRs: 168/1978 JBAJ 1978, p 894; 87/1980 JBAJ 1980, p 1518; 43/1981 JBAJ 1981, p 1088; 653/1998 JBAJ 1998, p 3652; 1592/1999 JBAJ 2002, p 2305.

of “freedom of contract” as it appears under the JCC. S 164(2) provides that it is permissible to subject the contract to any term provided that it is beneficial to the parties or one of them, unless it is prohibited by law or contradicts public policy or morals. It is obvious from this Section that the Code has left wide scope for including terms in a contract of whatsoever kind as long as they are lawful. Such a provision is a genuine mirror of the situation under the Islamic law, which is, to repeat, the main source of the JCC. Under the Islamic law, and as already discussed, contractors are obliged by the terms they incorporate in the contract except those which turn over the *Halal* (lawful) to be *Haram* (unlawful; forbidden) and vice versa; i.e. those which contradict the *Shari’a*. Any term beyond that is acceptable.

Although there is no decisive provision or ruling explaining the issue, which is regrettable, the above premise suggests that the phrase “oppression” is compatible with the phrase “right”. This is because the inclusion of any lawful term (a term which is not prohibited expressly by the law) is a right the contracting party is free to exercise, and there is no way to limit this right unless it is abused in a form of oppression. Hence, the appropriate reading is that the trader practices his right when incorporating a term which does not violate the direct, express provisions of the law in the contract. But, such an incorporation must not go against the requirement of taking the interests of others into account, which appears only under the test and, if not satisfied, constitutes an abuse of right.

Finally, even if there were equal chances for the Jordanian and the French tests of oppression to be applied with regard to S 204, which is not the case as set out above, one might still rightly argue in favour of adopting the Jordanian rather than the French test. This is because the latter is vague and problematic, whereas the Jordanian test seems much simpler.

3.2. Blacklisted terms

At the outset, it should be mentioned that Jordanian law suffers from the absence of a general list of unfair or potentially unfair terms. Yet, insurance contracts have been dealt with differently by listing some terms to be prohibited. Apart from this only miscellaneous, specific terms are banned from being incorporated in particular kinds of contracts for one reason or another. Because of their specificity and the fact that some

of them are outside the ambit of this study, mentioning those which their ban benefits the consumer in the Preliminary Chapter seems sufficient¹.

On the contrary, the black list of terms found amply in insurance contracts are addressed below. Studying this list seems important due to the fact that it is the only list of prohibited terms within Jordanian law and, furthermore, deals with unfair terms in insurance contracts, which are contracts of adhesion, in the hope of protecting the adherent party². These terms are provided by S 924 of the JCC, and can be categorised into two classes:

3.2.1. Terms banned for formal considerations

This covers three categories of terms:

- a) Terms excluding the legal rights of the insured vis-à-vis the insurer in the event of delay in notification of the accident or submitting the documents by the insured if the delay is for reasonable excuse.

Normally, insurers are keen to include in their standard contracts terms of the above sort. It cannot be denied that the insurer has every right to look after his interests which may be undermined or affected badly had the insured delayed in announcing the accident, where he is obliged to, or submitting the necessary documents which the insurer needs to pursue a third party appears to be responsible for the accident or to keep his rights against that party. However, it seems to be oppressive to subject the insured to the very harsh sanction mentioned in the above Sub-section, provided that he has a reasonable excuse and that the insurer has the right to sue him for any damage he incurred as a result of the delay.

A decisive balance is thus drawn between reserving the insurer's right in compensation should he suffer any damage resulting from the delay in announcing the accident or submitting the documents, and the insured's right in the remuneration. However, this balance might be jeopardised by the fact that there is no consensus on whether the insurer has the right to sue the insured for the damage the latter caused to him. Some commentators have taken the view that the insured is not responsible for such damage since he commits no mistake when announcing the accident or

¹ See *supra*, p 44 et seq, Fig.1.

² See, CCRs: 2541/99,3 JJ 2000, p 93; 2596/2001 ACC.

submitting the documents late, but rather benefits from the permission offered by the law¹. The commentators of this opinion relied on the fact that the legislator has not provided that the insurer has such a right. It can then be assumed, in the light of the absence of a mistake and express provision on the issue, that the insurer has no right to claim the loss he incurs as a result of such delays.

In response to this opinion, it could be argued that it is true that the legislator does not provide that the insurer has such a right. But, at the same time, he does not provide that the latter has no such right either, and the legal rule provides that “if the legislator wants he would say”. In addition, it is clear that the above Sub-section does not state whether or not the insured is mistaken if he delays in announcing the accident or submitting the documents. Instead, it protects him against the insurer’s attempt to exempt himself from the entire contractual obligation because of a delay which may appear to have very limited, or even no, adverse effect on him. Moreover, even if the Sub-section means that the insured is not mistaken, which does not seem to be the case, Jordanian law does not, generally speaking, establish tort liability on the element of mistake but rather on the mere element of damage. This stems from S 256 of the JCC which provides that “every injurious act shall render the person who commits it liable for damages even if he is a non-discerning person”. Therefore, one would support the line taken by the Court of Cassation holding that although the insurance company has no right to deny the insured’s rights under the contract if he breaches his obligation to inform the company of the accident, the door of compensation is still open for the company insofar as it suffers damage². The insurer’s litigation can be established on the basis of the contractual liability or tort, whichever applies. As for the contractual liability, the insurer might arrange to protect himself through a clause providing for a monetary penalty in the event of delay. Such a clause is eventually subject to the general rules of penalty clauses, which limit their effect to an extent representing the real loss the insurer suffers. If the insurer missed such an opportunity, he could benefit from the rules of tort as stated above.

The efficiency of the protection provided by this Sub-section is tied to the ambit of the ban it produces and its clarity. In exploring the boundaries of this provision, it

¹ On this opinion, see, *Soroor M, Losing the Right of Remuneration in the Terrestrial Insurance*, 1st Ed (Cairo: *Darul Fikr Al-Arabi*, 1979), p 118 (in Arabic); *Al-Owaidi A, Legal Protection of the Adherent Party in the Insurance Contract*, a Master Dissertation, University of Jordan, Amman, 1999, p 79 (in Arabic).

² CCR 246/76 JBAJ 1977, p 76. See, also, CCR 308/90 JBAJ 1991 p 1900.

is clear that the insured's failure to carry out his duty in announcing the accident or submitting the documents at all, or his failure to present an acceptable excuse if late both fall outside the ban. Then the insertion of a term providing for the insured's right under the contract to be lost in these cases is tolerable.

However, in some cases the boundaries of the ban seem unclear. One of these cases is where the insured has for a good reason delayed in submitting the documents until their submission becomes useless. On one view, such a case is no different from a failure to submit the documents, and therefore including a term for the purpose of excluding the insured rights in this case is legitimate¹. Motivated by repugnancy towards the inclusion of such a burdensome term, the opposing view suggests that such a delay, however dangerous, is not equal to complete failure to execute the obligation entirely². The latter view is probably correct, provided that the right of the insurer to seek compensation is reserved if such a delay causes damage to him and that the delay, even if extreme, is for good reason. Therefore, a term included in a contract to the effect of withholding from the insured his rights due to such a delay should, in the writer's opinion, be ruled out.

A second point left unclear is the form of notification which would satisfy the insured's duty of notification. According to the Court of Cassation, there is no stipulation in the law that the notification must be in writing, even if the contract itself provides that it must be so³. As such, it is acceptable that the notification be made orally (such as face to face or by telephone) or in writing (in a letter or telegram, etc). However, for the purposes of the averment, it is advisable that the notification be made by a recorded postal letter or telegram, taking into consideration that the onus of proof of the notification is, according to the general rules, on the insured⁴.

Thirdly, the JCC does not specify a period after which the insured will be in breach of his obligation to announce the accident or to submit the documents on time. It has been argued that there is nothing in the law preventing the contracting parties from specifying such a period, and if they fail or do not wish to do so the court will undertake this task by applying the reasonable period rule⁵.

¹ Soroor M, op cit p 126.

² This is the opinion of *Greitez* (see, Soroor M, op cit p 127, n 129).

³ CCR 320/72 JBAJ 1972, p 1522. See, also, *Al-Basheer Z, the Terrestrial Insurance*, (Tunis: *Dar Bu Salamah* Press, 1975), p 111 (in Arabic).

⁴ This is also the opinion of *Al-Attar* and *Sharaf Uddin*, (see, *Al-Owaidi A*, op cit p 68).

⁵ *Mansoor M*, op cit p 216.

There may be no objection to the second solution leaving to the court the issue of specifying the deadline for announcing the accident or presenting documents. Conversely, the first solution based on the parties' own arrangement for such a deadline would promote fears that this term might be in itself unfair, given that most insureds are weak parties who might submit to such a term even though it might be unfair because the deadline it provides is too short.

Finally, it is unclear what constitutes a "reasonable excuse" as a condition in the Sub-section. Nowhere in Jordanian law is an obvious definition of such a phrase provided. Accordingly, it seems that this issue is left to the discretion of the court which, in deciding whether the insured has a reasonable excuse, takes into consideration all the objective and subjective elements surrounding the case in the light of the good faith supposed to exist in performing the contractual obligations.

b) Every printed term concerning the avoidance of the contract or the loss of the insured's rights if it has not been brought to the insured's attention clearly.

This provision, which reminds us of the incorporation rule under English law, seems to be of great significance. This is because it is very common to find terms of the sort it deals with printed in such a way as to be undistinguishable from other terms, despite the dangerous consequence their breach entails which is the avoidance of the contract or the loss of remuneration. So, it is the issue of lack of information and transparency¹, in a very long and complicated contract, which is at stake, taking into account that one of its parties is highly likely a naive person with no legal or technical experience. If such terms appear unfair in other contracts, they would be even more rather unfair in contracts where the existence of good faith and disclosure principles are priority.

From the point of view of consumer protection, it is axiomatic that the wider the scope of this category is, the more efficient protection the insured (the consumer) will have. In an early decision², the Court of Cassation took a very narrow interpretation, limiting the scope of the requirement of clarity to terms which have the effect of rendering the contract void or those extinguishing the insured's right in remuneration. The result of this was that terms such as those excluding the insured's right in

¹ See, CCR 2596/2001 ACC.

² CCR 178/83 JBAJ 1984, p 53.

compensation of the missed benefit or opportunity, represented by putting a vehicle out of use during the period of repair, are not caught by this requirement. Lately, the Court has distanced itself from this understanding, acknowledging that such a term is at the heart of the ban provided that it is not distinguished from other printed terms¹.

It remains unclear, however, what makes a term distinguishable from other general terms. The Sub-section, when mentioning “every *printed* term”, alludes indirectly to a technique if used a term will be distinguishable, which is the handwriting. However, it seems that this is not the only method by which the insured’s attention can be drawn to the term and the heavy consequence it entails. Among the techniques that can be used to this effect are these referred to by the Court of Cassation such as printing in big or highlighted letters²; and that referred to by Lord Denning in *Spurling v Bradshaw*³ when explaining the requirement of clarity necessary to activate the rule of incorporation. His Lordship stated that some exclusion clauses “would 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”.

Finally, it might be asked from whose perspective a term is to be declared indistinct? It seems that there is no answer to this question in the JCC. However, the writer thinks that the subjective criterion, which depends on the state of the insured, his conditions and position in each particular case, is impractical. It would be too easy for any insured to contend that he was trapped by the disputed term to which he did not pay attention because it was, to him, undistinguishable. Therefore, the objective criterion based on a “reasonable man” (i.e. a person of average intelligence) test seems more suitable to be adjudicated in this regard.

c) Every arbitration clause unless it is embodied in a special agreement separate from the general printed clauses of the insurance policy.

Like many laws across the world, Jordanian law allows, and perhaps encourages, resort to alternative techniques of dispute resolution such as arbitration⁴ which have

¹ See, CCRs: 2541/99 JBAJ 2002, p 360; 157/2002 ACC; 1611/2002 ACC.

² See, CCRs: 15/93 JBAJ 1993 p 1985; 2541/99 JBAJ 2002 p 360.

³ [1956] 2 All ER 121.

⁴ Until very recently, arbitration was the only technique of alternative dispute resolution Jordanian law recognised, which was policed under the Arbitration Act No 18/1953 and its successor the Arbitration Act No 31/2001. Now, besides this technique, there is the mediation technique as produced and regulated by the Mediation Act No 37/2003.

the effect of easing and accelerating litigation procedures. However, in contracts where one of the parties is weak, and notably has no say in drafting the contract, the term stipulating that a potential dispute must be taken to arbitration may be infected with unfairness. This is due to the fact that this party is oppressively deprived from taking the normal route of litigation.

The JCC's avoidance of such terms is comparable to listing them as potentially unfair under the English Regulations¹. However, the JCC seems to be more efficient than the Regulations since it renders such terms void and not just potentially unfair. Nevertheless, the scope of protection provided by the JCC against these terms is narrower than that granted by the Regulations. On the one hand, the JCC's protection is restricted to insurance contracts, while the Regulations cover all contractual terms of this sort regardless of the type of contract they are included in, as long as the consumer is a party. On the other hand, there is no condition precluding an unbalanced arbitration clause from being declared unfair according to the Regulations. In contrast, the JCC does stipulate that such a clause shall not be distinguishable by the insured, otherwise there will be no place to declare its oppressive nature. Thus, whereas the Regulations are concerned with the issues of balance and fairness, the JCC pays attention to the issue of transparency. As a result, the insured is free to take the risk of accepting a heavy term as long as he is aware of its implication.

3.2.2. Terms banned for objective considerations

This covers the following categories:

a) Terms excluding the legal rights of the insured under the contract because of the breach of the law unless the breach constitutes a felony or intentional misdemeanour.²

Terms entailing that the insured will lose his right to remuneration if he breaches the law are, indeed, exclusion clauses, because they outline the scope of the risks the insurer undertakes. The legitimacy of this category of terms allocating the risks

¹ See *supra*, p 156 et seq.

² It may be important to mention that the exclusion of felonies and intentional misdemeanours from the ambit of the Sub-section amounts to be trite because it is not legitimate (against public policy) to insure against intentional crimes (See, in the context of fire insurance, s. 934(2) of the JCC. See, also, CCR 527/86 JBAJ 1988 p 1200).

depends on three conditions: that the term is consistent with the imperative rules of law; that the intentions of both parties to the contract are intended to create this exclusion; and that the exclusion is defined precisely¹. A look at the terms targeted by the above Sub-section shows that the exclusion is not accurately defined where the term does not specify the crime or infringement of law it excludes. Accordingly, the third condition is missed. This would subject the insured contractual obligations to a significant uncertainty, which may lead to empty the whole contract from its essence for tow reasons. Firstly, the insured's right to compensation is left to be adjudicated by what could be described as the insurer's own discretion. Secondly, the occurrence of the contingency insured against in the insurance against vehicles' accidents cannot be, except rarely, attributed to any reason other than the infringement of the traffic law.²

According to the above reasoning, the oppressive authority granted to the insurer led to the blacklisting of this category of terms because it allows him not to fulfil his obligation if the insured commits any infringement of any law without nominating any specific infringement so that the insured can know the boundaries of his rights. This means that where the term in question specifies a particular crime as outside the coverage of the contract, the term will not be deemed covered by the list.

In practice, the rulings of the Court of Cassation have followed this logic at the beginning, declaring for example the fairness of a "clause excluding the misdemeanour of exceeding the legitimate speed on roads, because of the specificity of the exclusion"³. Subsequently, however, the court has followed a more extreme reading of the Sub-section, providing for the term to be judged unfair even if it relates to a particular crime, unless this constitutes a felony or intentional misdemeanour⁴. This reversal, albeit somewhat confusing, provides more protection to the insured. Such a reversal could be attributed to the fact that uncertainty, lack of interest, and intention to hurt are not the only justifications of the ban. In addition, one can find that the issue of imbalance to the detriment of the weaker party in the contract plays a role in declaring the unfairness of the term. This reasoning can be seen as analogous

¹ This is the opinion of *Dosugi* and *Shara'an* (see, *Al-Owaidi A*, op cit p 56).

² See, *Soroor M*, op cit p 102; *Ar-Rabeeie K*, the Impact of the Obligatory Insurance on the Civil Liability Arising from Vehicles' Accidents, a Master Dissertation, University of Baghdad, Baghdad, 1976, p 213 (in Arabic).

³ CCR 299/78 JBAJ 1979 p 52.

⁴ See, CCRs: 364/83 JBAJ 1983 p 1139; 78/85 JBAJ 1985 p 816; 527/86 JBAJ 1988 p 2100; 665/91 JBAJ 1993 p 857; 1561/93 JBAJ 1995 p 2086.

to that appearing behind putting under suspicion of unfairness terms covered by element (f) of the Regulations, which authorise the seller or supplier to dissolve the contract on a discretionary basis where the same facility is not available to the consumer. On this matter, the evident oppressive power granted to the seller is not the reason for listing this category of terms as potentially unfair. Rather, and as the element itself states, the reason is the lack of balance.

b) Every oppressive term whose breach, it transpires, has nothing to do with the occurrence of the accident insured against.

This blanket provision seems to reiterate the general rule in treating the contract of adhesion as applied by S 204 of the JCC. The only stipulation that the Sub-section requires is that the occurrence of the contingency insured against has nothing to do with the insured breach of the term covered by the above category. This stipulation constitutes, in the meantime, an indication of oppression as defined by S 66 of the JCC, as already referred to. This is because the insurer has no real interest in including the term except to hurt the insured by depriving him of his rights under the contract. The fact that there is no causal link between the insured breach of the term and the occurrence of the contingency insured against is strong evidence on this.¹

However, such a repetition is, to some extent, important in that the court here has no discretionary authority to, or not to, eliminate the oppressive term. Rather it is obliged to nullify any term of this type. Furthermore, this Sub-section has the great benefit of preventing the list of oppressive terms, which is under consideration, from being exhaustive. This is because, unlike the above Sub-sections, it is not restricted to specific type of terms, but rather different kinds of terms may fall within the ambit of its coverage.

The Court of Cassation has taken the opportunity in Case No 915/88² to outline the boundaries of this ban by concentrating on the necessity to distinguish between oppressive terms falling within this blanket category and those solely aimed at depicting the risks the insurer wishes to cover. On this ground, the Court took the view that a term exempting the insurance company from responsibility should the insured vehicle be subjected to an accident while under the watch or supervision of a

¹ See, CCRs: 736/99 JBAJ 2001, p 798; 377/73 JBAJ 1974, p 879.

² CCR 915/88 JBAJ 1990, p 1792.

mechanic or director of the vehicles park is not an oppressive term insofar as it concerns the boundaries of insured risk.

3.3. Closing remarks on the JCC's test of oppression

We have seen earlier that the test of fairness under the Regulations concentrates on the issues of the balance between the contracting parties and the clarity. Such issues are reflected clearly by the indicative list annexed to Regulations where it is concerned, mainly, with whether a contract is transparent and binding both of its parties equally. In Jordan, the test of oppression worries about the abuse of right crystallized in the form of the intention to hurt or the want of interest in including the term. However, the black list on oppressive terms in insurance contracts shows that these are not the only considerations the test attaches importance to. The issues of imbalance, transparency, inaccessibility, and lack of information, which are sometimes intersecting issues, are also indications of oppression.

The second point to be made is that the absence of judicial rulings on the test of oppression can be attributed to, *inter alia*, the lack of the clarity and accessibility in that test. Not only do consumers (adherents) seem to be reluctant to challenge adhesion contracts outside of the insurance sector, which is discussed below, but so are the lawyers. No one would accept that no oppressive terms exist outside insurance contracts, and that this is why there is no litigation against them. Rather, the reality is that oppressive terms are common in a wide variety of contracts, including the most important transactions in daily life such as sale and tenancy contracts¹.

Vice versa, the lack of clarity on the oppression test can, partially, be attributed to the lack of court rulings shedding light on this issue (judicial clarification), which, in turn, is a natural result of the lack of relevant litigation on the issue. However, despite the considerable number of cases brought before the courts on the oppressive terms included in S 924, not once has the Court of Cassation taken the initiative to explain the elements on which the oppression test is based. These are missed opportunities for which the Court of Cassation has no excuse.

The lack of a list of oppressive terms, whether grey or black, might play a role in increasing this gloominess. The English experience reveals that such lists provide important guidance to attorneys, consumers, courts, and even traders, regardless of

¹ See, *Al-Rifae 'i A*, op cit p 248.

whether it is black or grey. This may provide some enlightenment as to the reason why consumers and lawyers have been more courageous in taking actions to the courts against oppressive terms in insurance contracts which have fallen mostly within the black list provided in S 924.

4. Conclusion: plainness and width v ambiguity and limitation

Having regard to the closing comments in the foregoing section, which could be deemed part of this conclusion, the comparison between the English Regulations' test of fairness and the Jordanian test of oppression shows that the clarity and accessibility of the former counterpart the ambiguity and inaccessibility of the latter.

The Regulations are keen to provide a clear and detailed test in relation to its pillars, the factors to be taken into account in considering a particular term, and the time of consideration. Conversely, the Jordanian test is a maze in relation to all what could make the test comprehensible and, basically, the pillars or main elements of the test. The legislator has not embarked on providing efficient provisions within the law for the sake of providing a clear oppression test. Nor have the courts had a real chance to set out the pillars of the test and the factors to be taken into consideration in assessing the oppression of terms.

This is not to say that the picture at the English level is entirely rosy, because there are still some points of uncertainty. In particular, the issue of good faith seems to be problematic both in terms of its relation to the requirement of imbalance; and, more importantly, the repugnancy the English courts, from the first instance till the House of Lords¹, have shown towards this concept. Such repugnancy appeared through resorting to English concepts dealing with lack of good faith instead of moving towards the European concept of good faith as intended by the Directive. That the New Legislation will include no explicit reference to this concept is an indication that the English legal environment has been unable to cope with it, despite the fact that it has already been emptied judicially of its intended essence.

Less importantly, the Regulations also include many problematic areas, especially in its grey list. Some phrases used in the grey list inspire fears of uncertainty and controversy over the role the list can play in preventing the use of unfair terms. Yet, it cannot be expected that such phrases are going to form a major

¹ The writer refers her to the *Director* case, which is the sole case addresses the issue of good faith under the Regulations.

problem in practice, and the solution adopted by the New Legislation allowing for the list to be amended from time to time seems to be an ideal solution to this problem.

However, the criticism directed at the English test is not comparable to the situation under Jordanian law. Here, the problem is neither restricted to the ambiguity of one element of the test nor to sundry points of uncertainty. The issue is much more complex simply because the features of the test are not clear at all. Even a list of oppressive or potentially oppressive terms, which may have constituted an indication of the directions the test follows, has never been on the Jordanian legislator's agenda except in relation to insurance contracts.

This leads to the conclusion that the Jordanian legislator would be strongly advised to adopt the English way of setting out a clear, practical test of oppression and a list of oppressive terms. Preferably this should be a black list provided that it is short, clear and subject to amendment according to market movements and the requirements of weaker parties (consumers). On the clarity of the test, the legislator could refer directly and expressly to S 66, as mentioned above, to be the standard according to which terms are to be tested, if, and only if, S 204 intends that this Section is the scale on which terms are to be measured. Alternatively, a new test of oppression should be produced. Both the black list of oppressive terms in insurance contracts and the English grey list should be helpful in creating a general list of oppressive terms, provided that the specificity of the Jordanian market is taken into consideration.

Chapter Three

Enforcement of the Protection Provided by the Regulations **and the JCC**

1. Introduction

Any law aiming at protecting consumers against unfair terms can only achieve its objectives if it is enforced effectively. This Chapter is dedicated to determining what kind of enforcement methods are used by the Regulations and the JCC in fighting unfair terms, and who is given the power to apply the provisions of these laws?

As will be seen, the English Regulations seem to be more well developed than the Jordanian JCC. Along with private enforcement, they provide for a general public mechanism of enforcement which Jordanian law does not, generally speaking, include. Therefore, it may be better to treat in some detail the English system of enforcement created by the Regulations first, and then to find out what type of enforcement the Jordanian law adopts.

The study of the English system of enforcement and the analysis of the comparable Jordanian one should provide a clear picture on how public enforcement adopted by the former makes the difference in favour of consumer protection, especially at the practical level. In turn, how the absence of public enforcement, among other factors, contributes to rendering S 204 of the JCC virtually ineffective.

2. Enforcement of the Regulations

2.1. Public and private enforcements

Initially, the Regulations can be used by a consumer to challenge an unfair term in a particular contract between him and a seller or supplier. In this case, and as seen in the previous Chapter, an unfair term is not binding on the consumer and the contract will continue to bind its parties unless it becomes incapable of continuing in existence without the unfair term¹. As will be seen, however, civil litigation at the individual

¹ The Regulations, reg 8.

level might not be worthwhile economically and practically, on the one hand, and could be exhausting to the consumer on the other hand¹.

At any rate, English law provides for another technique of enforcement through which public bodies are authorised powers of enforcement. Such a technique is concerned with preventing the continuing use of unfair terms, rather than with the consequences of such terms once they have been used. Unlike individual enforcement, this is novel² and has attracted considerable attention³. The following sub-section, 2.1.1, treats public enforcement as provided under the Regulations and the Enterprise Act 2002.

2.1.1. Public Enforcement

2.1.1.1. Prevention of the continued use of unfair terms

Art 7(1) of the Directive requires Member States to ensure that adequate and effective means exist to prevent the continued use of unfair terms in contracts concluded with consumers. It is further provided in Para (2) of the same Article that the means referred to shall include provisions allowing persons or organisations, having a legitimate interest under national law in protecting consumers, to take action according to the national law concerned before the courts or before competent administrative bodies seeking a decision as to whether a contractual term drawn up for general use is unfair, so that they can apply appropriate and effective means to prevent the continued use of such a term.

The above Article seems to contain one of the most important provisions in the Directive, for which it was welcomed⁴. Such importance should come as no surprise given the significance of the public enforcement the Article provides for. As seen later in this Chapter⁵, this increases the effectiveness of the Directive through conferring on organisations which have a legitimate interest under national law access to the relevant courts or competent administrative bodies. Accordingly, this Article was seen

¹ Oughton D and J Lowry, op cit p 401.

² Collins B, 'Unfair Terms in Consumer Contracts Regulations 1994', <http://webjcli.ncl.ac.uk/articles3/collins3.html>>

³ See *infra*, p 239 et seq.

⁴ Beale H, 'Unfair contracts in Britain and Europe', (1989) 42 CLP pp 197, 210; Beale H, Legislative Control of Fairness: the Directive on Unfair Terms in Consumer Contracts, in Beatson J (Editor), *Good Faith and Fault in Contract Law*, (Oxford: Oxford University Press, 1995), p 255; Reynolds F, 'Notes: Unfair contract terms', (1994) 110 LQR p 1.

⁵ See *infra*, p 239 et seq.

as a technique by which the significant imbalance between a consumer and a seller or supplier in relation to litigation could be removed in the context of unfair terms¹.

However, such a remarkable provision has faced problems in application at both the European and local levels. At the continental level, where the Directive gives the judicial system of individual Member States the discretion to determine the existence of fairness, there is the danger that different approaches to the same sort of contractual terms will appear.

The European Parliament and the Economic and Social Committee have tried to minimise this problem by making various recommendations. The European Parliament recommended that an Ombudsman's institution should be established in the Union with the tasks of: monitoring the application of the Directive throughout Member States; endeavouring to settle by amicable agreement disputes over unfair contracts where parties are resident permanently in two or more Member States; and presenting an annual report on unfair terms containing, *inter alia*, any reform seen as appropriate as to the Directive.²

Two recommendations were made by the Economic and Social Committee. The first was that a major role in determining the judicial approach to the test of fairness should be given to the ECJ. Secondly, the Commission should be notified of decisions of the judicial or administrative bodies of the Member States relating to the implementation of the Directive. Thus, the Commission would be able to identify the diversity of interpretation in Member States and monitor developments in connection with unfair terms.³

Nonetheless, neither the recommendations of the European Parliament nor those of the Economic and Social Committee have been adopted. This could be seen as unfortunate because it leaves no direct mechanism to ensure a compatible union-wide approach to the interpretation of terms in consumer contracts⁴. Furthermore, this might adversely affect European consumers, including English consumers, when shopping outside their own countries, where they would be obliged to sue the sellers or suppliers in the latter's home countries which might have different approaches towards the test of fairness and enforcement. This is in addition to the bad effect on the cross-border trade, which the Directive supposedly aims at encouraging.

¹ Lockett N and M Egan, *op cit* p 29.

² *Ibid*, pp 29, 30.

³ *Ibid*.

⁴ *Ibid*.

At the English level, the road towards implementing Art 7 as intended by the European legislator was not straightforward. In its earliest response to this requirement, the DTI adopted a minimalist application based on leaving control in the hands of private litigants before ordinary courts. The DTI relied here on the facts: that the doctrine of binding precedent would prevent the use of unfair terms; and that English law contains no general provision for representative actions¹. This approach was heavily criticized². As a result, perhaps, Reg 8 was incorporated into the proposed Regulations (i.e. 1994 Regulations) conferring on the Director the power to consider any complaints and to seek injunctions.

This development prompted another battle over restricting the bodies that have the right to pursue unfair terms to the Director. Although it would be good for the development of English law not to confine enforcement to the Director, it was argued that granting him exclusive powers of general enforcement complied formally with the requirement of Art 7 that any body which has a “legitimate interest under national law in protecting consumers” shall be entitled to bring an action against unfair terms³. Brownsword and Howells, upheld this finding, and interpret “persons or organisations...having a legitimate interest *under national law* in protecting consumers” as persons or organisations that have legal responsibility for the protection of consumers’ interests, and not merely an interest in protecting consumers. On this reading, only those persons or organisations recognised by national law as having an interest in protecting consumers will have the power to enforce the Directive⁴.

In the same direction, it was argued that prohibiting bodies other than the Director from the direct right of litigation would have no adverse effect on the interests of the Consumer’s Association, since the Director is obliged under the Regulations to consider each complaint made to him as to unfair terms⁵. The latter view may be strengthened by the fact that there is no limitation on who is allowed to

¹ DTI, Implementation of the EC Directive on Unfair Terms in Consumer Contracts 93/13/EEC, a Consultation Document, 1993, comment on art 7 of the Directive.

² See, Beale H, Legislative Control of Fairness: the Directive on Unfair Terms in Consumer Contracts, in Beatson J (Editor), *Good Faith and Fault in Contract Law*, (Oxford: Oxford University Press, 1995), pp 251,255; Reynolds F, op cit p 3; Collins H, ‘Good faith in European contract law’, (1994) 14 OJLS, p 244.

³ Beale H, Legislative Control of Fairness: the Directive on Unfair Terms in Consumer Contracts, in Beatson J (Editor), *Good Faith and Fault in Contract Law*, (Oxford: Oxford University Press, 1995), p 256; Upton M, op cit p 298.

⁴ Brownsword R and G Howells, op cit p 260.

⁵ Lockett N and M Egan, op cit p 60.

make a complaint to the Director, and therefore it has been suggested that it is more beneficial for consumer organisations to complain to him than to have the right to litigate directly without having the adequate resources to undertake direct litigation¹.

However, this was not the opinion of many commentators². Also, parties such as the Consumers' Association were eager to have such power and therefore challenged the DTI's approach before the court which, consequently, referred the issue to the ECJ for a ruling on Community law³. The ECJ, however, did not have the opportunity to take a decision since the UK government declared its intention to settle the Association's concerns through an amendment to be made to the Regulations, which happened in 1999.

When the DTI decided to make an amendment to extend powers of enforcement to other bodies, its intention was to set criteria and any body fulfils one or more of them would be considered as an enforcement body⁴. To this end, the DTI set out in a consultation paper⁵ the criteria which a court could refer to in deciding whether or not a particular body is qualified to bring an action at the general level. This approach, however, seemed impractical because it carried the risk of wasting traders' time and money by defending claims raised by bodies which might later be judged as unqualified⁶.

Eventually, the idea of a set of criteria was dismissed and a list of specific qualifying bodies was adopted instead in Sch 1 to the Regulations. Part one of the list includes the following bodies:⁷

1. The Information Commissioner.
2. The Gas and Electricity Markets Authority.
3. The Director General of Electricity Supply for Northern Ireland.
4. The Director General of Gas for Northern Ireland.

¹ Brownsword R and G Howells, *op cit* p 260.

² Smith S, 'Contract', (1995) 48 (1) CLP p 27; Collins B, Report on the practical implementation of the Directive 93/13/EEC in the United Kingdom and the Republic of Ireland, presented in the Brussels Conference, the 'Unfair Terms' Directive - Five Years On: Evaluation and Future Perspective, 1-3/7/1999, p 295.

³ *R v Secretary of State for Trade and Industry, Ex parte The Consumers Association* (1996) CO/656/95.

⁴ DTI, Widening the Scope for Action under the Unfair Terms in Consumer Contracts Regulations, a Consultation Paper, January 1998.

⁵ *Ibid*, para 2.8.

⁶ Bright S, *op cit* pp 336, 337.

⁷ As amended by the Unfair Terms in Consumer Contracts (Amendment) Regulations SI 2001 No. 1186.

5. The Director General of Telecommunications.
6. The Director General of Water Services.
7. The Rail Regulator.
8. Every weight and measures authority in Great Britain.
9. The Department of Enterprise, Trade and Investment in Northern Ireland.
10. The Financial Services Authority.

Part two includes only Consumers' Association.

The extension has rightly been welcomed, because if more bodies are able to enforce the Regulations, more positive results could be expected¹. Moreover, such extension will be useful in dealing with unfair terms used by small traders who use such terms because of inertia and ignorance of the law rather than an intention to contravene it². Moreover, although nothing in the Regulations implies that the powers of the new enforcement bodies are restricted to cases arising in their own field of interest³, these bodies have a significant role to play as experts in their own areas.

Despite these advantages, other bodies could show that they had a legitimate interest in protecting consumers, but are excluded from the list⁴.

Another disadvantage was based on the argument that such an extension would affect the Director's powers in enforcement, which would necessarily shrink since more specialised bodies would take part in enforcement activity⁵. If true, this would affect the interests of consumers by depriving them of an expert, efficient enforcing body. Nonetheless, the existence of the Director as sole player in the field of public enforcement might also hurt their interests. Statistics published by the OFT showed that the job of fighting unfair terms is too big to be undertaken by the Director alone⁶. By the end of 1998, the OFT had received an average of over 80 complaints monthly⁷. If this tells us any thing, it would be that the Director was in need of other bodies to help in fulfilling the task of enforcement.

¹ Harvey B and D Parry, op cit p 164.

² Irvine W, op cit p 258.

³ See, Lawson R, *Exclusion Clauses and Unfair Contract Terms*, 7th Ed (London: Sweet & Maxwell, 2003), p 232.

⁴ Bright S, op cit p 337.

⁵ Beale H & Others (Editors), op cit pp 929, 930.

⁶ See, Bradgate R, op cit p 50.

⁷ Ibid, p 47.

Notwithstanding this, a central role in enforcement was retained for the OFT under the 1999 Regulations¹. A considerable number of unfair terms have, as the OFT bulletins show, been pursued by the Director even after the listing of other enforcing bodies². In particular, the Director has retained the role of co-ordinating among the different enforcement bodies. This is achieved through measures such as the publication of bulletins and the duty of qualifying bodies relating to notification under Reg (14). This has the benefit of allowing the OFT to ensure that there will be no divergence in approaches taken in relation to unfair terms; an issue which some commentators³ were concerned about.

2.1.1.2. OFT's role

2.1.1.2.1. Considering complaints

The OFT is obliged by Reg 10(1) “to consider any complaint made to him that any contract term drawn up for general use is unfair, unless... the complaint appears to the Director to be frivolous or vexatious...”. Subsequently, a special unit, called the Unfair Contract Terms Unit, has been established within the OFT for this purpose.

Before treating how the OFT uses this power and what are the results of finding a term unfair, some of the problems that might be generated as a result of the wordings used in the above Regulation should be pointed out:

Firstly, the wording “made to him” seems to be controversial. On one reading, it would mean that the Director can take no action on his own initiative, but rather has to wait until he receives a complaint⁴. There is no clear reason for such a restriction. If it exists, it would probably be due to the legislator's fear of the over-zealous enforcement which could be harmful to the business sector.

However, another more likely reading suggests that the Director does not have to wait until he receives a complaint before launching his action. Regulation 10(1) refers to the case in which the Director is under a duty of consideration when he receives a particular complaint; beyond that it is up to him to deal with other cases.

¹ Twigg-Flesner C, ‘The Unfair Terms in Consumer Contracts Regulations 1999: new powers for the regulators and the Consumers’ Association’, (2000) 11 Util. Law Rev. p 43.

² Ervine W, op cit p 258.

³ Bright S, op cit pp 337, 338.

⁴ Bradgate R, op cit p 49.

Secondly, a problem would be generated by the exception of complaints which are “frivolous” or “vexatious”. The latter phrases have been left without definitions. Accordingly, they might be a source of uncertainty since the consumer who wishes to depend on public enforcement by the OFT might not be able to distinguish between complaints which are “frivolous” or “vexatious” in the eyes of the OFT and those which are not.

Thirdly, the preventive power is solely applied to terms which have been drawn up for “general use”. In this respect, it is not easy in many cases to determine whether a term has been drawn up for general use. Certainly, terms contained in standard form contracts which are recommended by trade associations to their members are drawn for general use. However, it is necessary to think twice about a term drafted by an individual trader for his own trade, or a standard contract recommended by a trade association and then amended by an individual trader so that he can insert his own terms therein¹. Thus, a narrow reading of this wording would bring many standard terms outside the scope of Reg 10(1).

Finally, it seems that no attention has been paid to the fact that oral terms are, like written terms, covered by the Regulations. This can be observed from the wording “drawn up”. While it is true that the main concern will be with written terms as they compose the vast majority of terms, a possibility remains that traders may use unfair oral terms. And, if it is submitted that oral terms have been left outside the ambit of Reg 10, it can rightly be concluded that the Regulations have failed to offer full protection to the consumer against unfair terms.²

Such a conclusion, however, might be erroneous. The inclusion of “drawn up” within Reg 10(1) came as a result of Art 7(2) of the Directive using the same wording “drawn up”. However, it has been suggested that the intention of the Directive was not to restrict the scope of the above Article to cover only unfair written terms³. Therefore and since what applies to the Directive applies, generally speaking, to the

¹ Collins B, ‘Unfair Terms in Consumer Contracts Regulations 1994’, <http://webjcli.ncl.ac.uk/articles3/collins3.html>>

² See further, Lawson R, *Exclusion Clauses and Unfair Contract Terms*, 7th Ed (London: Sweet & Maxwell, 2003), pp 229, 230.

³ Ibid.

implementing Regulations, it might be correct to suggest that the seeming exclusion of oral terms is unintentional, with the result that no practical effects follow.

The best body to describe how the process of considering complaints is carried out is the OFT itself, which stated that:

“Whenever a consumer contract is brought to our notice by a complainant who believes that it contains a standard term that is unfair, we examine the contract as a whole and look at all the circumstances in which it is likely to be used. We will question every term that we think is potentially unfair to consumers or possibly harmful to their interests in some way. As a part of this process, we will challenge any term where the obscurity of the language used could put a significant number of consumers at disadvantage.”¹

The decision taken by the Director after considering a particular complaint will be one of the following possibilities: that the complaint is false and the term is fair; that the complaint is “frivolous” or “vexatious” and should be dismissed; or that the term which is the subject of the complaint is potentially unfair and should be dealt with.

The Director deals with a potentially unfair term by applying for an injunction (including an interim injunction) which will encompass not only the person appearing to be using the term but also anyone recommending its use². In practicing this power, the Director is obliged to give reasons for his decision whether or not to apply for an injunction³. The reasons seem not to be required to be communicated in written form⁴.

However, before deciding whether or not to apply for an injunction and if he considers it appropriate to do so, the Director may have regard to any undertakings given to him by, or on behalf of, any person relating to the continued use of such a term in contracts concluded with consumer⁵. This provision came as a result of the concern of the coeval government to ease the regulatory burden on business⁶. At the same time, it seems to serve the interest of applying the law smoothly and effectively, which is, in the end, also in the interest of consumers.

¹ OFT, Bulletin Issue No 4, Dec 1997, pp 13, 14.

² The Regulations, reg 12(1).

³ Ibid, reg 10(2).

⁴ Lawson R, *Exclusion Clauses and Unfair Contract Terms*, 7th Ed (London: Sweet & Maxwell, 2003), p 230.

⁵ The Regulations, reg 10(3).

⁶ Downes T, op cit p 211.

2.1.1.2.2. Dissemination of information

The duty of the OFT in publication and advice came under Reg 15, which no doubt constitutes an important addition to the 1999 Regulations¹. First of all, the Director is obliged to arrange for publication, in the form and manner he considers appropriate, details of: any undertaking or order notified to him under Reg 14; any undertaking given to him by, or on behalf of, any person as to the continued use of a term considered to be unfair in contracts concluded with consumers; any application made under Reg 12 and application of any term of any undertaking given to, or order made by, the court; and any application made to enforce a previous order of the court².

The Director may also arrange for the dissemination in such form and manner as he considers appropriate of information and advice concerning the operation of the Regulations as may appear to him to be expedient to give to the public and to all persons likely to be affected by the Regulations.³

The bulletins issued by virtue of this obligation contain not only a description of the OFT's work, but also a large number of potentially unfair terms with illustrations of how they were abandoned or modified after agreement between the traders and the OFT.

It seems that a key feature in this dissemination is the “naming and shaming” of traders who have been using unfair terms. Accordingly, the publication has had a magnificent role in allowing others to become aware of the adjudication of unfairness whenever it has been determined that a disputed term is unfair, and the trader concerned has given undertaking that the use of this term will be discontinued.

The mission of the OFT in terms of information is not confined to the above duties. The Director is also obliged to inform any person on request whether a particular term to which the Regulations apply has been the subject of an undertaking given to the Director or notified to him by a qualifying body; or it has been the subject of an order of the court made upon application by the Director or notified to him by a qualifying body. Furthermore, he shall give that person details of the undertaking or a

¹ Paras 1 and 2 of Reg 15 have no counterparts in the 1994 Regulations, while Para 3 counterparts Para 7 of Reg 8 of these Regulations.

² The Regulations, reg 15(1).

³ Ibid, reg 15(3).

copy of the order, together with a copy of any amendments which the person who gave the undertaking has agreed to make to the disputed term.¹

Finally, it is worth mentioning that the fact that the OFT is obliged under the Regulations to carry out the task of publication does not prevent other qualifying bodies from publishing details of their work under the Regulations². Such publication may involve an advisory role like that of the OFT, such as the guidance on unfairness in mortgage contracts published by the Consumers' Association³. This would support the role of the OFT with regard to the dissemination of information, which has been somewhat effective⁴. Therefore, this should be supported because it provides more help to consumers, businesses and anybody else whom the publication may concern such as lawyers and researchers.

2.1.1.2.3. Obtaining of documents and information

The provisions of Reg 13 are new to the 1999 Regulations. It had been difficult, on some occasions, for the Director to obtain from businesses the documents or information needed to deal with complaints⁵, so the Director was conferred special powers to obtain documents and information in order to facilitate his consideration of a complaint raised before him, or in order to ascertain whether a person had complied with an undertaking or court order related to the continued use, or recommendation for use, of terms in consumer contracts⁶.

Additionally, the Director has the power to require any person to supply to him a copy of any document which that person has used or recommended for use as a pre-formulated standard consumer contract; as well as information in relation to the use, or recommendation for use, by that person of that document or any other document in dealing with consumers.⁷

¹ The Regulations, reg 15(2).

² See, OFT, Bulletin Issue No 16, Dec 2001, p 45.

³ See, OFT, Bulletin Issue No 14, May 2001, p 4.

⁴ Collins B, Report on the practical implementation of the Directive 93/13/EEC in the United Kingdom and the Republic of Ireland, presented in the Brussels Conference, the 'Unfair Terms' Directive - Five Years On: Evaluation and Future Perspective, 1-3/7/1999, p 297.

⁵ See, Ervine W, op cit p 257.

⁶ The Regulations, reg 13(1).

⁷ Ibid, reg 13(3).

Such powers are to be exercised by a written notice which may specify the way in which, and the time within which, this notice is to be complied with. The notice can be varied or revoked by a subsequent notice¹.

In the event of non-compliance the court may, on the application of the OFT, make such order as it thinks fit for requiring the default to be made good, and may provide that all costs or expenses of and incidental to the application shall be borne by the person in default or by any officers of a company or other association who are responsible for the default². Nevertheless, if a person is entitled to refuse to produce or give any document or information in civil proceedings before the court, he is not compelled to do so under the Regulations³.

2.1.1.2.4. Further powers to the OFT: “enforcement orders” under the Enterprise Act 2002

The OFT may, with regard to unfair terms in consumer contracts, enjoy further powers of enforcements by virtue of the Enterprise Act 2002. Part 8 of the Act⁴, which came into force on the 20th of June 2003, provides that a number of persons or bodies, including the OFT, (so called “enforcers”) may apply to the court for an “enforcement order” against a person who appears in breach of a contract or breaking legislation (whether domestic or European) enacted for the benefit of the consumer⁵. Enforcers are divided into three types. “General enforcers” include the OFT and local weights and measures authorities in Great Britain⁶. “Designated enforcers” consist of any public⁷ or private body in the UK designated by the Secretary of State as having the protection of the collective interests of consumers as one of its purposes⁸.

¹ Ibid, reg 13(4).

² Ibid, reg 13(6).

³ Ibid, reg 13(5).

⁴ The provisions in part 8 of the Enterprise Act relating to Community infringements implement the Directive 98/27/EC of the European Parliament and of the Council of 19 May 1998 on Injunctions for the Protection of Consumers’ Interests, Directive 98/27/EC OJ L 166/51 11 June 1998, p 51.

⁵ Enterprise Act 2002, ss. 211, 212; the Enterprise Act 2002 (Part 8 Community Infringements Specified UK Laws) Order 2003 (SI 2003/1347) which came into force on the 20th of June 2003, art 3; Enterprise Act 2002 (Commencement No.3, Transitional and Transitory Provisions and Savings) Order 2003 (SI 2003/1397), art 2.

⁶ Enterprise Act 2002, s. 213 (1).

⁷ For the list of the designated public bodies, see the Enterprise Act 2002 (Part 8 Designated Enforcers: Criteria for Designation, Designation of Public Bodies as Designated Enforcers and Transitional Provisions) Order 2003 (SI 2003/1399), art 5.

⁸ Enterprise Act 2002, s. 213 (2).

“Community enforcers” are listed by the European Parliament and Council¹, and include a number of entities recognised by the authorities of the Member States as qualified bodies for the purpose of bringing actions under the Consumer Injunctions Directive².

A body specified above can apply for an enforcement order only if the infringement of the legislation harms the collective interest of consumers³, and, where the matter is not one of urgency, after appropriate consultation with both the person against whom the enforcement order would be made and the OFT (unless the latter is the enforcer)⁴. This is to ensure that such an infringement will stop and will not happen again⁵. If the court finds that a person named in the application committed the conduct constituting the infringement, it will grant an enforcement order against that person⁶.

2.1.1.3. Qualifying bodies’ role

The role of qualifying bodies in dealing with complaints comes under Regs 10, 11, 12 and 14. Such a role resembles that of the Director, in that after considering a complaint, and if the particular term is found to be unfair, the qualifying body can either seek to obtain an undertaking from the trader stating that the use of an unfair term will be discontinued⁷, or apply to the court for an injunction⁸. However, it differs from that of the Director in three ways:

Firstly, it seems that not all qualifying bodies have the same powers as those of the Director. It is not clear that all of these bodies have the competence to consider complaints. This stems from Reg 11(1), which provides that “if a qualifying body *specified in part one of schedule 1* notifies the Director that it agrees to consider a

¹ Ibid, s.213 (5). For the full list of these bodies see ‘Commission Communication concerning Article 4(3) of Directive 98/27/EC of the European Parliament and of the Council on injunctions for the protection of consumers’ interests concerning the entities qualified to bring an action under Article 2 of this Directive, OJEC, (2002/ C 273/03).

² Directive 98/27/EC of the European Parliament and of the Council of 19 May 1998 on Injunctions for the Protection of Consumers’ Interests, Directive 98/27/EC OJ L 166/51 11 June 1998 p 51, art 4.

³ Enterprise Act 2002, ss. 212 (1), 211(1).

⁴ Ibid, s. 214.

⁵ Ibid.

⁶ Ibid, s. 217.

⁷ The Regulations, reg 11(2).

⁸ Ibid, reg 12(1).

complaint that any contract term drawn up for general use is unfair, it shall be under a duty to consider this complaint”.

The prevalent reading of the above Regulation suggests that it aims at withholding the power to consider complaints from the Consumers’ Association which is specified in part two of the Schedule.¹

Another reading is that it might mean to make it an obligatory duty of the qualifying bodies specified in part 1 to consider complaints if they notify the Director that they agree to consider them, without limiting the power of consideration to these bodies. This is Macdonald’s opinion as expressed indirectly in saying: “All of the qualifying bodies can consider complaints about unfair terms... If a ‘Part One’ qualifying body notifies the Director General that it agrees to consider a complaint, it comes under a duty to do so”².

The first reading, however, seems to be correct, for two reasons. First, there would be no justification for exempting the Consumers’ Association from the duty to consider complaints if it were entitled to the power to consider complaints. This would contradict the adherence of the Regulations, as will be seen below, to ensure that complaints are efficiently dealt with and to protect traders against multiple challenges from different bodies, and more importantly, to ensure that a consistent approach to unfair terms is taken³. Secondly, the first approach seems to be in line with the provision of Reg 13(2) which do not give the Consumers’ Association the power to obtain documents and information, which is relevant to the power in question.

But, if the first approach is correct, and the writer believes that it is, it is unclear why the Consumers’ Association is deprived of the power to consider complaints. How could the Association apply for an injunction or request an undertaking without considering the complaint in question? On what would it base its decision to dismiss the complaint or proceed with it?

In fact, these matters have not been made clear by the Regulations, which need to be more decisive in drawing the boundaries of the powers of the Consumers’ Association. The only reasonable interpretation is that the Consumers’ Association

¹ See, Twigg-Flesner C, op cit p 44; Ervine W, op cit p 258; Bright S, op cit p 336.

² See, Grubb A and Furmston M (Editors), op cit p 641.

³ OFT, Bulletin Issue No 8, Dec 1999, p 5.

cannot receive complaints; its powers in applying for injunctions and requesting undertakings are limited to cases it undertakes on its own initiative.

Moreover, only a qualifying body specified in part 1 must, like the Director, give reasons for the decision on whether or not to apply for an injunction in relation to complaints under its consideration¹, as well as having regard, in deciding whether or not to apply for an injunction, to any undertaking that it receives concerning the continued use of an unfair term in consumer contracts².

Furthermore, as alluded to above, only a qualifying body specified in part 1 of the schedule has powers similar to those conferred on the Director in obtaining documents and information.³

Depriving the Consumer's Association of the powers mentioned in the latter two Paragraphs should hence come as no surprise, since they are tied to the power of consideration which this body is not allowed, or at least is not under a duty, to exercise.

Secondly, there is no reference to the capabilities of qualifying bodies which have the power of consideration to refuse to consider a complaint if it is frivolous or vexatious, as the Director may do. This might be attributed to the fact that, unlike the Director, the statutory bodies specified in part 1 are not compelled to consider all complaints⁴. Rather, their duty of consideration is confined to complaints which they notify the Director that they accept for consideration. It can be assumed logically that such complaints are not frivolous or vexatious. In this way, any reference to their right not to consider such complaints would be redundant.

Thirdly, a qualifying body would not be able to apply for an injunction instantly. Instead it must notify the Director of its intention to apply for an injunction at least fourteen days before the date of application, beginning with the date on which the notification was given unless the Director authorises a shorter period for the application⁵. Moreover, it must inform the Director of any undertaking given to it by or on behalf of any person relating to the continued use of an unfair term that it has

¹ The Regulations, reg 10(2).

² Ibid, reg 10(3).

³ Ibid, reg 13(2). As to the way by which these powers to be exercised and the penalty of non-compliance, see *supra*, p 212.

⁴ Ervine W, op cit p 258.

⁵ The Regulations, reg 12(2).

considered, and of the results of the application for an injunction, as well as the result of any application that it has made to enforce a previous order by the court¹.

Most of the above measures are provided to ensure that a unified approach will be adopted as to unfair terms, and that a high level of co-ordination between the enforcement bodies will be achieved, so as to avoid the duplication of actions under the Regulations. This is regardless of the argument² that there is little risk of such a problem due to the limited number of enforcement bodies.

2.1.1.4. The court's role: granting injunctions and accepting undertakings

According to the new system created by the Regulations aiming at challenging the continued use of unfair terms in consumer contracts (i.e. the general level of enforcement), the court has been given authority to accept undertakings³ whereby particular terms will no longer be used or recommended for use and granting injunctions, as it thinks fit, against unfair terms whether used or recommended for use⁴. The injunction may extend to any term similar to, or which has the same effect of, that under pursuit whether used or recommended for use by any person, even if he is not a party of the action before the court.⁵

That the court is the only body that has the power of granting injunctions is based on the fact that although a term has been considered by one of the enforcement bodies, none of them has the authority to pronounce on the fairness/unfairness of this term. At this stage, it can only be deemed potentially unfair. In other words, only the court can judge whether a term is fair or not.⁶

In practice, this means that a term regarded by an enforcing body as unfair might be found not to be so by the court. For example, National Westminster Home Loans, which is part of the Nat West Group had offered long-term fixed-rate loans when interest rates were higher. The early redemption charge was tied to movements in market rates; therefore, it was variable, and rose with each fall in the level of interest rates. Accordingly, if consumers (i.e. the borrowers) wished to redeem early, they might pay a very high charge and consumers did not understand this. This was

¹ The Regulations, reg 14.

² Bright S, op cit p 337.

³ The Regulations, reg 14(b).

⁴ Ibid, reg 12(3).

⁵ Ibid, reg 12(4).

⁶ Unfair Standard Terms: Guidance for consumer advisers on the Unfair Terms Contract Regulations 1999, August 2000, p 4; OFT, Bulletin Issue No 20, Nov 2002, p 4, para 2.2.

associated with the fact that the formula used by the Bank to calculate charges was incomprehensible to most consumers, who did not realise that they would face open-ended rising charges, as indicated in their complaints to the OFT. Such lack of transparency about the term connected with the potentiality of oppression made it a source of unfairness. Under pressure from the OFT, the Bank agreed, *inter alia*, to make a reduction in variable redemption charges on its fixed loans. On the existing fixed-rate mortgages, the Bank agreed to limit redemption charges to no more than five percent of the sum redeemed if the original loan was for a period of five years or less, and to seven percent for loans that had had a larger fixed rate. Moreover, the bank agreed that on all new loan contracts, a maximum redemption charge would be clearly expressed in cash terms.¹

The problems that the consumers faced in the above case are close to those which appeared in the *Director* case where there was a lack of information with the result that the consequences of the agreement did not meet the consumer's expectation.

In the latter case, the Director had, in pursuing clause 8 of the loan contract, sought an injunction aimed at restraining the Bank from including in any contract with a consumer any term or provision having the object or effect of “(i) making interest payable on the amount of any judgement obtained by the bank for sums owing under a regulated agreement or (ii) making interest payable upon interest, and enforcing any such term already included in any existing agreement”². The Court of Appeal, which held that this clause was unfair³, took the line that “an injunction against the use of the relevant term in contracts concluded with consumers is at first blush the appropriate form of relief by reason of regulation 8(2)”⁴. However, as the defence argued that the injunction sought by the Director was too wide and going beyond what was needed by him, the Court referred to Para 6 of the notice of appeal, stating:

“The learned Judge ought to have held that clause 8 was unfair insofar as it was not limited by a proviso to the effect that the Defendant would not seek to rely on it after

¹ OFT press release, 8 October 1998, ‘<http://www.of.gov.uk/News/Press+releases/1999/PN+39-99.htm>’

² [2000] 2 All ER 759, para 19.

³ Ibid, para 35.

⁴ Ibid, para 36.

judgment (i) in any case where the court made an order for payment of the judgement debt by instalment, or (ii) alternatively, in any such case unless a judge has specifically considered whether to exercise the court's powers under sections 129 and 136 of the Consumer Credit Act 1974.”¹

From this Paragraph, the Court observed that the Director recognised that if an amendment were made to condition 8, the unfairness could be cured². As a result, the court accepted an undertaking from the Bank that an amendment to this condition would be made to meet the Director's objection, the amendment to be included in all the Bank's standard contracts³.

Eventually, the decision of the Court of Appeal was reversed by the House of Lords which upheld the High Court's decision that clause 8 was fair. The decision of the House of Lords in this case has been referred to earlier in this Thesis⁴. From the fact that the disputed condition has passed the test of fairness in the court, it can be said that had the National Westminster Home Loans case mentioned above gone to the court, it is possible that the court decision would be different from that taken by the OFT, depending on, to repeat, the fact that the issue of declaring the fairness is the job of the court and nobody else.

2.1.1.5. Closing remarks

After treating the model of enforcement in the Regulations in some detail, the following points can be made on this model and how it has been operated by the enforcing bodies:

Firstly, it is interesting that the approach taken by the OFT under the Stop Now Orders (E. C. Directive) Regulations 2001⁵ has been adopted in enforcing the Regulations. The 2001 Regulations gave the Director and other qualified entities the power to bring proceedings against a trader breaching the constraints imposed by the law in a way which is harmful to consumers. In enforcing these Regulations, the OFT preferred informal undertakings and other informal solutions above “heavy-handed

¹ Ibid.

² Ibid.

³ Ibid, para 37.

⁴ See *supra*, pp 78 et seq, 127 et seq.

⁵ SI 2001 No.1422, which came into force on the 1st of June 2001 and was revoked by the Enterprise Act 2002, s. 278, sch 26.

resolution through the court”¹. This seems to have been replicated under the Regulations on Unfair terms in Consumer Contracts. Although they have dealt with huge numbers of complaints², the OFT and the qualifying bodies have rarely gone to the court to obtain injunctions. Most of the complaints have been dealt with through negotiation, which has succeeded in persuading traders to delete or revise the disputed terms in their contracts. This has positively affected the application of the Regulations, one would believe. Both the smoothness and effectiveness of the enforcement are required.

Secondly, unlike the other qualifying bodies, the Consumers’ Association has played a minor role in enforcing the Regulations. According to the OFT’s bulletins, only on two occasions has the Association shown some attention to using the powers offered by the Regulations in pursuing unfair terms. The first occasion was the action it took against unfair terms in the mortgage contracts of the UK's top 20 lenders, which it announced in October 1999 and after which, on 23 December 1999, it signed a concordat on joint enforcement of the Regulations with the OFT in this area³. The second was an action taken against FPD Savills Ltd (an estate agency) in November 2000. Nine terms in the latter’s contract were amended as a result of this action⁴.

This situation is unfortunate because it is quite important that the Association should share responsibility of enforcing the Regulations in reality. This is due, among other things, to the fact that the Association is the body that represents all consumers. Furthermore, there is the danger that other qualifying bodies might lean in favour of businesses to the detriment of consumers; even adopting their perspective. In other words, whereas the Association is entirely committed to the interest of consumers, other qualifying bodies might also take the interest of businesses into consideration⁵.

The lack of enforcement by the Association might be the result of two factors. First, the Consumers’ Association is not granted powers equivalent to those given to other qualifying bodies. As has been observed previously, the likelihood is that the Association is prohibited from the power of considering complaints, and is specifically deprived of the relevant power to obtain documents and information. It

¹ See, Simmonds J, op cit p 218.

² See *supra*, p 206.

³ OFT, Bulletin Issue No 9, Sep 1999, p 4.

⁴ OFT, Bulletin Issue No 15, Aug 2001, p 21.

⁵ See further, Scott C and J Black, op cit p 521; Dickie J, op cit pp 30, 31.

might be argued that depriving the Association of the power of consideration is of little effect, because the Director might be prepared to use his powers of investigation in such cases¹. However, this might at least cause inconvenience to the Association, obstructing it in practicing its powers under the Regulations. Secondly, the Consumers' Association might lack the resources to undertake the serious task of pursuing unfair terms, given the fact that it receives no public funding². Even if the Association had the full powers that other qualifying bodies have, the latter obstacle would affect its ability in using them.

Thirdly, the Regulations do not utilise the criminal technique in controlling unfair terms which is deployed under the Consumer Transactions (Restriction on Statements) Order 1976³ which makes it a criminal offence to include in a contract specific types of terms rendered ineffective under UCTA⁴.

Using such a technique might have strengthened the ability of the Regulations to fight unfair terms, since the consequences of using such terms seems, theoretically speaking, insufficient to deter traders from including them in their contracts. It was seen earlier in this Chapter and in the previous Chapter that the only cost that a trader suffers if he uses an unfair term is that the consumer will not be bound by that term, and if the case is dealt with publicly by the enforcing bodies, an injunction will be generated by the court prohibiting the use of such a term at present and for the future. This might not constitute a sufficient penalty in the face of the widespread use of unfair terms.

The Directive, which provides that mechanisms must be put in place so as to protect consumers in the face of the continued use of unfair terms, has left the door open for deploying the method which suits each Member State, including criminal sanctions⁵. However, the English Government, and then the English Regulations, decided against such a method, even though it was advised to follow the approach of criminilisation in relation to the use of specific exclusion clauses⁶. The Government's

¹ Ervine W, op cit p 258.

² See, Scott C and J Black, op cit p 20.

³ SI 1813 amended by SI 127 which was enacted in 1978 of the same name.

⁴ On the penalties imposed on a person who contravenes a prohibition included in the Order or does not comply with its requirements, see the Fair Trading Act 1973, s. 23.

⁵ See, Bright S, op cit p 335.

⁶ This recommendation was made by Beale who hoped that the device used under the Fair Trading Act 1973, providing for the use of certain types of terms to be a criminal offence, will be replicated in the

point of view is that the aim of the Regulations is to prevent the use of unfair terms and not to punish traders using them. This objective will be achieved much more effectively by the use of court injunctions than the use of criminal sanctions, which may instead lead to vexatious and opportunist claims, a more defensive and adversarial culture, and which may constitute an obstacle to negotiation to remove unfair contract terms¹.

The Government's opinion might be based on the fact that criminilisation would not be an easy choice. Many difficulties might render this technique ineffective because it would take so much time, and cause frustration and delay². This would explain why the Director was keen not to use criminal action in enforcing the 1976 Order³, which was available as mentioned above. In addition, it is uneasy to benefit from the criminal method in the absence of a black list of unfair terms within the Regulations⁴.

Finally, as will be seen later in this Chapter, Jordanian preventive intervention in the area of insurance contracts is based on so-called "ultra-preventative control". This takes place when drafting the contract and before proposing it to the public, requiring professionals to submit their draft contracts to be approved by a court or administrative body⁵. The Regulations have not benefited from such a pre-validation system. However, such a technique could have been adopted, had the House of Lords E.C. Select Committee on the European Communities taken a decisive view towards its adoption. The Committee, which expressed some admiration to this system because "it would help to meet the fears of industry as to the uncertainty which the Directive could introduce into their commercial dealings", did not believe that it would be consistent with its overall approach to the Directive⁶. Nonetheless, the

legislation implementing the Directive, (see, Beale H, 'Unfair contracts in Britain and Europe', (1989) 42 CLP p 210).

¹ DTI, European Commission Review of Directive 93/13/EEC on Unfair Terms in Consumer Contracts, A Consultation Paper, July 2000, pp 4, 18.

² Scott C and J Black, op cit p 519.

³ See further, Bradgate R, C Graham and G Howells, 'Regulating fairness and promoting welfarism in contract: an institutional perspective', in Brownsword R, G Howells and T Wilhelmsson (Editors), *Welfarism in Contract Law*, (Aldershot: Dartmouth, 1994), p 174.

⁴ Brownsword R and G Howells, op cit p 259; Smith S, 'Contract', (1994) 47 (1) CLP, p 11.

⁵ See, Calais-Auloy E (Chairman), Clearing of the Market: the Mechanism for Controlling Unfair Terms (Article 7), a workshop held in Brussels Conference, 'Unfair Terms' Directive- Five Years on: Evaluation and Future Perspective, 1-3/7/1999, pp 174,175.

⁶ The House of Lords, The Sixth Report of the House of Lords Select Committee on the European Communities (Session 1991-92), papers 28 at para 86, p 27, cited in Duffy P, op cit p 79.

Committee recommended that “the idea should be re-examined with particular reference to experience in Germany since the adoption of their legislation on unfair contract terms”¹.

Indeed, such a system is fraught with disadvantages. It is not easy to imagine how a court or an administrative authority designated so as to check the fairness of contracts will have the time and ability to revise all consumer contracts in every single aspect of trade. Even if this were possible, such a system may have a bad, if not fatal, effect on competition in the marketplace. This is because the pre-validation process and the time it takes would increase the cost of the commodity incurred by businesses. In this case, only large companies will be able to bear such a cost without raising prices. Alternatively, the consumer himself will bear the cost of pre-validation through increased prices if businesses decide not to bear them. In both cases, the consumer is the loser. Moreover, the pre-validation technique might go against the consumer’s right to choose. The consumer’s choice will be replaced by the regulator’s choice, which might not be similar to that which would have been made by the consumer. Moreover, the pre-validation process might send a wrong signal to the consumer who will think that there is no chance to challenge a contract which was pre-validated, even though it is unfair in his eyes.²

All this makes it easy to understand why the House of Lords Select Committee refused to uphold this system, bearing in mind that “the idea had been examined before the introduction of the Unfair Contract Terms 1977 and dismissed as impractical³”.

3. Enforcement of protection afforded to the adherent party (the consumer) under Jordanian law

3.1. Private enforcement

Pursuant to the general rules of law, any person who has a legal interest in litigation can bring an action before the competent court to pursue what he sees as a rightful claim⁴. On this ground, a consumer can challenge an oppressive term in a contract

¹ Ibid.

² For further reading, see Cartwright P, op cit pp 42, 43.

³ The House of Lords, The Sixth Report of the House of Lords Select Committee on the European Communities (Session 1991-92), papers 28 at para 86, p 27, cited in Duffy P, op cit p 79.

⁴ The right to litigate or *locus standi* is one of the basic human rights that constitutions are normally keen to refer to, (See, for example, the Jordanian Constitution 1952, s. 101).

before the first instance court or the magistrate court of the trader's domicile¹, whichever is competent depending on the amount of the contract in question². And, as with the situation in England, if the oppressive term is rendered void, nullity of which will not, as made clear in the previous Chapter³, affect the whole contract. Rather, the contract will continue to bind its parties unless it is incapable of continuing in existence without that term, or in the words of the JCC "unless the term is the motive behind the whole contract"⁴.

After considering the term at issue, the court has full authority to amend the term to render it fair or to eliminate it totally⁵. This authority seems to be wide in that, firstly, the Court of Cassation has no supervision over this decision provided that it is reasonable. This is because the Court of Cassation is a court of law and not a court of facts (i.e. competent to revise questions of law but not questions of facts)⁶. Secondly, the contracting parties cannot agree to the contrary⁷ because such an authority is of public policy; otherwise this protective measure will be ineffective, since traders will be keen to include a term providing to the contrary had the law permitted such an inclusion.⁸

The only restriction to the above apparently absolute authority is that it shall comply with the rules of justice⁹. In any event, such a restriction does not contravene the width of such an authority because of the broad meanings the phrase "justice" denotes. More frankly, this stipulation seems to have no effect except to take the absolute authority entitled by the Code a step further, especially where the motive behind granting the court such a wide authority is, in the words of *Sewar*¹⁰, "the desire to protect the community by inducting the judge as a guard over justice so as to

¹ The Civil Procedures Act No 24/1988, ss. 36, 43.

² S 3 of the Magistrate Courts Act 15/1952, as amended by the Magistrate Courts Act No 13/2001, provides that the Magistrate court jurisdiction of amount is limited to amounts not exceeding 3000 *Dinars*. In turn, S 30 of the Civil Procedures Act No 24/1988, as amended by the Civil Procedures Act No 14/2001, provides that the Court of First Instance has the general competence over actions exceeding the above amount.

³ See *supra*, p 152 et seq.

⁴ The JCC, s. 164(2).

⁵ *Ibid*, s. 204.

⁶ *Haddad H*, 'The responsibility of the insurer in vehicles' accident insurance', (1979) 4 JBAJ, p 134 (in Arabic); *Saleem E*, op cit p 161.

⁷ The JCC, s. 204.

⁸ See, *Assanhory A*, *the Sources of the Right Under the Islamic Law: a Comparative Study with the Western Jurisprudence*, Part 1 (Cairo: *Dar Unnahdah Alarabiah*, 1967), p 80 (in Arabic); *Morqus S*, op cit p 185.

⁹ The JCC, s. 204.

¹⁰ *Sewar M*, op cit p 117.

provide the individuals with a shelter in the face of the harshness of the freedom of contract rule”.

However, associating the court’s discretionary authority with the compliance to the rules of justice may explain the fact that the court can, in some cases, maintain a term even if it is oppressive¹. This means that the existence of such a restriction has the effect of shifting the qualification to be given to oppressive terms from “void” to “voidable”.

In explaining why the court is given such an open discretionary authority, attention should be paid to the fact that granting the judge such an authority is consistent with the Islamic way of creating legal rules, especially in the early stages of applying Islamic law. At that time, the judge was often the jurist and the legislator simultaneously. This way of intervention, under the pressure of the practical necessities, resembles the main method of creating legal rules under common law as a judge-made law.

However, enabling the judge to rewrite the contract, which is available under the JCC, is foreign to the function of common law courts². Yet, the hostility towards judicial intervention in contracts, as a rule, is not restricted to common law systems. Even in codified systems the rule of freedom of contract is predominant. Therefore, along with cases such as; *force majeure*³, the penalty clause⁴, *Nadratul Maysarah*⁵ and *As-Salam* contract⁶ where the court may intervene against the parties’ will, S 204 is no more than an exception to the freedom of contract rule enshrined in S 199 of the JCC.

Intervention in such cases comes as a natural reaction against the very probable failure of an inflexible law in dealing with practical developments occurring in those arenas⁷. With regard specifically to oppressive terms, judicial intervention is a step in

¹ Haddad H, ‘The responsibility of the insurer in vehicles’ accident insurance’, (1979) 4 JBAJ, p 134 (in Arabic).

² See, Kessler F, op cit p 637.

³ See *supra*, p 158.

⁴ See *supra*, p 165 et seq.

⁵ The court’s authority to grant, in exceptional cases, the debtor in civil contracts extra period of time to fulfil his obligation under the contract provided that there is no serious damage inflicted on the creditor as a result of such a postponement (s. 334(2) of the JCC).

⁶ The court’s authority to amend the contract concluded between a farmer and a seller of his future yields in favour of the former if the contractual terms are so prejudicial to his interests (s. 538(1) of the JCC).

⁷ As such, these cases can be seen as an application of one of the JCC’s general lines, which aims at granting the courts the authority enabling them to overcome the inflexibility of the legislation in some areas, such as the above, (see, The Explanatory Memorandum of the JCC, op cit p 26).

the right direction, and is to be celebrated since it has the effect of alleviating the imbalance between the contracting parties resulting from the inequality of economic power in favour of the consumer¹.

Acknowledging the importance of giving the courts an unlimited discretionary authority does not intend to belittle the anxiety of some commentators who are concerned that this wide authority might be abused, given the axiomatic rule stating that “an absolute authority is an absolute bane”.

Such fears have been taken seriously in the context of French law where serious debate has taken place over giving judges discretionary authority in nullifying unfair terms. The predominant view at the juristic level is that the judge cannot consider the oppressive nature of a term even if he believes it is indeed unfair unless such a term has already been categorised as unfair by the Unfair Terms Commission, designated by the French government for the purpose of scheduling unfair terms in contracts, and is the subject of an applied Regulation². The attitude of the French *Cour de Cassation* (Court of Cassation) was, at the beginning, compatible with that of the jurists, refusing to grant the judge the authority to consider a term not the subject of an applied Regulation. However, the Court retreated in later decisions, allowing judicial intervention even without such applied Regulations³. All this might be a reflection of the situation at the legislative level, which kept silent on the issue until recently when S 9 was added to the Consumer Information Act 1978 subjecting wide categories of terms to the discretionary authority of judges⁴.

The question remains, however, if any of this applies to the situation in Jordan. It seems that there is a place in French law for the above debate, given the absence of a general, express provision allowing the court to have such a wide authority provided by S 204 of the JCC⁵, especially before the recent legislative amendment made to the 1978 Act as mentioned above. Conversely, the existence of such a provision in Jordan law under the latter Section leaves no doubt that there is no room for this debate in

¹ *Al-Rifae'i A*, op cit p 257.

² *Abd Ussalam S*, the Authority of the Court of Cassation over the Interpretation of the Adhesion Contracts, (*Shebin El-coam: Al-Wala' Press*, 1992), p 45 (in Arabic); *Al-Rifae'i A*, op cit pp 241-243, 249.

³ *Al-Rifae'i A*, op cit p 244 et seq.

⁴ *Ibid*, 253 et seq.

⁵ It is quite strange that the law of the state in which the contract of adhesion idea appeared includes no special provisions to deal with adhesion contracts, (see, *Lashob M*, op cit p 173).

Jordan. However, one should not act as if blind towards the legitimate fears that the courts might abuse such an authority, but rather must try to find a solution.

For two reasons, the French approach in dealing with these fears is not comparable to the response which seems to have been taken in Jordan. Firstly, the situation under Jordanian law is rather different from that under French law, given the existence of an express provision allowing for the judge to have this discretionary authority. Secondly, Jordan seems, legally speaking, in desperate need for such an authority even in the absence of such a provision. Thus, arguing in favour of giving the court such an authority is inevitable where it is the only shelter the Jordanian consumer has.

As a solution to the potential abuse of authority given to the court under S 204 of the JCC, it can be recommended that the Court of Cassation be given the authority to supervise the rulings taken by inferior courts on oppressive terms in contracts. The fact that the Court of Cassation is a court of law and not facts shall not prevent it from embarking on this task once designated by the law as a court of law and facts for this purpose, and this will not be the first time that this Court shoulders this duty. To the writer's knowledge, there are two cases constituting precedents in this regard: the high felonies crimes¹ and the crimes committed against the security of the state².

The High Felonies Court was created in 1986 to deal exclusively with serious crimes (murder, abduction, and rape) effectively and rapidly. In order to achieve this goal, it was thought, *inter alia*, that it was necessary to reduce the ways of appeal against the decisions taken by the Court without affecting the rights of the accused persons. As a solution, the Court of Cassation was given the exclusive competence to hear appeals as a court of both law and facts. For crimes committed against the security of the state, it was not possible to appeal against decisions taken by the Security of the State Court prior to 1993. Among other steps adopted to improve human rights in Jordan, the 1989 Parliament took the view that such a situation was no longer acceptable, and that way/ways of appeal before a judicial body must be created. However, the main concern was ensuring that litigation falling within the competence of this Court would be dealt with as quickly as before. The solution resorted to was similar to that adopted by the High Felonies Court Act 1986 giving the Court of Cassation the competence to hear such litigation as a court of facts and

¹ The High Felonies Court Act No 19/1986, s. 13.

² The Security of the State Court Amending Act No 6/1993, s. 10.

law. In both cases, there is no evidence that designating it for these tasks has had any negative impact on the effectiveness and smoothness of litigation, in spite of the considerable number of cases it has dealt with.

3.2. Public enforcement

3.2.1. Does Jordanian law offer pre-emptive intervention?

As demonstrated earlier in this Chapter, the English Regulations designated a number of public bodies headed by the OFT to intervene pre-emptively for the purpose of achieving the protection the consumer needs. The OFT and the majority of the other bodies have been entitled to negotiate with traders and companies on terms which are seemingly unfair; to take undertakings from them; and, in the end, to ask the court for injunctions against the use of such terms. Moreover, and no less importantly, the OFT has been entitled to take over an informational duty aiming at acquainting the public of all sectors, especially consumers, with developments occurring in relation to the struggle against unfair terms in consumer agreements.

Such a general protective measure is not available under Jordanian law. However, a similar measure is to be found within the sphere of insurance contracts where the Insurance Commission (hereafter the IC) is designated as a watchdog body, partly for the purpose of revising insurance contracts. According to S 39 of the Regulation of Insurance Businesses Act No 33/1999, all insurance companies are obliged to submit copies of their standard contracts and related documents and annexes to the IC so as to be checked by the Director General of the Commission (hereafter the DGC) who has the authority, should the public good require, to ask the company to alter the contents of the contract/contracts within the period he specifies, and in case of non-agreement the company can appeal to the Council of the Insurance Commission (hereafter CIC).

Several points may be made concerning this remarkable provision. The good news is that the issue of oppression seems to be at the heart of this wide authority, since it was rightly argued that the main reason behind granting it to the DGC is to ensure that the contract does not include any term which is onerous or which tends to relieve the company of its obligations under the contract.

The bad news is that the said Section specifies no role to be played by the court in considering the oppressive nature of the terms at issue. One would prefer the Section to go further. Not only should the court have the final say on the issue but

also, if the designated court is a low one, appeal against its decision before the higher courts (i.e. the Court of Appeal and/or the Court of Cassation) should be allowed. The Section has frustrated this ambition, although the authority granted to the DGC and CIC seems to be fairly wide, given that the only proviso on these authorities is considerations of the public good, which is not explained by the Section.

Consequently, the only judicial revision available to persons who have an interest in revoking decisions made by the DGC or CIC, such as an insurance company; the JCA, if it is acknowledged the right to litigate oppressive contracts on behalf of consumers; and a particular consumer after entering the contract, is through the administrative court avenue pursuant to the High Court of Justice Act No 12/1992¹.

As far as consumer protection is concerned, such an avenue is not straightforward. This is because it is not adapted to give relief to weak persons against unfairness in contracts and, meanwhile, impractical. The first problem appears where the opponent of the impugned decision is the consumer himself. On the one hand, the consumer will not be able to challenge this decision before entering the contract with the company due to the absence of “sufficient interest”, which is a condition for accepting any legal action. As such and since the action against an administrative decision shall, so as to be accepted, be made before the end of the period of sixty days from the date on which the impugned decision has been published in the Gazette², it can hardly be envisaged that any litigation raised by consumers will satisfy this stipulation. This is because the vast majority of contracts concluded between consumers and insurance companies will be concluded after the expiration of this period. Even in those rare cases in which the contract is made within this period, it is not imagined at all that the insured (the consumer) will be aware, at the stage of conclusion, of the harshness of the contract permitted by the DGC or CIC. Neither will he be keen to pursue this contract had he been aware of such harshness, since he does not, normally, pay attention to these issues unless he finds himself in a real trouble, and this is very unusual, if not impossible, to happen before the expiration of this very short period. On the other hand, the consumer who is a weak party is not likely to be in a situation to bear the litigation expenses before the High Court of Justice. This court is the ultimate court in the administrative judiciary hierarchy and

¹ s. 9(6), (9).

² The High Court of Justice Act No 12/1992, s. 12(a).

equal to the Court of Cassation in the civil judiciary limb¹. Accordingly, the attendance of an attorney on behalf of the consumer is, unlike the situation before the magistrate's court², obligatory³. Moreover, the judicial fees will be much higher than those required for inferior courts⁴. For these reasons, the litigation before the High Court of Justice does not suit the position of the consumer as a weak party.

As mentioned above, resorting to this way of appeal is not practical too. This is because it is not of the duty of the High Court of Justice to revise the contract when revoking the decision taken by either the DGC or the CIC to establish what is fair. Rather, it will return the whole issue to the maker of the revoked decision (either the DGC or the CIC), who will consider the contract from the beginning and take another decision. The new decision may not meet the consent of the consumer or the insurance company who/which may thereupon sue it before the Court once again. Such a time-consuming process is certainly unworkable and will lead to inconvenience to consumers and businesses across the insurance industry.

In conclusion, the High Court of Justice avenue is suitable to be used in relation to issues where this Court can take a decisive judgement which ends the dispute in question once and for all. This is the case in relation to administrative decisions taken in the fields of employment and retirement, but not when the judgment is just the beginning of another process of consideration carrying the possibility of a second action, if not more.

A similar criticism was directed to the court's role in the context of the English Regulations which is restricted to knocking out an unfair term without replacing it. However, the English legislator may find an excuse in the difficulties which may be created if he allows the court to intervene to replace the unfair term. Among these is the problem of the precedents system the law follows, limiting the ability of the court

¹ Ibid, 3(d).

² The Magistrate Courts Act No 15/1952, s. 13(1).

³ The High Court of Justice Act No 12/1992, s. 13(a).

⁴ See, para 24 of the Courts Fees Schedule 1997 annexed to the Courts Fees Regulations No 4/1952 giving effect to the Civil Courts Constructing Act No 26/1952. The Schedule gives the Head of the High Court of Justice the authority to allocate the fees in relation to actions brought before the Court. In any rate, his allocation shall not be less than 30 *Dinars* (about £25) or more than 300 *Dinars* (about £ 250). This amount is so much, compared with the fees allocated for actions brought before other courts.

to declare the unfairness of a term if another court higher than, or equal to, it has already established a guidance on the qualifications of a fair term¹.

Ultimately, the absence of judicial revision over the public enforcement, which is unfamiliar to Jordanian law, must not belittle the importance of this novel experience in the Jordanian legal environment, even if it is restricted to insurance contracts.

The Jordanian model of public enforcement is substantially different from the English model. While the latter is a preventive control technique, as required by Art 7 of the Directive, the former belongs to the so called “ultra-preventative control” or “pre-validation”. As mentioned earlier in this Chapter, the pre-validation process takes place before releasing the contract to the public through requiring businesses to submit their draft contracts to be approved by a court or administrative body.

A comparison between Jordanian and English preventive systems shows that the latter is more effective because it covers all contracts to which the consumer is a party and is not restricted to insurance contracts. Therefore, it may be argued that it seems wise to extend the ambit of application of the Jordanian system of intervention to cover all consumer contracts. However, and on the assumption that the legislator will take such a step, a question mark remains over the effectiveness of such an extension. The Jordanian pre-emptive model is problematic not only because it is restricted to insurance contracts but also, and more importantly, because it is not easy to employ it beyond specific types of contracts such as insurance and bank contracts². As seen earlier in this Chapter³, the pre-validation system is fraught with difficulties and, therefore, is not an ideal technique of enforcement to be applied in a wide field such as consumer contracts.

Another disadvantage of the Jordanian preventive system, as already mentioned, is that it, unlike the English model which merges judicial and administrative tools, depends only on the approval of an administrative body, leaving on room for effective judicial revision.

Nonetheless, the Jordanian system applied to insurance contracts seems to be more developed than that of the English Regulations in one important point which is

¹ DTI, European Commission Review of Directive 93/13/EEC on Unfair Terms in Consumer Contracts, A Consultation Paper, July 2000, p 23.

² Calais-Auloy E (Chairman), Clearing of the Market: the Mechanism for Controlling Unfair Terms (Article 7), a workshop held in Brussels Conference, ‘Unfair Terms’ Directive- Five Years on: Evaluation and Future Perspective, 1-3/7/1999, p 175.

³ See *supra*, p 221 et seq.

that it provides for criminal sanctions against the use of a contract not approved by the IC¹. Despite the disadvantages of the criminal technique, and particularly in the area of consumer contracts already referred to², being a criminal offence will, as far as Jordan is concerned, allow consumers to seek more easily compensation for damage a term causes to them. According to S 332 of the Criminal Procedures Act No 9/1961 the decision taken by a criminal court has the force of *res judicata* before the civil courts as for the occurrence of the crime and the personality of the criminal. This entails that the criminal court's decision should prevail in relation to these matters. Therefore, the act causing damage, which is in the meantime a crime, need not be proved before the civil court because it has already been proved before the criminal court. The consumer needs only to prove that he incurred damage as a result of entering into a contract not approved by the IC. This is along with the ability to claim compensation before the High Court of Justice against the IC itself once the Court takes the decree nullifying the decision taken by the IC³. Additionally, penalising traders for using contracts not approved by the IC has the benefit of allowing the courts to consider this issue *ex officio*, since the courts are obliged under the 1961 Act to notify the Public Prosecutor with regard to any crime with which they become acquainted⁴.

On the other hand, it is not easy to find out how the English courts would be able to employ the provision of the Regulations, which restrict the remedy of the consumer to the fact "that the unfair term shall not be enforceable against him", to serve the consumer's claim of compensation where he suffers a direct loss as a result of the use of that term. It is inevitable, therefore, that the court would resort to provisions outside the Regulations, in the contract itself, other statutes or torts, to uphold the consumer's claim for compensation. The fact that the existing provisions of the Regulations fall short in covering the consumer's right to compensation has prompted the European Commission to initiate discussion over a provision to the effect of curing this defect⁵.

¹ Regulation of Insurance Businesses Act No 33/1999, s. 89.

² See *supra*, p 220 et seq.

³ The High Court of Justice Act No 12/1992, s. 9(b).

⁴ s. 25.

⁵ See, DTI, European Commission Review of Directive 93/13/EEC on Unfair Terms in Consumer Contracts, A Consultation Paper, July 2000, pp 4, 19. See, also, Calais-Auloy E (Chairman), Clearing of the Market: the Mechanism for Controlling Unfair Terms (Article 7), a workshop held in Brussels Conference, 'Unfair Terms' Directive- Five Years on: Evaluation and Future Perspective, 1-3/7/1999, p 181.

Despite acknowledging these few advantages of the Jordanian system, there is still no clear evidence that it has been successful in practice. Meanwhile, it is not clear how the Jordanian courts have dealt with unfair terms in the contracts which passed approval. On the one hand, court records show that unfair terms are still in use in spite of the existence of the pre-validation system. This indicates the failure of the system, at least in its application, despite the very limited field of application of insurance contracts. On the other hand, it seems that the courts have not taken the pre-validation test seriously, in the sense that a contract which passes this test is not, according to the courts, immune from the test of oppression¹. Of course, terms which are referred to in the latter conclusion are those blacklisted under S 924 of the JCC², because other terms have been rarely, if not never, pursued, the issue which has already been mentioned.

From the conclusion that the Jordanian model of preventive intervention is far from ideal, at least outside the realm of insurance contracts, it follows that it is necessary to seek an alternative. This should avoid all of the weaknesses for which both Jordanian and English systems have been criticized while retaining their advantages where possible. Having said this, any proposed regime should not follow the current Jordanian model based on a pre-validation technique. This seems to be too problematic to be deployed without restriction to deal with unfairness in the area of consumer contracts, which includes endless types of contracts. Therefore, the proposed regime should be pre-emptive and very close to the English model employing administrative and judicial mechanisms in the war on unfair terms. This model has the advantage of preventing grossly unfair terms and saving time as well as the expenses of litigation, given that the vast majority of cases are dealt with pre-emptively through negotiation and undertakings without going to the court. At the same time, the Jordanian criminalisation of the use of unapproved contracts can serve in fighting unfair terms, even though the system proposed by the writer is not based on a pre-validation technique. Criminalisation can be employed reasonably as a punitive measure only in the case of the usage of an unfair term already subjected to an undertaking or injunction, or where the usage of a term is still under negotiation or consideration. This will, to some extent, make it easier for the consumer to seek a civil remedy should he suffer a loss from the use of an unfair term.

¹ On recent cases, see CCRs: 280/2002 ACC; 1705/2002 ACC; 409/2003 ACC; 2621/2003 ACC.

² On these terms, see p 189 et seq.

3.2.2. The absence of public action

As will be seen later in this Chapter, the public action, as part of public enforcement, can be expected to have a significant positive effect on consumer protection. However, there is no express provision within Jordanian law granting a specific body the right to bring such action. Consequently, the question must be raised of the possibility of representative action at the level of consumer protection or adherent protection. This is the subject of the following three sub-sections.

3.2.2.1. JCA and the question of interest

It is first necessary here to examine the position of the JCA, as one of the oldest and most active associations in the field of consumer protection in the Arabic world¹. If the right to bring public civil actions on behalf of consumers against unfair terms is given to any body it is highly likely to be the JCA. This is supported by the fact that consumers' associations in England and France have played an important role in prosecuting unfair terms before the courts on behalf of consumers. Moreover, the idea of representative civil actions is not new to the Jordanian legal environment. For example, the Labourers' Association has had the right under successive Labour Acts² to represent labourers before the courts³.

The only impediment that might prevent the JCA from having such a representative power is the lack of personal, legal interest in defending consumers. S 3(1) of the Civil Procedures Act No 24/1988 stipulates that any claim or plea before the court must be raised by the person who has a direct, legal interest in raising it. Such an interest may be supposed if the law provides that a specific person has it.

In the light of this Section, it could be rightly argued that Jordanian law does not uphold the JCA's right to speak on behalf of consumers before the courts. At the legislative level, there is no express provision allowing the JCA to bring a public action on behalf of consumers. Thus, whereas the JCA cannot claim that it has a

¹ See, *Baroudi A*, 'Consumer protection: concepts, the current situation and the future directions' <http://www.mafhoum.com/syr/articles/baroudi/baroudi.htm> (in Arabic); A Report published by Arab Organization for Agricultural Development (AOAD) - the League of Arab State, <http://www.aoad.org/que/genr.asp?id=23> (in Arabic).

² See, for example, Ss 1 and 99 of the Labour Act No 8/1996.

³ An example of collective actions in the context of labour disputes could be found in the action brought before the Industrial Court (renamed as the Labour Court) No 0/1981 published in 1981 at page 1202 of the Gazette.

personal interest in representing consumers, such an interest cannot also be presumed because there is no express provision in the law conferring on it the authority to represent consumers.

This makes the reference to the English and French experience somewhat deceptive, because granting consumers' associations such an authority in those countries depends on explicit legislative permission; otherwise such an extraordinary authority might have no place in the legal systems there. This is clear from the constant debate occurring at the French judicial and juristic levels over empowering consumers' associations with such an authority. This only came to an end with the enacting of the so-called Royer Act 1973, which referred to the right of the Consumers' Association to litigate on behalf of consumers¹. Even then, the Act's reference to a full right of litigation was questioned afterwards by the courts, which took the view that such a right is restricted to cases where the action committed by the trader constitutes a criminal transgression².

The situation in England used to be rather intolerant towards this type of actions. Only very recently has the legislator acknowledged the public action as a legitimate way of pursuing terms before the courts, and this was only under the pressure of the 1993 Directive on Unfair Terms in Consumer Contracts. Moreover, the English legislator waited five years before allowing the Consumers' Association to play the role supposed to be at the heart of its duty in protecting consumers, which is to litigate on behalf of them before the courts. Once again, this was under the threat of continental interference, when the Association brought an action before the EJC challenging the Government's decision restricting the bodies allowed to pursue unfair terms to the OFT, and requiring it to apply Art 7 of the Directive accurately by allowing other bodies interested in protecting consumers, including the Consumers' Association, to have such a right³.

The same can be said of the right of the Labourers' Association in Jordan to represent the interests of labourers before the courts, which came by virtue of an explicit legislative provision.

To sum up, the experience of the three countries (France, England and Jordan) in allowing for a legal person to represent the public interest of individuals of specific

¹ See, *Al-Rifae'i A*, op cit p 259 et seq.

² This happened in 1985 when the French Court of Cassation took the above line, (see *Al-Rifae'i A*, op cit p 260).

³ See *supra*, p 205.

types, such as consumers in France and England and labourers in Jordan, can be applied to Jordan as for consumer protection or, more generally, adherent protection; but at present that is not possible. This is because the former cases rely on an express legislative provision which to date is not available in the latter case.

The judicial application of S 3(1), mentioned above, is in line with this conclusion. Whilst the Court of Cassation has not had the opportunity to apply this Section to a claim made by the JCA, the High Court of Justice has. In an administrative dispute between the JCA and the Ministry of Health, the JCA sought to quash the decision made by the Ministry allowing for a shipment of wheat to be consumed by the public in spite of a suspicion of rot. The High Court of Justice found that the JCA's action was baseless because it was brought by a person who had no legal right to do so. The Court went on to declare that where there is no provision in the Associations and Social Organisations Act No 33/1996 entitling the JCA to bring a collective action on behalf of consumers, the JCA's reliance on the citizenship capacity would not help the Association in its claim¹. The Court explained that the JCA's action is an action of *Hisbah* and the Court's rulings have repeatedly declared that such an action is not accepted before it².

This brings us to the questions of what the action of *Hisbah* is and whether the Jordanian consumer or the JCA can benefit from it in fighting unfair terms. These questions are answered in the next sub-section.

3.2.2.2. The *Hisbah* system

The Islamic *Hisbah* system is based on the general principle of enjoining good and forbidding evil, especially the Qura'nic recommendation appearing in Verse 104 of *Surat Al 'Imran* which states that:

³(ولتكن منكم أمة يدعون إلى الخير ويأمرون بالمعروف وينهون عن المنكر وأولئك هم المفلحون) This Verse can be interpreted as follows "Let there arise out of you a band of people inviting to all that is good, enjoining what is right, and forbidding what is wrong..."⁴.

The *Hisbah* system itself includes two systems: the first is the action of *Hisbah*, which is a public action that can be raised by any person for the sake of public good,

¹ ACR 551/1999 JBAJ 2000 p 3005.

² See, for example, ACRs: 38/1980 JBAJ 1981, p 164; 314/ 1994 JBAJ 1995, p 1149; 551/1999 JBAJ 2000, p 3005; 348/2001 JBAJ 2002, p 1898; 399/2001 JBAJ 2002, p 1908.

³ The Holy Qura'n, Chapter 4, *Surat Al 'Imran*, Verse 104.

⁴ See, Ali A, *the Meaning of the Holy Qur'an*, 10th Ed, (Beltsville: Amanah Publications, 1999), p 154.

while the second is the *Mohtasib* Institution. Both seem relevant to the public action sought in order to enhance consumer protection. This is obvious from the fact that both systems are:

“Organized around safeguarding the limits of Allah [specific acts not to be committed such as drinking alcohol, sexual relationship outside marriage and theft] from being violated, protecting the honour of the people, and ensuring public safety. It also includes monitoring the marketplace, craftsmanship, and manufacturing concerns to make sure that the laws of Islam are upheld by these entities. It must also ensure that quality standards are maintained”.¹

An action of *Hisbah* is, as already mentioned, a type of public action raised by any person who has no direct, personal benefit in raising it. From the ruling of the High Court of Justice, mentioned in the previous section, it seems that there is no place for such an action to be activated before the Regular Section of the Judiciary². This is because of the lack of a specific provision in the law allowing the courts of this Section to hear such an action. The only field in which this action is active is the Religious Section of the Judiciary and in particular the *Shari'a* Courts³ with regard to matters of marriage and divorce. Pursuant to S 43 of the Personal States Act No 61/1976 (a law concerned with matters of marriage, divorce and succession), it is not permissible for a man and a woman whose marriage is incorrect or no longer correct to remain living together as a man and wife (i.e. as a cohabiting couple), and any person can raise an action against this situation in the name of the *Shari'a's* Public Right⁴.

As for the *Mohtasib* system, one would hope that the consumer opportunity in protection with it is not like that with the *Hisbah* action which, as shown above,

¹ *Al-Odah S*, ‘The hisbah’

‘http://www.islamtoday.com/discover_islam.cfm?cat_id=6&sub_cat_id=53>. For further reading on the *Hisbah* system see, Islamic-World.net, *Hisbah* Institution,

‘<http://islamicworld.net/economics/hisbah.htm>>; Moslem American Society, Islamic Practices and Institutions: The Mosque, the Madrasah, and the Waqf, ‘<http://www.masnet.org/history.asp?id=319>>; Maher M, the *Muhtasib* and the Attorney-General: the System of “*Hisbah*” in Islam, ‘<http://www.islamic-council.org/lib/crime/all-40-55/40-55.html>>

² According to S 99 of the Jordanian Constitution 1952, the Courts in Jordan are of three types: the Regular Courts, the Religious Courts and the Special Courts. The Regular Courts are: the Civil Courts and the Administrative Court (the High Court of Justice).

³ The Religious Section is divided according to S 104 of the Constitution to the *Shari'a* Courts and the Councils of other religious communities (the Christians).

⁴ Applications of such an action are to be found in: Sh.CAs: 36/1951 ACC; 14452/1965 ACC; 17728/1973 ACC; 21550/1980; 36865/1994 ACC.

carries no benefit to the JCA or any body else, as far as consumer protection is concerned, since the action is not in operation in this field. The *Mohtasib* Institution was founded in the seventh century AC when the second *Khalifah*¹ of Muslims, *Omar ibno Al-Khattab* (RAA), appointed a woman called *Al-Shifa' Al-Adawiyah* with the task of supervising the markets of Medina (the first capital of the Islamic state) so as to prohibit unjust trading and to punish the traders who deceive the public, the task which had grown and widened during the Abbasid² Era³. The task of the *Mohtasib* administratively resembles that of the OFT when fighting unfair contract terms, and this explains why the *Mohtasib*, where incompetent to challenge an issue, brings a *Hisbah* action before the court like any other person⁴. However, this organisation is now part of history and its duties have been inherited by many organisations or agencies such as the public Prosecutor and the Police⁵. The *Mohtasib's* general capacity to bring actions on behalf of society is at present the duty of the Public Prosecutor⁶, along with other bodies or associations which have such capacity in particular fields according to particular provisions or statutes⁷. Accordingly, the Public Prosecutor will be the competent body to sue, as part of his general duty of prosecuting against persons committing crimes, companies which contravene S 89 of Regulation of Insurance Businesses Act No 33/1999, which was referred to earlier in this Chapter, by proposing unproved contracts to the public. However, and more importantly, it is not envisaged that the Public Prosecutor will intervene beyond that to pursue the use of unfair terms outside this Section, because any dispute over such a use is a mere civil dispute.

Overall, it can be said that there is no room to activate the action of *Hisbah* for the purposes of protecting consumers against oppressive contracts. Firstly, such an action seems unacceptable before the Regular Courts (Civil and Administrative)

¹ "The vicegerency of man on earth or succession to the Prophet [PBUH], transliterated into English as the Caliphate" (see, Islamic Council, Universal Islamic Declaration of Human Rights, London, 1981, <http://www.alhewar.com/ISLAMDECL.html>>).

² The Abbasid era attributed to the Abbasid state which governed, from Baghdad, the whole Islamic world except Andalusia and extended between 750-1258 AC.

³ See, *Ar-Rawi* K, 'The possibility that women become judges under the law and the *Shari'a*' http://www.ust.edu/journal/jss/jss5_ar.php> (in Arabic).

⁴ See, the Ministry of Justice, the Courts and the Legal Regulations in the Saudi Arabia, a Conference, Riyadh, <http://www.moj.gov.sa/layout/NewsDetails.asp?ArticleID=331>> (in Arabic).

⁵ See, *Al-Sharnabasi* R, op cit p 77.

⁶ The Criminal Procedures Act No 9/1961, s. 2.

⁷ Such as: the Parliament with regard to crimes committed by MPs or Ministers (ss. 56 and 86 of the Constitution); the courts with regard to crimes committed during the hearing of cases (s. 142 of The Criminal Procedures Act No 9/1961); and Labourer's Association (see p 233).

which are competent to hear complaints concerning the fairness of terms. Secondly, the *Mohtasib* Institution, which formerly had the general task of bringing actions in the name of religion and the public, no longer exists and its main successor, the Public Prosecutor, has not been empowered to represent the public in relation to non-criminal acts.

3.2.2.3. The issue in summary

In the light of the above, it is clear that the public action has no place in Jordanian law protecting consumers. In the first place, there is no specific provision in the law to the effect of allowing a legal person, whether the State (i.e. one of its arms such as the Public Prosecutor) or the JCA, to exercise the power to litigate unfair terms in contracts. The courts competent to hear disputes of this sort seem not to be in the mood to accept such disputes if brought by persons who have no direct, personal interest in raising them.

In the second place, the Jordanian consumer definitely cannot benefit from the Islamic system of *Hisbah*. Firstly, the *Hisbah* action has not been allowed beyond the family law at most, and in particular, the issues of marriage and divorce, which are still governed totally by the *Shari'a* law. This is without hindrance to some invitations here and there in favour of the revival of such an action in the legal practical life¹. From the attitude taken by the High Court of Justice, the Regular Courts do not uphold attempts to widen the area in which this type of action is active. This attitude arises from the fact that there is no provision serving to allow such action with regard to administrative disputes that the Court is competent to hear. It is expected that the Court of Cassation would take the same attitude had a question concerning the allowance of the *Hisbah* action in the area of consumer protection raised before it. This is because the High Court of Justice seems, legally speaking, to be on the right side. The *Shari'a* Courts' acceptance of the *Hisbah* action as to marriage and divorce issues is not a mere discretion of their own selves, but rather it comes as a result of an express provision (S 43 of the 1976 Act, already indicated). Verily, there is no similar provision with regard to civil (contractual disputes outside personal states) or administrative disputes.

¹ See, *Al-Tajaskafi* M, 'Techniques of consumer protection in Islam',
'<http://www.taghrib.org/arabic/nashat/elmia/markaz/nashatat/elmia/matboat/resalataltaghrib/34-35/13.htm>> (in Arabic).

Furthermore, the stand taken by the High Court of Justice is in conformity with those of at least two of the famous four schools of Islamic *Fiqh* (Jurisprudence) who are expected to object to the use of the *Hisbah* action in administrative and civil disputes, as described above, though on different grounds. The *Hanbaliyah* School prohibits the use of the *Hisbah* action before non-*Shari'a* Courts (i.e. those do not apply the Islamic law or apply it only in part). Hence, the civil and administrative courts, such as the Court of Cassation and the High Court of Justice, are prohibited from hearing such an action. The *Hanafiyyah* School restricts this action to the so-called Rights of Allah or in the Qura'nic expression "the limits of Allah"¹. As has been made clear earlier,² disputes over unfair contract terms are not among the limits of Allah.

4. The effectiveness of public and private enforcement compared

It is clear from the foregoing sections that Jordanian law depends on private enforcement in challenging unfair terms in contracts. At the same time, there is little room for public enforcement in relation to insurance contracts. In contrast, the main role of fighting unfair terms in England is given to public bodies. Nevertheless, a person can pursue an unfair term individually should this way of litigation suit him more. Jordanian law thus represents a private enforcement system, while the English Regulations represent a public enforcement system.

When weighing the advantages and disadvantages of both systems, it is not difficult to declare that public enforcement is entirely more advantageous than private enforcement.

At the beginning, it can be argued that private enforcement has some advantages over public enforcement. The most important of these are firstly that public enforcement may experience failure due, for example, to lack of resources. Private enforcement can overcome this. Secondly, since it is individuals who have suffered losses, they have sufficient personal motivation to enforce the law to redress such losses, which public bodies do not have. Finally, the fact that individuals have been personally harmed means that they have more knowledge about the harmful action

¹ See, *Al-Ghonaimi A*, 'The roots of the *Hisbah* action' <http://almaqdes.net/r?i=1510&c=3047&PHPSESSID=3b18304e6b592aca4a97f2504c82c299> (in Arabic).

² See *supra*, p 236.

and the circumstances surrounding it than public bodies. This will reduce the costs of litigation in individual enforcement.¹

However, the above points could be beneficial if the suggestion is to choose between one of the above types of enforcements. The writer does not call for this. Nor does any other commentator do so, as far as the writer is aware. As indicated before, private enforcement is a constitutional matter and concerns human rights. Therefore, it should be clear that what is considered in this section is the necessity to deploy public enforcement besides private enforcement.

The necessity of public enforcement stems from the difficulties that private enforcement is fraught with. The individual consumer may find himself unable to take legal action against the unfair term before the court. Among the main reasons for this inability are financial obstacles, especially if the subject of the dispute is token, which is the case in the majority of consumer transactions. Even in larger transactions, consumers seem to be afraid to take the risk of engaging in disputes with huge companies which are in stronger economic position. In other words, the fact that the expected cost in most cases exceeds the expected benefit is a barrier to individual litigation.

Issues such as poverty, level of legal education and education generally are relevant here. Some commentators² have argued that consumer protection law is primarily for the middle class. Whilst middle class people worry about their purchases and complain if anything goes wrong in this respect, poorer people worry, in the first place, about being able to purchase at all. Middle class people understand the law and can threaten to use it. In contrast, poorer people are doubtful about the relevancy of the law to their needs. Put simply, the cost of litigation has a larger effect on the consumer's decision to pursue unfair terms if he is poor³.

It has also been said that the success of private litigation is linked with the level of legal education the consumer has. The consumer's ignorance of law, especially his rights provided by the law and how to pursue them, is a principal obstacle to the effectiveness of private enforcement⁴.

¹ Scott C and J Black, op cit p 513.

² Howells G and S Weatherill, op cit p 40. See, also, Scott C and J Black, op cit p 515.

³ Such an argument is better to be taken with some reservation as to the situation in England due to the legal aid scheme it applies, which has no counterpart in Jordan.

⁴ Cartwright P, op cit p 17; Scott C and J Black, op cit p 515.

The problem, however, is not restricted to the consumer's refusal, or inability, to litigate, but also the limited impact of his successful litigation. If a decision is taken by the court in favour of the consumer, it will benefit only that consumer and will not extend to other consumers contracting with the trader under the same or another unfair contract.

All this may not only render consumers unable to defend their rights, but also encourages traders to deal with them unfairly. The trader who knows that only a few of his customers will be able, or will have the courage, to complain will take the risk of including unfair terms in his contracts so long as he is able to bear the loss resulting from engaging in disputes with those few consumers who do complain.

Such problems were noted by the ECJ in *Oceano Grupo Editorial SA v Rocio Murciano Quintero*,¹ where the Court found that:

“The aim of Article 6 of the Directive which requires Member States to lay down that unfair terms are not binding on the consumer, would not be achieved if the consumer were himself obliged to raise the unfair nature of such terms, in disputes where the amounts involved are often limited, the lawyers' fees may be higher than the amount at stake, which may deter the consumer from contesting the application of an unfair term. While it is the case that, in a number of Member States, procedural rules enable individuals to defend themselves in such proceedings there is a real risk that the consumer, particularly because of ignorance of the law, will not challenge the term pleaded against him on the ground that it is unfair.”²

And, the bulletins published by the OFT showed how these obstacles have worked practically to render individual litigation more or less ineffective. The OFT has pointed out that after more than twenty years of operation, many terms which would be automatically ineffective under UCTA are still in use³, and terms which cannot have effect, such as those used to intimidate consumers into not cancelling the contract when they can do so without incurring liability, could be used to mislead or intimidate the consumer⁴. Of course, this is due, among other reasons, to the level at which the litigation has been exercised.

¹ (C-240/98) [2000] ECR I-4941.

² Ibid, para 26.

³ See, OFT, Bulletins: Issue No 2, Sep 1996, p 5, paras 1.1,1.2; Issue No 3, March 1997, p 8, para 1.2.

⁴ OFT, Bulletins: Issue No 3, March 1997, pp 12,13, para 4.4; Issue No 4, Dec 1997, p 25.

A more adverse impact could be noticed in Jordan, where the absence of litigation could largely be attributed to the non-deployment of public enforcement. As already indicated in this Thesis, Jordanian court reports show a lack of litigation against unfair terms except in connection to insurance contracts and particularly those terms specified in S 924 of the JCC as discussed in the previous Chapter. Several factors could have played a role in this, such as the ambiguity surrounding the scope of S 204 of the JCC and the test of fairness it applies, which might constitute a source of uncertainty preventing consumers from pursuing unfair terms before the courts, as has been clearly demonstrated in the previous two Chapters. However, it is still likely that the major reason for this result is the absence of public enforcement.

To explain this, it might be right to suggest that had Jordanian law recognised the public enforcement system there would be no problem of uncertainty. The public body would be a capable body with sufficient resources and personnel, and would take the initiative of pursuing different types of unfair terms without fearing the results of litigation and its cost. Accordingly, the impediment of uncertainty will gradually diminish because the courts would be forced to make decisions on controversial points of law. Subsequently, even for private litigation might proceed on a clearer basis.

At the general level, public enforcement could overcome the problems associated with private enforcement as mentioned above. The effect of challenging an unfair term in a particular contract would extend to other contracts, and difficulties relating to the cost of litigation, the time required, lack of information and skills of litigation, and uncertainty about the results of litigation would not constitute impediments preventing public bodies from litigation as they do at the level of private enforcement. Furthermore, public bodies would play an important role in educating consumers and making them aware of their rights. This is clear, for example, from the fact that a significant part of the OFT's role under the Regulations is dedicated to this issue.

Not surprisingly, the arming of the Regulations with a public system of enforcement has been welcomed. In the *Director* case, Lord Steyn noted the significance of the system of pre-emptive challenge, finding that it "is a more effective way of preventing the continuing use of unfair terms and changing

contracting practice than *ex casu action*”¹. Lord Steyn’s view accords with other comments suggesting that the public enforcement brought by the Regulations “cannot be doubted”² and “is a much more effective way of preventing the continuing use of unfair terms”³.

All of the above indicates that a public enforcement system is required for the protection of consumers against unfair terms. The vulnerability of consumers (i.e. that the consumer is poor, insufficiently educated, very young, or old) increases this need. Therefore, it is strange that Jordanian law does not deploy this system of enforcement while English law does, given the gap of development between the two countries. The Figure below explains this better in showing the following on the vulnerability of Jordanian consumers:

Firstly, there are many indicators on the poverty of Jordanian consumers, including the following:

- Around one-third of the Jordanian population are refugees. Refuge is always a source of poverty to both of the refugees themselves and the host country.
- The average household size and youth rate are to some extent high. So is the unemployment rate. This would increase the dependency rate which will be borne by the family itself and partially by the government. Jordanian adults have to take care of more people compared with their equivalents in other countries such as in the UK where the fertility rate in 2004 was only 1.77 children per woman⁴.
- The above facts along with other reasons, lead the poverty rate to be relatively high when compared with developed countries. More than one tenth of the Jordanian population live on less than one US Dollar per day.

Secondly, more than 65% of the Jordanian population have low levels of education. About 10% are illiterate and 55% do not reach the secondary stage of education. The issue of education is very relevant to consumer protection. Having regard to the above discussion, it can be supposed that the more knowledge consumers have, more

¹ [2001] UKHL 52, para 33.

² Macdonald E, ‘Unifying unfair terms legislation’, (2004) 67 MLR, p 91.

³ Bright S, op cit p 333. Similar comment has been made by Collins (Collins H, ‘Good faith in European contract law’, (1994) 14 OJLS, p 243).

⁴ National Statistics, ‘<http://www.statistics.gov.uk/cci/nugget.asp?id=951>>

perceptive they will be towards their rights, and the easier it will be to make them aware of their rights.

Thirdly, the Figure gives an answer to the question on whether or not it would be a government priority to spend the nation’s money on an enforcement system for unfair terms in consumer contracts given the level of poverty. The vulnerability of the Jordanian consumer as appears bellow argues strongly in favour such a system. Consumer protection is worthy of government recourses, since this is in the interests of the public good.

Indicator		Year
Population	5,350,000	2004
The Palestinian refugees in Jordan	1,780,701	2004
Average household size	5.4 persons	2004
Unemployment rate	14.4%	2006
Poverty rate (according to the international poverty line: \$ 1 per capita per day)	11.7%	2000
Educational status:		
-Illiteracy rate	10.3%	2004
-Less than secondary education	55.3%	
Youth: Population under the age of 15	37.1%	2004

Fig.3. Some indicators on the status of the Jordanian consumers: Poverty & Education.¹

5. Looking forward: do we need a special court or tribunal to resolve consumers’ disputes?

There is no doubt that consumers’ disputes do have a special nature in terms of the inequality between the positions of the consumer and the trader who are the parties to a contract. This fact may reflect on the situation afterwards had the matter gone to the court. So, the weaker position of consumers entails that a special court or

¹ The resources of this Figure are: The United Nations Relief and Works Agency for Palestine Refugees (UNRWA), ‘<http://www.un.org/unrwa/refugees/camp-profiles.html>>; the Jordanian Department of Statistics (DOS), ‘http://www.dos.gov.jo/dos_home/dos_home_a/main/index.htm’; and the World Bank, ‘<http://web.worldbank.org>> (in Arabic).

tribunal should be put in place so as to facilitate the resolution of disputes over unfair contract terms. At the level of public enforcement, however, it appears that there is less need for such a court or tribunal because the pursuer of the unfair terms is not the consumer himself but an able body that can easily undertake such a task.

English law is more advanced and thus more qualified to take such a step. However, it has not tried to give the task of resolving consumers' disputes to a special court, in spite of invitations to do this made by some writers with regard to other areas of consumer protection such as treating criminal violations of consumer law¹ and product liability². Perhaps the English technique of protecting consumers against unfair terms suggests that there is no need for such a court given the existence of an effective pre-emptive technique depending on public action and the role of the OFT in taking undertakings which might achieve the same end as that sought by such a special court.

The situation in Jordan is totally different, in that there is no recognition as yet of the severity of the problems facing consumers in relation to unfair contracts. As mentioned earlier in this Thesis, Jordanian law does not discriminate between consumer and non-consumer contracts at least as far as unfair terms are concerned. Therefore, to suggest such a special court or tribunal is at present unrealistic even though it might be needed. However, if Jordan is going to adopt a special act or provisions to protect consumers' interests in the field of unfair terms, it will be possible to consider the necessity of a special court to deal with consumers' disputes more easily and effectively. The Jordanian experience in other fields in which one party to the contract is substantially weaker than the other would then be an encouraging precedent for adopting a special court or tribunal. Experience in the labour field represents an ideal model to be followed. After setting many provisions for the sake of protecting the labourer and prohibiting any term in a contract contravening the Labour Act unless it is to his benefit³, the Act has gone beyond normal litigation by entitling special tribunals to hear collective labour disputes occurring between a group of labourers or the Labourers' Association on the one hand and the employer or the Employers' Association on the other hand⁴. The disputes may

¹ Scott C and J Black, *op cit* p 520.

² Willett C, M Morgan-Taylor and A Naidoo, 'The Sale and Supply of Goods to Consumers Regulations', (2004) JBL, p 118.

³ The Labour Act No 8/1996, s. 4.

⁴ *Ibid*, s. 2.

relate to the application of a collective contract, its interpretation, or the conditions of the work¹. If a collective dispute occurs, it will be the task of the Reconciliation Tribunal, consisting of equal numbers of members representing the labourers and the employers, nominated by the Labour Minister, to settle the dispute within 21 days². If the Reconciliation Tribunal fails to settle the dispute during this period, it will be raised to the Labour Court, consisting of three judges to resolve the dispute within thirty days, and its decision is then irrevocable before any court whether civil or administrative³. In doing its job, the Labour Court is free to follow suitable procedures to resolve the dispute without being bound to apply the civil procedures provided by the law, except those special provisions provided by the Labour Act itself regulating the process of resolving disputes of this sort⁴.

Individual disputes over wages are heard by another special tribunal, which is the Authority of Wages. The Authority consists of persons who have experience in wages (i.e. who are not necessarily regular judges) as nominated by the Ministers Council. Like the Labour Court, the Authority is not, in resolving disputes before it, bound to follow the Civil Procedures Act⁵.

All disputes raised by labourers before the regular court (the Magistrate Court which is originally competent to hear individual labour disputes except those concerning wages)⁶ and the Authority of Wages⁷ are free of fees.

It can be concluded from the above proposition that it is possible and recommended, especially in the Jordanian case, to adopt a more effective way of resolving disputes over unfair terms in consumer contracts. This might be achieved by allowing for a special, professional court or tribunal to carry out such a task. In this regard, the comparable experience in other fields, such as labour contracts, should be taken into account.

6. Conclusion

The effectiveness of a law in achieving its aims is dependent on the way in which it is applied. This entails that measures put in place to protect consumers, or more broadly

¹ Ibid.

² Ibid, ss. 121, 122.

³ Ibid, s. 124.

⁴ Ibid.

⁵ Ibid, s. 54.

⁶ Ibid, s. 137.

⁷ Ibid, s. 54.

weak parties, against unfair terms should not be left exclusively in the hand of individual litigants. This is because the latter will face many economic and procedural obstacles.

Providing for public enforcement besides the private enforcement is the best technique for fighting unfair terms in contracts. Public enforcement meant here consists of pre-emptive intervention through negotiation as well as obtaining undertakings, and the availability of public action regardless of the identity of the public enforcers conferred with these powers. It is preferable, however, if consumers' associations are given a role in using such powers in favour of consumers.

This was taken into consideration by the European legislator to whom the virtue of creating public enforcement in England with regard to unfair terms in consumer contracts should be attributed. Both limbs of public enforcement (pre-emptive measures and public action) are available in the Regulations, and the Consumers' Association shares in the effort to pursue unfair terms publicly. Enforcement at the public level has been wholly successful from the threshold step which is negotiating the unfair term with the trader until the final step of granting an injunction. The pivotal and effective role the OFT and the qualifying bodies have played in challenging unfair terms, which results in their removal, cannot be ignored¹.

The situation under Jordanian law is very different. No public enforcement mechanism is available under Jordanian law when challenging unfair terms in contracts. However, pre-emptive intervention based on the pre-validation technique has been adopted in respect of insurance contracts. This approach is problematic not only because of the narrow sector within which it is applied but also due to the impracticality of generalising the pre-validation technique to other sectors. Furthermore, the Consumers' Association has never been a part of this pre-validation process, even for consultative purposes.

The lack of general pre-emptive measures to help in protecting consumers or adherents against unfair terms more effectively is associated with the lack of public action. This means that the Jordanian consumer has been left on his own in the face of the danger of unfairness. Jordanian law is bereft of any sort of public action to the benefit of consumers or adherent parties. This has an undesirable practical effect, since individuals seem to be reluctant to take the risk of litigation, as court records

¹ DTI, European Commission Review of Directive 93/13/EEC on Unfair Terms in Consumer Contracts, A Consultation Paper, July 2000, pp 23, 24.

show. Even if some did litigate, no considerable advantage could be expected in terms of consumer protection, since the effect of private litigation is limited to its parties. On this basis, public enforcement is a necessity in Jordan given the vulnerability of the majority of Jordanian consumers, especially in the light of the large numbers of people who are unemployed, poor, young, refugees or uneducated.

The legislator is encouraged, therefore, to allow for a public body or bodies to have the authority to negotiate unfair terms with traders and to seek undertakings from them in this regard. In cases of non-agreement, such bodies should be given the authority to raise the dispute on behalf of consumers or adherents to the competent court, which would preferably be a special court created so as to deal exclusively with consumers' disputes.

It is also recommended that the consequences of including unfair terms in contracts should go beyond the general rules stating that an unfair term is not binding on the consumer. Legislative intervention should put in place criminal sanctions, say fines, to be used only where the contravention of the measures is serious. This is, it is enough to render the unfair term ineffective if there is no previous undertaking taken with regard to the use of this term. But, in cases where such a term is under negotiation when proposed to consumers, or has already been subjected to an undertaking, the trader should be fined and may be blacklisted. This recommendation is not only directed to the Jordanian legislator, but the English legislator also.

Chapter Four

Conclusions & Recommendations

1. Introduction

This study started from the point, which is not subject to any counter-argument or suspicion in the writer's view, that consumer protection against unfair terms is a necessity. The main provisions enacted in Jordan and England to handle the problem of unfair terms are included in S 204 of the JCC controlling unfair terms in adhesion contracts and the Regulations on Unfair Terms in Consumer Contracts 1999 respectively. The task set for this study, as explained in the Introduction, has been to examine the effectiveness of such provisions in protecting consumers. The writer believes that, because Jordanian law depends restrictively on S 204 to protect consumers against unfair terms, it has failed in achieving this purpose. In proving this, three main areas in the above laws have been investigated: the scope, the test of fairness/oppression and the enforcement mechanism. The breadth and clarity of scope, the plainness of the test and the deployment of a public enforcement mechanism can guarantee an effective piece of law in the field of consumer protection, I think. The most important findings of the study in relation to this are presented below, starting, for comparison purposes, with the situation in England.

2. The situation in England

-Introduction: As mentioned above, the main protection that consumers receive in the face of unfair terms comes from the Regulations. The Regulations are an Act produced specifically to deal with unfair terms in consumer contracts. This has reflected positively on the certainty of the law in relation to the issues examined by this study, which are the scope of protection, the test of fairness and existence of public enforcement. The following sub-sections shed some light on these issues.

2.1. The scope of the Regulations

The Regulations' scope appears, generally speaking, to be satisfactory in terms of width and certainty. It could be said that they are wide enough to encompass many types of contracts. However, if any criticisms can be directed to the width of the scope

of protection under the Regulations these would be based on two points. Firstly, legal persons are excluded from the coverage of the Regulations, which could be necessary for them since they may find themselves in weaker, not better, contractual positions than those of natural persons. Secondly, core terms are immune from the coverage of the Regulations as long as they are presented plainly and intelligibly. The problem that the latter exclusion might create to the protection sought should not be underestimated, taking into consideration the fact that core terms are the most important terms in the contract, and are where unfair provisions are typically located.

However, such criticisms can be mitigated. On the first point, the majority of consumers are natural persons and the majority of consumers who are in desperate need of protection are natural persons. The second criticism can be countered by the fact that the approach taken by the law, exempting core terms from being covered by the Regulations, is defensible, given that the legislator has no choice but either to generate a very compact protection at the expense of the freedom of contract or to save the latter by sacrificing the optimal level of protection. The legislator took the second approach and such a decision seems reasonable.

As to the certainty of scope, it could firstly be argued that the relationship between the Regulations and UCTA forms a source of confusion and complexity that has had a negative impact on consumer protection. The divergence of scope between the two enactments creates odd overlaps and loopholes which are the last things needed in an area such as consumer protection. Secondly, some important types of contracts, such as land and insurance contracts, have been left under suspicion as to whether or not they are covered by the Regulations.

2.2. The test of fairness

The study shows that the Regulations are keen to provide a clear test of fairness. The test's pillars, factors to be taken into account in considering a particular term, and the time of consideration are set out in a detailed way.

Despite this, the application of this test in practice has witnessed some difficulties due to the repugnancy which the English courts have shown towards the concept of good faith, which constitutes an important pillar in the test. Such a repugnancy has appeared through resorting to English concepts in treating the lack of good faith instead of moving towards the European concept of good faith as intended by the Directive.

A third point to be made here is that as a part of the test, the Regulations contain a list of potentially unfair terms. Although some of the phrases used in the list constitute a source of uncertainty and may create controversy, such a list is of great value, since it constitutes an important guidance to traders, consumers and lawyers on the test of fairness.

2.3. Enforcement

It has been made clear in this study that the effectiveness of a law aiming at protecting weak parties like consumers is dependent on not leaving the task of pursuing unfair terms exclusively to individuals. Private litigation faces many economic and procedural obstacles which would often render it ineffective or inadequate.

The Regulations, influenced by the Directive, was aware of this fact and, therefore, provide for public and private methods of enforcement to work side by side. It can be argued that this is the best approach to fighting unfair terms in contracts. Public enforcement under the Regulations consists of the pre-emptive intervention, through negotiation and seeking undertakings, and public action. Any enforcing body¹ can, after considering a complaint, either seek to obtain an undertaking from the seller or supplier stating that the use of the unfair term will be discontinued, or apply to the court for an injunction. And, it is to the court, in the last instance, to decide on whether to accept undertakings from the trader regarding the use or the recommendation of such a term, or to grant injunctions to this effect.

The study has shown that the enforcement of the Regulations at the public level is a story of success. It cannot be denied that the OFT and the qualifying bodies have done a great job in challenging unfair terms, which has yielded encouraging results as to removal of unfair terms. One of the features/factors of this success is that the enforcing bodies have preferred informal undertakings and other informal solutions above seeking a judicial resolution. Despite the huge number of complaints they have received, the OFT and the qualifying bodies have rarely sought injunctions from the court. Rather, the vast majority of complaints have been dealt with through negotiation, which has succeeded in persuading traders to delete or amend the

¹ However, it should be remembered that there is a debate over the scope of the role that the Consumers' Association, as an enforcing body, can play in enforcing the Regulations, (See *supra*, p 213 et seq).

seemingly unfair terms in their contracts. This approach shows how to implement the law smoothly without undermining the effectiveness of enforcement.

However, this compact administrative/judicial model of enforcement seems to be vulnerable to the criticism that, like the situation in individual litigation, the only consequence of including an unfair term is the non-binding nature of the term to the consumer. This might encourage the trader to incorporate the same term or a similar term in another contract without fearing serious consequences. Granting injunctions would be enough if the term is used for the first time, which is a minor violation of the law, given that the unfair nature of the term could not be determined before bringing it to the test. However, major violations of the law, such as the case of repetition and using a term while it is under negotiation or judicial revision, should be taken more seriously and rendered a criminal offence.

3. The situation in Jordan

-Introduction: The problems with the protection provided by Jordanian law are, in short, that it is defective in terms of narrowness of scope, an inaccessible test of oppression and an inefficient technique of enforcement. These factors, taken together, have rendered the protection sought in favour of consumers almost non-existent except on paper. This is explained further in the following four sub-sections.

3.1. The scope of protection

The study reveals that the scope of protection available under Jordanian law is extremely narrow, or at least its breadth is hugely uncertain. S 204 of the JCC is the only general provision giving some relief to the consumer against unfair contractual terms. This Section is applicable only where the contract containing the allegedly oppressive term is of an adhesive nature. The traditional theory on adhesion contracts entails that three conditions must be met for a contract to be described as adhesive: that it is pre-formulated and non-negotiated; that its subject matter is essential to the consumers; and that the seller or supplier of this subject matter is a monopolistic power. The prevailing opinion at the legislative, judicial and juristic levels suggests that these three conditions must exist in the adhesion contract. Accordingly, the scope of protection would be very narrow.

However, a few academic writers suggested that the only condition needed to be satisfied in a contract of adhesion is that it must be standard (pre-formulated and non-

negotiated). Whereas the above approach, which is dominant, means that the JCC exempts the vast majority of consumer contracts from being covered by S 204, it is very uncertain that the view taken by the latter writers is the reading intended to be given to S 204. In this way, both situations go against the requirement of satisfactory consumer protection. It is self-evident that the wider the scope of a protective law is, the stronger the protection which can be expected from it, and vice versa. So, if S 204 has a very narrow scope, as according to the first reading, this implies that the ambition of achieving sufficient consumer protection would remain unrealised. Obviously, the second approach offers more grounds for optimism. But, the fact that we cannot be sure which is the reading intended by the legislator undermines the certainty of the law which is as important as the width of scope. From this perspective, it seems to be very defective.

3.2. The test of oppression

As with the scope of protection, the test of oppression under Jordanian law seems to be unclear or inaccessible. This is because it is not easy to determine which test Jordanian law applies. Put starkly, there are no clues as to what are the main elements which the test consists of. The legislator has not embarked on providing clear provisions for the sake of providing an accessible test of oppression. Simultaneously, the courts have had no opportunity to fill such a legislative vacuum by setting out those pillars and factors which are to be taken into account when assessing the oppressive nature of a term.

The lack of a list of oppressive terms (whether grey or black) constitutes part of the problem, since had such a list existed it might be a valuable indication as to the main features of the test as well as providing important guidance to consumers, lawyers, and traders.

3.3. Enforcement

Unlike the situation in England, the study has shown that public enforcement mechanisms have not been deployed under Jordanian law when challenging unfair terms in contracts. A kind of pre-emptive intervention, based on the pre-validation technique, has, however, been adopted only with regard to insurance contracts. The existence of public enforcement in Jordan, therefore, seems to be extremely limited. Moreover, the pre-validation mechanism might be seen as an imperfect technique of

enforcement due to its many disadvantages. We have seen that such a system is very time-consuming. This may have a negative effect on competition in the marketplace since it increases the cost of the commodity, which will be incurred by either the consumer or the business. If businesses decide to bear such high costs without increasing the price of the commodity, only large companies will be able to do so whereas small companies might be forced to exit the market. Alternatively, the consumer will bear such an increase. Thus, in both cases the consumer is the loser. Moreover, the pre-validation system might act against the consumer's right to choose in the sense that the regulator's choice taken on behalf of the consumer might not correspond to that which would have been made by the consumer himself. Finally, the pre-validation process might be misinterpreted by the consumer, who may think that there is no chance to challenge terms which have passed the pre-validation procedure even though he believes that such terms are unfair.

Alongside the non-existence of a general pre-emptive system, Jordanian law suffers from a lack of public action at the level of adherent/consumer protection against unfair terms with the result that litigation is left to the adherent or consumer who has faced an unfair term. This has an undesired practical consequence, since individuals are reluctant to take the risk of litigation because of procedural and financial obstacles. In Jordan such obstacles might be more serious due to the high levels of poverty in comparison with those in developed countries. In conjunction with the uncertainty of the law on unfair terms, this constitutes another obstacle to litigation, whose existence the Jordanian courts records support very strongly.

Furthermore, given that the effects of private litigation are limited to its parties, even if some consumers do litigate it is unlikely that this would make any difference in favour of consumers as a whole. The trader who knows that only a few of his customers will sue him before the court if he includes unfair terms in his contracts will take the risk of including such terms so long as the costs of litigation do not exceed the profit he makes as a result of such inclusion. And, when enforcement is left to individuals, this is likely to be the case.

3.4. Lack of law as indication

The absence of litigation against unfair terms, except with regard to insurance contracts, was referred to in the introduction as a problem for the study and simultaneously a problem of the study. However, it seems that such an absence has a

third implication, because it appears to be strong evidence of legislative failure in delivering protection where it is needed. The effectiveness of any legal intervention is to be assessed according to whether it achieves its intended goals. The reliance on S 204 of the JCC in fighting unfair terms is a story of failure. The records of the courts show us that unfair terms are not commonly challenged by the consumers/adherents. At the same time, there is no evidence that the use of unfair terms is non-existent or at least very low and that is why they are not challenged before the courts.

This failure can only be imputed to the uncertainty surrounding the law on unfair terms (S 204 of the JCC) in that: the scope of this law is too restricted or at least too unclear to establish certainty; it is not clear which test such a law operates, and, most importantly, to the fact that this law does not benefit from a system of public enforcement. The result of this is that the protection provided by S 204 is unsound, impractical and exists only on paper.

4. Recommendations

-Introduction: The recommendations in this Chapter will be dedicated to major points which correspond to the main findings of the study based on its aim as set out earlier. Therefore, the recommendations have the aim of improving the legal situation in England and Jordan by targeting all what makes: the scope of the law on unfair terms in consumer contracts narrow or uncertain; the test used by this law uncertain; and an effective method of enforcement non-existent or defective.

Other suggestions and criticisms made throughout this Thesis on specific points but not mentioned within the recommendations below are also relevant and it is recommended that they should be taken into consideration by English and Jordanian legislators when amending, or producing, laws on unfair terms.

4.1. Recommendations for England

Most of the major defects that the Thesis has identified as regards the Regulations have been rectified by the New Legislation, with the result that all that is left to do, accordingly, is to hail this progress and to support bringing this legislation to the legal life very soon. The following summarizes those defects and how the New Legislation rectifies them:

- 1- Currently, two main pieces of legislation dealing with the issue of unfair contractual terms are in operation. The New Legislation will unify the law on unfair terms in one piece of legislation under the title “Unfair Contract Terms”.
- 2- The concept of the consumer under the Regulations falls short of covering legal persons and, thus, the latter may find themselves without protection although they need it as much as natural persons do. The protection under the New Legislation does extend to small businesses, although such protection is afforded outside the sphere of consumer contracts.
- 3- The Regulations place the burden of proving the unfairness of a term on the consumer. It is, therefore, to be welcomed that the New Legislation puts such a burden on the seller or supplier who wants to rely on the term. However, this applies only to individual litigation. The unfairness raised by the OFT and the qualifying bodies at the level of general enforcement should be proved by these bodies. This approach seems sensible given that the latter bodies, unlike individuals, do have the ability and resources to shoulder the burden of proof.

However, a few points of weakness still remain in the current legislation (the Regulations) which the New Legislation either has not dealt with or has cured in an unconvincing way. The most important of these are the following:

- 1- The Regulations failed to solve the problem of distinction between core terms and non-core terms; therefore, it is recommended that a clearer provision on what constitutes a core term be inserted.
- 2- The interpretation of “good faith” is a problem with which English law cannot cope. The solution that has been adopted by the courts through referring to the English concept of good faith was not successful and has been criticized. The New Legislation, on the recommendation of the Law Commissions, does not include any express reference to “good faith”, and this is a sign of how problematic such a notion is from an English point of view. Only the practical application will tell us to what extent the extreme approach taken by the New

Legislation is suitable. However, the writer believes that an ethical standard such as good faith is needed when dealing with issues such as fairness. The solution suggested in this Thesis is that “good faith” should be interpreted according to the continental approach as intended by the European legislator.

- 3- Criminal sanctions are needed when dealing with serious violations of the law on unfair terms, such as using a term where it is already subject to an undertaking/injunction or using a term while it is under negotiation/consideration.
- 4- The role of the Consumers’ Association should be clarified so as to avoid uncertainty. Meanwhile, such a role should be no less than that given to any other qualifying body, regardless of whether or not the Association will be able to undertake this role due, for example, to lack of resources.

4.2. Recommendations for Jordan: towards a free standing Act to protect consumers against unfair contract terms

Although the powers granted to the courts by virtue of S 204 of the JCC seem to be very broad, it has proven to be ineffective in providing consumers with the protection they need. Ignoring the problem that the latter face with regard to unfair terms is not acceptable. Jordanian law should treat consumer contracts differently, by not relying merely on S 204 to protect consumers. The traditional division, based restrictively on the distinction between commercial contracts and civil contracts, is no longer workable. A parallel division, consumer contracts as opposed to commercial contracts, should be recognised by Jordanian law.

Whereas it would be welcomed if a few provisions are added to the JCC for the purpose of eliminating the ambiguity surrounding the scope of S 204 and the test of oppression it employs, along with providing for public enforcement to be part of the effort to fight unfair terms in contracts, the JCC does not seem to be the most appropriate place to deal with the problem of unfair terms in consumer contracts. I would like, therefore, to join those who call for a special enactment for the sake of protecting consumers¹. As far as protection against unfair terms is concerned, such an

¹ See, in Jordan, *Saleh N*, op cit p 42; and in Egypt, *Imran A*, op cit p 41.

Act should specify provisions to deal with unfair terms. A similar, or maybe even better, result could be achieved by enacting a special Act for the specific purpose of treating unfair terms in consumer contracts.

The English legislative experience represented by the Regulations is of great value in this connection. If the general line taken by the Regulations, the advantages they create in favour of consumer protection and the shortcomings appearing in them, as mentioned in the above recommendations and within the previous Chapters, are taken into account by the Jordanian legislator when producing such a new law, this would constitute a significant advantage in such a piece of legislation.

Having regard to the above, the recommendations that can be made concerning the general features of such a potential law can be dealt with under three headings (scope, the test of oppression and enforcement) as follows:

Scope. The Jordanian legislator is strongly advised to adopt a wide, clear approach as to consumer contracts. This entails that the law should avoid generating grey areas. The concepts of “consumer” and “consumption” should be wide enough to encompass various different types of contracts beyond any restrictive or traditional meaning given to such phrases. In the meantime, controversial wordings should be avoided. For example, the word “seller” should not be used because consumer contracts are not restricted to selling goods despite the argument that such a word could be given a wide meaning.

While it could be argued that core terms should be immune from the test of oppression as long as they satisfy certain standards, such as clarity as under the Regulations, the writer can find no reason to grant negotiated terms such immunity especially where there is no other provision tackling unfairness in terms of this sort.

The test of oppression. It is recommended that a clear, practical test of oppression be created within any new law enacted for the purpose of protecting the consumer. The legislator can, in this regard, either refer directly and expressly to S 66, as already mentioned¹, to be the standard pursuant to which fairness of terms are to be assessed, or produce an alternative test of oppression should he consider the above Section inappropriate or irrelevant.

¹ See *supra*, p 187.

A list of oppressive terms, preferably a black list, is also needed as a part of this test. The list should be clear and subject to amendment according to market movements and consumers' requirements. Both the list of oppressive terms in insurance contracts and the English grey list could be helpful in creating a general list of oppressive terms, provided that the specificity of the Jordanian context is taken into account.

Regardless of whether or not a disputed term is included in the list, if it is a grey one, the burden of proof of the fairness of such a term should go against the general rule, as enshrined in S 77 of the JCC which provides that "the burden of proof of a claim is on the claimant". Rather, the burden should be placed on the trader as the stronger party in the contract, unless pursuing the term in question is undertaken publicly by an able body designated for such a task by virtue of the deployment of a public enforcement mechanism.

The final point to be made here is that the consequence of finding a term oppressive should extend beyond the non-binding nature of that term to the consumer. Limited sanctions can be reasonably employed in the face of the usage of a term which is either already prohibited or still under negotiation or consideration. This will, to some extent, make traders more keen not to use a term of this kind and will, incidentally, ease the consumer's task when seeking civil remedy should he suffer a loss because of the usage of an oppressive term which is made a criminal offence.

Enforcement. The suggested law on unfair terms should be armed with a public mechanism of enforcement. We have seen that the Jordanian model of preventive intervention based on the pre-validation technique which is deployed in insurance contracts is not effective to be extended to other realms. As such, the proposed regime should not follow this model. Rather, it should be pre-emptive and much closer to the English model. A hybrid administrative/judicial model seems most effective since it has the advantages of preventing grossly unfair terms and saving time as well as the expense of litigation, where the vast majority of cases will be dealt with pre-emptively through negotiation and undertakings.

The administrative bodies which will be given the authority to intervene through negotiation, seeking undertakings and bringing cases before the competent courts should be given the authority to take decisions facilitating their work in considering the cases before them, such as making orders regarding the obtaining of documents

and information. They should also be given an informational role, close to that granted to the enforcing bodies under the Regulations, complementing their role in pursuing unfair terms.

The JCA and any other private bodies interested in protecting consumers' interests should be allowed to be part of this regime, especially since the JCA is the organisation which at the moment is paying the greatest attention to protecting consumers.

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